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Elderly People and Discrimination: Prevention and Reaction

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Elderly People and Discrimination: Prevention and Reaction

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PROLEGOMENON

In a world that is constantly evolving, the challenges faced by elderly individuals are multifaceted and demand our utmost attention. Discrimination against the elderly is a pressing issue that requires a comprehensive and multifaceted approach. As we gather here to explore the various aspects of this complex problem, the proceedings of this conference provide a valuable resource for understanding, preventing, and reacting to discrimination against elderly people.

The collection of chapters in this publication, titled "Elderly People and Discrimination: Prevention and Reaction," delves deep into the intricate web of issues surrounding the rights, challenges, and experiences of elderly individuals. Each chapter contributes a unique perspective, shedding light on critical topics that range from legal aspects to social, psychological, and cultural dimensions.

The chapters remind us of the importance of upholding the dignity of elderly individuals even in their final moments, and explore the challenges faced by aging inmates, highlighting the need for humane treatment within correctional systems. Authors examine the barriers preventing the elderly from accessing the justice system, emphasizing the need for equal protection under the law and contemplate the significance of intergenerational relations in the context of family dynamics. The chapters also extend their gaze to the international stage, analyzing the legal mechanisms available at the European level. Meanwhile, and delves into the intricacies of criminal law as it pertains to elderly offenders. The Authors also, explore issues of social inclusion and accessibility in of cultural and social activities to elderly persons in different areas in Serbia. In the chapters about the perspective of the extremely poor elderly, authors witness the intersection of poverty and aging, underscoring the need for social support. Themes on victimization of elderly persons sheds light on a particularly vulnerable demographic, while themes on opportunities to prevent social exclusion calls for a boost in digital skills and media literacy among the elderly. Administrative procedures come under scrutiny in some articles highlighting the importance of home assistance for elderly individuals, and some of them offers a judge's unique perspective on cases involving elder victims.

The protection of elderly persons' rights on the European stage is addressed in few chapters emphasizing the need for comprehensive safeguards. There will be explored innovative approaches to anti-discrimination and human rights protection in long-term

care settings. Health considerations within the elderly prison population are the focus in chapters about status of the older prison population. International perspectives come into play, offering insight into Chinese legal practices. Authors take us into the world of academia, where prejudice and discrimination persist. Our discussions expand to the typical ways in which human rights are violated within homes for the elderly and the role of "Independent Institutions" of the Republic of Serbia in combating discrimination. The psychological consequences of stigmatization in Serbia are examined, and we advocate for the realization of Old Age Pension as a fundamental right. We delve into strategies to prevent abuse and discrimination and embrace a human rights-based approach in the European Union.

Our exploration takes us into the criminal justice system of Romania and the multifaceted role of criminal law in protecting the elderly. We examine gerontological aspects of delinquency in Kazakhstan and consider the challenges in criminal proceedings for safeguarding elderly rights. Confronting the unsettling issue of violence against the elderly, we seek avenues for prevention and protection, and contemplate the role of compliance programs in preventing discrimination. We scrutinize the legal framework for the criminal protection of the elderly in the legislation of the Republic of Serbia. Our exploration extends to the complex dynamics of aging behind bars and the impact on family relations.

The rights and well-being of persons with disabilities take center stage in few chapters, offering a comparative analysis of international standards and national frameworks. We contemplate the intergenerational dynamics between millennials and elderly individuals, recognizing the significance of combating discrimination and fostering mutual understanding. We emphasize the role of criminal law in protecting elderly rights and engage in theoretical discussions surrounding frauds aimed at the elderly, with a focus on Japan. The authors conclude with an examination of elderly people in prison assessing their rights, remedies, and the limits of punishment. We confront the Hungarian practice of life imprisonment and the implications for human rights. Lastly, we engage in a profound examination of the forensic interview process with elderly abused individuals, shedding light on the importance of providing a voice to those who have endured suffering and discrimination.

As we examine these diverse perspectives, it becomes evident that discrimination against elderly individuals is a global challenge that demands our collective attention. This volume serves as a comprehensive resource for academics, policymakers, legal professionals, and anyone concerned with the welfare of the elderly.

This publication is a testament to our shared dedication to promoting the rights, dignity, and well-being of elderly individuals worldwide. It is my sincere hope that the

insights contained within these pages will inspire ongoing research, advocacy, and policy changes, leading us toward a more just and inclusive society for our elderly citizens.

We extend our gratitude to the authors for their invaluable contributions and hope that the insights presented here will inspire meaningful action, policy reform, and societal change. Together, we can strive for a world where discrimination against elderly people is eradicated, and their rights and dignity are upheld at every turn.

Tunjica Petrašević
Ph.D, Full Professor
Osijek, 5th September 2023

FOREWORD

The international scientific thematic conference *Elderly people and discrimination: prevention and reaction* is organized by the Institute of Criminological and Sociological Research and Vojvodina Bar Association, with the support of the Ministry of Science, Technological Development and Innovation and branch of Serbian Academy of Sciences and Arts in Novi Sad. It took place on 26th and 27th October 2023 in Novi Sad, Serbia and gathered numerous experts and academics interested in how governance, policy and legislative mechanisms could be improved to better meet the needs and rights of the growing elderly population. The papers presented at this conference are included in this publication entitled as *Elderly people and discrimination: prevention and reaction.*

This publication contains the contributions in which different disciplinary, theoretical, and methodological approaches were employed to analyse numerous problems and topics of importance for understanding the phenomenon of discrimination against the elderly and look for an adequate strategy for building resilience and empower the elderly. The papers in the collection are divided into the four sections each of them dealing with the different public domain. The first section of the collection is focused on legal aspect, the second on criminology and victimology, the third one deals with the human rights of the elderly and finally, the concluding section is dealing with social inclusion and digital aspects of ageing, but also includes one paper about social and professional stratus of senior female scholars in Serbia.

I

THE LEGAL BASIS OF ENSURING THE EQUAL STATUS OF OLDER PERSONS

The first thematic section of the book deals with the legislative basics of the equal status of elderly people which is of the utmost importance for preventing the discrimination of elderly people. By including the contributions from various countries such as the US, North Macedonia, Hungary, Japan, Italy, Romania, China, and Serbia, this section provides an comparative overview of the legal mechanisms of securing the status of the elderly.

PhD Charles D. Weisselberg is a Yosef Osheawich Professor of Law at the University of California, School of Law, Berkeley, California. The paper written by Professor Weisselberg titled *"Releasing elderly people from prison: geriatric justice from a comparative perspective"* focuses on the growth and attributes of elderly prison population, with an accent on life sentences and procedures for release. Territorially, paper focuses on the USA where life sentence is quite common while there is an inconsistency and ad hoc decision making in respect to sentencing because the Constitution fails to provide a uniform standard among the state and federal criminal legal systems in respect to elderly people and incarceration. On the other hand, The European Convention of Human Rights sets sort of limitations, despite neither those are fully enforced since there are countries like for example Hungary which do not comply with the principles of the Convention. Among the issues thematized in the paper are also the challenges elderly prisoned population presents in terms of need or additional support and health care. In a conclusion, this paper offers a comparative overview questioning the possibility of transfer of the European good practices to the USA.

PhD Kambovski, Vlado is a Member of the Macedonian Academy of Sciences and Arts. His paper *"Protection of the rights of the elderly in the light of criminal law"* focuses on the social inclusion of elderly people and threats to their dignity and rights. The main consideration of the paper is designing the framework for conceptualisation of the elderly people as vulnerably category in international law and considering the existence of "elderly justice". The prevention of the abuse of elderly people becomes particularly challenging in transition countries such as Serbia and the Western Balkans in general, and the research findings are confirming a poor treatment of elderly people in institutions and their social marginalisation. Analysis of the presence of elderly people in international, regional, European, and national documents also has been overviewed. In conclusion, a paper states that recognizing the status of old people as specific category of

criminal offenses opens space for modifications to the system of sanctions by implementing the alternative measures, such as the house arrest, or serving a prison sentence adapted to their special needs.

PhD Gál István László is a Professor and Head of the Department of Criminal Law at the University of Pécs, Faculty of Law. His contribution "*The Hungarian practice of life imprisonment and the violation of the human rights of convicts*" deals with the Hungarian practice of life imprisonment and how it violates the human rights of the convinced. Hungary is the only among the EU states which is still applying the life sentence. The situation is such that in Hungary it seems possible to exclude the possibility of parole to the life sentence for the convinced person. The problem with life sentence could be summarized as it follows: "the convicted individual has no possibility of parole, and it significantly limits their prospects at the end of life". In conclusion, the author examines whether life imprisonment helps the goals of punishment, general and specific deterrence, to be fulfilled, and finds out that it does not and rather serves merely a symbolic function.

A paper *"Specialized frauds in Japan"* is written by PhD Shin Matsuzawa, a Professor at the Waseda University in Tokyo, Japan. In his paper, the Professor Matsuzawa is dealing with specialized frauds in Japan in which victims are tricked and taken cash or other assets from, who in many cases are the elderly people. Specialized frauds have become a major problem in Japan in recent years. The problem of specialized frauds is analysed from the perspective of the causal complicit theory, causal co-influence theory, and Japanese academic theory. In conclusion, the paper states that proper punishment of this type of crime is important part of protecting the elderly people.

PhD Signorato Silvia is the Associate Professor in Criminal Procedure, University of Padua in Italy. In her paper titled *"Non-discrimination of elderly people in criminal proceedings: a European overview"* Professor Signorato examines the problem of discrimination against the elderly in the context of criminal proceedings at the European level. This analysis includes the overview of the legal framework of the European Union and the examination demonstrates that while the direct discrimination does not derive from the legal framework of the European Union, the forms of indirect discrimination do. In further proceedings with the definition of the concept of discrimination, this paper is putting the accent on insufficiently unexplored relation between elderly people and criminal proceedings. The results demonstrate that both the legal sources of the EU and those of the Council of Europe do not implement direct discrimination against the elderly but, rather, provide the various rules aimed at countering any form of discrimination in general. However, on the other hand, there are no specified rules for the non-discrimination of elderly in the context of criminal proceedings, which means that elders are treated in the same way as other subjects - which might lead to discrimination.

PhD Laura Stanila is Associated Professor at the Faculty of Law of the West University Timisoara and Director of the Center for Research in Criminal Sciences. The chapter "*The Status of the Elderly Convicts in the Criminal Justice System of Romania*" is dealing with the status of elderly people in justice system in Romania. The legislative solutions from European Union have been integrated into the Romanian legislative system. One of the topics elaborated in this paper is the limitation of the application of life sentence which is not applicable for people over 65 in Romania. Despite there is a National Council of the Elderly established by Law 16/2000, this institution did not manage to cover all the specificities of the position of the elderly convicts. Despite there is a room for improvement, The Romanian model respects the dignity of the elderly from the perspective of the duration of the custodial sentence, its execution regime, as well as the application of disciplinary sanctions at the place of detention, as the author concludes.

In the paper *"The Right to a dignified death"*, by PhD Aleksandar Z. Stevanović, Professor at the Faculty of Law for Commerce and Judiciary in Novi Sad a connection between the phenomenon of death and the moral category of dignity is made. The author defines death from the aspect of modern science and attempts to establish a valid criterion for the introduction of the concept of dignity. Furthermore, the author emphasizes the importance of the moral paradigm as a precondition for establishing the moral values of the community on the example of Socrates. After that, the author analyzes the relationship between the law and the moral category of dignity with special focus on the negative impact of the ideology of human rights on the formation of moral concepts and the functioning of the system of values. In the concluding remarks, the author underlines the importance of respecting general moral values for the establishment of the possibility of dignity.

PhD Yang Chao, the Assistant Professor at the Beijing Normal University, College for Criminal Law contributed to a volume a paper titled *"The Criminal Policy* of "*Leniency for the Elderly" in China*". The chapter for its topic has crimes committed by elderly people in China. The Chinese Constitution does provide the protection of human rights, including the elderly people. The Criminal Law of China implies softer punishment for crimes committed by people above 75 years, the same is the case with the criminal procedural law of China which also has the special article for provide special protection on the basic right of elderly people in criminal process. The other legislative documents in China pay special attention to the rights of elderly people as well. Among the total number of committed crimes, those including the elderly people are the majority. The paper also discusses the a "Shanghai model" of "arrest, prosecution, supervision, prevention and research" in the field of judicial protection of the elderly and "Shanghai Procuratorate Criminal Justice Protection for the Elderly". In a conclusion, the author

stated that the laws of China include as the general principle of respect the human dignity, but also set special law and articles to provide the specific law system to protect the elderly people.

PhD Marina Matić Bošković, a Senior Research Fellow at the Institute of Criminological and Sociological Research in Belgrade contributed a paper titled "*Addressing Access to Justice for elderly people*". The challenges related to the growing elderly population, with accent to social justice, is the main topic of this article. More precisely, the article thematizes discrimination towards the elderly, their invisibility to the justice system and lack of awareness of the mechanisms of protection of their rights. In addition, the article is considering the affordability, delay and impact of digitalization on the rights of elderly people and their access to justice. All these topics were placed into the international and European legal framework for human and elderly rights protection, including the mapping of the omissions and weaknesses of this protection system. Among the other issues raised in the paper worth to mention is also the fact that the legal procedures and courtrooms may not be adapted to accommodate the specific needs of older individuals.

PhD Vujović Ranka, the Assistant Professor at the Faculty of Law, Union University in Belgrade, decided to focus on the topic of "*The position of the grandparents in Serbian Family Law: is the preservation of intergenerational relations the exclusive rights of the child?"* The main aim of the paper is to answer a question how to balance rights of children, parents and grandparents in the framework of family law legislation. The Serbian Family Law does not recognize a right of grandparents to maintain and preserve the contact with the grandchildren, and the exercise of this opportunity by grandparents is dependent on the grandchildren's parents or guardians. The main finding is that the Courts in Serbia are not consistent in applying the legal mechanisms to protect the rights of grandparents in lawsuits. In practice there is a need for the combined application of general rules from the Law on Civil Procedure and the application of special rules created in Family Law to the needs of the procedure in lawsuits for the protection of the rights of the child. The main conclusion of this analysis is that the right of grandparents to establish and preserve personal relationships with their grandchildren is not recognized as a special right in neither international legal documents, nor in domestic law. Grandparents' personal relationships with their grandchildren are viewed exclusively from the point of view of children's rights and that is something which will need to be changed and adapted in the future.

PhD Mario Caterini, Professor of Criminal Law at the Università della Calabria and Director of the "Alimena" Criminal Studies Institute (ISPA), Interdepartmental Research Centre of the Università della Calabria, and Morena Gallo, PhD candidate in Criminal Law at the University of Calabria wrote a paper "*The Elderly and Prison in Italy: a*

proposal to overcome discrimination". In this paper the conditions of the over 65 population old in prisons in Italy are examined, whose number in prison is one of the highest according to European Council. The paper is especially focused on how the prison regime accommodates with the status and condition of elderly people. The reason behind this huge number of elderly people in prison is assumed to be rigid penalty system for certain offences, usually connected to organized crime and serving the life sentences. What is the issue this paper aims to impose is whether the prison is the most suitable type of sentence, especially considering the needs and conditions of the elderly people. While it can be said that there are favourable tendencies towards elderly in the legislative phase, same cannot be said for the execution phase. The inadequate legislation and lack of use of the alternative sentences are among the main reasons of the rise of the prison inmates. As a conclusion, it is stated that that the lack of alternative punishment measures even goes in contradiction to the Italian Constitution.

II

THE SPECIFICITIES OF ELDERLY PERSONS IN CRIMINOLOGY AND VICTIMOLOGY

The second section of the book is focused on the position of elderly in criminal proceedings and victimology. As the elderly phase of life is specific as such, elderly people are particularly vulnerable category for certain types of crimes where they are particularly targeted because of their specific weaknesses. In this section, we have 11 papers dealing with different specificities of elderly people as both victims and perpetrators in various phases of the criminal proceedings.

Professor Emeritus from the Pennsylvania State University, PhD Djuradj Stakic, in his contribution deals with the topic of "*Forensic interview with elderly abused people"*. In cases when the abuse of the elderly people occurs, the abuse reported by elderly person might be approached with doubt and suspicion due to his/her diminished abilities and capacities to represent the case in legally acceptable way. Therefore, this paper argues for age-appropriate forensic interviewing approaches and methodologies. The conceptualization of an evidence-based, trauma-informed and strength-based protocols, methodologies and practices of unique forensic interview of elderly abused people as a part of effective stance in delivering legally defensible information is the main goal of the author. This methodology is expected to be an integral part of comprehensive policy, prevention, regulation and intervention system for protection of elderly people. The abuse of elderly has no widely accepted definition, but there are two elements included into the concept one of which is injury and the other one is trustful relationship involved. Among the forms

of elderly abuse, the following categories could be mentioned: physical abuse, sexual abuse, neglect by a caregiver, emotional/psychological abuse, financial abuse and multiple other forms of abuse are mentioned. Due to different reasons, a small proportion of the elderly abuse is reported. The author presents interview techniques and conditions which would enable examination of the abused elderly people in much more objective, evidence-based and supporting way.

PhD Zoran Pavlović, Professor at Faculty of Law of the University of the Business Academy in Novi Sad in his paper *"Elderly defendants in criminal proceedings"* emphasizes the fact that human rights norms do not provide for age as an obstacle to criminal prosecution or detention of elderly persons. The author also highlights the fact that criminal prosecution and punishment of the elderly have the same goal of general and special prevention as well as the fact that elderly persons have to be treated in the manner consistent with human rights even when accused or convicted of criminal offences, including the right to non-discrimination, access to justice, fair trial, respect for dignity, humane treatment etc. The author emphasizes that, according to the general rules of criminal procedure, the prosecutor's office and the courts should take into account age in the context of the presence of the defendant's procedural capacity for *legitimatio ad causam* and capacity for *legitimatio ad processum*, regardless of the criminal offense and the consequences during the entire procedure. He also states that it is necessary to establish adequate solutions and special measures of support where appropriate for victims of criminal acts and for elderly defendants, in order to conduct criminal proceedings properly and legally. The author concludes that this implies that criminal procedure authorities should have the necessary knowledge in order to enable elderly defendants to actively participate in the proceedings, to defend themselves and use all their rights, with procedural rules adapted to the age and capabilities of the elderly.

PhD Baćićanin Adnan working at the position of the Deputy Public Prosecutor of The Higher public prosecutor's office in Novi Pazar and Hubić Nurković Lejla, the Assistant of the Public Prosecutor at the Higher public prosecutor's office in Novi Pazar enriched the conference proceedings with a paper named *"The legal framework of the criminal protection of the elderly in the legislation of the Republic of Serbia"*. The authors of this paper are dealing with the usage of the term elderly in the legislation in Serbia, especially in the criminal legislation of the Republic of Serbia. As the examination shows, "some articles of the Criminal Code that indirectly sanction violence against the elderly and give possible guidelines for the introduction of special articles that would criminalize violence against the elderly more concretely and adequately". The article examines numerous legislative documents but also provides an overview of the future initiatives

aimed at improving the legislation and policy mechanisms for recognizing the specificity of the position of the elderly population in Serbia.

The chapter written by Professor at the Union University Law School in Belgrade, PhD Jovanović Slađana, and PhD Đorđić Cvijetin, the Director of the Penal and Correctional Institution in Niš titled *"One look at the elderly in prison: case study of the correctional facility in Niš"* deals with the position od elderly people in Prison in Niš. The categories of the prisoners were divided into two categories one of which is composed of people who were convinced earlier longer sentences and turned 65 in prison, while the second category are the elderly people already turned 65 years and older who were imprisoned afterwards. The observations focused on the criminal offences they have been perpetrated, their characteristics, the quality of ageing in prison, especially through the prism of relations with family members, and medical care issues. The perceptions of the criminal past of the convicts and their views of the treatment and resocialisation were particularly examined by the authors. The health and medical services are the first topic raising upon the mentioning the position of elderly people in prison, followed by the adaptation to their needs, the specificities of the treatment they have and maintaining their connections with family. The fieldwork was conducted in July 2023 in the Correctional Facility in Niš by taking insight into the official records and files of 53 male convicts who committed various type of crimes. The conclusions are that the family relations of the convict population are often damaged and that they often lack the family support, but however that this population of elderly inmates deserves much more attention in the future.

"Aging from the perspective of the extremely poor elderly: a case study" is a contribution coming from Professor of Social Pathology at the Faculty of Philosophy, University of Belgrade, PhD Milana Ljubičić. This paper addresses a problem quite common among the ageing population, poverty. Lack of social, cultural and material capital leads towards multiple deprivations as the outcome. In order to check whether the poor elderly lack the capacities to cope with the challenges, a case study has been completed by utilising the methodology of in-depth interviews and observation. The focus of this research was on personal strengths and resilience, including the everyday strategies elderly utilize to cope with the challenges, which often remain unrecognized. An interview has been conducted with Bosa, a 74-year-old woman who has been a street beggar for 38 years. Among the problems the respondents are facing are poverty, being abandoned, illness, violence and many other challenges. It is important that knowledge about the situation of the poor elderly people be turned into activities with preventive and empowering goals.

The following paper *"Old age, punishment, and forgiveness: from mitigating circumstance to early conditional release: some criminal law solutions"* has been prepared by PhD Adrian-Ioan Stan, Teaching assistant and LLM, PhD student at the Law Faculty, West University from Timișoara is analyzing the critical age for applying the forgiveness in criminal law. The methodology of the analysis is comparative historical overview, with a focus on Romanian Criminal Law and the other international instances such as the UN. Among the characteristics of how the Romanian criminal law deals with the situation of elderly people, several features could be identified: the general criterion of individualization of age, the non-application of life imprisonment to those who have reached a certain age, the possibility of replacing the sentence of life imprisonment with prison, after completion, in detention, of a certain age, as well as easier conditional release after reaching a certain age, even though the premise is life imprisonment, whether it is a fixed term prison. The conclusion is that in comparison and in contrast to the situation of minors, advanced age perpetrators do not receive special relevance in criminal legislation, and Romanian law follows this pattern.

A paper prepared by the Judge at the Higher Court in Valjevo, PhD Dragan Obradović it titled *"Elderly people- victims of criminal offences with elements of violence (one judge's view)"*, therefore it deals with the elderly as victims of criminal offences from a side of a judge. As the contribution reports, elderly people are frequent victims of violence and they do not obtain the protection from the side of Criminal Law easily like some other categories of victims do. The author deals with the most important obstacles during criminal prosecution and trial on the examples of individual court cases while he points out to the vulnerability of old people who are victims of certain criminal acts. In a conclusion, it has been pointed out that there is a need to empower elderly people in the criminal proceedings in Serbia and improve the protection of elderly persons through amendments to the criminal law regulations.

Another input on the elderly people in criminology and victimology comes from Senior Research Fellow, Institute of Comparative Law, Belgrade PhD Jelena Kostić which is dealing particularly with the *"Violence against the elderly people and possibilities of prevention"*. It has been stated that the most crimes against elderly people are committed by family members or caregivers. The assumption is that the prevention of the violence against the elderly people has not been given the priority neither on national or international level, therefore the protection measures against the violence against the elderly and poverty should be improved in the future. The given analysis contains not only the overview of the national and international legal framework, but also the reports considering violence against the elderly. The definition of WHO of the abuse of elderly has

been utilized, where abuse is understood as a one time or repeated action or lack of appropriate action in which there is an expectation of trust, which causes damage or neglect of an elderly person. Furthermore, the author is listing the factors increasing the risks of elderly abuse such as cognitive or psychological disparity. In a conclusion, it has been pointed out that adoption of the new *National Strategy on Ageing* should be a priority for Serbia.

Dealing with one quite specific phenomenon related to elderly population, a paper *"Fraud against the elderly: questions of interpretation of the criminal law in the qualification of crimes"* written by Khilyuta, Vl., Vadim from the Yanka Kupala Grodno State University in Belarus enriches the volume with one more significant topic. In the chapter, the question of the qualification of fraud by the subjective side of the composition of the offense is discussed. Based on law enforcement situations, the difference between direct alternative intent and indirect and vague (unspecified) intent is shown, and typified rules for qualifying and distinguishing between vague and alternative direct intent are proposed. The author makes a proposal that vague (unspecified) intent has much in common with indirect intent, and in fact is inseparable from it.

"The protection of the elderly and the role of criminal law: analysis of the Italian discipline and of its problematic aspects" is a paper written by Rizzo Minelli Giulia a PhD Candidate and Assistant Professor in Criminal Law at the University of Bologna. This chapter is focused on crimes and aggravating circumstances provided for in the Italian Penal Code which are primarily used in cases where the victims of the crime are elderly people. Particularly, the tendency of Italian Criminal Law to become "victim-centric" will be examined starting from assumption that Italian Criminal Law is now focused more on the victims than on the crime and its perpetrator. Especially relevant here is the Article 61 of the Italian Criminal Code which provides a list of circumstances that, if committed, aggravate the penalty provided for the basic offence - since they can potentially be applied to any crime - and to common effectiveness, as they entail on increase of the penalty up one third of that provided for by the basic offence. In a conclusion of this analysis, it is stated that criminal law is moving from the offence to the subject and that there is a subjunctivization of the crime (id est the return to the types of perpetrators) and of the enhancement of the victim of the crime (id est the re-emergence of the instinct for revenge) that is destined to constitute the inevitable future of criminal law.

The paper *"The role of compliance programs in preventing age discrimination: an analysis in the light of Brazilian law 10.741/03"* focuses on a specific type such as ageism, when it is committed in the business environment. Túlio Felippe Xavier Januário, a PhD Candidate at the University of Coimbra - Portugal and Fellow of the "Fundação para a Ciência e a Tecnologia - FCT" is the author of this segment of the book which

closes the section about the criminological and victimological field of the treatment of the elderly population. The author provides a comprehensive overview of the constitutional and legal mechanisms of protection of elderly people and prevention of discrimination against them. Furthermore, the focus is on prevention of discrimination within the compliance programs implemented by the companies. The conclusion of this paper is that despite the lack of legal incentives in this regard (e.g., absence of criminal liability for legal entities in Brazil, except for environmental crimes), compliance programs play a fundamental role in preventing and confronting ageism committed within the business activities.

III
UNDERMINING THE BASIC HUMAN RIGHTS OF OLDER PEOPLE

The third section of the collection deals with the topic of the biggest significance for prevention of the discrimination against the elderly population, which is endangering and not respecting their basic human rights. The chapters included encompass the various issues surrounding the undermining the basic human rights, among which are the problematic limitation of the freedoms during the COVID 19 pandemic, typical ways of violating the human rights of elderly in retirement homes, health problems of elderly in prisons, approaches to human rights of the EU and European Court of Human Rights, prevention of the discrimination of the elderly population and inclusivity of elderly disabled people into the labor.

The opening chapter of the section of endangered human rights of elderly people is dealing with a recent issue, *"COVID 19 discrimination of elderly people"*, and is written by PhD Balázs Elek, the Professor at the Debrecen University Faculty of Law in Hungary. In the paper, the measures undertaken during the COVID 19 pandemic and the response in form of revolt against those measures has been put under the analytic scrutiny. Particularly, the constitutional problems in connection with epidemic management to the detriment of the elderly people were taken into consideration in the case of Hungary. The restriction of freedom od non-vaccinated people has been thematized as a part of this topic. In a conclusion, the author pointed out that "there is a very thin line along which pandemic considerations, legality, common sense, the protection of human freedoms, the prohibition of discrimination, and ultimately the free exercise of religion can be reconciled".

The following paper titled *"Typical methods of violating human rights in homes for elderly people"* deals with the abuse of the rights of elderly people in retirement

homes. The author of this paper is PhD Mršević Zorica, a Retired principal research fellow in the Institute of Social Sciences and Professor at the Faculty of European Legal and Political Studies. Providing the overview of the forms of human rights violations in retirement homes in state and private homes for the elderly, the results of the undertaken examination indicate that users of such homes suffer most often due to violations of dignity and pressures to transfer property rights to their real estate to staff members of such homes. One of the solutions to the existing situation is moving the elderly outside institutions and providing for them care outside the institutional structures.

The chapter written by PhD Milena Milićević, a Senior Research Fellow, Institute of Criminological and Sociological Research *"Health status of the older prison population: a narrative review"* for its subject has the literature review of the sources published on the topic of the wellbeing of the imprisoned elderly population. The review included 27 sources published in English language. The overview of the sources has been represented through the thematic items such as quality of life, mental health and medications, daily living and disability, etc. One of the insights presented in the analysis is that earlier research has consistently demonstrated that imprisoned individuals, regardless of age, report lower levels of perceived health and quality of life compared to the general population. One of the conclusions of the author is that there is still a lack of research on how the population of prisoners perceive their health and quality of life, despite the need to understand their unique challenges and needs, therefore this mapped omission in existing literature could provide the directions for the future research.

PhD Tilovska-Kechedji, the Associate Professor at the Faculty of Law at the University St. "Kliment Ohridski" in Bitola, North Macedonia as a part of her contribution to the volume is dealing with the *"Human rights-based approach to ageing in the European Union"*. In the Charter of Fundamental Rights of the European Union, older adults are considered a homogeneous group within Article 25 (Rights of the elderly) which states the equal rights of the elderly people to take part in social life. On the other hand, the legislative instruments like the Community Charter of Fundamental Social Rights of Workers which pointed the right to adequate retirement, and the Revised European Social Charter which introduced the legally binding reference to the right of social protection of the elderly. The additional contribution of the chapter is the overview of the good practices related to the elderly population existing in the EU member states. Despite many soft governance mechanisms, the conclusion of the author is that the EU should act and present more obligatory legislation as well as promote good practices to promote the rights and dignity of older people.

Todorović Aleksandar, PhD, The editor-in-chief of the Glasnik - journal of legal theory and practice of the Bar Association of Vojvodina contributed a chapter about the

"Justiciability of rights of the elderly before the European Court of Human Rights". The paper opens with the observation that both theory and practice confirmed the mechanism of guarantees and human rights protection based on the European Convention on Human Rights as the most successful international human rights protection system. The author of this chapter tested the effectiveness of the human rights control mechanism from the perspective of the rights of the elderly. It has been claimed that the elderly have special socio-economic needs which should be followed by a set of rights and those rights were examined and defined more in detail from the side of their justiciability and the modifications of the system of social protection which should follow. The need for adoption of the Convention on the Rights of the Elderly has been noticed, which should guarantee the specific human rights of the elderly in the future. The European Convention for the Protection of Human Rights already guarantees some socio-economic rights. Further in the chapter the author has provided an overview of the cases related to the rights of the elderly in front of the European Court of Human Rights. From the side of the approach of this author, socio-economic rights of the elderly are justiciable rights, despite also some limits for this justiciability and judicial intervention were examined. The conclusion is that not only socio-economic rights of elderly are justiciable, but also the European Court of Human Rights operates in the direction in which the specific rights of the elderly will be able to thrive if the Court through its evolutionary interpretation continue to expand the catalog of specific rights of the elderly by incorporating them into the existing general rights of the Convention.

Igrački Jasmina, PhD and a Research Fellow at the Institute of Criminological & Sociological Research in Belgrade contributed a chapter on the *"Prevention of abuse-discrimination of elderly persons"*. Starting with the negative effects of the discrimination and negative stereotypes about the elderly population, this chapter contributes the overview of the research about the discrimination of the elderly. As it has been stated in the paper, the negative stereotypes internalized by elderly people themselves might even have a negative effect on the duration of life of elderly people. Overview of the factors which possibly contribute to the discrimination of the elderly population have been provided in the chapter by Igrački as well. This is followed by the examination of the prevention of abuse, ageism and discrimination of elderly. Furthermore, the contextualization of the phenomenon of discrimination in Serbia provided a local angle of observation of the problem.

Andrej Kubiček, MA and Research Associate at the Institute of Criminological and Sociological Research contributed to the volume a chapter about *"Older People in Informal Settlements: A Different Kind of Elderness"*. The elderly population living in informal settlements is a multiply deprived population and analysis of the condition in

which this population live is an inseparable element of examining the discrimination of the elderly and the mechanisms of prevention. This contribution points to the invisibility of the experience of this marginalized and deprived population and their problems. Among this population, particularly the Roma people and the position of their communities has been addressed. The social factors such as family structure, economic activity and ethnic marginalization deeply affected by racism which are deeply intertwined with biological process of ageing in relation to these groups of people were included as more specific elements of the examination. Historical perspective of understanding the position of Roma people is Serbia has been tackled in this paper as well. The generation of elderly Roma people specifically was elaborated on, including the statistical and overview of the fieldwork information obtained related to this problem in other research initiatives. The important change that has happened with modern civilization is the institutional taking care of elderly population which before has been mainly the duty of the families. In conclusion, this chapter demonstrated that the population of elderly Roma people are under a much higher risk of marginalization, deprivation and discrimination than the other groups of elderly people are.

Stefanović Lazar, a PhD Candidate at the Department for European, international and comparative law at the University of Vienna and Researcher at the Vienna Forum for Democracy and Human Rights contributed a chapter titled *"Unlocking workplace inclusivity: exploring the legal imperative of reasonable accommodation at work for persons with disabilities in Serbia"* to this volume. This contribution provides a critical examination of the protection of the right to work for disabled persons in Serbia, focusing on the obligations of the employer to provide the reasonable accommodation. The analysis encompasses the laws, regulations, judicial decisions, and practices of the national human rights institution, revealing gaps and inconsistencies. A comparative overview of the rights of the elderly within the international legislation as given in the Convention on the Rights of Persons with Disabilities and International Labor Organization standards has been commenced. Furthermore, in the context of Serbia, the analysis showed inconsistences between the Labor Law and Anti-discrimination Law. In conclusion, the author presented some recommendations on how the problems addressed might be improved and solved in the future, above all by addressing the inconsistences in the legislation.

IV

SOCIAL EXCLUSION, DIGITAL TRANSFORMATIONS AND COMING TO AGE

The fourth section of the collection is dedicated to the fields particularly important for elderly people in contemporary times, social exclusion, digital transformations and knowledge sector. This section is composed of 11 contributions focused on social science and policy responses to the marginalization of the elderly in contemporary societies. Among the topics included in the presented contributions are the access to social and cultural activities for the elderly population, the treatment and reintegration of elderly people upon the release from the prison, empowerment of senior female scholars, protection of rights of elderly in data management, improving the digital literacy skills and access to technology for the adults, robocare in elderly care services as a future solution, attitudes towards elderly in the independent public institutions, assistance to elderly in social care administrative procedures and stigmatization and suicidal behavior of the elderly.

PhD Batrićević Ana, a Senior Research Fellow, Institute of Criminological and Sociological Research in Belgrade provided an overview about the *"(In)accessibility of cultural and social activities to elderly persons in urban and rural areas in Serbia"*. The paper deals with some sorts of discrimination the elderly face in their attempts to access cultural and social activities and with the issue of inadequate infrastructural support for the cultural and social needs of the elderly. The main related challenges and obstacles to the participation of the elderly on an equal basis have been examined with the aim of proposing ideas on how the situation might improve. Furthermore, the basis for the protection of the inclusion of the elderly into cultural and social events has been looked for in the international legal framework and in the documents such as Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. In comparison to civil and political rights, social and cultural rights have usually attracted less attention. Furthermore, the national legal framework has been put under research scrutiny in order to find the basis for cultural and social rights of the elderly. Among the key obstacles for participation in cultural life for the elderly the following were listed: distance and mobility issues, lack of financial resources, insufficient knowledge about information-communication technologies, lack of formal and informal caregivers, marginalization and stigmatization of elderly persons leading to their discrimination and self-discrimination are some of the key obstacles for their participation in cultural life. The initiatives for improvement of the situation need to be implemented in a more systematic manner in order to bring better results, the conclusion says.

PhD Ilijić Ljeposava, a Senior Research Fellow at the Institute of Criminological & Sociological Research, Belgrade has chosen to deal with the *"Treatment, release and reintegration of elderly in prison - Problems and challenges in practice"* in a contribution to the volume. The population of the older inmates is growing while the prisons are not adapted to meet the needs of the elderly people, therefore there comes a need for analysis and proposal for some adaptations and better solutions. The imprisoned elderly are at risk of mental illness and their reintegration should be planned more carefully. The author in this paper is providing some answers to the question of what the key health and social needs of elderly convicts are and how the treatment and its contents can be adapted to this population. In conclusion, it is pointed out that work, family and community relations play a crucial role in reintegration of the released elderly prison population.

PhD Petkovska Sanja, a Research Fellow at the Institute of Criminological and Sociological Research, Belgrade analyses the coming to age process of researchers in a chapter titled *"Senior Female Scholars in Serbia Between Struggle for Recognition and Empowerment Strategies"*. The chapter deals with the position of senor female scholars in Serbia and has for its goal an overview of the challenges and differences female scholars are facing during their career path and examination of the legislative framework regulating labor, seeking for the possibilities for its improvements in the direction of providing higher level of gender neutrality of the position in the institutions of higher education and research. Starting with the historical exclusion of female scholars from higher education and existing research approaches, a paper further elaborates the international policy framework for improving the position of senior female scholars. Finally, the methodology of autoethnography and life-cycle studies is suggested as a strategy for improvement of the existing policies which could be significantly transformed by evidence-based insights into their experiences in direction of empowerment rather than struggle for recognition.

Joris Bijvoets, the AVG Complete BV and Owner/Data Protection Officer contributes the volume with one significant contemporary topic such as *"GDPR in Practice: Navigating the Challenges of Data Protection in Elderly Care"*. The main goal of the paper is to provide some insights into the topic of managing the personal and medical data of the elderly while observing the topic from a confluence of elderly care, information protection and Dutch legislation. The central categories of this investigation are privacy concerns, informed consent, and the nuances of data sharing. The Privacy Impact Assessments (PIAs) is a key tool for risk management of particular interest for the author. The comprehensive critique of the ambiguous role definitions in established guidelines is one of the prominent related issues, including the proposed multi-disciplinary approach to ensure comprehensive and effective assessments.

MPhil Todorović Tanja, a Teaching Assistant at Department of Philosophy of the University of Novi Sad imposes a question of the inter-generational relations in her paper titled *"Millennials and elderly people: discrimination or fundamental misunderstanding?"* Her framework is based on the theory of contemporary media and the philosophical concept of alienation. The main assumption her paper has been that misunderstanding between generations has been caused by cultural transformations while media and internet play a crucial role in this process of deepening the inter-generational gap.

PhD Pavićević Olivera, a Research Fellow at the Institute of Criminological and Sociological Research in Belgrade contributed a paper titled *"Digital exclusion of older adults"*. The usage of digital technology is one of the aspects in which elderly are particularly discriminated against and in which ageism prevails, as this paper demonstrates. Elderly people have a low degree of access and usage of digital technology, which brings important social consequences. The functioning in everyday life is extensively mediated by technology, therefore people who do not use it are facing obstacles. This all created the condition of "digital divide" which is to be attributed to a lower level of computer literacy, technophobia, lack of perceived usefulness, and physical and cognitive deficits that must be overcome by applying a multidisciplinary approach.

PhD Dinka Caha, Assistant Professor at the Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek and MSW student at the Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek, Kristina Turkalj, are dealing with the *"Opportunities to prevent social exclusion of elderly people by enhancing their digital skills and media literacy"*. This paper provides an adequate follow-up to the previous paper dealing with the same problem and thematizes the EU Digital Decade policy program set for 2030 whose aim is to digitize all key public services and make medical records fully available online. The focus is on the factors which are contributing to the digital literacy of the elderly and prevent their social exclusion, or more precisely, on their ICT experience. The interviews were collected from professionals, elderly people and their families and analyzed using a COM-B model that distinguishes capability, opportunity, and motivation as important factors that delineate behavior. Psychological capability, physical opportunities, and reflective motivation are among the key factors shaping the ICT experience of elderly people. The research findings which could be used to shape policies confirmed that the COM-B model of behavior helps to expand the forms of professional work to strengthen digital literacy and engagement among older people.

Chen Mengxuan, a PhD student of Faculty of Law and Political Science at the University of Szeged in Hungary contributed a particularly interesting chapter about the *"Exploring the Potential of Robocare in anti-Discrimination and Protecting Human Rights for Elderly People in Long-term Care Setting"*. The assumption of the author is

that with the increase of the elderly population also the need for care is increasing, which should be guaranteed as a form of basic social protection. The focus of this paper is exploration of how the emergence of AI technology in healthcare is revolutionizing long-term care, and this article discusses the potential of robocare in preserving dignity and upholding the human rights of the elderly. It is expected that robocare might reduce ageism in care services.

MA Janković Svetlana from the Center for Encouraging Dialogue and Tolerance in Čačak_wrote a paper on the *"Independent institutions of the Republic of Serbia on discrimination against the elderly"*. The focus of the paper of Svetlana Janković is the attitudes of the employees in the independent institutions towards elderly people. Ageism among the workers in the independent institutions is a frequent reason for the complaining of the elderly. Among the independent institutions included in the sample are Protector of Citizens, Provincial protector of citizens - ombudsman, and the Commissioner for the Protection of Equality. The conclusion is that the mentioned institutions were discriminatory against the elderly in the previous period, but that their transformation in the future is crucial in the fight for better respecting human rights.

PhD Đanić Čeko Ana, the Assistant Professor at the Faculty of Lawat the Josip Juraj Strossmayer of Osijek and Josipović Kondaš, Una, the LLM, expert associate for development projects at the Administrative Department for Health in Social Welfare and Croatian Veterans, Osijek-Baranja County and PhD student at the Doctoral Study Programme of Law of the Faculty of Law at the University of Josip Juraj Strossmayer of Osijek delivered a paper on the topic of *"Administrative procedures in the field of social care with an emphasis on the importance of home assistance for elderly persons"*. This paper focuses on social care for the elderly and the importance for its deinstitutionalization. Recent innovations can serve to bridge the gaps in social services. The adequate social care is provided by the Croatian Constitution and the legislation such as the Social Welfare Act and enable care at home as a special form of social care. The paper also analyses "Zaželi - women's employment program" as one of the models for the implementation of the deinstitutionalization policy.

MA Gojković Teodora, a Research Assistant at the Institute of Criminological and Sociological Research in Belgrade contributed a paper *Stigmatization and suicidal behavior among the elderly population in Serbia"*. This chapter is a concluding chapter of the volume and thematizes stigmatization and suicide of the elderly as one of the most striking phenomena related to their social position. The author also discusses factors contributing to suicidal behavior, among which also stigmatization should be mentioned.

In his paper entitled as *"Human (social) rights based protection for elderly persons with special regard to the Revised European Social Charter"*, József Hajdú, Professor of Law, University of Szeged, Hungary and Member of the European Committee of Social Rights, Council of Europe, emphasizes the fact that Article 23 of the European Social Charter is the first international treaty provision to specifically protect the social rights of the elderly persons in Europe. He points out that its measures reflect a new progressive notion of elderly life, requiring state parties to take coherent actions in various areas. He also notices that Article 23 overlaps with other provisions of the European Social Charter which protect elderly persons as members of the general population, such as the right to protection of health, social security, social and medical assistance, and protection against poverty and social exclusion. In this paper, Professor Hajdú claims that an adequate legal framework is essential in order to combat the age discrimination that prevails in Europe in various areas such as healthcare, education and resource allocation. He concludes that it is necessary to provide elderly people with a legal framework that supports decision-making to ensure that they have the right to make their own decisions unless proven otherwise, which means that elderly people suffering from illness, disability or lack of legal capacity should not be presumed to be incapable of making decisions.

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I

The Legal Basis of Ensuring the Equal Status of Older Persons

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RELEASING ELDERLY PEOPLE FROM PRISON: GERIATRIC JUSTICE FROM A COMPARATIVE PERSPECTIVE[**]

Older people comprise the fastest-growing cohort of prisoners worldwide. Yet studies show that elderly individuals generally pose the least risk of recidivism and require the most extensive medical care. This paper explores the growth and attributes of this population, their incarceration, and whether there are appropriate limits to a government's ability to punish them. It focuses on life sentences and procedures for release.

The paper begins with the United States, where life sentences (including life without parole) are quite common. There are different release mechanisms in federal and state systems, which may or may not include parole, compassionate release, and executive clemency. The hallmark of the U.S. with respect to sentencing and release is inconsistency and ad hoc decision making. This is because under principles of federalism, the states and the U.S. government may design their own systems within any limits imposed by the U.S. Constitution. However, the Constitution fails to provide a meaningful uniform standard with respect to elderly people and incarceration.

Europe is different. The European Convention on Human Rights may provide a principled outer limit to incarceration. The European Court of Human Rights has held that an irreducible life term may violate the Convention when there is no prospect of release and possibility of review, generally within 25 years. In addition, confinement may be inhuman and degrading where health is incompatible with incarceration. But enforcement is weak. Hungary provides an example of non-compliance with the Convention in the case of life sentences. The paper concludes with a comparison of U.S. and European approaches, and asks whether Europe can provide guidance for the U.S.

Keywords: *elderly prisoners, cruel and inhuman punishment, parole, compassionate release, clemency, health and social care.*

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Introduction

Elderly people comprise the fast-growing cohort in prison systems world-wide, yet they generally present the least risk of recidivism and require the greatest level of medical care. This paper explores some of the attributes of this population, and mechanisms for reducing the number of older individuals behind bars, with a focus on limiting life without parole (whole life) sentences as well as implementing clemency and compassionate (medical) release.

While the context of the paper is the imprisonment of the elderly, much of the story here is about federalism in the U.S., norm enforcement in Europe, and permissible choices about punishment. The U.S. has separate state and federal criminal legal systems, with few relevant overarching standards, resulting in *ad hoc* approaches and decision-making. Europe has significant supranational standards under the European Convention on Human Rights, but weak enforcement. While Member States are obliged to comply with the Convention, Hungary is an example of a nation that has ignored the Convention with respect to life sentences.

The paper asks whether we can find justice for geriatrics. Is there a way to release elderly people from prison when there is little or no legitimate penological reason to confine them? Can the U.S. learn from Europe's experiences and international norms?

1. Elderly People in Prison - A World-Wide Issue

The population of elderly people in prison has vastly increased. In their exceptional literature review, Milena Milićević and Ljeposava Ilijić present this increase as a world-wide phenomenon, with older prisoners as the "most expanding portion of the prison population." [Milićević & Ilijić, 2022: 505] Certainly that is true in the United States. [Ibid: 504; Bor, 2022: 622-623; Carson & Sabol, 2016: 2-3 (noting growth after 2003)] In California, the most populous of the United States, the share of older people in prison more than quintupled between 2000 and 2017. [Hayes, Goss, Harris & Gumbs, 2019]

Elderly prisoners present unique challenges. Incarceration takes a toll on a person's physical and mental health. Incarcerated people experience a "high degree of early-onset medical and social complexity," a process often called "accelerated aging." [Bedard, Metzger & Williams, 2016: 919; Weisselberg & Evans, 2022: 109] Older prisoners have a higher incidence of psychiatric, cardiovascular, musculoskeletal, respiratory, and mobility issues. [Wilkinson & Caulfield, 2020: 254; Khechumyan, 2018: 4-6] They "have rates of chronic illness and disability comparable to those of non-incarcerated people who are 10 to 15 years older." [Li, Williams & Barry, 2022: 1101; see also Milićević & Ilijić,

2022: 505] Scholars and officials regularly consider those 50 and above to be older prisoners. [Loeb & AbuDagga, 2006: 559; Bedard, Metzger & Williams, 2016: 919; Tennyson, Jeralds & Zibulsky, 2022: 2]

Older prisoners are "a heterogeneous population." [Milićević & Ilijić, 2022: 506] Many enter prison at a young age and grow old while incarcerated, while others arrive at a mature age. Some have multiple prior convictions and incarcerations, and others not. And of course their offenses and sentence lengths vary, as do their medical and mental health needs. [Ibid: 506-507; Wilkinson & Caulfield, 2020: 254-267; Khechumyan, 2018: 3-6] Nevertheless, taken as a whole, older people in prison are significantly less likely to commit a crime when released. [Weisselberg & Evans, 2022: 109; Tennyson, Jeralds & Zibulsky, 2022: 41-44]

Though the points in this paper are not necessarily relevant to all elderly individuals who are incarcerated, they will be to many or most. The prospect of compassionate or medical release is important for all, regardless of the length of their sentence or prior record. The problem of non-reducible life sentences is relevant to a sub-group. But it is an important and endemic issue, and a significant driver of the increase in the population of older prisoners.

2. The United States - Variation and Inconsistency in a Federalist System

The variation in penological approaches among the U.S. state and federal criminal legal systems may be their most notable feature. Under federalist principles, absent limitations imposed by the U.S. Constitution, legislatures have discretion to define crimes and prescribe sanctions. Prosecutors have virtually unfettered discretion to bring charges and seek lengthy sentences. To get a sense of the variation in state systems, one might compare incarceration rates and permissible sanctions, particularly the death penalty. Recently, Mississippi imprisoned 575 adults per 100,000 residents, compared with 96 per 100,000 in Massachusetts. [The Sentencing Project, 2023] Currently, 27 states and the federal government have laws permitting the death penalty; 23 states do not. In five of the death penalty states, governors have placed moritoriums on executions. [Death Penalty Information Center (2023)]

How do system variations affect elderly people in prisons in the U.S.? As explained below, the U.S. Constitution provides few relevant limits. States are free to set their own penological goals, even when they lead to draconian sentences.

a. The Constitution, punishment and prison

The U.S. Constitution limits the power of the states and the federal government to investigate, prosecute, and sentence criminal defendants. For certain aspects of a case - such as searches, police interrogation, and the right to counsel - constitutional provisions have real teeth. Not so much for the law of sentencing and punishment. The Eighth Amendment to the Constitution prohibits "cruel and unusual punishments." [U.S. Constitution, amend. viii, 1791] Perhaps surprisingly, it does not meaningfully limit sentences of life without parole ("LWOP") for adults. Nor does it require the release of even terminally ill individuals.

The U.S. Supreme Court takes two different approaches to claims that a sentence amounts to cruel and unusual punishment. In a small set of circumstances, principally involving juveniles or the death penalty, the Court has declared *categories* of sentences to violate the Eighth Amendment. Thus, for example, the Eighth Amendment prohibits the imposition of the death penalty for non-homicide offenses, as well as for defendants with intellectual deficits or who were under the age of 18 at the time of their offense. [*Kennedy v. Louisiana*, 2008: 438; *Atkins v. Virginia*, 2002: 321; *Roper v. Simmons*, 2004: 578] The Eighth Amendment also forbids LWOP for juveniles convicted of non-homicide crimes as well as *mandatory* LWOP sentences for juveniles convicted of murder. [*Graham v. Florida*, 2010: 74-75; *Miller v. Alabama*, 2012: 489] Otherwise, the Supreme Court has upheld LWOP sentences for adults, even though it is remarkably harsh. Indeed, some advocate the term "death by imprisonment" as more accurate than "life without parole." [Carter, López & Songster, 2021: 318]

If rehabilitation was the accepted penological objective in the U.S., LWOP sentences might categorically violate the Eighth Amendment. After all, LWOP "forswears altogether the rehabilitative ideal." [*Graham v. Florida*, 2010: 74] However, under federalist principles, states may choose to pursue some penological goals and not others. A sentence can be based on a number of justifications, including incapacitation, deterrence, rehabilitation and retribution. [*Ewing v. California*, 2003: 24-25] Beginning in the 1970s, U.S. jurisdictions moved away from rehabilitation as the main purpose of a criminal sanction. [Allen, 1981: 5-10] "Rehabilitation had been the field's central structural support . . . When faith in this ideal collapsed, it began to unravel the whole fabric of assumptions, values and practices." [Garland, 2001: 8] This shift away from rehabilitation is reflected in the federal criminal legal system's use of non-parole-eligible determinate sentences and sentencing guidelines. In implementing this change, Congress declared that "imprisonment is not an appropriate means of promoting correction and rehabilitation." [Sentencing Reform Act of 1984: 18 U.S.C. § 3582(a)]

The second approach under the Eighth Amendment is a non-categorical case-by-case "proportionality" review. In non-capital cases, the proportionality principle is quite narrow. The Supreme Court has rejected challenges to a mandatory LWOP sentence for a first-time offender with 672 grams of cocaine, and to a life sentence (with review after 25 years) for a three-strikes defendant convicted of stealing three golf clubs. [*Harmelin v. Michigan*, 1991: 995-996; *Ewing v. California*, 2003: 30-31] The late Justice Antonin Scalia once argued that "it becomes difficult to speak intelligently of 'proportionality'" when states pursue a variety of sentencing goals beyond retribution. [*Harmelin v. Michigan*, 1991 (concurring): 989]

Finally, with respect to illness and compassionate release, the Eighth Amendment obligates prison officials to provide adequate medical and mental health care, which is especially critical for the elderly. [*Estelle v. Gamble*, 1976: 103; *Brown v. Plata*, 2011: 510-511, 545] A prison system too overcrowded to provide such care might be ordered to reduce its population. [*Brown v. Plata*, 2011: 502] But for individuals, the judicial remedy is typically damages or an order for adequate care. The Eighth Amendment does not require the release of even a terminally ill person. [*Glaus v. Anderson*, 2005: 387; *Stewart v. United States*, 2013: *20] Remarkably, "[a]lthough the incarceration of a terminally ill prisoner may be 'cruel,' it is not 'unusual.'" [*Engle v. United States*, 2001: 397; *Ware v. Sices*, 2023: *14]

b. Life sentences

The number of life sentences - both parole-eligible and LWOP - has greatly increased in the U.S. in recent years. As of 2020, over 105,000 people were serving parole-eligible life sentences, and over 55,000 were serving LWOP. This is an estimated 40% of the world's population of individuals serving life, and 83% of those with LWOP. [Nellis, 2021: 15-16] Thirty percent of life-sentenced people (61,000) were 55 or older. [Ibid: 20] Another 42,000 individuals were serving sentences of 50 years or longer, which we might consider *de facto* life terms. [Ibid: 17] In the federal system alone, 3,700 people are currently serving life sentences, overwhelmingly LWOP. [U.S. Bureau of Prisons, 2023: Sentences imposed] During fiscal years 2016 through 2021, 709 defendants received federal life sentences and another 799 received lengthy *de facto* LWOP. [Craun & Purdy, 2022: 1]

Terrell Carter, Rachel López and Kempis Songster attribute the rise in life terms to three factors: (1) the abolition of parole in many places, along with implementation of determinate sentencing and three-strikes laws; (2) an increase in mandatory sentences; and (3) the use of LWOP as an alternative to the death penalty. [Carter, López & Songster,

2021: 348] Over half of the people serving LWOP are in five jurisdictions: Florida, Pennsylvania, California, Louisiana and the federal system. [Ibid] We might note that these are all death penalty jurisdictions. [Death Penalty Information Center, 2023]

For those serving LWOP, clemency is generally the only possible means of release. Yet even having a parole-eligible life sentence does not guarantee that an individual will ever leave prison. Parole authorities must be willing to grant release. In California, a series of hard-line governors once forced effective parole rates down to zero. [Simon, 2007: 159-161]

c. Clemency and compassionate release

Every state has some procedure for clemency - generally meaning the power to pardon a person or commute a sentence - typically exercised by a governor or other executive official or agency. [Collateral Consequences Resource Center, 2013] In some jurisdictions, individuals sentenced to LWOP are excluded from eligibility. [Carter, López & Songster, 2021: 356-367] The President has the power to grant clemency to federal defendants. [U.S. Constitution, 1788: art. II, sec. 2] That power is rarely exercised. Over 16,000 federal clemency applications are now pending with the U.S. Department of Justice. [Office of the Pardon Attorney, 2023]

In the absence of a constitutional right to release, compassionate release is likewise varied. Forty-nine states along and the District of Columbia provide some form of early release for circumstances such as illness or imminent death. [Price, 2018: 8, 28-33] People serving federal sentences may ask their sentencing court for compassionate release for "extraordinary and compelling reasons," though release is in the court's discretion. [18 U.S.C. § 3582(c)(1)(A)(i), 2021] Tragically, a subset of several hundred elderly individuals serving federal prison sentences are not legally eligible for compassionate release at all. [Weisselberg & Evans, 2022: 107, 110-111]

3. Europe - Evolving Supranational Standards But Weak Enforcement

If the United States has no consistent and unifying approach, have other solutions emerged in Europe and can they be enforced?

While each nation in Europe has its own judicial and criminal legal systems, 46 nations are currently members of the Council of Europe and are signatories to the European Convention on Human Rights. Article 3 of the Convention provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." [European Convention, 2021: art. 3] This prohibition has been applied to the incarceration of

elderly people in two main respects. One relates to the lawfulness of irreducible life sentences; limiting these would necessarily reduce the population of elderly prisoners. The second addresses the imprisonment of people who are severely ill or incapacitated. This part of the article reviews both aspects, with an emphasis on life terms, and then turns to Hungary as a case study of defiance.

a. Life sentences

For years, the European Court of Human Rights (ECtHR) merely suggested that imposing an irreducible life sentences "may raise an issue under Article 3 of the Convention." [*Einhorn v. France*, 2001: ¶ 27] In *Einhorn*, an extradition case, the ECtHR held that clemency power rendered a potential U.S. life sentence reducible. In *Kafkaris v. Cyprus*, the Grand Chamber likewise found that a life sentence was reducible because the President could suspend or commute any sentence with the agreement of the Attorney-General. [*Kafkaris v. Cyprus* [GC], 2008: ¶¶ 102, 103] But dissenting judges argued that the possibility of release must exist both *de jure* and *de facto*, meaning it must be "real and tangible." [Ibid (Joint Partly Dissenting Opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens): ¶¶ 2, 6] Dirk van Zyl Smit predicted that the ECtHR would soon need to clarify "what a *de jure* and *de facto* prospect of release really means." [van Zyl Smit, 2010: 45] Clarification came three years later in the landmark case of *Vinter and Others v. the United Kingdom*.

The applicants in *Vinter* were serving "whole life" sentences for murder with only the possibility of compassionate release by the Secretary of State for "exceptional circumstances." [*Vinter and Others v. the United Kingdom* [GC], 2013: ¶¶ 14, 42, 43] The Grand Chamber found that a life sentence is not in itself incompatible with Article 3. [Ibid: ¶ 106] However, there "must be both a prospect of release and a possibility of review." [Ibid: ¶¶ 108, 110] The key to this conclusion was recognizing that "the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence." [Ibid: ¶ 115] As Natasa Mavronicola has explained, the Court "does not accept that the retributive (and deterrent) purpose of imprisonment can in and of itself justify whole life imprisonment." [Mavronicola, 2014: 303]

Of course, in Member States - just as in the U.S. - a sentence may be imposed for a variety of legitimate penological grounds, including retribution, deterrence, public protection and rehabilitation. Yet the balance between these grounds is not static; it may shift during the course of a sentence. [Ibid ¶ 111] This may be the Grand Chamber's most critical insight, and it makes sense in light of the emphasis on rehabilitation. When a person has atoned for the offense and achieved rehabilitation, a whole life sentence may

over time become "a poor guarantee of a just and proportionate punishment," even if the sentence was appropriate when it was imposed. [Ibid: ¶ 112] There must be a review after an some point to consider whether changes in the individual and their progress towards rehabilitation mean that continued confinement is no longer justified on legitimate penological grounds. [Ibid: ¶¶ 111, 119] Respect for human dignity also demands that the State provide a person with the chance to achieve rehabilitation and obtain release. [Ibid: ¶¶ 113, 114]

The *Vinter* Court provided guidance on both timing and standards for such a review. Analyzing comparative and international materials, the Grand Chamber found "clear support for . . . a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter." [Ibid: ¶ 120] It rejected the argument that discretion to grant compassionate release to terminally ill or incapacitated prisoners "could really be considered release at all, if all it meant was that a prisoner died at home or in a hospice" instead of behind prison walls. [Ibid: ¶ 127] Further, a person "is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions." [Ibid: ¶ 122] This does not require release after 25 years. Consistent with the focus on rehabilitation, a state may continue to detain someone who still poses a danger to others. [Ibid: ¶ 108]

The ECtHR has *mostly* adhered to the animating principles of *Vinter*. The Court has stated that emphasis on rehabilitation and reintegration is "a mandatory factor" for the penal policies of Member States. [*Khoroshenko v. Russia* [GC], 2015: ¶ 121] In *Murray v. the Netherlands*, the Grand Chamber again noted the primary aim of rehabilitation. While the early days of a sentence may primarily further punishment and retribution, the later stages should emphasize preparation for release. [*Murray v. the Netherlands* [GC], 2016: ¶ 70] Life prisoners must be given an opportunity to rehabilitate themselves. [Ibid: ¶¶ 104, 109] Murray's life sentence was not *de facto* reducible because the State failed to provide the mental health care he needed to make progress towards rehabilitation. [Ibid: ¶¶ 122-127] However, these holdings were undercut in a later U.K. case where the ECtHR found that a domestic court opinion (*R v. McLoughlin* (2014)) had supplied the Secretary of State with sufficient clarity to comply with Article 3. [*Hutchinson v. the United Kingdom* [GC], 2017: ¶ 70]

Hutchinson may represent a significant retreat from *Vinter*. For one thing, *McLoughlin* is not a model of clarity; its primary virtue is asserting that the Secretary of State must exercise authority in consistent with Article 3, and that the "exceptional circumstances" for release are not limited to end-of-life situations. [Ibid: ¶¶54, 55] One dissenting judge in *Hutchison* expressed the fear that the decision represented "a growing trend towards downgrading the role of the Court before certain domestic jurisdictions,

with the serious risk that the Convention is applied with double standards." [Ibid (Dissenting Opinion of Judge Pinto de Albuquerque): ¶¶ 31, 38; see also Khechumyan, 2018: 142-143 (discussing *McLoughlin*)] Mark Pettigrew has gone further, accusing the ECtHR of strategically retreating from *Vinter* due to the hostile response from Westminster, which had included threats to withdraw from the Convention. He perceives a risk to the Court's authority due to double standards, and wonders whether the Court would enforce *Vinter* with less influential Member States. [Pettigrew, 2017: 269-275; see also Pettigrew, 2015: 289-293] Indeed, in two more recent cases involving extradition from the U.K. to the U.S., the ECtHR found that the applicants failed to show a sufficient risk of receiving LWOP even though there is no parole from U.S. federal sentences and the applicants could receive life if convicted. [*Sanchez-Sanchez v. The United Kingdom* [GC], 2022: ¶¶ 92, 95, 100-110; *Hafeez v. The United Kingdom*, 2023: ¶¶ 49-55]

b. Ill and incapacitated elderly people in prison

The ECtHR has also held that continued incarceration may be inhuman and degrading treatment in violation of Article 3 where the person's health "is absolutely incompatible with detention." [*Chaykovskiy v. Ukraine*, : ¶ 55] The inquiry is fact-specific - analyzing factors such as medical condition, adequacy of care, advisability of continued detention in light of state of health, and advanced age - with release required only in "exceptional cases." [Ibid; *Farbtuhs v. Latvia*, 2005: ¶ 53] Aleksandr Khechumyan makes a compelling argument for greater review of elderly people's confinement, either due to age combined with health factors or age standing alone, especially where a sentence exceeds an individual's life expectancy. [Khechumyan, 2018: 69-87, 108-111] But at least for now, this inquiry is so case-specific and demanding that it is difficult to derive bright-line rules with meaningful guidance.

c. A case study - Hungary and life sentences

As always, though, the question is not just what the ECtHR has ruled, but how its judgments are implemented in the Member States. A review of the Member States' compliance with Article 3 is beyond the scope of this paper. But it may be useful to examine Hungary's response, which provides a cautionary example. While Hungarian judges are obliged to apply the Convention and judgments of the ECtHR [Bárd & Bárd, 2016: 152], the country has a poor record of implementation. Hungary is one of two Member States with the highest rate of non-implementation of leading ECtHR judgments over a ten-year period. [Democracy Reporting International & European Implementation

Network, 2022: 17] In addressing Hungary's record, commentators have specifically referenced life sentences. [Hungarian Helsinki Committee, 2021: 44-45; Bárd & Bárd, 2016: 154-158]

Hungarian law permits courts to impose whole life sentences. The Criminal Code of Hungary provides for imprisonment for a fixed period of time or for life. [Criminal Code, 1978: § 40(1); Criminal Code, 2012: § 34] If an individual is sentenced to life, the court sets a parole-eligibility date or precludes parole altogether. [Criminal Code, 1978: § 47/A; Criminal Code, 2012: §§ 42, 43] The Fundamental Law of Hungary also specifies that life without parole may be imposed for intentional and violent crimes, and gives the President the power to grant pardons. [Fundamental Law of Hungary, 2023: Freedom and Responsibility, art. IV(2); The State, art. 9(4)(g)] The ECtHR has repeatedly found that these laws do not meet the standards of Article 3. However, Hungary's domestic courts and legislature have not implemented the decisions of the Strasbourg court.

Decades ago, in the wake of *Kafkaris v. Cyprus*, the ECtHR found that Hungary's sanction structure did not violate Article 3 of the Convention. The Court declared inadmissible an application by a person who would be eligible for parole after 40 years of a life sentence. Citing *Kafkaris* and other cases, the ECtHR considered that the sentence was both *de jure* and *de facto* reducible because he would be eligible for parole after 40 years and could receive presidential clemency even earlier. [*Törköly v. Hungary*, 2011: ¶ 2] But *Vinter* changed all that.

The first post-*Vinter* decision came in 2014. The applicant, Lázló Magyar, was sentenced to life without eligibility for parole for a series of offenses, including multiple counts of murder and robbery. [*László Magyar v. Hungary*, 2014: ¶¶ 9, 10] Distinguishing *Törköly*, the ECtHR found the sentence was not reducible despite the possibility of presidential clemency. Hungarian law did not require the President to assess whether continued imprisonment was justified on legitimate penological grounds or if the individual was making progress towards rehabilitation. Nor did the law provide any specific guidance on the criteria or conditions for clemency. [Ibid: ¶¶ 57, 58]

Government officials heavily criticized the ruling. [Polgári, E., 2016: 299-300] The Hungarian Parliament responded with legislative amendments. For individuals sentenced to life with the possibility of parole, the sentencing court should set a parole eligibility date of between 25 and 40 years. [Criminal Code, 2012 (as amended): §§ 42, 43(1)] Individuals sentenced to life without parole (whole life) would undergo a "mandatory pardon" procedure after 40 years, with initial review by a five-member Clemency Board appointed by the President of the *Kúria* (Hungary's Supreme Court). [Act no. CCXL of 2013, as amended by Act no. LXXII of 2014: §§ 46/B, 46/D; Fundamental Law of Hun-

gary, 2023: Courts, art. 25(1)] After reviewing documents and hearing from the individual, the Clemency Board would adopt a "reasoned opinion containing a recommendation on the granting of clemency." [Act no. CCXL of 2013, as amended, *supra*: § 46/F] The recommendation would then go to the minister responsible for justice, tasked with drafting the clemency application for the President of the Republic. The President then would make the ultimate decision. [Ibid: §§ 45, 46/F, 46/G]

Hungary's domestic courts have mostly dodged the question whether the new procedures comply with Article 3 of the Convention. Pointing to the new law, Hungary's Constitutional Court terminated a proceeding that was to determine whether a life sentence imposed under the prior law satisfied the Convention. [Constitutional Court Decision No.: 3013/2015. (I. 27.) Order AB, 2015: ¶¶ 14-18] Two judges dissented, arguing that the new provisions do not cure the violation of Article 3. [Ibid: ¶¶ 34, 52-56; Bárd, 2015a]

The *Kúria* then took up the case of László Magyar, whose sentence had been reopened for review. The *Kúria* decided that the only relevant ECtHR cases were those directly involving Hungary, meaning it would not consider *Vinter*. The Court declined to apply the new pardon procedures to Mr. Magyar. The *Kúria* upheld the life sentence but then made him eligible for parole after serving 40 years, essentially replicating the sentence in *Törköly*, the pre-*Vinter* case. [Bárd, 2015b; Kúria Decision No. Bfv.II.1812/2014/7, 2015] However, a few weeks later, the Criminal Law Unification Council of the *Kúria* issued a resolution making clear that this ruling about the new parole and pardon procedures would not serve as precedent. The Council emphasized that Hungarian courts are to apply provisions of domestic law that are in force unless those provisions have expressly been judged by the ECtHR to violate the Convention in the individual's specific case. The new parole and pardon procedures were not actually before the ECtHR in *László Magyar* - they were promulgated afterwards - and (according to the Council) Hungarian courts are not bound by general standards set forth in ECtHR decisions. [Hungarian Helsinki Committee, 2016: 3; Bárd & Bárd, 2016: 157; Kúria Resolution No. 3/2015. BJE decision, 2015] At a press conference that followed the Council's resolution, a Ministry of Justice official said that the previous decisions of the ECtHR gave no reason to change the jurisprudence of life imprisonment in Hungary. He added that while there will always be people who take their cases to the ECtHR, the government will never release murderers who killed innocent victims. [Répássy, 2015; according to Novoszádek, 2018]

None of this played well in Strasbourg. In *T.P. and A.T. v. Hungary*, the ECtHR held that while States enjoy a "margin of appreciation" in the area of sentencing, the margin is not unlimited. [*T.P. and A.T. v. Hungary*, 2016: ¶ 44] There was clear support

for a mechanism of review no later than 25 years after sentencing, and the existence of presidential clemency does not make a whole life sentence reducible *de facto* or *de jure*. [Ibid: ¶¶ 41, 45, 46] In addition, while the new legislation does not oblige the President to determine whether continued imprisonment is justified on legitimate penological grounds or even provide reasons for any decision. [Ibid: ¶ 49] Nor could Hungary rely upon *Törköly* in light of *Vinter*. [Ibid: ¶ 47]

The Council of Europe's Committee of Ministers supervises the execution of ECtHR judgments. [European Convention on Human Rights: art. 46] In 2019, Hungary submitted a "Group Action Plan" to the Committee of Ministers regarding *László Magyar* as well as *T.P. and A.T.* The government emphasized that it had adopted new legislation following the ECtHR's 2014 decision. It claimed to need further clarification from the ECtHR on whether 40 years for parole eligibility was within the "margin of appreciation" in the most serious cases, arguing that Hungary's courts have made individualized assessments that such a sentence is proportionate and furthers retributive purposes. [Communication from Hungary, 2019: 2-3] Clarification came quickly in two cases in which the ECtHR reinforced the judgment in *T.P. and A.T.*, including the requirement of review long before 40 years. [*Kruchió and Lehóczki v. Hungary*, 2020: ¶¶ 26-28; *Sándor Varga and Others v. Hungary*, 2021: ¶¶ 48-50; see Hungarian Helsinki Committee, 2022: 3] And the ECtHR then erased any possibly legitimate remaining doubts in *Bancsó and László Magyar (no. 2)* (2021). It determined that László Magyar's reconfigured sentence, as well as that of the first applicant (Bancsó), violated Article 3 because the parole eligibility period was set at 40 years. [Ibid: ¶¶ 45-47]

In September 2022, the Ministers' Deputies urged the Hungarian authorities to align their legislation with the ECtHR's case-law, and invited an updated action plan. [Committee of Ministers, Ministers' Deputies, 2022: ¶ 6] In July 2023, Hungary submitted another plan, again emphasizing the 2014 legislation. It also asserted that a number of issues remain unresolved in the ECtHR and "several constitutional complaint proceedings are pending before the Constitutional Court, the outcome of which needs to be awaited before adequate legislative measures can be taken." [Communication from Hungary, 2023: 2-3]

Perhaps Hungary's defiance will not be surprising. Ula Kos offers the life imprisonment cases as an example of the government's "disguised non-compliance" with ECtHR decisions through a form of autocratic legalism: the government superficially appears to comply but in fact circumvents the ruling by adopting legislation that is merely cosmetic. [Kos, 2023: 14-16] The government also creates a domestic narrative that is critical of the court, while nevertheless supporting formalistic reforms. [Kos, 2023: 19;

Polgári, 2016: 298] Viktor Orbán, the Hungarian Prime Minister since 2010, has reportedly referred to this strategic behavior as performing a "peacock dance." [Mos, 2020: 270] As of this writing, the dance continues, and it is not clear whether or when the music may stop.

Conclusion

In comparing approaches to incarcerating elderly people in the United States and Europe, the take-away is variation. In the United States, the states are free to set up their own procedures within very loose Constitutional bounds. Were the U.S. Constitution to provide bright-line standards, there would be enforcement, and hopefully states would not engage in the sort of strategic behavior that we have seen from Hungary. Sadly, there are no such bright lines. Europe is the flipside. As interpreted by the European Court of Human Rights, Article 3 of the European Convention provides clear standards with respect to life imprisonment. Hungry is a cautionary example of a nation that is willing to pay pecuniary damages awarded by the ECtHR, but refuses to bring its domestic law in line with international norms. And while there may be political consequences for such incalcitrant Member States, there is no effective enforcement mechanism. Even so, there is much the U.S. can learn from Europe, especially with respect to life sentences.

To begin, it is clear that the United States is an absolute outlier in its use of life terms. Guided by developments in Europe, the U.S. could benefit from a second look at elevating rehabilitation to the dominant purpose of a criminal sanction, and ending life without parole. The pendulum swung away from rehabilitation in the late 1970s, but perhaps after almost 50 years it is time for it to swing back. If so, Europe provides a nuanced approach. The consensus that 25 years is sufficient for retributive purposes for any offense, and that continued incarceration must satisfy other legitimate penological goals, may seem odd to American eyes. We tend to think of penological purposes in combination and as static, relevant only at the time of sentencing. Europe's approach - that the purposes are dynamic and a sentence structure should require different, identifiable justifications later in a period of incarceration - is very much worth thinking about.

Further, international standards and practices can and should inform what amounts to "cruel and unusual punishment." In declaring as unconstitutional LWOP sentences for juveniles in non-homicide cases, the U.S. Supreme Court pointed to "the global consensus" against such a sanction. [*Graham v. Florida*, 2010: 80] Likewise, in striking down the juvenile death penalty, the Court noted that the U.S. was the only country to impose that sentence, though at least one justice has objected to considering practices of other nations. [Roper v. Simmons, 2005: 575, 622-628] Certainly the Court could weigh

the U.S.'s outlier status with respect to life sentences. Terrell Carter, Rachel López and Kempis Songster put forth compelling arguments for a redemptive reading of the Eighth Amendment, which would be consistent with evolving norms. [Carter, López & Kempis, 2021: 367-381]

Absent such a reading, under federalist principles, change must be implemented state-by-state. Yet there is no reason why international practices and developments in Europe cannot also influence state legislatures and courts interpreting state law. One must begin somewhere. California, which heavily employs life terms, might be a place to start.

So, can we achieve justice for geriatric people in prison? At the moment, sometimes - but quite inconsistently. There is much more to do in both the U.S. and Europe.

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PROTECTION OF THE RIGHTS OF THE ELDERLY IN THE LIGHT OF CRIMINAL LAW

Protecting the dignity and rights of the elderly is becoming a global problem, together with the accelerated growth of the elderly population. According to forecasts by the World Health Organization, the global population aged 60 and over will double, from 900 million in 2015 to 2 billion in 2050. This becomes an increasingly serious problem of their social inclusion, respect for the dignity and rights of the elderly and their protection from discrimination and various forms of abuse and violence. Numerous studies of the treatment of the elderly in society that provide very reliable indicators of the general degradation of their dignity and the threat of their rights in numerous areas - from the area of work, health care, help and care in the family or in institutions, to participation in political decision-making, cultural life and other areas,, provide a basis for singling them out as a "vulnerable category", which should be guaranteed special rights and their protection, in line with the singling out of other such categories: children, persons with disabilities and women, for which a set of special international norms and standards was created. This paper deals with the real scope of designing such a concept in the field of international human rights law, especially through the adoption of the Convention on the Rights of the Elderly, as well as with the necessary changes in penal legislation with the aim of highlighting and special protection of the elderly as a special category of victims of criminal acts, as well as modifications of their treatment as perpetrators of criminal acts.

Keywords: *elderly, degradateg dignity, universal convention on the rights of the elderly, human rights, criminal law protection.*

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Foreword

The treatment of the older persons, whether they appear as perpetrators of criminal acts or, more often, as victims of crime, is becoming an increasingly topical challenge for modern criminal law. Are we at the beginning of creation, similar to the concept of juvenile justice, special rules of "elderly justice"? The modern tendency in criminal law, which corresponds to the development of the concept of special rights, is to provide special protection to certain vulnerable categories of crime victims: children, people with mental and other disabilities, women and, recently, the elderly. This tendency is still in its infancy, which requires raising the protection of the rights of the elderly by means of criminal law, along with strengthening the respect of second and third generation of human rights through the establishment of international norms and standards for their protection. A significant contribution to this can be the adoption of the UN Convention on the Protection of the Rights of the Elderly, changes to the criminal code, especially for the purpose of introducing special incriminations with the aim of strengthening the protection of the elderly as a vulnerable category of victims, as well as improving the types of sanctions for old perpetrators.

1. Facts about the degraded dignity of the elderly

1.1. On 15 June 2022, World Elder Abuse Awareness Day, WHO and partners published the document "Tackling abuse of older people: five priorities for the UN Decade of Healthy Ageing (2021-2030)", starting from the following generally accepted facts: around 1 in 6 people 60 years and older experienced some form of abuse in community settings during the past year; rates of abuse of older people are high in institutions such as nursing homes and long-term care facilities, with 2 in 3 staff reporting that they have committed abuse in the past year; rates of abuse of older people have increased during the COVID-19 pandemic; abuse of older people can lead to serious physical injuries and long-term psychological consequences; abuse of older people is predicted to increase as many countries are experiencing rapidly ageing populations; the global population of people aged 60 years and older will more than double, from 900 million in 2015 to about 2 billion in 2050 (s. World Health Organization. (2022). In 2018, the number of people older than 64 years old surpassed the number of children under 5 years old. The working-age population in Europe is projected to decrease by 18 percent between 2021 and 2070, and by 2100, those aged 65 and over will make up 31 percent of the EU-27 population, up from 20 percent in 2019 (*Ritchie, and Roser,* (2019)).

The fight against elder abuse in the United Nations Decade of Healthy Aging (2021-2030). according to the WHO has five priorities (World Health Organization

"Tackling abuse of older people"). These five priorities, arrived at through wide consultation, are: combat ageism as it is a major reason why the abuse of older people receives so little attention, generate more and better data to raise awareness of the problem, develop and scale up cost-effective solutions to stop abuse of older people, make an investment case focusing on how addressing the problem is money well spent, raise funds as more resources are needed to tackle the problem. A 2017 WHO review of 52 studies in 28 countries from diverse regions provides prevalence estimates of the proportion of older people affected by different types of abus the elderly were subjected to some form of abuse, psychological abuse being the most common, especially towards older people in institutional settings. The tendency to increase the scope of elder abuse in many countries is particularly worrying, because even if the share of victims of elder abuse remains constant, the global number of victims will increase rapidly due to the aging of the population.

1.2. The range of risks for the occurrence of abuse of elderly is the result of numerous mutually interrelated individual and social factors (*Pillmer et al*., (2016): 194). These are some of the individual general and conditioned by the changes brought about by the aging process itself (chronic diseases, physical weakness, reduction of psychological functions, etc.). The social, cultural and economic factors have a decisive influence on the creation of an appropriate system of prevention and protection from abuse. They also influence the determination of the scope of protection by means of criminal law. Community- and societal-level factors may include ageism against older people, even promoting or tolerating certain cultural norms (e.g., normalization of violence). On the other side, social support and living alone reduce the likelihood of elder abuse. Numerous studies in countries with an established system of support for the elderly, especially those over 70 years of age (Sweden, etc.), have shown better results of treatment in society and prevention of abuse, with the help of third persons, than institutional treatment (*Sonn*, (1996):5). In the modern welfare state, the attitude towards them is reduced to investments in their health and social protection or appropriate institutional treatment, which depend on the generosity of pension, health and social insurance funds, and the possibility of investing in appropriate institutional treatment (*Despotović et al*. (2019): 76)**.** The respect for the rights of the elderly becomes one of the important indicators of measuring the quality of life, expressed through the international Quality of Life Index. From the medical aspect, quality of life is defined by the World Health Organization (WHO) as "an individual's perception of their position in life in the context of the culture and value systems in which they live and in relation to their goals, expectations, standards and concerns" (*Top 10 Countries with the Highest Quality of Life, mid year-2023 - Numbeo*: Luxemburg, Netherlands, Iceland, Denmark, Finland, Switzerland, Oman, Austria, Norway, Spain). Numerous studies have confirmed the knowledge that economic factors have

an impact on the quality of life, but the quality of life does not depend only on economic factors. The role of social support and its protective influence should not be neglected either. As the family in modern society is disintegrating, the state as *parens patriae* should take over its functions of support and protection of the elderly.

1.3. As one of the major challenges of the development of the state's social functions, the protection of the rights of the elderly and the prevention of their abuse becomes a special challenge for countries in transition, such as countries from our region. In contrast to developed democracies and stable legal systems of developed countries, countries in transition face the elementary problems of resetting all state functions on new principles of governance and protection of basic human rights. The need for rapid changes dictated the enforcement of basic civil and political rights, especially freedom of expression, political association and action, voting rights, etc.. Social, economic and other rights remained in the deep shadow and, connected to the weak performance of economic and social development- the protection of the dignity of the elderly and the creation of conditions for their dignified health, social and economic status. The bad economic situation, wars and general social instability of our region, caused the issues related to the position of the elderly to be relegated to the background. In the context of other political and economic priorities, changes in the legislation did not lead to a significant improvement in their status due to the lack of sufficient investments by the state. For the situation in Serbia, which also coincides with the situation in Macedonia and other countries of the Western Balkans, the policy directed towards the elderly still has passive features, which, considering the demographic situation and the characteristics of the society, is negative. In the health care system, people over the age of 65 represent a special group, to which special attention is directed, given the increased exposure to the risks of disease. Nevertheless, the issue of health care for the elderly is often problematic, because despite good will, developed legislation and good professional staff, many health centers, whose old permanent users, do not have the necessary resources (as many as 40% of all health centers do not have a home treatment service, or do not have a sufficient number of professional staff, most often technicians and nurses, necessary to perform their work (s. *Despotović* et al., (2018): 78). Likewise, research in our region confirmed the findings that the treatment of the elderly placed in institutions is very poor, so that most of them suffer from inadequate health and psychological support, contrary to the appropriate level of social relations (s. *Sretenović, Nedović*, (2019: 33). The economic and social status of the elderly in Macedonia over the age of 65, which is the limit of their pension, is also shown by data on the amount of pensions (as of July 2023): out of 333,000 pensioners, 94,000 receive pensions in the first group, which includes pensioners up to 13,000 dinars (something above 200 euros), while the largest group of pensioners, 150,000 from the second

and third groups, receive pensions of up to 20,000 dinars (about 330 euros). If there is information that the minimum family expenses in Macedonia ('consumption basket') are around 800 euros, one does not need any additional argument about the poor status in which the majority of elderly people in Macedonia live (*Gerovska Mitev*, (2021): 5).

The regional research on the social inclusion of the elderly in the countries of the Western Balkans (TASIOP) from 2019 points to a number of serious indicators of their marginalized position in society, which in some areas results in their complete exclusion from socially engaged activities (work, performance of social functions, participation in political processes, cultural life, education etc.), but throws them into complete poverty and desperation to survive (s. *Todorović, Vračević*, (2019): 4). In addition to the self-assessment of health status as very poor in over 40% of people over 65 years of age, data on the frequency of domestic violence are particularly worrying. In Serbia, according to a survey conducted in 2015, 19.8% of elderly persons reported that they had been the subject of some type of violence in their old age. In Bosnia and Herzegovina in 2014, 1,459 cases of violence were reported to the Ministry of Internal Affairs. In the Republic of North Macedonia, in the period from January 1, 2018 to January 31, 2018, 43 people over the age of 65 were registered as victims of domestic violence, of which 18 were men and 25 were women. Different types of violence (emotional, physical and financial abuse) were reported. Experiencing discrimination often relates to treatment in institutions, including receiving health care services. According to research, 90% of elderly people believe that society discriminates against them, does not respect and does not recognize their contribution and merits to society, and this experience often refers to treatment in institutions and health care services. Discrimination of elderly people is based on real experience: long waiting lists for medical appointments; poor nutrition and treatment in hospitals; unkindness of the medical staff; denial of health services to individuals living in another area; withholding health information; waiting for the appointment of specialist examinations, surgical interventions, etc. The elderly report that they often have to wait several months just to get an appointment with a specialist, for a diagnostic examination and a surgical procedure. Finally, more than 80% of people over the age of 65 state that they have very little influence on important decisions about community life.

2. Old people as victims and perpetrators of criminal acts

2.1. Scientific researchs of the position of the elderly, the fact that the elderly population is increasing on a global scale, the strengthening of the universal concept of human freedoms in rights, including minority rights and the rights of "vulnerable categories", as well as the necessary transformation of the modern state connected with such tendencies in the direction of developing its protective and social functions, have a strong influence on changing society's attitude towards their treatment. It is recognized that advocating for progress in health and longevity, as well as in the treatment of the elderly, was not foreseen when the first international instruments on human rights were drafted. None of the foundational human rights instruments, namely the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), or the International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly prohibits discrimination on the basis of age, citing "without distinction of any kind, such as race, colour, sex….or *other status*". Within the subsequent nine core international human rights treaties, only one prohibits discrimination on the basis of age and two mention older people: Articles 1.1 and 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of 4 Their Families (ICRMW, 1990) prohibit discrimination on the basis of age. Article 11.1.e of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) provides for the equal right of women to social security including in old age. Article 25.b and 28.2.b of the Convention on the Rights of Persons With Disabilities (CRPD, 2008) require States to provide services to prevent and minimise further disabilities among older people, and to ensure older people with disabilities have access to retirement benefits and programmes (s.*Doron, Mewhinney*, (2007):25). A consequence of excluding age from explicit prohibited grounds for discrimination is that states are not prompted to report on the situation of older people, and can selectively interpret "other status," and therefore their obligations. Treaties that only implicitly include older people do not provide solid footing for State parties to address older people's rights through special measures. (s. *Murph*, (2012): 3).

Contrary to universal documents on human rights, explicit mention of old persons is foreseen in certain regional documents. For example, the American Convention on Human Rights (1969) prohibits capital punishment for people under 18 or over 70. Its Additional Protocol in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador, 1988) provides for the right to social security in old age, and special protections (facilities, food and medical care) in old age. The African Charter on Human and Peoples' Rights (1981) articulates special protection for older people. Its Protocol on the

Rights of Women in Africa (2003) articulates special protection for older women and their right to freedom from violence and abuse. The Arab Charter on Human Rights (1997) articulates State responsibility for "outstanding care and special protection" for older people. The Charter of Fundamental Rights of the European Union (2000) prohibits discrimination based on age, declares respect for the right of older people to live a dignified and independent life and to participate in social and cultural life and articulates the right to social security in old age.

The European Convention on Human Rights does not explicitly refer to the protection against discrimination or violation of the rights of the elderly, but the European Court of Human Rights has developed a very rich practice that provides for special protection within the framework of the foreseen fundamental rights. The concept of the Council of Europe on the protection of the elderly is under development, and resulted in adoption by the Committee of Ministers, on 19 February 2014, of Recommendation CM/Rec(2014)2 to member states on the promotion of human rights of older persons. This instrument, which aims to raise awareness of public authorities and civil society to human rights and fundamental freedoms of older persons, foresees an assessment by the Committee of Ministers, five years after its adoption, of its implementation at national level. To this end, are collected and analysed information submitted by member States with a view to update the examples of good practices appearing in the Appendix to the Recommendation.

2.2. As a result, older people's rights and State obligations are not explicitly codified on the international level and on the level of national legislations, including criminal law. Today, when discrimination and violations of the rights of elderly people is a confirmed fact, the principles of justice and equality of human rights dictate the development of a fragmented system of the general law on human rights and the elaboration of mechanisms for its effective application. It should be pointed out that the idea of developing special norms and standards on the international level for the protection of the rights of the elderly has its opponents, who have argued that since all human rights are universal, provisions within existing human rights law are applicable to older people, and therefore attempts to further clarify States' obligations are unnecessary. However, under the pressure of global facts about the discrimination of elderly, the conviction is slowly overriding that for international human rights law to be effectively incorporated into national law, there must be legal certainty about how obligations to respect human rights apply to different people and in different circumstances.

Starting from such a point of view, the 1982 Vienna International Plan of Action on Ageing is the first international document on ageing, created by the first World Assembly on Ageing, and later endorsed by UN General Assembly resolution 37/51. It is

developmental in focus, outlining principles and recommendations on areas such as the family, social welfare, health and income security. General references are made to human rights via reaffirmation of the applicability of the principles and objectives of the Universal Declaration of Human Rights to older people. The main concerns of the Plan were issues related to health and nutrition, protection of elderly consumers, housing, social welfare, family, income security, unemployment, and education. The next step is the adoption of the UN Principles for Older Persons by UN General Assembly Resolution A46/91 of 1991. The Principles are divided into five sections, which closely correspond to the rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, this document is not binding. The 2002 Madrid International Plan of Action on Ageing (MIPAA) was adopted by the Second World Assembly on Ageing, along with a political declaration. It contains three priority themes: development; health and well-being; and enabling environments. The Madrid Plan also highlights the vulnerability of older persons during emergency situations, emphasizing their need to access food, shelter, and medical care, and recommends protecting and assisting older persons through concrete measures taken in situations of armed conflict and foreign occupation. However, the Madrid Plan fails to call for the development of a specific instrument that would afford protection to the elderly, one of the fastest growing and most vulnerable groups in society. Whilst some commitments in the political declaration may reinforce human rights, MIPAA is not a human rights treaty. Governments have no legal obligation to implement any of the recommendations within MIPAA, and there is no independent monitoring mechanism.

One of the most relevant international instruments regarding the current international status of elderly rights is the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). The supervisory body of the ICESCR is the Committee on Economic, Social and Cultural Rights, which developed the most comprehensive legal analysis of the rights of the elderly currently existing at the international level, drawing its authority first from interpreting Article 9 of the ICESCR, "the right of everyone to social security, including social insurance," to implicitly refer to the right to old-age benefits. The Committee appears to have given substantial weight to the numerous documents produced in the last decade to support the trend in eliminating age discrimination, representing a position that States parties to the Covenant are obligated to pay particular attention to promoting and protecting the economic, social and cultural rights of older persons. To ensure the right to social security (article 9 of the Covenant), the Committee considered that states should provide old-age benefits or some other form of assistance for all persons. This benefit would be given, regardless of sex, to those without adequate resources

upon reaching a prescribed age specified in national legislation (s. *Rodríguez-Pinzón, Martin*, (2003): 947).

2.3. The contemporary phase of promoting the concept of elder justice is marked by the debate on the need to adopt a special UN convention on the protection of the rights of the elderly (s. *Doron, Apter*, (2010): 586).The discussion on the need to adopt a special convention has begun In October 2010,when the United Nations General Assembly adopted Resolution 65/182 which established the "Open-Ended Working group on Ageing for the purpose of strengthening the Human Rights of Older Persons" as a follow-up to the Madrid Plan. The starting point of this initiative was the position that the codification of special rights on protection against discrimination, violence and other violations of the rights of the elderly is extremely necessary. It is believed that the Convention on the Rights of Older Persons (UNCROP), which has been prepared for a long time, will be a significant human rights treaty, which complements the already established models of special protection of the rights of other vulnerable categories of people, after the adoption of the UN Convention on the rights of the Child which has seen near universal acceptance since 1989, the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol adopted on 13 December 2006, the UN Convention on the Elimination of All Forms of Discrimination agains tWomen adopted on 18 December 1979, and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) entered into force on 1 August 2014. These conventions have a significant impact on changes and harmonization of national criminal legislation, in certain segments, such as justice for children, encouraging deep and successful reforms of criminal law.

The focus of the Convention on the Rights of Older Persons (UNCROP), will be persons over 60 years of age, its main goal is rejection of stigmatization and ageist images of older persons, which result in discrimination and violations of their rights. This attitude of society towards old people can be changed only by adopting a set of normative standards about their rights in an internationally binding instrument. A UN Convention on the rights of older people would: provide a comprehensive framework to promote and safeguard their rights, covering areas such as healthcare, social protection, employment, and participation in decision-making processes, serve as a powerful tool in combating ageism, discrimination, and neglect, while fostering an inclusive and age-friendly society for all, establish clear guidelines and mechanisms for preventing, detecting, and addressing instances of abuse, promote the importance of dignity, autonomy, and independence for older people, while ensuring that they have access to justice and support systems, contribute to a shift in societal attitudes and practices by raising awareness and setting standards for the treatment of older people, ultimately fostering a culture of respect and care

for our older population.The project is supported by civil society in numerous member states and international organizations (especially the World Health Organization), as well as from some countries (Argentina, Austria and Germany) (*Gutterman,* (2022)).

The main criticism of a new convention has come from states, who have argued that a new convention would not add anything to the existing protections under international conventions already in existence, such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights The ongoing discussions about a convention is accompanied by tensions between views assuming an older persons' specific convention may reproduce age-related group differences and could perpetuate ageism, and those who argue that it will help reducing it (s. *Hopf, et al*.(2020): 19).

A significant argument in favor of the need to adopt a universal convention on the rights of the elderly is the athe effectiveness of the Inter-American Convention on the Protection of the Human Rights of the Elderly, which was adopted by the General Assembly of the Organization of American States in June 2015 (Argentina, Brazil, Bolivia, Chile, Costa Rica and Uruguay are the first member states which have signed the Convention Currently, the Convention has been ratified by Bolivia, Chile, Costa Rica and Uruguay). This convention exerted a strong influence on the legislation, including the criminal law of the signatory states, in order to adopt non-discriminatory laws and assign budgets more fairly to all age groups, collect data disaggregated by age to help political decision-making, design programmes that benefit older people, undertake national campaigns to reduce discrimination against older people and ensure dignified and respectful treatment, provide a system to monitor government action and hold them accountable for their actions.

As the first binding Convention on the rights of older persons to enter into force in the world, its purpose is to recognize, promote and protect the rights of older persons, generally defined as persons 60 years of age or older. It enumerates 26 protected rights and establishes a mechanism for monitoring the implementation of obligations under the Convention, which includes a reporting procedure and the ability for individuals to submit petitions alleging violations of the Convention to Inter -American Commission on Human Rights. The Convention lists general principles related to the rights and fundamental freedoms of older persons, with a focus on equality and non-discrimination, and emphasizes the dignity, independence, and autonomy of older persons as well as their physical, economic, and social security. It also calls for the respect and appreciation of cultural diversity, effective judicial protection, and proper treatment and preferential care. In applying these principles, the Convention not only places a responsibility on States, but also re-

quests the participation of the family and the community to care for and assist older persons to ensure the "active, full, and productive integration of older persons into society". According to the Convention, the states have a duty to adopt measures to prevent, punish, and eradicate practices contrary to the Convention, as well as to adopt affirmative measures and make the necessary changes in domestic legislation so that older persons can exercise the rights established in the Convention. As rights, which should be protected by penal norms, are foreseen (art.5-31): the right of older persons to safety and a life free of violence of any kind; right to receive long-term care; right to work; right to health; right to education; right to housing; and the right to accessibility and personal mobility. Also, the Convention places an obligation on States to adopt legislative and administrative measures that will prevent negligence and mistreatment, and that will ensure that older persons are treated with dignity, and to implement effective complaint mechanisms for cases of violence. The Convention also expressly protects the rights to: equality and non-discrimination for reasons of age, life and dignity in old age, independence and autonomy, participation and community integration, freedom from torture or inhuman treatment, free and informed consent on health matters, personal liberty, freedom of expression and opinion and access to information, a nationality and freedom of movement, privacy and intimacy, social security, culture, recreation and leisure, property, a healthy environment, political rights, freedom of association and assembly, protection in situations of risk and humanitarian emergencies, equal recognition before the law, and access to justice. In relation to prohibitions relevant to criminal law, the Convention contains (in art.2) legal definitions of "abandonment", "palliative care", "discrimination", "multiple discrimination" "age discrimination in old age", "abuse", "negligence", "older person" and other concepts that are important for determining the nature of criminal acts. According to Article 4, States Parties undertake to safeguard the human rights and fundamental freedoms of older persons enunciated in this Convention without discrimination of any kind and, to that end, inter alia shall: adopt measures to prevent, punish, and eradicate practices that contravene this Convention, such as isolation, abandonment, prolonged physical restraint, overcrowding, expulsion from the community, deprivation of food, infantilization, medical treatments that are, inadequate or disproportional or that constitute mistreatment or cruel, inhuman, or degrading treatment or punishment that jeopardizes the safety and integrity of older persons, and adequate access to justice.

2.4. The establishment of special rules on the protection of the elderly by means of criminal law at the international and national level encounters certain difficulties, which far outweigh the problems of creating special criminal law regimes for minors, women, persons with disabilities or other protected groups, who can be identified accord-

ing to some precise irrefutable legal assumptions. As a separate group, they are distinguished according to their age (60 or 65 years), which is the only exact criterion, as well as variable personality traits that are distributed in a wide array- from the health condition, which is generally assumed to worsen, family status (life in a small house or loneliness), material condition, etc. (s. *Fünfsinn*, (2015): 7). On the other hand, the average life expectancy is only a general concept, so that "old age" is characterized by a wide disparity of different physical and psychological conditions (s.*Roksandić Vidlička et al*.(2017), 1105: the life expectancy in Sierra Leone is 50.1 years, while in Croatia it is 78 years). It is different from the system of the justice for children, which is based on the irrefutable assumption that these are persons in development who cannot take care of asserting their rights, are not responsible for their actions, etc., from persons with disabilities, which must be determined using exact scientific methods, women, which are in a position of a vulnerable category due to socio-biological determinants, etc. The only common characteristic of the elderly, which can generally be considered as a legal assumption, is that they are a vulnerable category due to a complex of bio-psychological (illness, infirmity, etc.) and social determinants (care conditions, health care, or lack of care, etc.).

In addition, while there is a general consensus for the category of old people that it is discriminated on several grounds, deprived of numerous rights and opportunities for protection, and that it needs special rights and "positive discrimination", this does not necessarily apply to individual old persons who do not suffer such generally negative consequences of aging (maintain their social and material status, receive the best medical care, live in a social environment without any disturbances, are more respected than the young, etc.). For this reason, in the criminal legislation strengthened protection for the elderly in cases of violence, abuse or neglect is usually linked to the general concept of "powerlessness, helplessness" (so, for example, in the criminal laws in our region there is no criminal offense of abandoning an elderly person, but the offense of " abandoning an powerless persons." This means that an old person does not automatically fall under this type of protection, but only if he is incapacitated due to the illness, i.e. some handicap, general weakness, etc.

2.5. The next complex issue is the protection of the dignity of the elderly from various forms of discrimination and rights violations by means of criminal law The concept of human dignity is very comprehensive. It was declared the highest value that absorbs all natural human freedoms and rights, and leading idea of law by the Universal Declaration on Human Rights (Art.1) (s. *Perović,* (2013), 119: the inviolable and inalienable comprehensive establishment of human virtues in an organized sociability, as the absolute goal of humanity protected by the legal and moral imperatives of natural and

positive law; s. *Hajdú*, (2020): 571: fundamental "mother of the rights"). However, dignity is not defined as a concrete legal value that could be threatened outside the circle of human freedoms and rights expressly protected by the constitution and laws, including the prohibition of discrimination as a human right (s. *Simović, Simović*, (2020): 382). There remains a principled distinction between dignity as the highest innate human value and human freedoms and rights - "freedom from" and "right to", as requirements in relation to the status of the individual that arise from that basic value (s. *Kambovski*, (2014): 24) In the practice of the European Court of Human Rights, the important interpretive rule for the interpretation of the Convention as a whole has been determined: "human rights represent an integrated system for the protection of human dignity" (in the judgment Refah Partisi and others v. Turkey (2001), s. *Omejec* (2013), 1020). The Charter of Fundamental Rights of the EU from 2000, in the first chapter with which the normative part begins, entitled "Dignity", contains a very general provision (Art. 1): "Human dignity is inviolable. It must be respected and protected". Further, the content of this chapter is reduced to the protection of only certain rights (art. 2 - right to life; Art. 3 - right to integrity of person; art. 4 - prohibition of torture and inhuman treatment or punishment; art. 5 - prohibition of slavery and forced labor), expressing the same restrictive approach, as the ECHR, to respect for dignity as an independent protected value.

The approach of the European constitutions, including constitutions from our region is identical. Rare exceptions are the Constitution of Sweden and the Constitution of Belgium. The Swedish Constitution contains complex provisions on the connection of dignity with strict duties of the state. Among the basic principles (art. 2), that principle explicitly determines that public authority is exercised with respect for the equal good of all and the freedom and dignity of the individual and that the personal, economic and cultural well-being of the individual is the main goal of public activity. The Belgian Constitution also contains similar formulations, which obviously result from renewed debates regarding the recognition of human dignity as the highest legal value. That first principle prescribes (art. 23) that everyone has the right to lead a life in accordance with human dignity, and for that purpose they shall legally guarantee their economic, social and cultural rights. In this way, the Belgian Constitution penetrates most deeply into the meaning of dignity in the context of social, economic, legal and cultural assumptions for its respect. Such a constitutional framework of dignity opens up a more precisely defined area for the protection of the dignity of the elderly.

2.6. Starting from the difference between dignity as a general human value and human freedoms and rights that have a positive legal status, it is impossible to formulate a separate criminal offense of violating the dignity of an old person, which would read: "whoever violates the dignity of an old person, will be punished...". The protection of the

dignity of a person is achieved only through the criminalization of discrimination or other violations of certain freedoms and rights, which fulfill its human content. The special protection of the right to the dignity of old people is possible and achievable only in the context of the interpretation of legal rights protected by criminal law in the spirit of the practice of the European Court of Human Rights or the approach of the mentioned constitution. This means introducing an appropriate measure of special respect for the dignity of old people when interpreting violations of fundamental rights or special rights, protected by criminal law (s. also *Ćorić,* (2020): 32: dignity is often placed in the context of human rights, as a mechanism for their realization, as a criterion based on which it is assessed whether a right is respected or not). Nevertheless, the meaning of the postulate of dignity is not exhausted in the content of a particular right determined by the law by which it is guaranteed. As a general requirement to respect the personality in its total dimension, the concept of dignity is a normative concept that exhausts not only formal-legal, but also moral and social principles of humane behavior: justice and fairness, moral principles, social elements, reputation and honor, social and professional status, sense of dignity of an old person, etc. In this sense, a violation of dignity is considered to be the consequence of any act of discrimination or injury to the person himself and his sense of dignity, due to an act that threatens or violates a right guaranteed by law.

This approach has a key meaning for the further development of "justice for the elderly" from the aspect of strengthening protection against discrimination, by introducing the category of the elderly in general crimes (violence, hatred, violation of the equality of citizens, etc.), as one of the grounds for discrimination. But in addition to such an intervention, it is necessary to incorporate in the actions of state authorities in the penal system substantial and procedural criteria that give a wider scope for value assessment in the interpretation and application of the law, based on the principle of justice and fairness.

2.7. Since the protection of the dignity of old people and their discrimination is related to the violation of general rights or those specially provided for them, the scope of the protective function of criminal law is closely conditioned by the legal regulation of basic human rights in the national legislation. Criminal law has a fragmentary and complementary role in the protection of human rights guaranteed by international treaties, the constitution and laws, including the special rights of the elderly.

The list of internationally accepted rights is constantly expanding, including, in addition to basic civil and political rights of the first generation, more and more rights of the second generation - economic, social and cultural rights, and is at the promising beginning of the creation of the third generation - informational rights, rights to sustainable development, to peace or to a healthy environment etc. That tendency comes partly as a response to the progress of ideas about human dignity, and partly as a result of new threats

and opportunities that appear in the concept of the welfare state as challenges to the democratic and humane development of society. The basic idea of rights from the second and third generations is that their respect is a condition for realizing basic human rights (to life, bodily integrity, etc.), as well as the postulate of solidarity, which tends to reduce social differences and create a fairer, and therefore more stable, society. From the perspective of the protection of the rights of the elderly, the distinction between basic civil and political rights and, in particular, economic, social and cultural rights that belong to the second generation of rights is of particular importance. In relation to the first category of rights, the main problem of enhanced protection of the elderly comes down to effective protection against discrimination. This primarily refers to "negative:" rights, which are protected by criminal law prohibitions (prohibition of murder, torture, violence, etc.). But also respect for their "positive" rights (guarantees for political freedoms, freedom of expression, etc.), in addition to strengthening the prohibition of discrimination, they find special protection of preferences and measures of positive discrimination provided by law, which consists of different options for their enjoyment.

The biggest problem is the criminal law protection of the violation of the rights of the elderly that belong to the generation of social, economic and cultural rights, such as: the right to work, health care, social care, economic conditions for a decent life, education, participation in cultural life, etc.These rights are generaly not accepted on an equal level with civil and political rights, for reasons which are both ideological and political. Main reason is undoubtedly that ensuring basic social and economic rights for everyone worldwide would require a massive redistribution of resources. A second one is that economic, social and cultural tights require positive intervention from governments and that it is not realistic to expect governments to take positive steps, for example to provide equal righst for everyone, and that they are therefore not obliged to do so. The governments only need to show that they are taking measures towards meeting these aims at some point in the future. On the other side, the contemorary concept of human rights is based on the postulate that all human rights are universal, indivisible and interdependent and interrelated. The states must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. Some rights can be derogated in times of public emergency; others cannot. Some rights are recognised as being 'jus cogens' or norms that have been accepted by the international community of states as a norm from which no derogation is permitted: examples include the prohibitions against genocide, slavery, and systematic racial discrimination. Some rights are 'absolute' in that they cannot be subject to derogation or limitation in their manifestation, for example the prohibition on torture. 'Minimum core' obligations have been identified in relation to certain

economic and social rights, for example the provision of essential primary health care, basic shelter and education.

For all these reasons, it is very important to adopt an international Convention on the rights of the elderly, which, in addition to proclaiming their rights and the obligations of states to respect them, would also provide for international instruments for monitoring, including an international body for the protection of the rights of the elderly.

2.8. Achieving the complementary protective function of criminal law in relation to the rights of the second generation of elderly persons presupposes the improvement of legislation in numerous areas of law, which touch on the dignified status of the elderly: from the health care system, prevention of various abuses in the family, caregiving in the family or institutions, mobility, etc. Strengthening the concept of special protection of the rights of the elderly implies, above all, the reform of all those legal areas, on which the criminal law with its incriminations should be based. Today, it does so only at a certain level of development of the legal regulations on the special rights of the elderly. In our criminal legislation, the protection of their rights is drowned in the to general groups of criminal offenses related to rights from employment, social and health insurance, or rights to health care (on incriminations in the Serbian Criminal Code, see *Mirić,* (2012): 219). etc. In these areas, a special protective function of society in relation to the elderly has only recently been developed (for example, in the laws on preventing discrimination, on family relations, family violence, social protection, etc.), which can be followed by criminal law imperatives and prohibitive norms (s. *Radaković*, (2020): 555).

Without such interventions in special extra-criminal laws, a special concept of justice for the elderly as victims of criminal acts cannot be upgraded. The current penal legislation in our region is in a transitional state, in which a reserved attitude about the special protection of the elderly still prevails. A striking example is the application of existing incriminations on the abandonment of elderly persons. Thus, according to the Macedonian Criminal Code (art. 135; also the Serbian Criminal Code, art. 126), the victim of this crime is a "helpless person", so an old person can be considered a victim only if he is incapacitated for some special health or similar reason. The crime consists in leaving without help in circumstances that are dangerous to the life or health of a helpless person, by the perpetrator to whom that person is entrusted or for whom he is obliged to take care. But it is even more significant that a more severe form of this act exists if the person left behind loses his life. Therefore, if a son or daughter leaves the mother without help in conditions dangerous to her life and she dies, or in the opposite situation, the perpetrator is responsible for the more severe form of abandonment (imprisonment for up to five years), and not for murder, for which he should be responsible according to the rules on responsibility for a criminal act committed by omission.

Criminal legislation in our region and in other countries is in a phase of constant reform, caused precisely by the changes and development of the concept of universal human freedoms, the need to seek answers to the challenge of new forms of crime and in the context of the concept of restorative justice - strengthening the protection of certain vulnerable categories of victims. In this context, in addition to the adoption of the Convention on the rights of the elderly, it is necessary to approach changes in the criminal legislation, focused in the area of substantive criminal law in the following directions: introducing the category of elderly persons in the General Part of the Criminal Code in the legal definitions of victims of criminal acts, domestic violence, hate speech crimes and hate crimes on discriminatory grounds. In the Special Part of CC for all criminal offenses with elements of violence where more severe forms of the offense are prescribed that are related to the characteristics of the victim and his/her belonging to a vulnerable category, old persons should be added. Likewise, as qualified forms of crimes committed against the elderly, individual crimes should be singled out, such as theft, fraud, abuse of trust and similar property crimes, as well as medical crimes of negligent treatment, failure to provide assistance, and other crimes related to care and social helping the elderly, as well as acts of abandonment, failure to help and abuse. Special attention deserves the recognition of the right to a dignified death, which is now restricted in our legislation within the criminalization of murder for noble motives (Macedonian CC, art. 124, Serbian CC art.117). By passing a special law on passive euthanasia, which would precisely regulate the conditions for exercising the right to a dignified death, the basis should be created for the introduction of a corresponding provision in the Criminal Code, according to which it is not considered to be the murder for benevolent motives (see *Turanjanin*, (2022): 523). In the same way, it is necessary to strengthen the protection of the elderly with appropriate amendments to the law on criminal procedure, especially with regard to the provision of legal aid, compensation or damages, protection of the elderly from re-victimization, and protection of the elderly as witnesses.

2.9. In the world of crime, older people are far more likely to be victims of crimes than perpetrators. The publication "Perpetrators of criminal offenses in the period 2008-2017" of the State Statistical Office of Macedonia presents data on reported, accused and convicted adult offenders. According to these data, out of a total of 6,273 adults convicted in 2017, only 493 were aged 60 and over. Of these, 59 persons were previously convicted. In relation to the crimes committed, the majority were convicted of crimes against life and body, against the freedoms and rights of citizens, against property, and against the safety of public traffic. This picture of the crime of the elderly coincides with the findings of comparative criminological researchs, which point to the conclusion that the elderly commit various types of criminal acts, but not in the same number or proportion as adult

offenders, and especially frequent are thefts and negligent acts that endanger the public safety and traffic.

In relation to the treatment of the elderly as perpetrators of criminal acts, the criminal law does not make any special rules on criminal liability. The existing general institutes of guilt, the grounds for excluding illegality or complicity are set sufficiently wide to include all special circumstances in the commission of a criminal offense by an old person. This refers, first of all, to the determination of the state of accauntability, negligence and delusion in the execution of the act, where subjective elements of the psychological state of the perpetrator may be relevant. In relation to sentencing, although the criminal code does not consider age as a mitigating factor in sentencing, many judges are often reluctant to fully prosecute cases involving older criminals (s. *Silverman et al*., (1984): 97).

Whereas international human rights law recognizes that criminal proceedings must accommodate the special needs of the elderly person on trial and that serious physical or mental ailments can render prosecution and incarceration inhumane, age alone is no impediment to prosecution or punishment. Age is, however, a permissible consideration at sentencing. If an elderly person is accused of a crime, their age and health could be taken into consideration during the legal process. This might influence decisions about bail, sentencing, and the overall handling of the case. In court practice, an older criminal is perceived in a much more positive way than an adult and receives a much lighter sentence than an adult criminal.

The lenient attitude of the criminal law towards older convicted persons is also expressed through the frequent imposition of alternative measures, such as conditional sentence and conditional sentence with protective supervision. Among such measures, the Macedonian Criminal Code foresees a special measure of house arrest (art. 59-a; as well as the Criminal Code of Serbia, art.45), which is imposed instead of an effective sentence, if the perpetrator of the act for which a prison sentence of up to one year is prescribed is “old and powerless” (now it is proposed also for offenses for which a prison sentence of up to three years is prescribed, but the condition that in addition to age the convicted person is also “powerless” is not omitted). The application of these measures encourages requests for certain modifications in the penitentiary law, which, based on the principles of individualization and humanity, will make ease the position of convicted old persons (such as their detention in special prisons that have the possibility of health care, and semi-open or open institutions).

Conclusion

The humiliating status of the elderly and the weak protection of their dignity and human rights from discrimination, abuse and violence is a fact confirmed by numerous scientific studies. Today, when the population of the elderly is increasing due to the extension of life expectancy, the knowledge that the elderly are becoming an increasingly numerous "vulnerable category" affects the formation of collective awareness of the need to create a special set of norms and standards on their enhanced legal protection. In this sense, the adoption of the UN Convention on the Rights of the Elderly would represent a necessary completion of the corpus of universal human rights, modeled on special conventions on the rights of children, persons with disabilities or women. The adoption of that convention would mean giving strong support to the implementation of the prohibition of discrimination of old people and respecting not only their basic rights from the first, but also the rights from the second and third generations.

The reform of the national legal system in all areas that affect the dignified life and death of the elderly - from the law on health care, social care, pensions, the right to work, etc., to the law on family relations, family violence and abuse in institutions for the care of the elderly, represents a necessary condition for changes in criminal laws as well, in the direction of highlighting the elderly as a special vulnerable category of victims and their enhanced protection by introducing special incriminations for protection from violation of their rights. Recognizing the status of old people as specific perpetrators of criminal offenses opens up space for modifications to the system of sanctions, through the introduction or greater application of alternative measures, house arrest, or serving a prison sentence adapted to their special needs.

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Gál István László*

THE HUNGARIAN PRACTICE OF LIFE IMPRISONMENT AND THE VIOLATION OF THE HUMAN RIGHTS OF CONVICTS

The study deals with the Hungarian practice of life imprisonment. The Strasbourg Court has already stated in several judgments that the actual life imprisonment in Hungary violates the human rights of the convicted. In response, the Hungarian legislature amended the Penal Execution Act and introduced an automatic mercy procedure after 40 years. According to the Starsbourg Court, this is still not sufficient. It is a fact that, among the EU member states, only Hungary applies the penalty of "real life imprisonment", and the Hungarian criminal law can be considered the strictest of the EU member states. This is one of the reasons why, for example, in China, the Hungarian Criminal Code is seen as an example, and the effectiveness of it is supported by the decreasing crime rate statistics in the last 10 years.

Keywords: *human rights, life imprisonment, Criminal Code, death penalty, crime rate statistics*

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Introductory thoughts

Hungary ranks first in terms of the proportion of prisoners to population in the European Union: according to statistics, in 2021, we had 191,38 prisoners per 100,000 inhabitants, while the second-ranked Poland had slightly fewer at 190,99. This number translates to a total of 19 thousand prisoners in Hungary. By comparison, in Finland, which ranks at the bottom of the EU list, only 50,8 out of 100,000 people were incarcerated in the past two years.[1]

In Hungary, the Constitutional Court declared the death penalty unconstitutional in 1990, making life imprisonment the most severe form of punishment. Of the two types of life imprisonment, real and notional, the former can be considered as a substitute for the death penalty, as it effectively removes the offender from society without physically eliminating them.

The Hungarian Supreme Court has always paid particular attention to ensuring unity in sentencing practices, their predictability, and the applicability of life imprisonment. Although sentencing is the most individualized aspect of criminal justice and therefore not without its challenges in terms of unity, the highest judicial forum has always strived to provide guidance to lower courts through its decisions and collective positions on regular and extraordinary remedies. This is to ensure that this important part of judicial application of the law does not become erratic and significantly divergent across different regions of the country. The Criminal Collegium of the Supreme Court worked on numerous specific cases between 1990 and 1998 to address the unfavorable phenomenon observed nationwide in sentencing due to the abolition of the death penalty by the Constitutional Court (such as lenient sentencing that does not correspond to the proportional responsibility for the offense or inconsistent and extreme imbalances) and to stabilize sentencing practices.[2] The primary institution designated for the execution of judgments for those sentenced to actual life imprisonment in Hungary is the Szeged Prison and Penitentiary. However, due to serious placement issues and the increase in the number of inmates, the capacity of the Csillag cell has reached its professional limit.[3] As a result, such prisoners are now housed in other penitentiary institutions as well.

[1] https://qubit.hu/2023/06/16/magyarorszag-a-rabok-orszaga

[2] Kónya István: Érzelmek és indulatok az életfogytig körül (Magyar Jog, 2017/3., 129. o.)

[3] Kiszely Pál: Merre tovább, magyar életfogytiglan? Börtönügyi Szemle 2013/1. szám 47.o

Decisions of the European Court of Human Rights regarding the practice of actual life imprisonment in Hungary

According to Hungarian judicial practice, in numerous cases, it is deemed justified to exclude the possibility of parole for the convicted person. In the case of a defendant who has committed a particularly serious, unmotivated crime capable of undermining the sense of security among citizens, taking into account all relevant circumstances in sentencing, the option of parole from life imprisonment is not warranted [BH 2004.265.]. In cases where a convicted person with a prior criminal record has been sentenced to life imprisonment for multiple serious crimes beyond the offense of qualified homicide, there is no place for parole [BH 2004.353.]. The fact that the crime for which a person is sentenced to life imprisonment occurred during a previous conditional release from a determinate sentence does not justify excluding the possibility of parole [BH 2007.179.].

Hungary applies actual life imprisonment in practice as an EU member state, despite the fact that the European Court of Human Rights considers it incompatible with the European Convention on Human Rights and has condemned Hungary in several of its decisions. The European Court of Human Rights has criticized Hungary in multiple decisions for the imposition of actual life imprisonment as a punishment. One example is the case of Tibor Törköly against Hungary. In 2004, Tibor Törköly severely assaulted his partner and then, a few days later, killed her with at least nine stab wounds during prolonged and brutal torture. The Bács-Kiskun County Court sentenced the defendant - as a repeat offender - to life imprisonment for murder committed with particular cruelty and aggravated assault, stating that he could be eligible for parole no earlier than after 40 years. The decision was upheld by the Szeged Court of Appeal, and the convicted individual's request for review was dismissed. The applicant lodged a complaint with the European Court of Human Rights primarily based on Article 3 of the Convention, claiming that if he were to be released on parole in 2044, he would have to reach the age of 75, which is statistically unlikely according to Hungarian mortality data. As he was effectively sentenced to actual life imprisonment, he argued that the decision violated the prohibition of cruel and degrading punishment. The court explained that the imposition of life imprisonment per se on an adult defendant is not in violation of the Convention if the law and practice of the respective state allow for the reduction of the sentence. The possibility of release after 40 years, though distant, provides a realistic chance of freedom, and according to Hungarian law, this time can potentially be further reduced through the

president's exercise of clemency. Therefore, depriving him of the chance of release cannot be justified, particularly only a few years after the commencement of the sentence.[4]

The case of Varga and Others v. Hungary (2017) or the case of Magyar v. Hungary (2014) also dealt with the practice of life imprisonment in Hungary. In the latter decision, the European Court of Human Rights stated that the Hungarian regulation of actual life imprisonment violates the prohibition of inhuman and degrading punishment, thus violating the European Convention on Human Rights. The essence of the judgment was that every prisoner has the right to have their continued detention examined at predetermined intervals based on discernible criteria to determine if it is still justified.[5] According to the position of the European Court of Human Rights, the application of actual life imprisonment as a punishment in Hungary has violated human rights in a manner that is disproportionate and in violation of the principle of proportionality. The essence of this punishment is that the convicted individual has no possibility of parole and it significantly limits their prospects at the end of life. The court's decisions established that Hungarian legislation does not provide sufficient opportunities for the exercise of the rights of convicted individuals regarding their trial and appeals, and that the irreducible punishment imposed on those who were previously convicted and have already spent several decades in prison gravely violates human dignity. Based on these decisions, Hungary had to review the institution of actual life imprisonment and make the necessary legal and institutional changes. The decisions of the European Court of Human Rights are binding, and member states are obliged to implement them. Despite the decisions of the European Court of Human Rights, the Supreme Court of Hungary, the Curia, declared in a resolution of legal uniformity one year after the European Court of Human Rights' decision: The exclusion of parole from life imprisonment is part of the constitutional order, and its judicial application - subject to the fulfillment of statutory prerequisites - is not prohibited by any international treaty. (Resolution No. 3/2015 of the Curia) However, the decisions of the European Court of Human Rights contributed to the change in the Hungarian regulation of actual life imprisonment, which occurred after the European Court of Human Rights' decision in 2014.

[4] Tóth Mihály: Az életfogytig tartó szabadságvesztés és a remény joga újabb emberi jogi döntésekben (Jogtudományi Közlöny, 2012/6., 270. o.)

[5] https://hvg.hu/itthon/20140520_Strasbourg_Emberi_jogot_sert_a_tenyleges

The reform of the Hungarian regulations took place in 2014.

In the case of Kafkaris v. Cyprus (21906/04), in its judgment of February 12, 2008, the ECHR once again reaffirmed its previous position that life imprisonment, in itself, is not prohibited. However, it also established that if the duration of the penalty is "irreducible" both de facto and de jure, it would constitute a violation of Article 3 of the Convention. One of the most crucial factors in assessing the reducibility of the duration is whether the convicted person has any prospect of release. If the state ensures the review of life imprisonment through commutation, pardon, termination, or the possibility of conditional release, then the relevant criminal legislation complies with the requirements of Article 3 of the European Convention on Human Rights.[6]

However, the aforementioned case of László Magyar v. Hungary (2014) led to the reform of the Hungarian legislation. The Parliament did not amend the Criminal Code, so the actual life imprisonment remained part of our penal system. This was confirmed by the highest judicial forum, the Curia's (Supreme Court) Decision No. 3/2015. However, the Act CCXL of 2013 on the Execution of Penalties, Measures, Certain Coercive Measures, and Misdemeanor Imprisonment introduced an automatic clemency mechanism[7], which is contained in Sections 46/A-H of the Act. Its essence is as follows:

In cases where life imprisonment, which excludes the possibility of conditional release, has been imposed, a clemency procedure must be initiated ex officio. The mandatory clemency procedure does not preclude the possibility for the person sentenced to life imprisonment, who is excluded from the possibility of conditional release, or any other eligible person, to submit a clemency application in accordance with the general rules or for the competent authority to initiate a clemency procedure ex officio.

The penitentiary institution detaining the convict notifies the Minister responsible for justice if the convict has served forty years of imprisonment. Prior to the notification, the penitentiary institution shall ask the convict whether they consent to the initiation of the mandatory clemency procedure. In case of the convict's lack of consent or refusal to make a statement, the mandatory clemency procedure shall not be conducted.

The Minister responsible for justice obtains the necessary personal data for the conduct of the mandatory clemency procedure within sixty days and informs the President of the Curia about the commencement of the mandatory clemency procedure. The Clem-

[6] Czine Ágnes: Életfogytiglan, élethossziglan a büntetés-végrehajtási intézetben, avagy 40 évig tartó remény? (Miskolci Jogi Szemle, 2019., 2. Különszám, 2/1. szám, 153. o.)

[7] A feltételes szabadságra bocsátás lehetőségéből kizárt életfogytig tartó szabadságvesztésre ítéltek kötelező kegyelmi eljárása

ency Commission is a five-member body composed of judges, responsible for participating in the mandatory clemency procedure. The decisions of the Clemency Commission are made by a simple majority vote. The Clemency Commission elects a chairperson from among its own members.

The Minister responsible for justice sends the obtained documents to the Clemency Commission within eight days of their availability. The Clemency Commission examines within ninety days following the receipt of the documents whether it can be reasonably assumed, based on either

a) the exemplary conduct demonstrated by the convict during the execution of the punishment and their readiness to lead a law-abiding lifestyle, or

b) the personal or family circumstances of the convict and their state of health, that the purpose of the punishment can be achieved without further deprivation of liberty.

During the proceedings of the Clemency Commission, it may involve the participation of any person with relevant expertise in a significant technical issue or request an opinion on a specific technical matter. Regarding the mental condition of the convict, the Clemency Commission is obliged to seek the involvement of a specialist doctor or psychologist as an expert. The appointed expert may have access to the obtained documents and data during the proceedings, and the costs of the appointed expert are borne by the state.

The Clemency Commission listens to the convict during its proceedings. The Clemency Commission adopts a reasoned position, which includes a proposal concerning the exercise of clemency. The Clemency Commission sends its reasoned position, as well as the received documents, obtained data, and expert opinions, to the Minister responsible for justice. The Minister responsible for justice must not deviate from the position of the Clemency Commission. Based on the content of the position of the Clemency Commission, the Minister responsible for justice prepares a submission for the President of the Republic, which includes the justification of the position. The Minister responsible for justice sends the submission to the President of the Republic within fifteen days following the receipt of the position of the Clemency Commission. The Minister responsible for justice also sends the submission to the convict through the penitentiary institution detaining the convict.

If the mandatory clemency procedure concludes without the convict being granted clemency and the convict continues to serve a life sentence, two years after the closure of the mandatory clemency procedure, the procedure must be repeated.

Regarding this procedure, two critical observations can be made based on the practice of the European Court of Human Rights (ECHR): firstly, the President of the Republic can still reject clemency even in cases where a positive decision is proposed,

and secondly, it would be justified to initiate the automatic clemency procedure after 25 years instead of 40 years. However, considering the current Hungarian criminal policy concept, I do not see much chance for the current regulations to be relaxed in either aspect.

Closing thoughts

The genus proximum of punishment lies in the infliction of legal disadvantages. It refers to a legal disadvantage imposed by the state on the perpetrator of a crime in order to protect society and express societal disapproval. The Constitutional Court stated in its decision 40/1993 (30, June) that in a democratic rule of law, the power to punish offenders is a constitutionally limited exercise of state authority. In this criminal justice system, crimes are considered as infringements upon the legal order of society, and the state exercises the right to punish. In the most severe cases, the punished person may be deprived of personal liberty, experience asset confiscation, be compelled to perform labor, or face other forms of restrictive measures. However, in all cases, it is required that the punishment remains proportionate to the committed act.[8]

The question arises as to whether the goals of punishment, general and specific deterrence, can be achieved through the application of life imprisonment. Does life imprisonment have a deterrent effect? In my opinion, it does. If we accept that imprisonment generally has a deterrent effect, then the most severe form of imprisonment, life imprisonment, must also have it. But even if we don't accept this, I immediately add that according to Hungarian criminal law, the main purpose of punishment is not specific and general deterrence. We believe that the primary goal of punishment is the protection of society, as stated in Section 79 of the Hungarian Criminal Code: “The aim of a punishment is to prevent - in the interest of the protection of society - the perpetrator or any other person from committing an act of crime.” Therefore, the most important goal is the protection of society, which can be achieved through specific and general deterrence. The protection of society can be effectively ensured by imposing life imprisonment as a sanction replacing the death penalty. I agree with the position of the renowned Hungarian criminal law Professor, academic, and constitutional judge:

- It is not necessary to link criminal punishment to goal orientation or suitability for a purpose, as its application may still be necessary, just, and justified even if it is not effective or does not achieve goals. The principle that crime deserves punishment can be fulfilled without goal orientation, effectiveness, and efficiency.

[8] https://birosag.hu/sites/default/files/2018-08/18_dok.pdf

- The societal purpose of criminal law is to serve as the closing link of the entire legal system. It does not have an independent operational scope like other branches of law. Therefore, the criminal sanction is different from the reparative, restorative, or other obligation-imposing sanctions of other branches of law. Therefore, the criminal sanction is punishment, and its role and purpose are to maintain the integrity of legal and moral norms when other legal sanctions no longer suffice.
- The punitive punishment serves a symbolic function: criminal commands cannot be violated with impunity, whether we have a reason for it or whether the punishment achieves any goal or is unsuitable for achieving a specific goal. The purpose of punishment is inherent: in the public declaration of legality, in purpose-independent retribution.
- Purpose-independent, symbolic, punitive punishment is synonymous with the principle of proportionate punishment. The principle of proportionate punishment excludes goal punishment because goal punishment requires not only the proportionality to the gravity of the act but also a comparison with the goal, and allows for it. (Parallel opinion of Prof. Dr. András Szabó, constitutional judge, in decision 23/1990 (October 31) of the Constitutional Court.)

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SPECIALIZED FRAUDS IN JAPAN

This paper discusses specialized frauds in Japan. Specialized frauds are defined as follows: A generic term for crimes of defrauding an unspecified number of persons of cash or other assets by making the victim trust them by telephone or by other means without meeting them face-to-face, and then defrauding them by transferring the money to a designated unspecified number of persons in the form of cash or other assets to a designated savings account or by other means. Specialized frauds are often organized. For example, they are often perpetrated by gangs or similar criminal groups. They mainly target the elderly, and they plan their crimes meticulously and divide their roles carefully. Specialized frauds have become a major social problem in Japan. They have devised various special methods to avoid being caught by the police. This has given rise to new theoretical issues regarding attempt, complicity, and intent to commit fraud. This paper provides a theoretical examination of these new theoretical issues, with reference to recent precedents by the Japanese Supreme Court.

Keywords: *Fraud, Attempt, Complicity, Intent*

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1. What are “Specialized Frauds”?

1.1. In Japan, there have been numerous cases of fraud against the elderly.
For example, the following case is typical.

> A planned to cheat an elderly woman C out of 1,000,000 yen with the help of B. A called C and said, “Hello, I'm your son, A. I failed in my company’s business and lost 1,000,000 yen. I need to make up the loss, but I don't have enough money right now. My friend B will come to your house to collect the money, and you will give him 1,000,000 yen in cash? C wanted to help his son and immediately prepared 1,000,000 yen in cash. A short time later, B, who claimed to be her son's friend, came to C's house, and C gave B 1,000,000 in cash.

Elderly people often have impaired listening skills, and because they are speaking on the phone, they are often unable to accurately determine if it is their own child's voice. Also, if their child tells them they are in trouble, they will often trust them. Although Japan has a pension system, many elderly people believe that the pension alone is not enough to live a comfortable life. As a result, the elderly often have a considerable amount of money on deposit in banks, making them easy targets for fraud.

1.2. This type of fraud is commonly known as *specialized fraud*. There are different types of specialized fraud. For example, in the example above, the scammer may contact the victim by email instead of telephone, or they may ask the victim to transfer money to a bank account instead of receiving it in person, or they may ask the victim to send cash by courier to a specified location. In addition to being tricked into believing that their own child is calling, there are also cases where the person is made to believe that a bill has not been paid, or that it is a financial instruments transaction.

Therefore, a more general definition of this form of fraud has been developed. *Specialized fraud* is a generic term for crimes of defrauding an unspecified number of persons of cash or other assets by making the victim trust them by telephone or by other means without meeting them face-to-face, and then defrauding them by transferring the money to a designated savings account or by other means.

1.3. Specialized frauds are often organized. For example, they are often perpetrated by gangs or similar criminal groups. They plan their crimes meticulously and assign roles carefully, with the elderly being their main target.

Criminal groups are adept at successfully avoiding detection. In the example given above, the person most likely to be apprehended by the police is the person in the role of physically collecting the money. For this role, students and people without a regular job are hired under the guise that they will be given a lucrative part-time job. As the person hired is a temporary employee, he or she is not linked to any criminal group and has no knowledge of his or her employer. As a result, the police are often unable to penetrate the criminal group, even if they catch the person in the role of collecting money.

1.4. Specialized fraud has become a major problem in recent years. Statistics from the National Police Agency in Japan concerning specialized frauds are as follows.[1]

Year	Number of Cases	Total amount of damage (Yen)	Number of Arrests
2022	17,570	37,081,354,580	6,640
2021	14,498	28,199,462,547	6,600
2020	13,550	28,523,359,039	7,424
2019	16,851	31,582,937,585	6,817
2018	17,844	38,286,761,222	5,550

1.5. With regard to specialized frauds, there is a question of interpretation when it comes to the provisions involving fraud in the Japanese Penal Code. Several important precedents[2] have been issued in recent years:

(1) 2017(A)322 Keishu Vol. 72, No. 1
(2) 2017(A)1079 Keishu Vol. 71, No. 10
(3) 2017(A)44 Keishu Vol. 72, No. 6

First, precedent (1) has established the point at which the conduct punishable as attempted specialized fraud can be considered committed. Next, precedent (2) addressed the issue of whether complicity can be established with respect to a person involved after

[1] This data can be found on the Japanese National Police Agency's website (https://www.npa.go.jp/english/).

[2] These precedents can be read in English by searching the Japanese Supreme Court website (https://www.courts.go.jp/english/index.html.).

the fraud was initiated. Lastly, precedent (3) deals with the issue of intent in specialized frauds.[3]

This article reviews these cases and examines the theoretical issues they raise. These precedents deal primarily with general criminal law issues.[4]

2. Consideration of Attempted Crime of Specialized Fraud

2.1. Precedent (1) involved the following facts.

One day, the victim was the target of a specialized fraud and was cheated out of 1,000,000 yen in cash. The next day, a person with an unknown name claiming to be a police officer called A. The man asked the victim to "confirm the loss". The man told the victim that he should withdraw all of his deposits in order to confirm the amount taken, and that he wanted the victim's cooperation with the investigation. A short time later, the unidentified person called the victim again and told him that he would be there at 2:00 PM. In other words, the criminal group was trying to con the victim out of her money again. However, the victim also realized that the call was a fraud. So, the victim contacted the police. The victim pretended to be deceived and waited for perpetrator A to come to the victim's house to collect the cash, where the police officer arrested him.

In this case, perpetrator A is not guilty of a completed fraud because he was caught by the police before receiving the fraudulent money. The question is whether the crime of attempted fraud has been committed.

2.2. In order for the crime of attempt to be committed, the perpetrator must have commenced the commission of the crime of fraud. Now, let us look at the provisions of the Japanese Penal Code for the attempted crime and the provisions for the crime of fraud.

[3] Precedents to the same effect as Precedent (3) are at 2016 (A) 1808 Keishu Vol. 72, No. 6 and 2018 (A) 1224 Keishu Vol. 73, No. 4.

[4] The resolution of these issues should be seen as inherent in the interpretation of the fraud provisions. This is because the provisions on fraud are characterized differently from those of other crimes. In order for an act to fall under the fraud provisions, it is necessary to follow a certain causal chain: the act of deception, the victim's mistake, the act of delivery and the occurrence of material damage. The conclusions reached here should not be extrapolated to the whole general theory of criminal law.

(Reduction or Exculpation of Punishments for Attempts)
Article 43
The punishment of a person who commences a crime without completing it may be reduced; provided, however, that voluntary abandonment of commission of the crime, shall lead to the punishment being reduced or the offender being exculpated.

(Fraud)
Article 246 (1)
A person who defrauds another of property shall be punished by imprisonment with work for not more than 10 years.

The act of committing fraud is the act of demanding the delivery of property in order to defraud. In this case, however, the perpetrator did not demand delivery of property. Therefore, is it possible for an attempt to defraud, such as in the above case, to also constitute a criminal offense?

In this regard, the Japanese Supreme Court stated: "An act of making the victim, who had already been defrauded of 1,000,000 yen, believe the lies as truth can be said to have significantly increased the danger of the victim's delivering cash immediately in response to a requirement made by the defendant, who was going to visit the victim's residence in a short time".

2.3. Scholars have offered various analyses of this precedent. There are also criticisms of this precedent. Some scholars say that since the act of fraud is seeking delivery of property, there can be no attempted crime as long as the act has not been commenced. Such a conclusion is not unnatural when one reads the numerous fraud precedents which have been issued in the past.

However, from a practical standpoint, this case has sufficient value to be punished as an attempt to commit fraud. In particular, considering that specialized frauds are an organized crime targeting the elderly and that there is a high need for deterrence, the conclusion that this case is punishable as an attempted crime is generally seen as acceptable.

How, then, can such a conclusion be explained? Theoretically, it could be explained as follows. Why is the attempted crime punished in the first place? It is because the attempted act creates a real and concrete danger of infringement of legal interests. Since criminal law is primarily intended to protect legal interests, it should be triggered

only when legal interests are infringed. However, it need not do so unless that legal interest is an important one. The state is permitted to use criminal law when there is an imminent danger that an important legal interest will be infringed.

If this is the case, then the attempt can be punishable as soon as there is an imminent danger of the legal interest being infringed. In other words, even if the criminal act itself has not yet begun, it may be punishable as an attempted crime at the preparatory stage.

In the first place, the initiation of a criminal act does not always coincide with the occurrence of an imminent danger to the legal interest being infringed. Normally, the initiation of a criminal act is accompanied by an imminent danger to the legal interest being infringed. However, this is not always the case.

In this precedent, A, in collaboration with an unidentified person, attempted to demand delivery of the property after telling the victim a series of lies. According to this plan, by telling a series of lies, the danger that the property would be defrauded was greatly increased. In this light, the defendant's actions should rightly be punished as an attempt to defraud.

Additionally, it should be considered that the precise point at which a crime becomes punishable as an attempted crime is a matter of policy. It is fair to say that the timing of the imminent danger of infringing legal interests is determined by a series of precedents. And the precedents referred to here certainly recognize that the timing at which a person becomes culpable as an attempted offender is at a much earlier stage than previous Japanese precedents. In that respect, this precedent signals a new approach taken by the Supreme Court regarding the crime of attempted specialized frauds.

3. Consideration of Complicity of Specialized Fraud

3.1. Precedent (2) involved the following facts.

B phoned the victim and lied to her, telling her that she could take part in a special lottery draw in which she was certain to win if she paid a fee, and asked her to send money by courier to a specified location. The victim realized that B's call was a scam because it was suspicious. B, on the other hand, instructed C, who was unaware of the situation, to go to the destination and collect the package, which C accepted because he would receive a large reward from B. C became suspicious of the large reward, and realized that he might be involved in a Specialized Fraud that he had often heard about in the media, but C received the package which he was sent to collect at the target address.

In this case, can C be punished as an accomplice to the crime of fraud? The crime of fraud is committed when goods are delivered with the intent to defraud. On the other

hand, C is not involved in such an act of fraud. Initially, at the time of the fraudulent act, C does not even know that the fraud is being committed.

3.2. Let us look at the provisions of the Japanese Penal Code on co-principals.

(Co-Principals)
Article 60
Two or more persons who commit a crime in joint action are all principals.

Japanese courts have interpreted this provision to mean that if one of the conspirators commits the crime after communicating his intentions to the others, they are all criminally liable for the entire criminal result.

C was not involved in the fraud from the beginning, but only in the course of it. In such a case, would he still be a co-principal?

3.3. The Supreme Court ruled that C was a co-perpetrator of attempted fraud for the entire fraud in question, including the fraudulent acts before C joined the fraud.

The Japanese Supreme Court stated: "…in connection with the fraud, the defendant was engaged in the Receiving Act, which was contemplated to be integrated with the Deceitful Act in order to accomplish the fraud, in conspiracy with accomplices, without being aware that the pretending-to-be-deceived operation had commenced, after the Deceitful Act was conducted by an accomplice. From these points, it is adequate to construe that the defendant bears the responsibility of a co-principal in attempted fraud in connection with the fraud, including the Deceitful Act conducted before the defendant's engagement…".

However, this does not explain why the accused is considered a co-principal. In this precedent, the reasoning for the finding of co-principals is unclear. Why did the Supreme Court deem the defendant to be co-principal?

In fact, prior to this decision, the Supreme Court has dealt with cases involving the culpability of persons who, while not initially involved in a crime, participated in the commission of the crime at a later stage. The following is the explanation given by the Supreme Court when it ruled on this issue with respect to physical injury (2012 (A) 23 Keishu Vol. 66, No. 11).

The Japanese Supreme Court stated: "In that case, it is reasonable to construe that the accused is not culpable as a co-principal of the crime of injury for the injuries that P and Q had already caused before he conspired and joined with them because his involvement in conspiracy and his acts arising therefrom have no causal relationship with

said injuries, and he is culpable as a co-principal of the crime of injury only for having contributed to causing injuries to R and S by assaulting them so violently as to result in injuring them, after conspiring and joining with P and Q".

Here, the Supreme Court has explained that a person is liable as a co-principal for the consequences arising from acts committed by others because he or she has participated in the conspiracy, acted on it, and causally contributed to the consequences. Such a theory is known in Japan as *the causal complicity theory.* The causal complicity theory has been a firmly accepted theory in academic discourse for the past 30 years. In practice, there are a number of precedent setting cases that are thought to be based on this concept.

On the basis of this causal complicity theory, how would the above precedent on fraud be explained? This is extremely difficult to explain from the causal complicity theory. This is because defendant C was not involved in the act of committing the fraud, and the conspiracy of the defendants and their acts based on it do not have a causal relationship with respect to the fraud as a whole. If that were the case, C would be liable only for his act of receiving the package, and would not be a co-principal with respect to the fraud as a whole. This new precedent would not be consistent with the Court's previous thinking.

How, then, should this precedent be reconciled with previously decided cases? Some have suggested that this precedent has negated the theory of causal complicity. However, in view of the entirety of criminal law practice to date, this is unlikely to be the case. Although there is no room here to go into detail, the Supreme Court's precedent to date has accumulated decisions over the years based on the causal complicity theory. Moreover, in 2012, the Court explicitly articulated the causal complicity theory as described above and issued a precedent that did not affirm co-principal offenses with respect to perpetrators who became involved later, so it is exceedingly unlikely that, five years later, the Court would adopt a theory of complicity based on a completely different theory.

The question is how to explain this precedent from the perspective of causal co-influence theory. Many academic theories modify the causal co-involvement theory in various ways. However, since causal relationships do not flow from the future to the past, causal contribution cannot be attributed to an act in which one was not involved in to begin with. If this is the case, then co-principals should only be liable for consequences after their own acts of involvement. In the end, it must be said that this precedent cannot be logically explained.

If so, the only possible explanation is that this precedent created a new category of crimes, limited to cases of Specialized Frauds. I know this is certainly a very strange explanation from the perspective of the principle of legality in continental law, since new laws must be enacted by the legislature, i.e., the Parliament. The Supreme Court should

never have issued such a precedent. Quite simply, it is the wrong precedent. However, there would be no practical point in criticizing it for being wrong.[5] From a practical standpoint, it is better to think of this precedent as an exception to the rule of fraud, and to use it on a limited basis.

4. Consideration of intent of Specialized Fraud

4.1. Precedent (3) involved the following facts.

On the instructions of an acquaintance, the accused received a parcel sent to a room in a block of flats from an employee of a delivery company by pretending to be someone else. The package contained cash which had been sent by the victim of a specialized fraud. At trial, the defendant claimed that he thought the package contained illegal drugs and weapons. In addition, the defendant had repeated the act of receiving similar packages several times, each time receiving a reward.

This case deals with the intent to commit specialized fraud. This is because the defendant in this case does not have a definitive and binding awareness that he is participating in the crime of fraud. Of course, he is aware that the item in the package or envelope he receives is some kind of illegal item. However, he believes that it might be a prohibited drug or a handgun. In such a case, would he still be found guilty of intent to defraud?

4.2. The Japanese Penal Code defines intent as follows.

(Intent)

Article 38 (1) An act performed without the intent to commit a crime is not punishable; provided, however, that the same does not apply unless otherwise specially provided for by law.

From a jurisprudential point of view, this provision alone does not clarify exactly what intent is. Japanese criminal justice practice and scholarship have developed the concept of intent theoretically. It is important to define what intent means here. In Japanese criminal justice practice and academic theory, intent is defined as the recognition and admission of the fact of a crime.

[5] If the Supreme Court, i.e., the judicial power, makes an illegal decision, it is the legislative or executive power that can admonish it. This is the concept of separation of powers. Here, however, there is a practical problem of legislative technique, which prevents the Diet from legislating appropriately on specialized frauds. Considering this, it is possible to view the courts as supplementing the legislation that the Diet was unable to pass, in the form of case law. In common law countries, such a response may not be viewed as particularly strange.

In this precedent, the Japanese Supreme Court stated: “The accused then stated that the accused believed that the packages contain guns and drugs, but did not confirm that the packages contain guns and drugs, and there are no circumstances that eliminate the possibility that the accused was aware that the accused’s own acts might constitute a fraud”. The Supreme Court then concluded that the accused had the intent to commit fraud.

Japanese academic theory describes Intent as follows. Intent is the recognition and admission of the fact of a crime. This criminal fact is framed by the constitutive requirements that typify the crime (*Tatbestand*). Thus, it is not enough to have an awareness that something is illegal in relation to some crime. In the case of this precedent, it is necessary to recognize that the object may have been acquired as a consequence of the crime of fraud. Of course, the recognition that it may be a handgun or that it may be an illegal drug may also exist in parallel with the recognition that it may be fraud.

Put another way, in this case, there are no circumstances which eliminate the possibility that the accused was aware that the accused's own acts might constitute a fraud. Therefore, the conclusion is that the accused had the intent of fraud. The majority of the academic literature evaluates this precedent as justifiable.

However, on further reflection, the above idea can be somewhat questionable. If we simply accept that the intent to commit several offenses exists in parallel, there is a risk that the determination of intent will be extremely crude. Of course, if the conclusion is accepted that the fraud cannot be established in this case, the problem which arises is that the police will not be able to obtain any evidence to proceed with the investigation of the specialized fraud. It is therefore understandable that both practitioners and academics agree on the conclusion that fraud should be established in this case. However, it seems certain that there is an important theoretical problem here. It seems that Japanese scholars do not take this issue very seriously, but I would be interested to hear what the readers of this paper (non-Japanese readers) think about it.

5. Final Remarks

Properly punishing and deterring special frauds such as those described in this paper is of great importance for the protection of the elderly. It is assumed that such frauds occur not only in Japan but also in many other countries. While what is described here may be a local problem stemming from Japan's fraud provisions, it is possible that similar problems occur in other countries as well.

In addition, the criminal law interpretative issues examined in this paper present important challenges with regard to the fundamental issues of attempt, complicity, and intent. It is hoped that this paper will be of use to readers interested in these issues.

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NON-DISCRIMINATION OF ELDERLY PEOPLE IN CRIMINAL PROCEEDINGS: A EUROPEAN OVERVIEW

The article is aimed at verifying whether there is discrimination against the elderly in the context of criminal proceedings at the European level. To this end, the concepts of discrimination (distinguishing between direct discrimination and indirect discrimination) and the elderly are analysed. Furthermore, the European legal framework on the subject of discrimination is explored, focusing separately on the legal sources of the European Union and on those of the Council of Europe. Based on this, it is evaluated whether the criminal proceedings show cases of direct discrimination and/or indirect discrimination against the elderly. The article concludes that forms of direct discrimination of the elderly do not derive from the European legal framework. However, forms of indirect discrimination can derive from the same legal framework. Specifically, the elderly could be victims of indirect discrimination in relation to: a) reporting a crime; b) the right to obtain a judgement; c) participation in hearings; and d) incurring the costs of one's own defence.

Keywords: *Ageism, Elderly people in criminal trial; Discrimination of elderly people; Right to a fair criminal trial; Article 6 ECHR; Criminal proceedings 'sensitive' to needs of elderly people.*

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1. The concept of discrimination

The concept of discrimination implies the coexistence of three factors: the unequal treatment of individuals or groups; the existence of negative effects deriving from discrimination; and the absence of legitimate reasons for practicing the discrimination in question (Dahove, 2021: 118-123).

The discrimination deriving from legal sources can be a direct discrimination or an indirect discrimination (European Union Agency for Fundamental Rights and of the Council of Europe, 2018: 43-64).

On the one hand, direct discrimination occurs in those cases where, on the basis of legal sources, a person or group of persons is treated less favourably than another is treated, has been or would be treated in a similar situation, and this in the absence of legitimate legal reasons which can justify unequal treatment.

On the other hand, indirect discrimination occurs when the legal act provides for apparently neutral rules, but the concrete application of these rules results in less favourable treatment for a person or group of people than that which other people or groups would receive in analogous situations. Of course, in this case as well there is no legitimate legal basis that justifies unequal treatment.

The reason for the discrimination can be single or numerous. In the latter case, the term ‘multiple’ is properly used when the multiple grounds of discrimination operate separately. Conversely, when the various reasons interact with each other to the point of producing specific types of discrimination, the discrimination is called ‘intersectional’ (European Union Agency for Fundamental Rights and Council of Europe, 2018: 59). Beyond this rigorous distinction, however, it should be noted that the expressions ‘intersectional discrimination’, ‘combined discrimination’, ‘multiple discrimination’, ‘cumulative discrimination’, and ‘compound discrimination’ are often used as synonyms.

2. When can a person be defined as elderly?

In order to specifically examine the issue of discrimination against the elderly in criminal proceedings, it is necessary to first clarify what the term elderly means.

Scientific studies do not agree on the exact age at which a person can be defined as elderly. Specifically, some authors refer to the age of 60 (World Health Organization, 2022). Others refer to age 65 (Crown Prosecution Service, 2020). Other authors instead distinguish between ‘youngest-old’ (ages 65 to 74 years), ‘middle-old’ (ages 75 to 84 years) and ‘oldest-old’ (people aged 85 or older than 85) (Lee et al., 2018: 249-255).

However, at the European Union (EU) level, the age of 65 years tends to be considered the age upon which a person can be defined as elderly. This age is also considered as a reference parameter by Eurostat, which is the EU statistical office, and whose data indicate that the European population is ageing. In particular, the latest population projections published by Eurostat show that by 2050 the number of elderly people will reach 129.8 million, while in 2019 this number was 90.5 million (Eurostat, 2020). In addition, the number of people aged 100 and over will also increase and is expected to rise from 96600 in 2019 to 484000 by 2050.

However, it is necessary to underline that the ageing of the European population is not compensated for by an adequate number of young people. Eurostat data clarify that already as of 1 January 2019 the elderly were 20.3% of the European population. Thus, for each elderly individual there were just over three people of working age.[1]

These data have led to an increase in the scientific debate on the elderly in reference to the most diverse fields. Specifically, a series of factors that may concern the elderly are highlighted: progressive physiological changes, compromised state of health, character and behavioural changes, state of loneliness, dependence on other people in solving one's problems, etc. (Scali, 2013: 2-4).

With respect to these factors, the reaction should be inter-generational solidarity. Instead, and not infrequently, phenomena of ageism are observed (Butler, 1969: 243-246), a term which is defined as 'stereotype, prejudice or discrimination of a person based on their age' (Solarević, Pavlović, 2018: 54).[2] Furthermore, people often perceive the elderly as having lost their social and economic importance, especially after retirement, to the point of considering them a burden to society. On the contrary, the Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the promotion of human rights of older persons[3] states that 'the great increase in life expectancy which has taken place in the past century should not be perceived as a burden for society but as a positive trend'.

[1] Aging is also witnessing worldwide, so much so that it is estimated that by 2030 there will be 1 in 6 people aged 60 or over (World Health Organization, 1 October 2022), and this despite the fact that in many developing countries young people are currently a very large majority.

[2] 'The epidemic ageism affects more than 164 million seniors living in Europe. This means that many more Europeans are exposed to ageism than to sexism or racism.' See Mikolajczyk, 2015: 84.

[3] Adopted by the Committee of Ministers on 19 February 2014 at the 1192nd meeting of the Ministers' Deputies.

3. The elderly and their role in Criminal Proceedings

Compared to other areas, the relationship between the elderly and criminal proceedings appears to be less examined. However, this relationship deserves greater attention, as has happened with regard to the issue of elderly prisoners (Aday, Krabill, 2013: 207). [4]

If 65 is identified as the age at which a person can be considered elderly, an elderly person can play any of various roles within the criminal process such as judge, public prosecutor, lawyer, expert, perpetrator of a crime, victim, defendant party, witness. Specifically, in various Member States of the European Union (for example, Italy, Germany, Spain, France) judges, public prosecutors, and lawyers can retire after the age of 65, and often several years later. Similarly, experts can be over 65 years-old.

As for the perpetrators of crime, some of them are elderly people who commit various types of offences, including organized and white-collar crime, homicide, larceny, alcohol-related crimes, and family violence. However, criminal behaviour tends to decline with age (Langworthy, Belinda, 1988) and mental disorder is frequent in older offenders (Yorston, 2011: 694). It is interesting to note that, with reference to criminal enforcement, the American Correctional Association recommends carefully evaluating the state of older and geriatric offenders according to their real physical condition, regardless of their age, given that even a 50- or 55-year old prisoner could in some cases be considered elderly (Aday, Krabill, 2013: 207).

In addition, the elderly are frequently victims (Pavlović, 2019: 169-183). Indeed, for some kinds of crime they represent ideal victims as they tend to be weaker, less able to defend themselves, and have a life perspective that is often incompatible with the length of criminal proceedings. At the European level, the exact number of crimes committed against the elderly is not known. There are statistics, but researchers agree that many crimes go unreported and, therefore, the true number of these crimes remains unknown.

As regards the types of crimes of which the elderly are victims, they tend to be the most varied. It can first of all be highlighted that the elderly are often victims of economic crimes, in particular of scams, including those perpetrated online, as demonstrated by the cases of romance scams[5] or scams connected to false online trading.[6] Furthermore, there are numerous elderly victims of physical, psychological, and sexual abuse, as well

[4] An overview on the topic of elderly population in prison can be found in Milićević, Ljeposava, 2022: 503 - 519.

[5] This crime causes serious psychological harm in the victims (Sorell, Whitty, 2019: 342-361).

[6] For a discussion on the topic of fight against cybercrimes committed against elderly victims see Signorato, 2022: 431-438.

as poly-victimization. In high-income states, the rates of elder abuse are highest in nursing homes and other long-term care facilities (Mikton et al., 2022: 2), such that 64.2% of staff of different facilities admitted to having abused an elderly person at least once in the last year (Yon et al., 2019: 61[7]).[8] Furthermore, many elderly people are also victims of abuse by their own family members or by the people who are supposed to take care of them in their homes. Finally, not infrequently, elderly people are witnesses or defendant parties in criminal trials.

4. European legal framework on discrimination:
A) Absence of direct discrimination

We often speak generically of Europe. In reality, from a legal point of view two concepts of Europe coexist or, better, in Europe there are two distinct organisations: the first is the European Union (EU) [9] and the second is the Council of Europe.[10] The judicial authority of the EU is the Court of Justice which has its seat in Luxembourg, while the reference Court of the Council of Europe is the international court called European Court of Human Rights (ECtHR), also known as the Strasbourg Court.

The European Union and the Council of Europe have different sources of law. Specifically, the EU sources can be classified in primary and secondary legislation of EU[11] (Kostoris, 2018: 23-28). Instead, there are different sources of law of Council of

[7] According to data provided in this article, the abuse episodes are distributed in this way: 33.4% psychological abuse, 14.1 % physical abuse, 13.8 % financial abuse, 11.6% neglect abuse, and 1.9% sexual abuse.

[8] Globally, the issue of abuse of women and children has long been the subject of reflection. Instead, less attention seems to have been paid to the issue of elder abuse. For an overview of the situation in Serbia see Jovanović, 2022: 487-502.

[9] There are 27 EU member states. They are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.

[10] Both EU member states and non-EU member states are part of the Council of Europe. In particular, these 47 states are parties of the Council of Europe: Albania; Andorra; Armenia; Austria; Azerbaijan; Belgium; Bosnia-Herzegovina; Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Georgia; Germany; Greece; Hungary; Iceland; Ireland; Italy; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Republic of Moldova; Monaco; Montenegro; Netherlands; North Macedonia; Norway; Poland; Portugal; Romania; San Marino; Serbia; Slovakia; Slovenia; Spain; Sweden; Switzerland; Republic of Türkiye; Ukraine; and United Kingdom.

[11] The primary legislation of the EU includes: Treaty on European Union (TEU), Treaty on the Functioning of the European Union (TFEU), and their protocols; Charter of Fundamental Rights of the European Union; Treaty Establishing the European Atomic Energy Community (Euratom); international agreements; general principles of union law. Instead, the following sources could be considered to be secondary legislation: Regulations, Directives, Decisions, Recommendations, and Opinions. In particular, a regulation is a binding legislative act and must therefore be applied in all member states. Instead, a directive indicates the objectives to be achieved, and as a consequence member states must legislate in order to achieve those objectives.

Europe which are aimed at promoting democracy and human rights. In particular, they include: the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the European Social Charter; the European Convention on the Suppression of Terrorism; and the Budapest Convention on cybercrime.

Both in the EU sources and in those of the Council of Europe there do not seem to exist rules implying direct discrimination. On the contrary, the sources of both European organisations provide for the prohibition of discrimination.

In the EU there are not only rules against discrimination based on gender[12] and racial or ethnic origin,[13] but also against discrimination based on age. For example, Directive 2000/78/EC specifically mentions the need to combat discrimination on the ground of age regarding employment and occupation. However, in criminal matters, it is more difficult to find an age-based prohibition of discrimination specifically calibrated on the elderly, given that the age is usually taken into consideration with reference to minors, as in the case of Directive 2012/29/EU.[14]

Nonetheless, even in criminal matters, the prohibition of discrimination of the elderly can be inferred from various EU sources that declare this prohibition, including: Article 20 of the Charter of Fundamental Rights of the European Union, which provides for equality before the law; Article 21 of the same Charter, which prohibits any discrimination based on various grounds, including age; Article 2 of consolidated version of the Treaty on European Union (TEU), which states that the Union is founded on certain principles, including equality and non-discrimination; Article 3.3 of the same Treaty, according to which the EU 'combats social exclusion and discrimination'; Article 9 of Consolidated version of the Treaty on the Functioning of the European Union (TFEU) which reaffirms that the Union fights against social exclusion.

As regards the sources of the Council of Europe, the prohibition of discrimination is first of all affirmed by Article E[15] of the European Social Charter (Revised).[16] Even

[12] See Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

[13] See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[14] For example, see Article 1.2, and 10.1 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, even if some whereas refer, in general, to the age of the victims (see whereas 9, 21, 46, 56).

[15] See Part V.

[16] This Charter also declares that 'very elderly person has the right to social protection.' See Part I, 23.

if this Charter does not expressly refer to age discrimination, the grounds for non-discrimination indicated by it are only examples; consequently, the European Social Charter (Revised) also prohibits discrimination against the elderly based on their age.

Moreover, the prohibition of discrimination is emphasised also by Article 14 of the ECHR, which clarifies that the rights and freedoms envisaged by the ECHR must be guaranteed without discrimination based on national or social origin, colour, race, language, sex, religion, property, political or other opinion, association with a national minority, birth or other status. Article 14 does not expressly state age among the grounds of non-discrimination. However, as in the case of the list contained in Article E of the European Social Charter (Revised), also the list in Article 14 is illustrative and not exhaustive.

Consequently, this article also prohibits discrimination based on age. Furthermore, Article 1 of the Protocol 12 (2000) to the ECHR[17] strengthens the prohibition of discrimination by extending it to the enjoyment of the rights and freedoms, including those under national law (European Union Agency for Fundamental Rights and Council of Europe, 2018: 18).

It should be remembered that the 'meaning and content of the provisions of the Convention will be understood by the Commission and Court of Human Rights as intended to evolve in response to changes in legal or social concepts' (Waldock, 1981: 547).

These changes are also taken into account by the Strasbourg Court which has repeatedly examined issues concerning elderly people in terms of compatibility with the rights protected by the ECHR.[18] For example, in the court case of Dodov v. Bulgaria,[19] the ECtHR held that there was no violation of Article 2 (right to life) of the ECHR concerning the reaction of the police to the applicant's mother's disappearance. In the case

[17] Among the sources of the Council of Europe, there are others that refer to non-discrimination, albeit in specific situations. In this regard, consider by way of example: Article 4 of Framework Convention for the Protection of the National Minorities, which prohibits any discrimination based on belonging to a national minority; Article 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, which aims to eliminate discrimination against women; Article 3 of the Council of Europe Convention on Action against Trafficking in Human Beings, which affirms the Non-discrimination principle regarding the fight against trafficking in Human Beings; Article 2 of the Council of Europe Convention on Access to Official Documents, which specifies that the Right of access to official documents must take place without discrimination; and Article 14.4 of the Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence, which aims to avoid the unlawful discrimination regarding sensitive data.

[18] See ECtHR, Factsheet - Elderly people and the ECHR, September 2022.

[19] See case of Dodov v. Bulgaria, application no. 59548/00.

Sawoniuk v. United Kingdom,[20] the same court stated that the Convention does not provide any prohibition of detention in prison of persons elderly, but that the states do have an obligation to adopt measures aimed at safeguarding their health and well-being.[21] In the case Vasileva v. Denmark[22] the ECHR stated that a violation of Article 5 § 1 (right to liberty and security) occurred because the applicant was deprived of her liberty by the authorities for a time deemed disproportionate and unnecessary (thirteen and a half hours) and, moreover, the applicant was not attended by a doctor.[23]

That duly noted, for the principal purposes of this article, it should be remembered that the ECHR has on several occasions examined cases in which there was non-compatibility with the Prohibition of discrimination (Article 14 of the ECHR) and General prohibition of discrimination (Article 1 of Protocol No 12 to the Convention) of the elderly. However, these were mostly non-criminal matter cases, as shown, for example, by Burden v. the United Kingdom[24] about the inheritance tax bill; Carson and others v. the United Kingdom[25] about indexlinking of the State pension; Taipale v. Finland,[26] and Tulokas v. Finland[27] about the taxation of pension income.

B) Indirect discrimination

The European legal framework demonstrates that there is no direct discrimination against the elderly but that, on the contrary, there are rules against direct discrimination. However, despite these rules which prohibit discrimination in general and, therefore, also against the elderly, there are no rules specifically aimed at avoiding discrimination in practice against the elderly.

[20] See case Sawoniuk v. United Kingdom, application no. 63716/00. In this case the applicant did not exhausted domestic remedies, are required instead by Article 35 (admissibility criteria) of the Convention. For this reason, the Court declared the application inadmissible.

[21] See case Farbtuhs v. Latvia, application n. 4672/02, where the Court believed there existed a violation of Article 3 (Prohibition of torture) of the ECHR. Specifically, the applicant was 84 years old when he was sent to prison. That elderly person was paraplegic and disabled, and a treatment appropriate to his health conditions was not guaranteed for him. Similarly, see also Contrada (No. 2) v. Italy (application no. 7509/08). On the contrary, the Court excluded the violation of Article 3 of the ECHR in the case Haidn v. Germany (application no. 6587/04).

[22] See case Vasileva v. Denmark (Application no. 52792/99).

[23] In relation to the violation Articles 8 (right to respect for private and family life), 6 § 1 (right to a fair trial), and Article 41 (just satisfaction), see Georgel and Georgeta Stoicescu v. Romania (application no. 9718/03).

24 See case Burden v. the United Kingdom (application no. 13378/05).

25 See case Carson and others v. the United Kingdom (application no. 42184/05).

[26] See case Taipale v. Finland (application no. 5855/18).

[27] See case Tulokas v. Finland (application no. 5854/18).

It follows that cases of indirect discrimination seem to derive from the current legal framework. We will now analyse some of these phenomena.

Suppose a young person and an elderly person are victims of the same crime.

First of all, compared to a young person, an elderly victim has a lower capacity to obtain information about their rights. Furthermore, in today's society, which is characterized by the crises of the family and in interpersonal relationships, an elderly person is often alone and could even fall victim to the hikikomori phenomenon,[28] which is one of the causes of kodokushi[29] (i.e. dying alone). The fragile social and familial context and the lesser ability to access information (also via the Internet) could cause discrimination of the elderly in the exercise of his or her rights and make it difficult for the elderly person to access justice. In accordance with the resolution adopted by the General Assembly on 25 September 2015 named 'Transforming our world: the 2030 Agenda for Sustainable Development',[30] the access to justice should be 'equal' instead.

Secondly, Article 6 of the ECHR provides that 'everyone is entitled to a fair and public hearing within a reasonable time.' However, in many European countries the criminal trials are characterized by a long duration. This is a critical aspect for any innocent defendant and for any victim.[31] In addition, it creates discrimination against the elderly. This in because an elderly individual tends to feel more discouraged about reporting crime due to the length of time expected for criminal proceedings to unfold, a period often incompatible with his or her life expectancy.

Moreover, in the event that the complaint is presented or that the ex officio prosecution is provided for a crime, the advanced age of the elderly person could potentially cause discrimination. While the young person has a life expectancy compatible with the duration of the criminal case, the elderly person does not have such a life expectancy and,

[28] This term refers to the Japanese phenomenon of people isolating themselves for months or even years. However, it is not a phenomenon that concerns only Japanese society (Kato, Kanba, Teo, 2019: 427). It is in fact now a contemporary society-bound syndrome. The very concept of culture-bound syndromes is upon us, given that globalization and the spread of the Internet have meant that cultures no longer remain within their own borders, but that they also mutually influence each other at the level of these types of syndromes (Kato, Kanba, 2016: 1).

[29] The term kodokushi indicates the phenomenon of those who, totally isolated from family, friends, colleagues, relatives and any other person, die alone (Otani, 2011: 105-113). Their bodies are often found only after some time. A survey carried out in 23 wards of Tokyo, Japan, revealed that in 2003 the number of kodokushi of people aged 65 and over was 1451, while in 2018 it had increased to 3882 (Nakazawa, Yamamoto, London, Akabayashi, 2021: 2).

[30] See United Nations, General Assembly, Seventieth session, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1, § 35. The theme of equal access to justice is at the center of reflection in various States. For an in-depth analysis of the case of Serbia, see Bošković, 2022: 139-152.

[31] In those states where the criminal legislation provides for the statute of limitations, the long duration of the trial can instead be an advantage for the guilty defendants.

therefore, the death of the victim could occur before the criminal proceedings is completed. Of course, even a young person may have a short life expectancy due to illness, in which case he or she should be treated as an elderly person for procedural purposes.

Thirdly, it has been highlighted that a Right to a fair trial in accordance with Article 6 of the ECHR also implies the existence of a criminal trial 'sensitive' (Signorato, 2023: 200-201), namely one intended to adopt concrete measures aimed at countering possible situations of discrimination. These measures must be capable of giving adequate responses to the needs of people that are effective, proven, and such as to implement fundamental rights. In many cases, to meet such needs, 'common sense' would be enough, for example, in organizing the calendar of hearings.

Furthermore, in cases where such a timetable is established through the use of a software application, this application should also consider age. Instead, there are cases in which, although the lawyer informed the judge that the victim of the crime was elderly, the judge replied that he/she was unable to anticipate the hearing because the software application cannot take age into account.

However, this phenomenon is symptomatic of a wider problem. Too often, technology is not programmed for particular cases or else is unable to satisfy certain needs of justice. In such situations, the solution should be a suitable human remedy to bypass the standard procedure implemented in the software application. Instead, in many cases such a bypass is problematic or cumbersome to the point of quasi-impossibility, so that rights and needs are renounced because of technological deficiencies. In these cases, however, an inversion of ends occurs: There is no longer a technology for man, but a man for technology with frustration of the needs of justice due to software applications which do not consider variables like age or health conditions of the involved persons.

In the absence of specific rules on the length of the criminal proceedings in the case of elders, the ECtHR had already examined, albeit not in criminal matters, the question of the length of a proceeding concerning the notarial deed null and void, a case in which the applicant had 71 years old when the litigation started. Specifically, in the case Jablonská v. Poland,[32] the ECtHR declared that there was a violation of Article 6 § 1 (right to fair trial) of the Convention because, also due to the age of the applicant, the 'reasonable time' requirement was not satisfied.

Furthermore, it should be noted that elderly people are often unable to physically bear the stress resulting from the criminal proceedings. Not infrequently, they also have to travel long distances to attend hearings. For this reason, trials involving the elderly should include longer hearings, this in order to decrease the number of hearings needed.

[32] See Jablonská v. Poland (application no. 60225/00).

Additionally, participation in the hearing via videoconference link should be allowed, if it is the elderly victim of a crime who requests it.

Moreover, if the participation in the trial of an elderly person in the role of witness is examined, further problems emerge. In fact, studies show that everyone's memory undergoes the so-called forgetting curve (Deffenbacher et al., 2008: 139-150). This curve is conditioned by many variables which worsen in the case of an elderly person.[33]. Consequently, if the testimony is crucial for the purposes of the trial, there is a concrete risk that the path towards a just judgement may be wholly or partially compromised.

Finally, elderly persons who are not well-off may suffer defensive discrimination compared to wealthier people. Some states provide for the institution of legal aid at the expense of the state, but the income thresholds for accessing it are very low. As a result, it is common for people with relatively low incomes to fall short of these thresholds and, thus, cannot make use of them. This fact could reverberate in a weakened defence, because less affluent subjects often ask their lawyer to identify the least expensive defensive strategy although this could imply the waiver of legal acts that could be useful for defensive purposes. This occurs not only for in the defence of the victims, but also in that of the accused.

Conclusions

First of all, the article has verified that at the European legal level two types of discrimination are considered: direct discrimination and indirect discrimination. Furthermore, the concept of the elderly was examined, showing that there is no convergence on the age at which a person can be defined as elderly, even if, in the EU, reference to the age of 65 is generally made.

Based on the analysis of the concepts of direct discrimination, indirect discrimination, and the elderly, it was verified whether or not there is discrimination against the elderly in the criminal proceedings, the results summarized below have been reached.

On the one hand, both the legal sources of the EU and those of the Council of Europe demonstrate that the legal acts do not implement direct discrimination against the elderly but, rather, provide for various rules aimed at contrasting any form of discrimination in general.

[33] Some judicial systems provide mechanisms for the early taking of testimony in cases where they cannot be examined during the trial for illness or any other serious impediment. An example is the Italian system (see Article 392 of the Italian Code of Criminal Procedure). However, such a rule has a general nature and does not specifically refer to elders. An elderly person can therefore make use of the provisions of Article 392 only if he/she is ill or if there is a serious impediment.

On the other hand, since, usually, there are no specifically calibrated rules for the non-discrimination of elders in the context of criminal proceedings, this means that elders are treated in the same way as other subjects. However, such an equalization of treatment can lead to indirect discrimination.

Specifically, the main forms of indirect discrimination seem to be the following: a) discrimination regarding reporting crimes, given that the short life expectancy of the elderly acts as a disincentive factor in reporting crimes; b) discrimination in obtaining a judgement, given that in cases where the elderly person has nevertheless filed a complaint or the ex officio prosecution is provided for a crime, his/her short life expectancy implies that in many cases his/her death will occur before a final judgment is passed; c) discrimination in the right to participate in hearings, given that the physical condition of an elderly person could make it very difficult for him/her to travel to attend such hearings; and d) if an elderly person is not well-off, discrimination in the implementation of his/her right of defence could occur, since for him/her it is necessary to reduce the costs of the lawyer as much as possible.

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Laura Stanila[*]

THE STATUS OF THE ELDERLY CONVICTS IN THE CRIMINAL JUSTICE SYSTEM OF ROMANIA

The present article addresses the status of elderly people in the criminal justice system in Romania. Romanian criminal legislation is modern, establishing a framework for the application and execution of punishments applied by criminal courts that is up-to-date and fully respects the principle of humanism as well as the rights of convicts who have reached the age of 65.

The Romanian model is perfectable, still we believe, respects the dignity of the elderly from the perspective of the duration of the custodial sentence, its execution regime, as well as the application of disciplinary sanctions at the place of detention.

Keywords: *convicted in old age, punishments, execution of punishments, system of execution of the custodial sentence.*

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Introduction

Old age tends to be increasingly viewed as a risk of dependency and social exclusion. When a criminal conviction is added to this accumulation of vulnerabilities, the elderly seem to be definitively marginalized.

International documents with legal value in the field of the rights of the elderly have been signed and/or ratified by the Romanian State while the obligations established by them have been integrated into the legislation adopted in the field of both criminal law and social protection of the elderly.

Starting with the Article 25 of the The Charter of Fundamental Rights of the European Union - *The rights of the elderly*[1] - stating that *"the Union recognizes and respects the right of older people to lead a dignified independent life and to participate in social and cultural life"* - the framework of international and national provisions of the elderly seems to configure a better status for elderly convicts in comparison with other criminal cathegories of people.

The present topic of discussion is part of a wider context, that of respecting and promoting human rights. Even if the theme is specificly focused on the the category of elderly convicted persons, it is of great interest because, in addition to the vulnerabilities determined by age, there are more vulnerabilities added, vulnerabilities born from the existence of a criminal conviction which dramatically affects both the life and the way of relating as well as the elderly person's participation to social relations following the execution of the sentence imposed by the court. I appreciate that in Romania there is a major lack of information on the subject of the rights of the elderly, many Romanians being poorly informed or not at all informed about this aspect. When it comes to elderly convicted persons, sadly, their social reintegration is almost abandoned.

Relevant Romanian Criminal Law Regulations Regarding the Elderly People and Their Interpretation and Aplication

According to the Romanian Criminal legislation, any person who has committed a crime or offense will be subject to criminal liability, provided he/she has acted with criminal capacity. The advanced age of the offender at the time of committing the

[1] This article is inspired by article 23 of the revised European Social Charter and articles 24 and 25 of the Community Charter of the fundamental social rights of workers. Participation in social and cultural life includes, of course, also participation in political life. Publishend in Official Journal of the European Union C 303/17 - 14.12.2007.

crime/offense does not constitute an impediment in engaging his/her criminal liability, but it can serve as a general criterion for individualizing the punishment by the court, according to art. 74 para. 1 lit. g RCC or it can be used as an appropriate judicial mitigating circumstance, in accordance with art. 75 para. 2 lit. b RCC. As a general criterion for individualization, the advanced age of the offender will determine the court to focus on the special minimum or maximum penalty limit provided by law for the crime committed. As a judicial mitigating circumstance, advanced age does not compel the court to retain it. However, if the court considers this aspect relevant and still retains the judicial circumstance, the punishment limits provided by law for the crime/offense committed are reduced by one third and the court will set the punishment within the limits thus reduced.

What is really worth noting is the fact that the provisions relating to the application of custodial sentences - life detention and imprisonment - which, when applied to the elderly, contain some derogatory provisions, safeguarding their dignity and validating the physical and social characteristics of an aged person compared to the other convicted persons. There are a number of such provisions in the Criminal Code, but also in Law no. 254/2013 on the execution of sentences.

Thus, the first derogatory provisions appear regarding the application of life imprisonment, the heaviest main punishment provided by the Romanian Criminal Code.

a) Life imprisonment exception

According to art. 57 RCC, if, at the date when the judgment to convict is returned, the defendant has turned 65 years of age, the sentence of life imprisonment shall be replaced by a prison term of 30 years and a ban on the exercise of certain rights for the maximum duration of the prison sentence.

The new Romanian Criminal Code[2] keeps in art. 57 the provision of non-application of life imprisonment for persons who, on the date of the sentencing judgment, have turned 65 years old, who are to serve a sentence of 30 years in prison and the ancillary penalty of the prohibition of the exercise of certain rights for its maximum duration which is 5 years. Compared to the previous Romanian Criminal Code (art. 55), in the new Criminal Code we observe two important changes, as follows:

- raising the age of non-application of life imprisonment from 60 to 65 years, as well as
- the amount of the sentence replaced by imprisonment, from 25 years to 30 years.

[2] Law no.286/2009 entered into force on 1st of February 2014, published in the Official Monitor no. 510 /24th of July 2009.

The age change from 60 years to 65 years, provided for those who turned this age at the time of the sentencing to life imprisonment, is explained by the correlation with the terms for the discussion of the commission for the individualization of the regime for the execution of the sentence for conditioned release. (Dobrinoiu, Pascu et alii, 2016)

Not applying life imprisonment to people who are approaching the life expectancy limit of the population in our country is a gesture of humanity on the part of the legislator, so that the age reached and the part to be executed, together with the other legal conditions, offer hope to a possible conditional release, even under the conditions of long-term sentences. Although the conditions for not applying the life imprisonment sentence seem more severe in terms of age and mandatory fraction, the number of crimes to which it is applied is much lower compared to the previous Criminal Code and only represents the cases with the highest degree of risk of the criminal's behavior.

The age of 65, at which the court decides not to apply the life imprisonment penalty, from a procedural point of view, will lead to the application of the previous law in the event of a conflict of laws over time, by applying the more favorable law.

The non-imposition of life imprisonment represents a measure of mandatory commutation to the 30-year prison sentence, which operates by law, if the defendant has reached the age of 65 on the date of the sentencing decision.

Although it is not mentioned in Chapter V, "Individualization of punishments" of RCC, the non-application of life imprisonment is a measure of legal individualization, the reason being that established by the provisions of art. 74 para. (1) lit. g) "level of education, age, state of health, family and social situation" of the perpetrator (s.n., I.C.). In this sense, the amount of the punishment was set at 30 years, to which is added the ancillary penalty of the prohibition of the exercise of certain rights for its maximum duration.

Under the given conditions of non-application of life imprisonment, the ancillary penalty of the prohibition of the exercise of certain rights will be applied for its maximum duration, namely 5 years.

Under these conditions, the court will determine concretely which of the rights established in art. 66 para. (1) RCC are to be prohibited, so that the accessory penalty is applied during the execution of the penalty, then during the conditional release and subsequently for a period of 5 years after the expiration of the penalty term, in the content of the ancillary penalties.

The non-application of life imprisonment in the event that the convict has reached the age of 65 is mandatory for the court, compared to the replacement provided by art. 58 RCC, when the substitution is optional.

The application of the ancillary penalty of the prohibition of the exercise of certain rights for its maximum duration, even under conditions of conditional release, of the suspension of the sentence in case of illness, of the parolle, is likely to increase the criminal coercion in the case of those who are not sentenced to life imprisonment, as a result of reaching the age of 65.

The non-application of the sentence in the case of long-term sentences or life imprisonment is a measure of individualization of the sentence in European countries, as well as in our legislation, although there are distinct elements that can be found in connection with the substitution of such sentences for different reasons.

Thus, the German Penal Code does not provide for such a measure, with the mention that the sentence of life imprisonment can be suspended if: 15 years of the sentence have been served, the continuation of the sentence is not required or due to the seriousness of the crime committed. The suspended sentence is considered executed, and the convicted person will be supervised within 5 years. Another example comes from the French Penal Code, which, in art. 132-18, states that "in the case of a crime punishable by imprisonment or life imprisonment, a prison sentence or limited criminal detention which cannot be less than 2 years may be imposed by the court". (Streteanu, 2008; Pascu & Buneci 2010; Ristea, 2006)

The Romanian legislation does not provide different provisions for women who turned 65 at the time of the commission of the crime even if the interpretation of European Court of Human Rights of other countries different regulations for women did not recognize a discriminatory approach of the national legislator, like, for example, case Khamtokhu and Aksenchik vs Russia, judgment of 24.01.2017.[3]

b) Replacement for life imprisonment

In accordance with art. 58 RCC, in case the defendant sentenced to life imprisonment turns 65 years of age during the serving of that sentence, life imprisonment can be replaced by a term of 30 years of imprisonment and a ban on the exercise of certain rights for the maximum duration, if they had good behavior throughout serving their sentence until that point, were in full compliance with all their civil obligations as ruled in the judgment to convict them (except for the case when proof is brought that they had no avenue to comply) and they made constant and visible progress towards social reintegration.

The new Romanian Criminal Code provides more severe conditions for replacing life imprisonment in the case of those who reach the age of 65 during the execution

[3] See in Romanian http://ier.gov.ro. *Applications nos. 60367/08 and 961/11*, www.echr.coe.int.

of the sentence [compared to 60 years - art. 55 para. (2) of the previous RCC]. The replacement with a sentence of 30 years, can be decided by the court only "if the convict had good behavior throughout the execution of the sentence, fully fulfilled the civil obligations established by the decision of the Court, except for the case when he/she proves that had no possibility to fulfill them, and made constant and obvious progress towards social reintegration" .

The legislator gives the possibility to the court to assess, in relation to the particularities of the convict's conduct, if he/she deserves such a replacement, so the replacement is not mandatory, as in the case of not applying life imprisonment provided by art. 57 RCC.

The new provision regarding the replacement of the sentence of life imprisonment establishes an analysis by the court of the conduct of the convicted person, who, after obtaining this replacement, has the vocation to be released on parole, according to the legal provisions, if the mandatory fraction of two thirds is also fulfilled , according to art. 100 RCC

As concern the legal nature of replacing the sentence of imprisonment for life, this legal institution is a measure of judicial individualization of the execution of the sentence by which the court, without finding a change in terms of the content of the crime, the methods of commission or the guilt of the criminal, replaces this punishment with imprisonment for 30 years and the ancillary penalty of prohibiting the exercise of certain rights for its maximum duration, taking into account the convict's 65th birthday during the execution of the sentence.

The replacement can be decided by the court if the convict has had good behavior throughout the execution of the sentence, has fulfilled the established civil obligations, except for the situation where he proves that he had no possibility to fulfill them, and has made constant and obvious progress for social reintegration.

Although it is not mentioned in Chapter V, "Individualization of punishments", the replacement of life imprisonment with a prison sentence is undoubtedly a measure of judicial individualization, the reason being that established by art. 74 para. (1) lett. g) - "level of education, age, state of health, family and social situation" of the perpetrator. In this sense, the amount of the punishment was set at 30 years, in the case of replacing the life imprisonment sentence with the prison sentence, as well as in the case of "non-application of the life imprisonment".

We find that the specificity of the individualization is given by the faculty available to the court to grant it, as well as the conditioning of this individualization on the behavior in detention, the fulfillment of civil obligations and the progress regarding the behavior towards resocialization.

Substitution implies the real possibility of moving from the indeterminate nature of the life imprisonment sentence to a determinate sentence, so that, after its execution, the convict lives without deprivation of liberty.

Considering that the sentence of life imprisonment is replaced by 30 years of imprisonment, and according to art. 100 para. (4) Penal Code, in the most favorable case, conditional release may be applied to the execution of half of the sentence, it is assumed that, after the age of 65, the convicted person will no longer be willing, due to natural physical limitations and educational influences during the execution of the sentence, to commit or participate in a new crime.

Replacing life imprisonment with a 30-year prison sentence also has the benefit of moving from the maximum security regime to an easier regime, respectively to a closed regime.

Replacement of the sentence of life imprisonment during the conviction is an expression of the humanism of the execution of the sentence, as well as other institutions of criminal law, such as parole, amnesty and pardon, which can also operate for those sentenced to life imprisonment. The mitigation of the deterrent character of the life imprisonment sentence led to its replacement with the prison sentence, giving hope to the convict that, after a period of execution of the sentence and under the conditions established by the law, he will be able to be released and return to society, so that at the age of senescence to enjoy freedom.

The replacement of the sentence of life imprisonment with the prison sentence changes the status of the convicted person, because it brings him/her from an exceptional regime to the regime of ordinary, common law, where he/she has all the possibilities conferred by Law no. 254/2013 to access programs of working, schooling, training, religion, cultural-educational, all leading to resocialization.

In the case of replacing the life imprisonment sentence with the prison sentence, according to art. 40 of Law no. 254/2013, the individualization commission shall change the detention regime to closed execution regime. Moreover, the closed regime will continue if it has already been applied after the mandatory execution of 6 years and 6 months of life imprisonment, analyzing the person's conduct and his efforts for reintegration. It would have been useful to analyze that, after replacing life imprisonment with a 30-year prison sentence, the regime could be changed, in relation to the criteria of Law no. 254/2013, in a semi-open and open regime, where the possibility of cohabitation under the conditions of normal free life can be tested under penitentiary control. Also, it would be worth analyzing the usefulness of revoking the 30-year prison sentence and executing the life imprisonment sentence, with the approval of the court, in the situation where the behavior of the convicted person cannot adapt to the requirements of the semi-open and

open regime. The proposal should be made within the Commission for individualization of the penitentiary regime, whose president is the judge supervising custodial sentences.

The conditions imposed for obtaining the substitution of life imprisonment are:

a) reaching the age of 65, both for men and for women, during the execution of the sentence. The condition of reaching the age is fulfilled even if the convicted person is hospitalized, is on suspension of execution due to illness or is hospitalized in a civil hospital;

b) had good behavior throughout the execution of the sentence. Good behavior is permanently monitored in places of detention by the permanent supervision of these categories of convicts, so that they do not commit very serious, serious or minor offenses during the execution of the sentence, comply with the daily schedule and fulfill the obligations, so that they are rewarded periodically for this. Good conduct is given by three indicators: firstly, the execution of the sentence without being sanctioned for disciplinary violations, secondly by constant perseverance in fulfilling the obligations throughout the execution of the sentence, which leads to reward, and thirdly to prove through all manifestations (visits, meetings with the staff, volunteers and the psychologist, within the work or socio-educational programs, in the attitude towards the other detainees) that he sincerely regrets the committed acts;

c) fully fulfilled the civil obligations established by the conviction. Fulfilling the obligations to compensate the victim or victims or their families, repairing the damage caused to the state or to public institutions or private legal entities are evidence of the measure in which the convicted person understands to prepare in order to obtain from the court the measure of replacing the punishment, bearing in mind seeing that this is not obtained automatically, but is a possibility granted by the court. The fulfillment of the obligations can be proven with documents, receipts, agreements, by returning the goods, paying the amounts established for court costs, as well as any other obligations with a determined achievement, or by paying periodic installments. In the situation where the convicted person did not fulfill his civil obligations, he must prove that he had no possibility to fulfill them. The impossibility of fulfillment is proven by the lack of wealth, the arrest and execution of the sentence before being able to actually fulfill these obligations, the lack of income during the possession from inheritances, work, other earnings from which it was possible to pay the civil obligations. Fulfilling the moral obligations of requesting an apology for the committed deed

d) made constant and obvious progress towards social reintegration. Completion of educational programs, professional training and training in a job, active participation in cultural-educational or religious activities, permanent presentation of external signs of respect towards staff or other detainees, visitors or volunteers, absence of any disciplinary

sanction and periodic reward are likely to demonstrate his/her progress. Behavior in which there are periods of disciplinary sanctions alternating with periods of rewards demonstrates the inconstancy of behavior and the obvious lack of educational progress. The constant and obvious progress is recorded in the documents of the socio-educational service, which prepares the planning sheet for the execution of the punishment, where the attitude towards the punishment, the level of understanding and assumption of guilt, the increase in the degree of responsibility towards the community and towards the person are periodically highlighted , the desire to stand out with good deeds and stand out in the category of convicts, by complying with the rules of the penitentiary and supporting the administration in maintaining discipline at a normal level. (Ristea, 2006; Dobrinoiu, Pascu et alii, 2016)

It must be specified that the replacement of the life imprisonment sentence with the prison sentence is not a legal or mandatory replacement, as is the institution of not applying life imprisonment. The convict having the opportunity to benefit from this measure of individualization, his/her merits will be ascertained by the staff of the commission for individualization of the detention regime in the penitentiary, according to art. 40 of Law no. 254/2013. The commission will draw up a written report, which will be brought to the knowledge of the convict under signature. This commission, verifying the fulfillment of the age criterion, will also check the other conditions established by art. 58 RCC and will make a reasoned proposal to the court, which will decide to replace life imprisonment with a 30-year prison sentence.

In the case of replacing the sentence of life imprisonment with 30 years imprisonment, the court will issue a new enforcement mandate, through the delegated judge of the enforcement court, in which it will be specified, according to art. 584 RCPC. Fr. pen., the new legal situation. The request to replace the sentence of life imprisonment is submitted to the court by the prosecutor or by the convicted person at the court where the place of detention is assigned. The modification of the punishment is carried out in accordance with art. 555-557 RCPC, by summoning the interested parties, appointing an ex officio lawyer, of the penitentiary administration where the respective convict is serving his sentence. The convict is brought to court. The participation of the prosecutor is mandatory, and the trial is carried out in accordance with the general provisions of the criminal procedural law. (Neagu & Damaschin, 2014)

In comparison, in the Belgian Penal Code, for example, there are no similar provisions to the Romanian law regarding the substitution of life imprisonment for reasons of age.

c) Conditions of conditional release in case of imprisonment in case of elderly convicts

According to art. 100 RCC, (1) conditional release may be ordered if:

a) a convict has served at least two-thirds of the penalty, in case of a term of imprisonment no longer 10 years, or at least three quarters of the penalty, but no more than 20 years in prison, in case of a term of imprisonment exceeding 10 years;

b) a convict is serving their sentence in an open or semi-open regime;

c) a convict fulfilled completely all civil obligations established by the judgment of conviction, unless they prove to have been unable to do so;

d) the court is convinced that the convicted person has reformed and is able to reintegrate into society.

(2) *If a convicted person turned 60, conditional release may be ordered after the effective serving of half of the penalty, in case of a term of imprisonment not exceeding 10 years, or at least two-thirds of the penalty, in case a term of imprisonment exceeding 10 years, provided that the conditions set forth in par. (1) lett. b) - d) are fulfilled.*

(3) In calculating increments of penalty provided in par. (1), the part of the sentence term that may be deemed, according to law, as served due to the work performed is to be considered. In this case, conditional release may be ordered prior to the effective service of at least half of the prison sentence, when it does not exceed 10 years, and at least two-thirds, when the penalty is more than 10 years.

(4) In calculating increments of penalty provided in par. (2), consideration shall be given to the part of the sentence term that may be regarded as served, according to law, due to the work performed. In this case, conditional release may be ordered prior to the effective service of at least one-third of the imprisonment sentence, when it does not exceed 10 years, and at least half of it, when the sentence is more than 10 years.

(5) It is mandatory to submit the de facto reasons having led to the granting of conditional release and to warn the convict about their future conduct and about the consequences they are exposed to if they continue to commit offenses or fail to comply with the supervision measures or to fulfill their obligations during the term of supervision.

(6) The period between the conditional release date and the date of the sentence expiry is the term throughout which the convict is supervised.

According to Romanian legislation elderly convicts have to serve the lowest increment of penalty in comparison with other cathegories of convicts, which is half of the penalty, in case of a term of imprisonment not exceeding 10 years, or at least two-thirds of the penalty, in case a term of imprisonment exceeding 10 years. Although several attempts were made to censure these provisions by the exception of unconstitutionality with

the reasoning that these provisions create discrimination between the categories of convicts, the Constitutional Court of Romania rejected the two exceptions raised, by the decisions no. 595/2015[4] and no. 207/2017[5]

d) Other aspects regarding the servig of the sentence by elderly convicts

The Romanian National Administration of Penitentiaries establishes the place of detention, taking into account that it should be located as close as possible to the place of residence of the convicted person, taking into account the execution regime, the safety measures that must be taken, the identified social reintegration needs, gender and age.

Since 2013, penitentiaries have been profiled for holding certain categories of persons deprived of liberty, in relation to the execution regimes.

The maximum security regime does not apply to convicted persons who have reached the age of 65. Elderly inmates can work during the execution of custodial sentences, in the service provision regime, on a voluntary basis, they can participate in housekeeping activities in the penitentiary, but also in case of calamity and during the night. The duration of work is 8 hours per day and no more than 40 hours per week. Prisoners who have reached the age of 60 or who have the status of retirement due to age limit or are retired due to the loss of work capacity of III degree of disability can perform work only at their request. Work performed outside the normal duration of weekly working time cannot be performed without the prisoner's consent.

Elderly convicts can attend courses in schooling and vocational training, including university preparatory studies.

3. Conclusion

Even if the provisions of the Romanian criminal legislation may seem quite harsh at first sight, a careful and corroborated analysis of the legal texts shows us that the Romanian legislator had in mind the basic principles established in modern law regarding the execution of custodial sentences, taking into account the cumulative vulnerabilities of elderly persons who have been convicted of crimes and concernes with the respect of the rights of older persons who have been convicted.

The real problem that remains is the social integration after their release, elderly convicts, due to their age and the trauma caused by life in prison, may face psychological, economic and social problems in the remaining period of their lives.

[4] Published in the Official Monitor no. 876 of 24 November 2015.

[5] Published in the Official Monitor no. 521 of 5th July 2017.

Although there is a National Council of the Elderly established by Law 16/2000[6] on the organization and functioning of the National Council of the Elderly, which should be concerned with ensuring a dignified life for all categories of the elderly, including those who have suffered criminal convictions and have executed them, this Council unfortunately fails to cover the specific needs of this category of convicts.

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[6] Republished in the Official Monitor no. 866 of 23rd September 2020.

Aleksandar Stevanović*

"SOCRATES AND HUMAN RIGHTS -THE RIGHT TO A DIGNIFIED DEATH"

In this paper, an attempt to connect the phenomenon of death and the moral category of dignity is made. At the beginning, the definition of death as seen in modern science has been given, and an attempt was made to establish a valid criterion for the introduction of the concept of dignity. The importance of the moral paradigm as a precondition for establishing the moral values of the community is pointed out on the example of Socrates' personality. Then, an analysis of the relationship between the law and the moral category of dignity is given, with special emphasis on negative influence of the ideology of human rights on the formation of moral concepts and the functioning of the system of values. In the conclusion of the paper, the importance of respecting general moral values for establishing the possibility of dignity is unerlined.

Keywords: *death, dignity, Socrates, human rights, morality.*

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1. Introduction

The phenomenon of death represents one of the most complicated and delicate elements for the research. As negation of existence, death has inevitable impact on all social and personal dimensions of human life. For every human, this matter has a special weight, because, as beings, they are mortal, and this fact disables any attempt to approach it without the feeling of immediate involvement. The Fact of mortality naturally leads to a certain opinion (sometimes prejudice) toward the idea of personal death, and experience of death and dying relatives and friends accompanied with feeling of grief, pain and loss, and creates specific emotional significance of the matter. For all these reasons, the explanation of the phenomenon of death encounters certain difficulties in the effort to obtain scientific objectivity. Things become more complicated if our interest is to understand relation between concept of death and quality of dignity. In this area of research, our opinion is that depersonalization from matter in order to achieve an objective attitude will not bring the desired outcome. To overcome this problem we will try to approach it multidisciplinary, taking into consideration various stances that philosophy, sciences and arts have toward the phenomenon of death. Although we are faced with the fact that it is impossible to mention even the most important features of this complex and ubiquitous theme, we will try to outline some elements necessary to understand the idea of dignified death and dignified dying. At the beginning we will try to create an epistemological frame for proper understanding of death in its relation to the phenomenon of life.

2. Epistemological relation of life and death

To understand notion of death in the proper way we must reconsider the way we look upon our own life. We basically look upon our existence as a static fact connected with the existence of sensible experience of our personal conscience - identical in every single moment. [1] Identity of our personality provides continuum of life in every single moment of time. If we try to understand death from such standpoint we could understand it as ceasing of existence of our personality including expiring of our sensory experience. Because all knowledge we have is directly inducted by experience, (even our own mind without apprehension of facts given through our senses is empty) in such circumstances death would present blank point and end of our personality. Such understanding of death as objectively given ceasing of all physical functions is close to that of contemporary

[1] "Just this transcendental unity of apperception, however, makes out of all possible appearances that can ever come together in one experience a connection of all of these representations in accordance with laws." Kant 1998: 233

medicine. [2] Such understanding, however, is not capable to satisfy some important requests of philosophy and especially theology. And these requests have direct influence on our future definitions of dignified death or dignified dying. If we are to understand man as a being of inherent personal dignity, we must understand him as a being obtaining special purpose. Understanding human as purposive being directly collides with his usual biological definition. Every science gains explanatory value through its capability to explain certain phenomenon by the relation of cause and effect. Reducing human only to his material capacities directly disables possibility to understand him as a somewhat different from any other physical being (animal, plant etc.) Mechanics of human organs correspond to similar mechanics in other organisms,[3] and it is scientifically proved that some animal species obtain intellectual and emotional capacities resembling human. To examine human merely as a biological being in comparison with other beings will greatly diminish our attempt to give him any special capacity to be dignified. [4] In that case, death as the cessation of existence of a human being will not differ from the cessation of existence of any other being. The understanding of Life as a mechanical process given in the cause-and-effect way of modern biology and medicine has a valid form of scientific explanation, but it is completely devoid of any possibility to introduce the capacity of dignity. The Idea of dignified death or dignified dying lies out of sphere of natural sciences, because we are not able to create scientifically relevant criterion for differentiation of human life and the life of other living beings which would allow us to ascribe human an innate capacity of dignity. To create the preconditions for such an idea, we must try to find them elsewhere. The history of philosophy perhaps could provide us with an interesting example of the dignified dying and death.

3. Apology of Socrates

Socrates, one of the most prominent philosophers in history, was sentenced to death in 399. B. C. He was on trial before the court of Athens under the accusation for asebeia (desecration of gods) and corruption of youth. Reasons for putting him under the trial were mainly political and Socrates, who was 70 in that moment, deliberately refused

[2] "The UDDA simply states: 'An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead." Sarbey 2016: 747

[3] Nikolić 1969: 22

[4] "Taylor concludes, 'Rejecting the notion of human superiority entails its positive counterpart: the doctrine of species impartiality. One who accepts that doctrine regards all living things as possessing inherent worth - the same inherent worth, since no one species has been shown to be either higher or lower than any other.'" Schmidtz 1998: 58

to humiliate himself in court according to customs of those days.[5] Judges of Athens were not professional jurists, but plain citizens, and court appearances were full of emotional and theatrical efforts to convince court in someone's innocence. One of the most prominent ways to be freed was to show regret and will for repentance. Socrates, on the contrary, did not show the slightest attempt to influence his judges emotionally and rhetorically. Against his accuser he defended his moral principles using his dialectical method without admitting for a single moment that he might be guilty of the accusation. Such a formidable and courageous defense was unusual, and Socrates was sentenced to death by a narrow margin of the judges' votes. [6] After the first sentence, Socrates could legally propose a different, somewhat milder punishment. However, instead of any punishment, Socrates proposed that he should be privileged to have a free meal in the Prytaneum, a public building, with the most deserving citizens of the City. The reason for such a proposal was Socrates' intention to emphasize his role in the life of Athens. For half a century, Socrates devoted his life and well-being to the goal of making his citizens better persons, and for that cause, he and his family lived in poverty. The court, however, took such a proposal as an insult and sentenced Socrates to death by a greater margin than before.[7] In his "Apology of Socrates" Plato quotes Socrates' speech before the Court after the final decision. Socrates first addressed those judges who condemned him, and then those judges who wanted to set him free. He spoke to them:

"You too must be of good hope as regards death, gentlemen of the jury, and keep this one truth in mind, that a good man cannot be harmed either in life or in death, and that his affairs are not neglected by the gods. What has happened to me now has not happened of itself, but it is clear to me that it was better for me to die now and to escape from trouble. That is why my divine sign[8] did not oppose me at any point. So I am certainly not angry with those who convicted me, or with my accusers. Of course that was not their purpose when they accused and convicted me, but they thought they were hurting me, and for this they deserve blame." [9]

Before his execution, Socrates was imprisoned for some time, and his friends and admirers wanted to free him by bribing the guards to let him go. Socrates resolutely rejected such a possibility. He knew that he was unjustly convicted, but he did not want to escape at any cost. He made an interesting argument for such a decision, quoted in

[5] Plato 24 de, 25 ab (references to Plato's works are given in universal notation) see, Đurić 1987: 264

[6] Đurić 1987: 265 (the number of votes was 280:221 for the sentence)

[7] Đurić 1987: 266

[8] Socrates obtained special capacity of moral sense which he called God's voice in him or Daemonion (messenger remark A. S.) See Đurić 1987: 245

[9] Plato 41 de

"Crito", Plato's dialogue that describes a conversation between Socrates and Crito, his friend, a rich merchant who wanted to free him:

"Look at it this way. If, as we were planning to run away from here, or whatever one should call it, the laws and the state came and confronted us and asked: "Tell me, Socrates, what are you intending to do? Do you not by this action you are attempting intend to destroy us, the laws, and indeed the whole city, as far as you are concerned? Or do you think it possible for a city not to be destroyed if the verdicts of its courts have no force but are nullified and set at naught by private individuals?" [10]

With these words, Socrates initiates the most important argument in understanding the relationship between death and dignity. Using the Laws as the assumed participant in the dialogue, Socrates explains the difference between mere, physical existence and existence in dignity. To have a dignified death, one must rise above basic, biological existence to eternal, metaphysical values. The importance of following laws and justice at all costs transcends basic biological existence in every possible way. At the end of the dialogue between Law and Socrates, the following conclusion is given:

"Be persuaded by us who have brought you up, Socrates. Do not value either your children or your life or anything else more than goodness, in order that when you arrive in Hades you may have all this as your defense before the rulers there. If you do this deed, you will not think it better or more just or more pious here, nor will any one of your friends, nor will it be better for you when you arrive yonder. As it is, you depart, if you depart, after being wronged not by us, the laws, but by men; but if you depart after shamefully returning wrong for wrong and mistreatment for mistreatment, after breaking your agreements and commitments with us, after mistreating those you should mistreat least—yourself, your friends, your country and us—we shall be angry with you while you are still alive, and our brothers, the laws of the underworld, will not receive you kindly, knowing that you tried to destroy us as far as you could. Do not let Crito persuade you, rather than us, to do what he says." [11]

At the end it became clear that defense of Socrates in the Court is complex, two-fold defense. In the person of Socrates, defense of justice is given also, and the unjust death sentence that ended the biological existence of Socrates paradoxically marked his just personality in history. In present moment of our inquiry it is of utmost importance to emphasize that idea of dignified death or dignified dying includes not only physical existence as such but metaphysical validation also. If the notion of death could be easily

[10] Plato 50 ab

[11] Plato 54 bcd

understood by its physiological definition, the idea of dignity requires some fundamentally different criterion. In order to understand the dimension of dignity as such, we must now try to find that criterion.

4. Criterion of Dignity

Concerning criterion enabling to differentiate right and wrong, just and unjust and allowing us to judge righteously between dignity and shame we must rely on wider social scale of values and virtues. Every human society is based on norms among which moral norms directly influence human relations in the most substantial way. Values and virtues defined through moral norms create prerequisites for implementation of other norms, including the Law.[12] Idea about what is good and what is wrong defines institutional and educational framework allowing society to setup feasible coexistence of its members. Provision of such framework allow society to judge personal deeds as good or bad, giving certain qualification of someone`s personality. Every society has moral archetypal personalities representing positive examples of goodness, generosity, wisdom, courage, but negative examples of archetypal lie, betrayal and cowardice exist also.[13] Criterion for dignifying someone`s personality usually correspond to his capability to follow positive ethical attitudes of certain society. We could proclaim someone as a dignified man according to his capability to symbolize certain moral values of his society. In that case, capacity for dignified death and dignified dying directly rely on moral capacities of personality corresponding to wider social criterion. In that case, it would be impossible to proclaim dignity by law, because that concept is based on a significantly different area, ethics.

To avoid such consequences, that could bring us to the position of totalitarianism[14] we will introduce an additional segment in the definition of dignity. Common understanding in the contemporary ideology of human rights (relying on the ideas of the 18th century Enlightenment) is that every man from the moment of his birth obtains certain innate rights including the right to be dignified. An interesting question is: "Whether such

[12] "What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny." Hart 1994: 210

[13] Đurić 1987: 49

[14] "Soviet socialist law aims at the task of overcoming the resistance of class enemies and their agents to socialism, ensuring the completion of socialist construction and the gradual transition to communism." Vyshinsky 1941: 11 (trans. A. S.)

an idea can put us in a position to dignify someone who has committed a war crime or some other unacceptable deed?"

To avoid such case we could say that we cannot dignify his personality, but we must respect his rights given by the law. That sounds plausible, because the Law, as human institution, exists prescribing to every person rights and duties including penalties for their violation. But idea of "dignifying" the Law is substantially different from dignifying someone`s personality. Problem could be seen if we use term "to dignify Law" in the narrow sense, by attaching moral category of Dignity to the Law. Law cannot acquire the quality of Dignity in the same way as a person, because it has not any personality.[15] In other word, we "obey" to the Law, and idea to "dignify" the Law is somewhat problematic. But what if criterion of Dignity, to be according to moral values could be in some way attached to the Law, making the Law subject to moral reasoning.

Nuremberg Laws of Nazi Germany, although formally applicable could be judged as morally unacceptable in the same way as Eugenic Laws in the US and ideologically instructed laws of the USSR. Paradoxically, these laws were basically enacted for moral reasons according to the dominant social values of their time.[16] From the time of Renaissance we are able to trace ideological stances that justify perversion of original basic moral values, making the positive criterion for the acquisition of dignity in murder, lies and deception.[17] This expansion of ethically acceptable acts was dependent on the rise of substantially different criteria for understanding of moral values. In the Western Europe ideological domination of Roman Catholic Church was ended with the rise of Protestant denominations proclaiming their values on the Luther`s declaration of "sola scriptura" moral authority.[18] This fundamental change allowed transfer of ultimate moral authority from the unique spiritual-political organization to a multitude of different, sometimes fundamentally opposed authorities based on promotion of possibility of individual choice of values.

[15] Albeit as we could see that Socrates in the dialogue address the Laws as persons, attaching to them inherent moral obligation.

[16] "It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." Buck v. Bell, 274 U.S. 200 (1927) (U.S. Supreme court) https://supreme.justia.com/cases/federal/us/274/200/ (app. 18. 9. 23.)

[17] "So if a leader does what it takes to win power and keep it, his methods will always be reckoned honourable and widely praised. The crowd is won over by appearances and final results. And the world is all crowd: the dissenting few find no space so long as the majority have any grounds at all for their opinions." Machiavelli 2014: 71

[18] Schaeffer 2004: 123

Such condition of mutually opposed moral authorities raised fundamentally different conditions for expressing of moral values. Capacity of the society to establish universal moral values was replaced with the state of mutual tolerance of different moral authorities under the unique legal system of the state. This fragmentation of ethical capacities (in Protestant societies) brought up the need of creating certain universal frame of values capable to establish ethical communication between different moral authorities. Because of this, numerous para-moral organizations and societies (such as Freemasonry) were founded. Their aim was to connect individuals from different moral groups by the loose and all-acceptable stances, which allowed creating of strange multipolar system of influence where moral values were more a mean than an end. Such situation brought to certain consequences:

1. Universally accepted system of values was replaced with loose corporation of different moral authorities under the assumed precondition of mutual tolerance.
2. Universal moral authority of the society as the whole was suspended to the chosen moral authority, transferring capacity of establishing moral values from the society to the individual.
3. In such conditions criteria of establishing moral values were left mostly to the individual choice under the precondition of tolerance.
4. Legal authorities of State in the absence of the universal moral authority became source of moral values, bringing influence of the ruling political ideology in direct connection with existence of ethical values.

In such circumstances concept of dignity based on the acceptance of universal moral values, suffered fundamental change of perception. Criteria of its establishing with the dissolution of universal moral authority of the society were transferred into the legal framework reducing it in the moral capacity of the individual choice of values. Dignity as the capacity to embody universal moral values has been reduced to the capacity to choose certain values as individually acceptable. This fundamentally reduced concept of dignity from the ethics to the law giving it meaning of formal tolerance of any choice concerning individual values and aims under the circumstances of not violating someone`s other values and aims. [19] This ability to choose one's own values and make one's own choices forms the basis of inherent human dignity. The universal framework of moral values has been broken and only the legal framework remains allowing the individual to make moral decisions as he wishes. A similar reduction in moral capacity exists in some

[19] Mill 1963: 199

individualistic traditional cultures and has negative consequences for attitudes toward elders. [20] At the end we can conclude that in modern Western societies, the concept of a dignified death is the concept of dying as one wishes to die, and only criterion for dignified death can be reduced to the personal decision. In that case, all we need to do to establish a criterion for a dignified death is to create a legal framework for the circumstances that allow everyone to make a deliberate and free personal decision about how they want to die. [21]

5. Dignity of Human rights ideology

One of the most prominent ways of establishing moral values through legal system is contemporary ideology of Human rights. Originating after the WW2 as the result of mutual agreement between the sides of the victorious Coalition, Universal declaration of Human rights was proclaimed by the United Nations General Assembly in Paris on 10 December 1948.[22] What is most interesting in the case of Universal declaration "inherent dignity" is first term to be mentioned. What kind of "inherent dignity" Universal declaration of Human rights imply? Of 30 articles of the Declaration 18 directly refer to the rights and freedoms of exercising Free Will.[23] Thus we can conclude that Declaration of Human rights rely on "inherent dignity" as the capacity to make individual choices without any excessive restraints. The only limitation prescribed in the use of Free Will is to restrain the willful violation of another's Free Will.[24] This concept of Freedom is defined by 19th century philosopher John Stewart Mill, but is traditionally based on the Protestant "sola scriptura" of Lutheran theology.

[20] Barker argues that this indirect geronticide must be connected to a wider constellation of cultural components. He documents a Polynesian culture in which little empathy is displayed for the needs of others. This includes a notion of just desserts - those elderly who had seemed excessively materialistic, individualistic and selfish when young were merely reaping the consequences. Further, emigration had depleted the resources available to any one extended family. Old people were not on the consequent list of domestic priorities. The structural context furnished the seedbed within which geronticidal attitudes could flourish. Brogden 2001: 66

[21] It is interesting that Switzerland based non-profit organization for legal euthanasia bear the name "Dignitas", Latin name for dignity. http://www.dignitas.ch/?lang=en (acc 4.9.23.)

[22] https://www.un.org/en/about-us/universal-declaration-of-human-rights (acc. 3. 9. 2023)

[23] Albeit all articles rely on this capacity articles 1,3,4,13,14,15,16,17,18,19,20,21,22,23,24,25,27,29 directly lean on the exercising individual freedom of choice.

[24] "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Article 29

We can conclude that from the moment of introducing of Human rights in the International community concept of "inherent dignity" was recognized as the fundamental concept. In the same time we can understand that concept of "inherent dignity" was defined fully according to the Protestant moral paradigm. Tracing the historical development of the Human rights we can observe rapid increase of opportunities in the field of personal choice. Possibilities unimaginable at the time of the Universal Declaration such as gender change, creative identities and sexual diversity are becoming a common state of affairs. All these changes however are based on the presumption that (technically) unrestrained expression of choice in establishing of personal identity represents undeniable and desirable moral value. Declaration of Human rights is not juridical document albeit it has declarative juridical form. Declaration of Human rights represents tacit introduction of undisputable moral values into International political relations. These moral values declare unrestrained expression of individual Will under any circumstances (under the condition of not violating the law). Consequently these values downgrade the role of socially acceptable moral values in favor of free expression of personal Will. Two substantially opposed moral criteria concerning functioning of the community, prevalence of personal choice over social values, and dominance of social values in the expressions of personal will are colliding. The development of the concept of Human rights makes the principle of unrestrained individuality mandatory and indisputable.[25] Even in some liberal countries, such as Belgium, this can lead to a violent response to the imposition of unacceptable values on that community.[26] The dominant discourse of the contemporary international community makes human rights a significant political lever by creating decisions directly dependent on the fulfillment of proclaimed values. National sovereignty of certain States could be suspended or harsh political measures introduced in the name of Human rights.[27] In such conditions Human rights expansionism gains characteristics of full-scale ideology pretending to define all elements of social life: education, public health, justice, security etc. Like in the case of Communist ideology, one of the most important collateral consequences of forcible introduction of Human rights into certain society is rapid dissolution of previously existing social and moral values. For the same accusation Socrates was sentenced two millennia before.

[25] UNESCO`s *International technical guidance on sexuality education*, recognize as learning objective for the children 9-12 years old, that "beliefs about gender norms are created by societies (attitudinal)" and insisting that "The way that individuals think of themselves, or describe themselves to others in terms of their gender, is unique to them and should be respected" ITGSE 2018: 50

[26] "Arson attacks at schools in Belgium are believed to be connected to a controversial sex education program" https://apnews.com/article/belgium-schools-arson-sexual-education-0c7dcbd11587f28c6a12c92388e09236 (app 18. 9. 23.)

[27] Amstuc 2008: 53

6. Socrates and Human rights

What would happen to Socrates in the ruling time of Human rights? Under the criteria mentioned above we can conclude that Socrates under present conditions would inevitably die in vain. Respect for universal moral values was main reason for his decision to stay in the prison and die. But by present moral criteria his death does not have any special quality of dignity in comparison with any other death chosen deliberately. Eternal values somehow expired. Contemporary citizen of Western societies does not have the chance to die for universal moral values, because they do not exist.[28] Universal moral values are universal because they apply to all men of all times without any limitation. Authority capable to establish such values could not be Will of the individual human but some eternal authority capable to establish values transcending mere individual existence. We have just concluded that Free Will of the individual became unique source of moral values. Instead of eternal validity of moral authority we have general applicability of legal authority. But legality and morality are fundamentally different concepts, and intertwining them could not bring any consistency. In such circumstances, legality must provide some assumptions for the validity of moral values, which inevitably turns out to be inconsistent.

Socrates was condemned legally, but legality of this act proved unjustifiable in the moral sense of the word. This sentence was not just, and Socrates` fellow citizens came soon in regret for his death.[29] That was possible only because they became aware that Socrates somehow proved personal moral excellence in acceptance of the verdict and the act of dying. The feeling of the citizens of Athens that the sentence of their court was unjust was based on the fact - that they shared with Socrates the same universal moral values and that his demeanor in court was the immediate embodiment of the universal moral paradigm. Such universally accepted stance of the society enabled dignifying of Socrates` death and dying. For our understanding of the proper relation of death and dying on one and dignity on the other side we must introduce universal moral values of the society as the unavoidable fact. Legally established individual dignity is “contradictio in adjecto”, because dignity is solely ethical quality. Dignity can be obtained only through

[28] Stevanović 2017: 107

[29] “There are reports that the Athenians soon repented of their deed. As a sign of mourning, they closed gymnasiums and other schools, sentenced Meletus to death, exiled the other two prosecutors, and erected a bronze statue of Socrates, the work of Lysippus. And when Euripides' *Palamedes* was shown soon, all the spectators remembered the similar fate of Socrates, and when the chorus sang: “You killed of the Hellenes, the most excellent and wisest, who did no harm to anyone - the nightingale of the Muses” the whole audience weeped.” (trans. A. S.) (Đurić 1987 : 268)

the capacity of the individual to stand according universally accepted moral values of the society and this fact is well anthropologically proved.

Process of aging, dying and death in all traditional societies of the world is connected with certain customs enabling the person to transcend mere physical existence.[30] All of these customs presupposes metaphysical frame for establishing relation of personality toward eternity. The moral values of a particular society create an essential criterion for the metaphysical validation of the individual. Forcible promoting of the individual free will as the sole criterion of the moral values, as in the case of the Human rights ideology, disables even the possibility of obtaining dignity as universally accepted capacity. We can legally promote dignity only through indirect legal measures to strengthen the moral community capable of promoting generally accepted moral values for its members. That means that we should not legally introduce measures potentially threatening for accepted public moral unless we want to deliberately create tacit prerequisites for the social anomia. Forcible introduction of Human rights ideology meaning of "dignity" as personal capacity to create his own "eternal" values in legal system will certainly diminish any possibilities for introducing dignity as moral quality. Dignity of Socrates` death was solely based on the moral capacity of his society. In the world of the Human rights ideology oppressing any capacity for establishing of universal moral values, he would certainly die in vain. Ethics, as in the case of communist or Nazi ideology cannot be proclaimed by the law. In order to promote a dignified death, first we must try to promote the morality, allowing us to die for the eternal values.[31]

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[30] "The Kikuyu attached great importance to age cohorts as the basis for social organization. There were close links between grandparents and grandchildren, and symbolically they belonged to the same age group… A council of old women enforced moral rules over the young, demonstrating magical powers in that process, and punishing when necessary, a council possessed of magic powers. The Kikuyu had a saying, 'An old goat does not spit without a reason' and 'Old people do not tell lies'. The old women were much respected when they had no teeth left, were thought to be highly intelligent, and their bodies were buried ceremoniously instead of being left to the hyenas." Brogden 2001: 71

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Yang Chao*

THE CRIMINAL POLICY OF "LENIENCY FOR THE ELDERLY" IN CHINA

China has entered an aging society, although the proportion of crimes committed by the elderly in the total number of crimes is low, but it is increasing year by year. Crime committed by the elderly is the result of both individual factors and social factors. For the elderly crime, China has taken a clearly criminal policy that is lighter or mitigated punishment, limit the application of the death penalty, lenient application of probation and other provisions, also the lenient punishment of the criminal policy is reflected in the legislative, judicial level.

Keywords: *Elderly; Crime; Criminal Policy; Leniency; Mitigating Punishment; Probation*

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Introduction

According to the statistics, for China now, there are 264 million people aged 60 and above, accounting for 18.7% of the total population, of whom 190 million are aged 65 and above, accounting for 13.5% of the total population[1], it is means that China will enter a moderately aging society. As the amount of elderly people getting bigger, China also put attention to the governance of elderly people commit crime, with the criminal policy of leniency and severity carry out, the judicial organs also set the matching and specific regulations for implementation of criminal police for the elderly people, also The Supreme People's Court issued the Opinions on Providing Judicial Services and Protection for the Implementation of the National Strategy of Actively Coping with Population Aging in April 2022. By these laws and regulations in order to achieve the goal of combatting crime and provide special human right protection for elderly people.

1. The Conception and Scope of Elderly People in the Law System of China

1.1. Constitution

In 2004, the Constitution of China was amended to add Article 33, paragraph 3, "The State respects and safeguards human rights," and the legal protection of human rights was given greater attention by the State and the people. By this provision the Constitution provide the general principle for human right protection, including the elderly people. Article 45 of Constitution sets that "Citizens of the People's Republic of China in old age, illness or loss of working capacity, have the right to material assistance from the state and society. The State develops the social insurance, social assistance and medical and health care necessary for citizens to enjoy these rights." The right to a life of dignity is a basic human right. Human rights are those rights that belong to all humans from the moment they are born, regardless of their age, citizenship, nationality, race, ethnicity, language, sex, sexual orientation, or ability (Radaković,2020:566). Although, the Constitution of China do not set the age limits for elderly people. Instead, use the general word of "in old age" for represents all the elderly people that the law stipulates the special protection as the human right protection.

[1] http://www.stats.gov.cn/tjsj/tjgb/rkpcgb/qgrkpcgb/202106/t20210628_1818824.html Accessed on: 5.22.2023.

1.2. Criminal Law

The Criminal Law of China sets the age of 75 as the starting point for leniency for crimes committed by the elderly. According to Amendment (VIII) to the Criminal Law, "A person who has reached the age of seventy-five years and has committed a crime intentionally may be punished less severely or mitigated; a person who has committed a crime negligently shall be punished less severely or mitigated." "The death penalty shall not apply to a person who has reached the age of seventy-five at the time of trial, except in the case of death by particularly cruel.

By the Amendment (VIII) of the Criminal Law, elderly people have the clearly age threshold in the criminal field, when the suspect or criminal reached the age of 75, it has the forceable legal effect that shall exclude application of death penalty, expect to some extreme case. And depends on the intentional or negligently crime, the elderly people shall have the right to consider the mitigated sentencing.

1.3. Special Law for Protection Elderly People

Law of the People's Republic of China on the Protection of the Rights and Interests of the Elderly, implemented in 1996 and amended in 2013. Article 2 of the Law sets that" The elderly referred to in this law refers to citizens over 60 years of age. "Article 3 of the Law states: "The State shall protect the rights and interests of the elderly in accordance with the law. The elderly has the right to material assistance from the state and society, the right to social services and preferential treatment, and the right to participate in social development and share the fruits of development. Prohibit discrimination, humiliation, abuse or abandonment of the elderly."

As the specialized law provide the protection for elderly people, the law on the Protection of the Rights and Interests of the Elderly constructs the basic legal basis of interests of elderly people. Also, this law is the first mention of preferential treatment for the elderly at the national level in China, the text is considered to be the starting point of the national policy on preferential treatment for the elderly.

On March 5 of 2022, the Supreme People's Court, in conjunction with the All-China Women's Federation, the Ministry of Education, the Ministry of Public Security and other seven departments, jointly issued the Opinions on Strengthening the Implementation of the Personal Safety Protection Order System, specifying that the work of preventing and stopping domestic violence should be further improved, and the legitimate rights and interests of family members, especially women, the elderly and the disabled,

should be protected in accordance with the law[2]. Cases in which elderly people who suffer from domestic violence apply for personal safety protection orders. Clearly the elderly has independent control over their own property, children may not be "for the good of the parents" and other reasons to violate the property rights of the elderly, not to abuse, threats, beatings, restrictions on personal freedom and other acts of domestic violence against the elderly.

In brief, the scope for elderly people have different definition of age in diverse laws in China. Defining old on certain characteristics, can be very difficult and in some instances discriminating. But if a specification is added in the definition by clarifying that old means the end of the life-cycle, then it is clear (Tilovska-Kechedji 2022:441). Therefore, for the legislation do need to set the clearly age for definition of elderly people. The Law on the Protection of the Rights and Interests of the Elderly defines an elderly person as a person who has reached the age of 60 or older. While in the criminal law and criminal procedural law, the definition for elderly people is older than the special law, that may reflect the legislator hold the cautious attitude in criminal filed. For the people between 60-75 ages, considered from the fiscal perspective, they may not experience dramatic decline of fiscal capacity, still have the relative capacity to commit crimes as intentional, therefore, the criminal policy to the elderly people shall be more meticulous. And as the age of 75, considered from the preventive prospect, above the age 75 general has less capacity to commit crime again, so excluded the people above 75 to death penalty shall considered a special protection to elderly people.

2. Special Protection for Ederly People in Criminal Filed

2.1. Criminal Law

As above introduction, Amendment to the Criminal Law (VIII) emphasizes the leniency of punishment for crimes committed by the elderly at the level of substantive law, which has filled the gap in China's criminal law system for crimes committed by the elderly. Also, in the Criminal Law of China, there are some provisions particular for protects elderly people, in the field of sentencing, Article 17(1) states: "If a person who has reached the age of seventy-five commits a crime intentionally, the punishment may be mitigated or reduced; if the crime is committed negligently, the punishment shall be mitigated or reduced." Article 72 states: "For criminals sentenced to detention or fixed-term imprisonment of less than three years, while meeting the requirements of the crime If the circumstances are minor, there is repentance, there is no danger of recidivism, and there

[2] https://www.court.gov.cn/zixun-xiangqing-348611.html, Accessed on: 10.5.2023.

is no significant adverse impact on the community in which they live, they may be sentenced to probation, and those under the age of eighteen, pregnant women and those who have reached the age of seventy-five shall be sentenced to probation."

In particular, refer to the death penalty, the legislator also made special leniency for elderly people, as Article 49, paragraph 2 of the Criminal Law states: "The death penalty shall not be applied to a person who has reached the age of seventy-five years at the time of trial, except in the case of death by particularly cruel means."

As we can see that, Criminal law of China provides for a system of exemption from the death penalty based on the criterion of age. In other words, if an elderly person is over 75 years of age at the time of trial, he or she will not be punished by means of deprivation of life if the negative conditions are met. This system of exemption from the death penalty is a system of exemption from the death penalty for the population, which is applied to those who meet certain conditions. The determination of age in the Criminal Law also limits the time point, i.e. "the time of trial". "The time of trial" obviously expanded the scope of elderly people who could applied the exemption of death penalty, not just limits to the time of commit crime or the time arrest. It is shows that the legislative purpose of this article is to provide more legal protection to the elderly population as humanitarian.

Besides the article of criminal law, the judicial interpretation also has the legal effects in China, therefore, we can see the relative judicial interpretation for protect elderly people as follows. The Provisions on the Specific Application of Law in Handling Cases of Commutation of Sentence and Parole, which were adopted by the Judicial Committee of the Supreme People's Court in September 2016 and implemented on January 1, 2017, contain a number of special provisions on the application of commutation of sentence and parole for elderly offenders. Article 20(1) stipulates that when commuting the sentence of an elderly offender, the main consideration shall be the actual performance of the offender in repentance. Article 26(1)(4) stipulates that the application of parole to an elderly offender who has difficulty in taking care of himself or herself and who has a real prospect of living after parole may be treated with leniency in accordance with the law. Article 31 stipulates that if an offender is sick, has reached the age of 80, or has difficulty in taking care of himself or herself and is not in danger of committing another crime, he or she shall be given priority in applying parole if he or she meets the conditions for sentence reduction or parole; if he or she does not meet the conditions for parole, he or she shall be treated leniently with reference to the relevant provisions of Article 20. It can be seen that our criminal law has a special bias in the application of sentence reduction and parole to elderly offenders.

2.2. Criminal Procedural Law

In the criminal procedural law of China also has the special article for provide special protection on the basic right of elderly people in criminal process.

From the provisions of Article 81 of the Criminal Procedure Law on the conditions of arrest, social danger is one of the key factors in the application of arrest, the application of arrest measures for the elderly should strictly grasp the "necessary to arrest" arrest conditions, for some occasional offenders, first-time offenders or socially less dangerous cases, are all belongs to the scope of application of non-custodial coercive measures. This provision as the general principle in criminal procedural law for provide special protection for the elderly people.

In 2006, The Opinions on Speedy Handling of Minor Criminal Cases in accordance with the Law, Article 4 stipulates that "cases of crimes committed by elderly persons over 70 years of age shall be handled quickly. Next year, the Supreme People's Procuratorate issued the "Quality Standards for Handling Non-Prosecution Cases by People's Procuratorates (for Trial Implementation)", which stipulates that "for elderly criminal suspects, if the subjective evil is small, the social harm is insignificant, and the circumstances of the crime are minor and do not require the imposition of a penalty or exemption from penalty according to the criminal law, the decision not to prosecute is made in accordance with the law". The initiative to apply the relative non-prosecution of the elderly crime conditions for the statutory non-prosecution, relaxed the conditions for the application of statutory non-prosecution of elderly crime. Article 8 stipulates that "if an elderly person commits a crime, the conditions for prosecution and non-prosecution shall be correctly grasped, and non-prosecution shall be applied in accordance with the law".

In addition, in 2010, issued by the Supreme People's Court, the Opinions on Implementing the Criminal Policy of Leniency and Strictness, articles 21 and 34 of also stipulate that "when an elderly person commits a crime, the circumstances, purpose, motive and special characteristics of the crime shall be fully considered, and the punishment shall be lenient as appropriate".

The relevant judicial interpretation of the Supreme People's Procuratorate include the whole phrases of criminal procedural on arrest, non-prosecution, sentencing recommendations, speed of processing for elderly, and trial stages of litigation protection for the elderly which shows the special care for elderly suspects and defendants, as well as constructed the special system and the protection concept. Throughout the judicial interpretations, it is easy to find that the spirit of elderly protection. The judicial authorities' efforts to take full care of the special needs of the elderly are demonstrated. The litigation protection for the elderly has a certain comprehensiveness.

But it is deserving to note that in the criminal procedure law, the criteria of elderly people to applied the Speedy Handling of Minor Criminal Case is 70age, neither the same age of limits for elderly people in criminal law nor in the specialized law. We may conclude that the purpose of judicial explanation is to expand the scope of application speedy procedural to the minor cases, in order to save the judicial resource. Meanwhile, it is also a regrettable point that the criteria of elderly people are not harmonious in different laws.

2.3. Criminal Policy

To the point of criminal policy, in 2005 the National Political and Legal Work Conference first put forward the criminal policy of leniency and severity, which means that criminal disposition should, under the premise of adhering to the principle of legal guilt and punishment, implement different treatment for different circumstances of crimes, pay attention to the organic unity of leniency and severity, so that leniency and severity is the major criminal policy in China now.

To the "Amendment to the Criminal Law (VIII)" and the Supreme Prosecutor, the Supreme Court issued successive judicial interpretation of the implementation of the criminal policy of leniency and severity are provided for "leniency in the case of crimes committed by the elderly," such as the Supreme Court "on the implementation of the criminal policy of leniency and severity," Article 21 of the Supreme Court's Opinions on Implementing the Criminal Policy of Leniency and Compassion stipulates that "in the case of crimes committed by the elderly, the motive, purpose, circumstances, consequences and repentance of the crime shall be fully considered, and the punishment shall be lenient as appropriate, taking into account their personal danger and the possibility of recidivism.

In the substantive disposition, the accurate application of leniency and severity of criminal policy. On the one hand, "when strict is strict". For the subjective malice, serious crimes or a number of previous criminal suspects, the full implementation of the arrest, prosecution and other procuratorial functions, severe punishment, strict enforcement; on the other hand, "the leniency is lenient". Adhere to the principle of less arrest, prudent prosecution, less detention, according to the law, the use of good not arrested, not prosecuted, exempted from criminal punishment, recommended probation and other procuratorial functions, the timely review of the necessity of detention. In the process of criminal justice, discretionary lenient punishment for the elderly pursued can not only help them return to the society and reduce the possibility of committing crimes again, but also protect the human rights of the elderly pursued and manifest the leniency of the punishment. Furthermore, by application of speedy procedures, the elderly plead guilty to

minor crimes, from the fast and simple procedures, the elderly defendants or suspects will be enjoying special protection. No grounds to deny, the principle of equality is the fundamental principle of law and criminal law, on the basis of freedom and equality, based on the different capacities of the members of society to realize their rights regulating the distribution of rights so as to maximize the protection of disadvantaged members of society. For consider elderly physiological and psychological characteristics, take relatively lenient implementation measures are indeed the comprehensive represents implementation of the concept of social development and special protection for elderly people.

2.4. Community Correction

The Community Corrections Law of the People's Republic of China was adopted on December 28, 2019. China's community corrections have been piloted since 2003 and have taken 16 years to complete codification. According to the Community Correction Law, a pattern of the Judicial Bureau - Community Correction Committee - Community Correction Agency - Judicial Office is formed to carry out all aspects of community correction.

Then in the community correction, the elderly community sentenced persons should also consider their characteristics, pay attention to protect their rights. Focus on the medical problems of this part of the population. Older community prisoners generally have more diseases, in the support also pay attention to care and help them to solve the difficulties and problems in the medical care. The issue of medical treatment for community prisoners is also an important issue involving the right to life and health. The Opinions on Organizing Social Forces to Participate in Community Corrections issued by the Ministry of Justice, the Central Office of Comprehensive Governance, the Ministry of Education, the Ministry of Civil Affairs, the Ministry of Finance, and the Ministry of Human Resources and Social Security in 2014 clearly stipulates that “community service prisoners may implement basic medical insurance and other relevant medical security policies and enjoy corresponding treatment in accordance with regulations.”

Non-discrimination goes hand in hand with human dignity. An important characteristic of the prohibition of discrimination as a human right is that this right does not have an independent existence, as is generally the case with all other rights (Simović A, M, Simović M, 2020:382). The criminal law system does not include the issue of placement of elderly offenders after their release from prison. In order to ensure the right to survival of elderly offenders after their release from prison, it is necessary for us to consider reasonable social placement for elderly people after their release from prison.

Firstly, considering the older offenders generally have the characteristics of being older, physically weaker, and generally committing less serious crimes, which are

generally said to be more suitable for community corrections. Therefore, in China now the issue of community correction for elderly offenders pay attention to the protection of the rights of elderly offenders in community correction, as well as to receive corresponding attention. Secondly, due to the special physical and psychological structure of the elderly, society tends to give special care to the elderly group, For individual elderly people, everyone is equal before the law, and when elderly people commit crimes, the criminal law evaluation of their criminal behavior is the same, in terms of sentencing and execution of punishment, they should be given, however, the corresponding leniency should be given.

3.The Current Status of Special Protection for Elderly People in Criminal Field

3.1. Statistic in General

According to the statistic of Supreme court of China, in 2022, the total number of cases involving the elderly that were concluded by people's courts at all levels nationwide and whose adjudication documents had been made public was 325,900, of which 323,800 were civil cases, accounting for 99.34%; 2,128 were criminal cases, accounting for 0.65%; and 38 were administrative cases, accounting for 0.01%[3]. By statistic, we can see that the elderly people who commit crime still a little proportion of the cases involved with elderly people. Although elderly people commit crime cannot be seem as the major problem in China now, considering the characteristics of elderly people, it is still deserving to put more attention with the governance of elderly people commit crime, not only use the punishment as the Unico tool to handle the crimes or cases involved with elderly people, but also with humanitarian care and special assistance.

3.2. The Practices of the City of Shanghai as an Example

Shanghai is one of the developed city in China, also with a high degree of aging, facing the aging society and cases involved elderly people, Shanghai procuratorial authorities began to explore the specialization of elderly crime cases since 2009, which has formed a "Shanghai model" of "arrest, prosecution, supervision, prevention and research" in the field of judicial protection for the elderly, and has formed a series of effective working mechanisms in judicial protection, combat and punishment, crime prevention and comprehensive management.

[3] http://news.cnr.cn/dj/20230317/t20230317_526186068.shtml, Accessed on: 25.5.2023.

In the year of 2021, after years of practices and explore in the issues of elderly people committed crimes, Shanghai Procuratorate released a white paper on "Shanghai Procuratorate Criminal Justice Protection for the Elderly". The white paper shows that crimes committed by the elderly in Shanghai are mainly concentrated in cases involving property invasion. At the same time, due to weakened self-control, the elderly is prone to violent crimes with minor circumstances due to family disputes or neighborhood conflicts[4]. According to these characteristics, while punishing crimes committed by the elderly according to the law, the Shanghai procuratorial authorities actively implement the criminal policy of leniency and severity in cases of crimes committed by the elderly with minor circumstances, confession and repentance, and little social harm, and strive to create conditions for repairing social relations and maintaining social harmony and stability.

Since January 2019, the city's procuratorial authorities have handled 3,116 cases of crimes against the elderly submitted by the public security organs for approval of arrest, 3,896 people, 5,106 cases were referred for review and prosecution, 797 cases and 923 people were not approved for arrest and 761 cases and 818 people were not prosecuted, the rates of no arrest and no prosecution were 23.9% and 12.7% respectively[5].

Meanwhile, inside the city of Shanghai, different district also issues their own mechanism and regulations to handle cases with elderly people, in order to achieve the purpose of keep the balance between combat crime and provide special protection for elderly people. From 2016 to 2018, Huangpu District Procuratorate in Shanghai received 247 cases of arrest and prosecution of various crimes against the elderly. Among them, 51 cases and 73 persons were accepted for arrest and prosecution in 2016; 83 cases and 103 persons were accepted in 2017; 113 cases and 163 persons were accepted in 2018(王喆骅,袁雪娣,姜一辉, 2019:287).

In April 2017, the Shanghai Pudong New Area Procuratorate issued the "Supporting Mechanism for Handling Criminal Cases of the Elderly (for Trial Implementation)", which "replicates" some of the special judicial protection concepts in handling cases involving minors into the procuratorial practice of handling cases involving minor crimes against the elderly, and made non-prosecution decisions in two cases of crimes committed by the elderly in accordance with the law. The decision not to prosecute was

[4] 林中明 潘志凡(2021, October 27th) 检察日报, 老年人犯罪集中于涉侵财类案件, 上海：发布老年人刑事司法保护白皮书, p.2.

[5] 林中明, 潘志凡(2021, October 27th) 检察日报, 老年人犯罪集中于涉侵财类案件, 上海：发布老年人刑事司法保护白皮书, p.2.

made in two cases of crimes committed by elderly people[6]. Develop "Shanghai Pudong New Area People's Procuratorate's working mechanism for handling criminal cases involving the elderly", summarizing and refining the scope of application of the case, special mechanism, timely intervention, fast processing, detention review, legal aid, and return visit mechanism. Explore and improve the relative non-prosecution applicable mechanism reform, and public security organs signed the relevant work mechanism, and in practice to explore and improve.

The Shanghai Hongkou District Procuratorate explored the establishment of a special judicial protection system for the elderly, set up a case processing center for the elderly, dedicated to handling cases of the elderly, tried to carry out some prosecutorial extension work, and actively explored criminal policies that meet the characteristics of crimes committed by the elderly.

Extending to the penalty enforcement stage, the Bureau of Justice of Jing'an district with the relative authorizes carried out "Implementation Opinions on Strengthening the Work of Elderly Community Correction Subjects in Jing'an District", taking advantage of the system of procuratorial integration to build a long-term collaborative mechanism for community correction work with elderly offenders. With this implementation, it is helpful to realize the positive effects of criminal reconciliation while protecting the special group of elderly people in a more reasonable manner.

Conclusion

We can conclude that the right to human dignity is the right of every person as a human being. Young and old, man and woman, physically and psychologically health or ill, prisoner, detainee and upstanding member of society, domestic citizens or foreigner, each of them has right to human dignity (Ivanović 2021:671). As for the right of human dignity of elderly people, it is not only stipulating in the laws of China as the general principle of respect the human dignity, but also set special law and articles to provide the specific law system to protect the elderly people as the truthy sprit of principle of equity, which provide special protect for minor groups. In substantive criminal law, the criminal law of China provides for mitigated or reduced penalties for crimes committed by the elderly, restricts the application of the death penalty, and the conditions should be applied to probation. By criminal procedure law and relative judicial interpretation, the review and prosecution stage and the trial review stage can reflect the leniency of the judiciary in dealing with crimes committed by the elderly. As the ability of the elderly to

[6] http://www.xinhuanet.com/local/2017-05/05/c_1120923628.htm, Accessed on: 16.5.2023.

recognize and control their own behavior decreases, their ability to be criminally responsible decreases as well.

The leniency of punishment as the implements of "leniency and Strict" Criminal Policy for crimes committed by the elderly reflects the principle of compatibility with crime, and is also a reflection of humanitarian concern and special human rights protection for the elderly.

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Marina Matić Bošković[*]

ADDRESSING ACCESS TO JUSTICE FOR ELDERLY PEOPLE[**]

The number of persons aged 60 years or over is projected to grow by 38 percent in period between 2019 and 2030, globally outnumbering youth. Recognizing that trend, attention needs to be paid to the specific challenges affecting older persons, including in the field of access to justice. Considering that violence, abuse and neglect of elderly persons are the most hidden and unreported violations of human rights, it is important to ensure mechanisms to facilitate older people access to justice. Scope of the problem is significant, since according to the World Health Organization it is estimated that 1 in 6 people 60 years and older experienced some form of abuse in community settings during the past year.[1] Access to justice as a basic principle of the rule of law guarantee people to exercise their rights, hold perpetrators and decision-makers accountable. However, the older persons often face multiple barriers in accessing justice. The author analysis the challenges in access to justice for elderly persons and grounds for their discrimination in the judicial system, specifically invisibility of older persons in the justice system and lack of awareness of their legal rights and on existing legal mechanisms. Furthermore, the article assesses issues of affordability, excessive delays and impact of digitalization on access to justice for elderly persons. The author elaborates practice of the European Court of Human Rights and EU Court of Justice and their interpretation of the violation of right to a fair trial.

Keywords: *elderly people, access to justice, discrimination, human rights, judicial protection*

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[1] See: https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people

1. Introduction

Access to justice is fundamental principle assessed in legal theory and recognized in both international and European standards. These standards aim to ensure that individuals have effective and equal access to justice systems and can seek redress for violation of their rights (Francioni, 2007: 4). Concept of effectiveness is crucial element of access to justice, since it should ensure that access to justice is unrelated to differences of parties (Cappelletti, Garth, 1978: 186).

In legal theory, access to justice goes beyond mare physical access to courts or legal institutions and encompasses broader dimensions of justice, fairness, and equality (Schetzer, Mullins, Buonamano, 2002: 5).

Access to justice has been analysed from various perspectives, including procedural justice, substantive justice and social justice. Procedural justice emphasizes fair and transparent procedures in legal processes, ensuring that individuals have the opportunity to present their case, be heard, and receive a fair and impartial decision. this includes aspects such as legal representation, legal aid and the availability of alternative dispute resolution mechanisms (Klaming, Giesen, 2008: 9).

Substantive justice focuses on the outcome of legal processes and whether they lead to fair and just results. It involves analysing laws, regulations, and legal principles to assess their fairness and impact on different individual groups. Substantive justice seeks to address systemic inequalities and promote equal treatment under the law (Dylag, 2023: p. 4).

Social justice recognizes that access to justice is often shaped by broader social and economic factors (Crawford, Maldonado, 2020: 7). It takes into account socioeconomic disparities, power imbalances, and structural barriers that may hinder individuals' ability to seek justice. Social justice perspectives aim to address these inequalities and promote inclusive legal systems (Barendrecht, M. *et al*, 2012: 17).

The concept of access to justice is also explored in relation to human rights, through examining how legal systems and institutions can uphold and protect fundamental rights (Matić Bošković, 2022: 140). However, prior to the entry into force of the UN Convention on the Rights of Persons with Disabilities, there were no specific articulation of a general right to access to justice in the UN human rights treaty (Flynn, 2015: 21). Therefore, the predecessors to a specific right to access to justice included different elements such as the role of courts, legal aid services, legal empowerment, and public interest litigation in ensuring access to justice for marginalized or disadvantaged groups (Abel, 2010: 299).

At the international level, the Universal Declaration of Human Rights[2] proclaims that everyone has the right to an effective remedy by competent national tribunals for acts violating their fundamental rights.[3] Additionally, the International Covenant on Civil and Political Rights[4] recognises the right to a fair and public hearing by a competent, independent, and impartial tribunal.[5]

Furthermore, access to justice is closely linked to the UN Sustainable Development Goals (SDGs). Access to justice is recognized as a crucial element in achieving these goals and advancing sustainable development.[6] It is considered a key enabler for the realization of SDGs, due to a vital role in poverty reduction, gender equality, good governance, and the protection of human rights. Without access to justice, individuals may face barriers in obtaining remedies for violations of their rights, addressing discrimination, or seeking redress for social and economic injustices.

Within the European context, the European Convention on Human Rights[7] guarantees the right to a fair trial and access to court for the determination of civil rights and obligations.[8] The European Court of Human Rights serves as the judicial body responsible for interpreting and enforcing these rights.

Furthermore, the European Union has also established legal frameworks to ensure access to justice. Access to justice is a fundamental principle within the EU (Flynn, Lawson, 2013: 21). The EU has established legal frameworks and mechanisms to promote and safeguard access to justice across its member states. The EU Charter of Fundamental Rights[9] guarantees the right to an effective remedy and a fair trial,[10] emphasizing the importance of access to justice in upholding fundamental rights within the EU. This ensures that individuals can bring their grievances before the courts and have their rights protected. The EU promotes legal aid and support services to enhance access to justice for individuals who may face barriers in seeking legal remedies. This includes the provision of legal aid for those who cannot afford legal representation and the development of legal information and assistance programs (Matić Bošković, 2020: 32).

[2] General Assembly Resolution 217 A, 10 December 1948.

[3] Article 8.

[4] General Assembly Resolution 2200 A, 16 December 1966.

[5] Article 14.

[6] Sustainable Development Goal 16. See: OECD, 2019, Governance as an SDG Accelerator, Country Experience and Tools, pp. 89-98.

[7] European Treaty Series - No. 5, Rome, 4 November 1950.

[8] Article 6.

[9] Charter of Fundamental Rights of the European Union, 2000/C 364/01, Official Journal of the European Communities C 364/1, 18.12.2000.

[10] Article 47.

These international and European standards provide a foundation for ensuring that individuals have the opportunity to seek justice, enforce their rights, and obtain redress when their rights are violated. They underscore the significance of accessible and impartial judicial systems in promoting the rule of law and protecting human rights (Matić Bošković, 2021: 33).

Access to justice for older people is a crucial aspect of promoting their rights, ensuring their well-being, and addressing any legal issues they may encounter. Older individual, like any other segment of society, should have equal and effective access to justice systems.

The twentieth century saw a revolution in average life expectancy, which resulted in a significant global phenomenon of the aging population (Kanasi, Ayilavarapu, Jones, 2016: 14). This demographic trend referring to the increasing proportion of older adults within the total population worldwide. The number of persons over 60 will increase from about 600 million in 2000 to almost 2 billion in 2050.[11] The increase will be greatest and most rapid in developing countries where is the older population is expected to quadruple during the next 50 years.

The access to justice could present challenge for aging population due to consideration in different aspects from legal awareness to physical accessibility and legal aid. The protection of fundamental rights includes an inclusive society for all ages in which elderly people participate fully on the basis of equality.

2. Access to justice for elderly people in international and European instruments

The international standards and frameworks do not specifically address access to justice for older persons. However, the principles do highlight the importance of promoting and protecting the rights and well-being of older individuals. While access to justice is not explicitly mentioned, it can be understood as an essential aspect of ensuring the full realization of their rights.

Having that in mind, there is some protection against discrimination and violence under the international and regional instruments that applies to older persons. Some of these instruments underline the significance of ensuring access to justice for older individuals. They emphasize the need for equal and effective remedies, the elimination of barriers, and the provision of accessible legal services to address the specific legal chal-

[11] United Nations, Report of the Second World Assembly on Ageing, Madrid, 8-12 April 2002, p. 5.

lenges faced by older persons. Although, principles are soft law instruments, Governments and stakeholders are encouraged to adopt measures and policies that promote and safeguard access to justice for elderly, in line with the international standards. Some of UN instruments relate to the specific area of access to justice, such as legal aid or crime prevention, so they do not cover comprehensively access to justice principle (Spanier, Doron, Milman-Sivan, 2016: 58).

While the United Nations Principles for Older Persons from 1991[12] do not provide specific guidelines on access to justice, they establish a broader framework for promoting the rights and well-being of older individual. Access to justice is an essential component of realizing these principles, as it enables older persons to exercise their rights, seek redress, and ensure their dignity and equality within legal system (Kanter, 2009: 539).

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems adopted by the General Assembly in 2012,[13] that made it an obligation for Member States to put in place accessible, effective, sustainable, and credible legal aid systems, with specialized services for groups. The instrument contains direct reference to the rights of older persons. Principle 6 on non-discrimination affirms that "States should ensure the provision of legal aid to all persons regardless of age, race colour, gender,…" Furthermore, Principle 10 on equality in access to legal aid, upholds that "Special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs, including, but not limited to, the elderly,… Such measures should address the special needs of these groups, including gender-sensitive and age-appropriate measures."

Similarly, the updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice[14] recognizes the importance of adopting a systemic, comprehensive, coordinated, multisectoral and sustained approach to fighting violence against women, while acknowledging that some special groups of women are particularly vulnerable to violence, including because they are elderly, and as such, require special attention.

Furthermore, the Madrid International Plan of Action on Ageing[15] encourages states to promote access to justice for older persons, including measures to eliminate barriers and obstacles they may face in accessing legal assistance and redress.[16]

[12] General Assembly Resolution 46/91, 16 December 1991.

[13] Resolution adopted by the General Assembly, A/RES/67/187, 20 December 2012.

[14] Resolution adopted by the General Assembly, A/RES/65/228, 21 December 2010.

[15] Second World Assembly on Ageing, Madrid, 8-12 April 2002.

[16] Para. 108.

In addition to soft law instruments, several UN treaties as binding human rights instruments have been adopted that deal specifically with the rights of disadvantaged groups. Although, none of the UN binding instruments focuses on older persons, a few mentions age.

Furthermore, the Convention on the Rights of Persons with Disabilities[17] is an international human rights treaty that specifically addresses the rights of persons with disabilities, including the older persons with disabilities. The Convention recognizes that older persons with disabilities should have access to justice on an equal basis with others.[18] This includes ensuring accessible facilities, specifically age-appropriate accommodation, procedures and support mechanisms.

The General Recommendation No. 27 on older women and protection of their human rights[19] on the Convention on the Elimination of all Forms of Discrimination Against Women[20] states that state parties should provide older women with information on their rights and how to access legal services. Specifically, information, legal services, effective remedies, and reparation must be made equally available and access to older women with disabilities.[21]

Overall, no treaty offers older persons a tailored, comprehensive, and binding protection of their rights, including access to justice.

Similar situation is at the EU level, where support to elderly is fragmented. Only when Treaty of Amsterdam entered into force in 1999 the Article 13 provides grounds for prohibition of discrimination including age. Council Directive 2000/78/EC of 27 November 2000[22] establishing a general framework for equal treatment in employment and occupation envisages age as ground. The Directive includes a series of mechanisms to ensure effective remedies are triggered in the event of discrimination, such as improvement of legal protection by reinforcing access to justice in the Article 9 (Bueren, 2009: 7).

[17] General Assembly Resolution A/RES/61/10, 13 December 2006.

[18] Article 13 of the Convention "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages".

[19] United Nations, Committee on the Elimination of Discrimination against Women, CEDAW C/GC/27, 16 December 2010.

[20] General Assembly Resolution A/RES/34/180, 18 December 1979, entry into force 3 September 1981.

[21] Para 33.

[22] Official Journal L 303, 2 December 2000, p. 16-22.

3. Challenges in access to justice for elderly people

In line with international instruments, the older people have the right to equal treatment before the law and to equal access to justice (Doron, Georgantzi, 2018: 73). As it is assessed above, the right to access to justice is composed of different elements, but for the purpose of the article the access to justice for elderly people will be analysed in the context of access to information and access to the judicial system, including physical access, affordability and delays.[23]

3.1. Access to information

Older people faced the challenges in accessing information about their rights, complaint processes and the judicial system. These obstacles exist not only for individuals with disabilities but also for those without impairments.

There may be a lack of legal services specifically tailored to the needs of older people. Legal professionals and service providers may not have adequate training or understanding of the unique legal issues affecting older individuals, such as elder abuse, healthcare, pensions, or inheritance.

Many older individuals may be unaware of their rights or the legal mechanisms available to them. They may lack information about legal aid services, alternative dispute resolution methods, or relevant legal resources. Insufficient awareness and information can prevent older people from seeking appropriate legal remedies.

The rapid advancement of technology can create barriers to accessing information, especially for older individuals who may not be as familiar with or have access to digital platforms. Thus, it is important to ensure that information and methods of seeking redress or filing complaints are available in various formats, including printed copies, to satisfy the diverse needs of older people. This recognition of the specific needs and equal value of older individuals in accessing justice is crucial for promoting their rights and ensuring inclusivity within the legal system.

Digitalization can both facilitate and present challenges to access to justice for older people (Donoghue, 2017: 998). While technological advancements offer potential benefits, such as increased convenience and efficiency, they can also create barriers for older individuals who may have limited digital literacy or face technological obstacles.[24]

[23] Substantive inputs on the focus area "Access to justice", Working document submitted by the Office of the High Commissioner for Human Rights, Open-ended Working Group of Ageing, 29 March-1 April 2021, p. 4.

[24] European Commission, Ageing well in the Information Society, Action Plan on Information and Communication Technologies and Ageing, An 2010 Initiative, Communication form the Commission to the European

Older individuals may have lower levels of digital literacy and limited access to technology, including computers, smartphones, and the internet. This digital divide can prevent them from effectively accessing online legal resources, communicate with legal professionals, or participating in digital legal proceedings.

3.2. Access to the judicial system

Physical and cognitive impairments associated with aging, such as mobility issues, hearing or vision loss, or cognitive decline, can pose challenges to accessing judicial system. Physical barriers in courtrooms, lack of assistive technologies or difficulties in comprehending legal documents can impede meaningful participation in legal processes (Ashton, 2004: 45).

Physical barriers impact the ability to access courts due to lack of accessible buildings, transportation, waitering and seating areas and information, but also because court proceedings are not adapted to older people's needs and abilities and do not provide reasonable accommodation. For instance, the courts do not take into account the best time for older persons to testify, and they do not offer alternative care for people with care giving duties so that they are free to take part in proceedings.[25]

Legal procedures and courtrooms may not be adapted to accommodate the specific needs of older individuals. Limited accommodation for physical disabilities or cognitive impairments can prevent older people from fully participating in legal proceedings.

Older people may face financial constraints that limit their ability to access legal services or pursue legal action. Legal fees, court costs and associated expenses can be prohibitive, especially for those on fixed incomes or within limited savings.

Older individual may face communication barriers when interacting with legal professionals or within the legal system. Language difficulties, use of complex legal terminology, or inadequate support for individuals with hearing of speech impairments can hinder effective communication and understanding. [26]

The specific barriers of excessive delays and long legal processes faced by older persons emphasizing that this issue becomes critical for them due to their potential impact on their ability to benefit from the outcome of legal proceedings. Germany adopted a new

Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2007) 332 final, Brussels, 14 June 2007.

[25] AGE Platform Europe, Submission on access to justice, 31 October 2019.

[26] See: Recommendation CM/Rec(2014)2 and Explanatory memorandum, *Promotion of Human Rights of Older Persons*, May 2014.

law in December 2011 to tackle unreasonable legal delays.[27] It gave people opportunity to challenge slow progress in judicial proceedings and ask for this to be remedied and provided a right to compensation if delays continue. Reforms specifically targeted lengthy judicial proceedings, with consideration given to the age of the parties involved. The specific situation emphasises the importance of addressing excessive delays in legal processes, particularly for older persons, and highlights examples of initiative undertaken in Germany to mitigate this issue. The mentioned example showcases the need for tailored approaches that take into account specific circumstances of older individuals and their limited time frame contribute to a more inclusive and accessible justice system.

4. Jurisprudence of the European Court of Human Rights

Access to justice is crucial for older persons, because in the context of old age, a delay in accessing judicial system means justice may be denied (Pauw, 2014: 240). Due to abovementioned, the European Court of Human Rights has considered the relevance of the advanced age of a person in considering whether a case is heard "within a reasonable time" under Article 6(1) of the European Convention of Human Rights and the right to a fair trial (Mole, Harby, 2006: 24).

The European Court of Human Rights has recognized that lengthy legal proceedings can constitute a violation of the right to a fair trial, particularly when considering the specific needs and circumstance of the older persons and the reasonable time criterion.[28]

For example, the Court found a violation of the provision, considering the applicant's very great age and specific needs as an older person, including the need to maintain essential contacts with the outside world.[29] This highlights the Court's recognition of the particular vulnerabilities and requirements of older individuals, emphasizing the importance of ensuring timely access to justice for them.

The European Court of Human Rights has acknowledged the importance of considering the age and specific needs of older persons when assessing whether legal proceedings have met the reasonable time criterion. By taking into account the age of the

[27] European Court of Human Rights, Application no. 46344/06, case *Rumpf v Germany*, judgement 2 September 2010. In addition, Resolution CM/ResDH(2013)244 71 cases against Germany, Execution of the judgements of the European Court of Human Rights, See: https://www.coe.int/en/web/impact-convention-human-rights/-/reforms-to-address-unreasonable-legal-delays

[28] See e.g. ECtHR, 30 October 1998, *Styranowski v. Poland*, 28616/95, para. 57; ECtHR, 16 April 2002, *Jablonská v. Poland*, 60225/00, para. 43; ECtHR, 15 May 2008, *Mikhaylenko v. Ukraine*, 18389/03, para. 27; ECtHR, 3 June 2010, *Konashevskaya and Others v. Russia*, 3009/07, paras 50, 54.

[29] ECtHR, 4 April 2000, *Dewicka v. Poland*, 38670/97, paras 55-58. Cf. ECtHR, 16 September 1998, *Süssmann v. Germany*, 20024/92, para. 61.

applicant, the Court recognised that older individuals may have distinct requirement and vulnerabilities that warrant special consideration.

As regards access the Court itself, on several occasions has given priority to cases due to the applicant's old age.[30]

The European Court of Human Rights has addressed various aspects of access to justice for older people in its jurisprudence, particularly concerning discrimination and the protection of fundamental rights.

It is important to note that the jurisprudence of the Court on access to justice for older people is developed within the context of European law and its interpretation. European national courts also play a role in applying and interpreting European law in cases involving access to justice for older individuals.

Interpretation of excessive delays is specifically mentioned in the cases *Süssmann v. Germany* and *Jablonská v. Poland*. The European Court of Human Rights has held that the advanced age of a person may be a relevant factor in considering whether a case was dealt with within a reasonable time and thus may tighten the requirements for prompt trial under Article 6(1).

In the case *Jablonská v. Poland*, the 81 year-old applicant complained that the length of proceedings concerning the annulment of a notarial deed had exceeded a reasonable time. She argued in particular that, despite her very old age and the fact that her every appearance before the Regional Court had involved a long and tiring travel, she had attended hearings and given evidence whenever necessary and had never caused any undue delay.

The Court held that there had been a violation of Article 6 (1) of the Convention in respect of the length of proceedings, having regard more particularly to the fact that in view of the applicant's old age. Since the applicant was already 71 years old when the litigation started, the European Court of Human Rights stated that the Polish courts should have displayed particular diligence in handling her case.

The Court has highlighted the importance of effective judicial remedies for individuals to enforce their rights. It has ruled that national courts must provide effective and timely remedies, enabling older persons to challenge decisions or actions that infringe upon their rights (Martin, Rodriguez-Pinzon, Brown, 2015: p 125).

[30] ECtHR, 18 January 2005, *Popov v. Moldova*, 74153/01, para. 4; ECtHR, 16 October 2007, *Marcu v. Moldova*, para. 4; ECtHR, 18 December 2008, *Nerattini v. Greece*, 43529/07, para. 4.

The Court has recognized the importance of access to legal aid in ensuring effective access to justice. In cases involving vulnerable individuals, including older persons, it has emphasized the need to provide legal aid to guarantee their ability to effectively participate in legal proceedings (Apostolo, Das Neves, Liberado, 2021: 16).

The Court has consistently affirmed the protection of fundamental rights in the European Union, including the rights of older individuals. It has interpreted Europen law in manner that upholds the dignity, autonomy and non-discrimination of older persons, ensuring their access to justice within the EU legal framework.

5. Conclusions

Despite existence of legal instruments, the international and regional legal framework on the human rights of older persons remains fragmented and incomplete, with evident gaps for protection. The option to overcome this challenge could be adoption of comprehensive international standards to protect the rights of older persons, including older persons access to justice. Furthermore, the international instrument should stipulate the obligation of states to adopt legislation and policies to guarantee and effective access to justice for older and when they do not have adequate support and remedies. To achieve that the advocacy initiatives should be planned for changing legislation to reduce obstacles and address these challenges adequately in the domestic laws (Beqiraj, McNamara, 2014: 19).

Exercise of access to justice for elderly people in practice is very challenging, due to lack of age-friendly practices such as assignment of court assistants to explain court procedures and help older people reach the court and navigate in the buildings, a duty of reasonable accommodation, the possibility for remote testimony, the training of legal staff on communicating with people with declining cognitive capacities, etc. There is an urgent need to improve awareness of legislation among older persons and among court staff and to ensure exercise of the rights.

To mitigate the risk of the excessive delays in the justice system, measures such as expedited court processes, alternative dispute resolution mechanisms, and specialized support services for older people can help to ensure timely and efficient access to justice.

To address challenges of the rapid digitalization, online legal platforms and digital systems should be designed with older users in mind. They should prioritize simplicity, clear navigation, and user-friendly interfaces to ensure older people can easily understand and interact with digital legal tools. Educational initiatives that offer guidance on using digital devices, accessing online legal resources, and navigating digital platforms

can empower older people to engage with the digital aspects of accessing justice. Furthermore, digital tools and online platforms should be accessible to individuals with visual, hearing or motor impairments. Recognizing the diverse needs and preferences of older individuals, a hybrid approach that combines digital options with traditional methods can enhance access to justice. This may involve offering alternatives, such as telephone consultations, paper-based documentation, or in-person support, alongside digital solutions. Ensuring that older people have access to legal aid services, including digital platforms, can provide them with guidance and support in navigating online legal processes. Legal professions should be equipped to assist older individuals in using digital tool effectively.

Raising awareness among legal professionals, policy makers, and society at large about the specific challenges faced by older people in accessing justice is crucial. Promoting understanding and sensitivity towards the needs of older individuals can lead to more inclusive and accessible justice systems.

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Ranka Vujović*

THE POSITION OF GRANDPARENTS IN SERBIAN FAMILY LAW: IS THE PRESERVATION OF INTERGENERATIONAL RELATIONS THE EXCLUSIVE RIGHT OF THE CHILD?

Despite the fact that, due to the general economic and social crisis, grandparents as a "resource" are increasingly present in the lives of grandchildren, their legal position is quite ambivalent and does not correspond to their role. Serbian, like most modern family legislations, does not contain the terms: "grandparents" at all. Instead, a dry legal phrase is used: "relatives in the straight ascending line", and when it comes to their rights towards grandchildren, only the right and duty of support are regulated. Personal rights, especially the right of grandparents to access the child, are not specifically regulated and, as a rule, depend on the will of the parents.

Given that the preservation of intergenerational relationships in the family is important for the health and stability of the family itself, and thus of society as a whole, this paper examines the legal position of grandparents in Serbian family law and the mechanisms for protecting their rights from personal relationships with grandchildren. The goal of this paper is to analyze the legislation and judicial practice to see the shortcomings and room for improvement of the existing legal solutions and provide an answer to the question of how to balance the personal rights of children, parents and grandparents in complex family relationships.

Keywords: *grandparents, grandchildren, child, parents, personal rights, personal relationships*

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1. Introduction

The family generational structure consists of a network of connections between generational positions. One position, for example the parent's, cannot exist without another, for example the child's, and vice versa, just as the actions of the parents depend on the actions "from the position" of the child, so that a change in one causes a change in the other (Alanen, 2001). The child-parent relationship is the central point in that network and the basis of all other intergenerational connections. The connection of generations is, therefore, both a relational and a structural concept. Seen from an intra-family perspective, relations between generational positions are based on emotional closeness, understanding and cooperation, which necessarily includes tensions and conflicts, while the external manifestation of intergenerational relations in the family implies the transmission of the socio-cultural heritage on which social stability and continuity rests (Milić, 2007). In addition to being a factor of stability, the family structure is also one of the risk factors that is indicated in a large number of sources from the fields of criminology, sociology, and social pathology, since it "represents a psychosocial milieu that breaks social values but also creates its own value systems" (Nikolić-Ristanović, Konstantinović-Vilić, 2018: 24). Therefore, preserving healthy intergenerational relationships in the family is important for the health and stability of the family itself, but also for the health and stability of society as a whole. Unfortunately, both in the family and in society, the rights and interests of the elderly population, which usually includes grandparents, are not always taken into account. Their rights, including those from family relations, are not recognized or specifically included in any international legal document, "but today we see that these gaps need to be filled, in order to prevent the rise of stigma" (Tilovska-Kechedji, 2022: 439).

The subject of this paper is the intergenerational family relationship between grandparents and grandchildren, focused on relationships of a personal nature and the way in which that relationship is regulated and protected in Serbian family law. This topic has not been the subject of much attention by domestic legal theorists, although, traditionally, grandparents, as "repositories of family values, morals and customs" (Ponjavić, 2015: 536) have an important role in the lives of their grandchildren, and numerous examples from literature confirm that. Joyce Allston, quoted many times, wrote: "Grandparents, like heroes, are as necessary to a child's growth as vitamins". The social reality in Serbia is that families are often multi-generational in both urban and rural areas. The extended family, which basically has a nuclear family, is extended to other close or distant relatives, who as a rule reside and live in a domestic and economic community: a married

son or a married daughter continues to live together with their parents and their descendants (Nikolić, 2007: 534). Unfortunately, many grandparents, after the termination of the union, experienced from their children and/or their children's partners the inability to maintain personal relationships with their grandchildren. Some, on the other hand, have never even met their grandchildren. Essentially, their position regarding contact with the child is "on the periphery of the parental conflict" (Smart, 2003: 150).

In Serbian family law, the family rights of grandparents towards their grandchildren are not differentiated from the rights of child's other relatives. The right to contact is prescribed as a child's right, and in the section on court proceedings related to family relations (which are specifically listed in the Family Law and specifically regulated in Part 10 of the Law), there is no provision for a procedure following a claim by a relative for the protection of the right to personal relations, which raises the question whether grandparents, in addition to the natural and moral right to occasionally visit their grandchildren, have the legal possibility of protecting that right outside of cases the protection of which is regulated by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950). In legal theory, it is rightly pointed out that observing this relationship exclusively from the point of view of the child, from a purely individualistic point of view and without respecting the wider social context, is not adequate and creates "a fear that the preservation of intergenerational relations will be the exclusive right of the child" (Etienney de Sainte Marie, 2012: 113).

This paper, through a critical analysis of the relevant legislation, points to the legal position of grandparents in Serbian family law, with a focus on regulating personal relationships with grandchildren, which are key to preserving this intergenerational family bond. In addition to the few points of view presented in the legal literature, the paper presents the most important position from the well-known decisions of the European Court of Human Rights, which had and have concrete implications for the harmonization of internal regulations and legal practice in the member states, and also provides a critical review of domestic jurisprudence of local courts and positions expressed in domestic case law. In the concluding remarks, the possibilities of improving the existing legal solutions are pointed out, in order to establish a balance of personal rights between the generational positions of the child, parents and grandparents.

2. The legal framework for exercising the family rights of grandparents in the Republic of Serbia

The legal framework for exercising the family rights of grandparents towards their grandchildren *de lege lata* consists of the norms of the Constitution of the Republic of Serbia from 2006 on basic human rights and legal protection, norms contained in ratified international treaties, norms of the law regulating family relations, as well as norms of the functional character that prescribe the handling of legal matters in family relations.

The Constitution of the RS, in addition to the provisions on the rights of the child in connection with the origin and the statements that the rights of the child and their protection are regulated by law (Art. 64. Par. 2 & 5), also contains norms that guarantee the immediate application of human and minority rights determined by ratified international treaties and generally accepted rules of international law (Art. 18) and stipulates that laws and other general acts adopted in the Republic of Serbia must not contradict confirmed international treaties and generally accepted rules of international law (Art. 194. Par. 5).

The basic source of rights in family relations is the Family Law (FL, 2005). The Family Law explicitly regulates the rights of the child, and the following are relevant for considering the legal position of the grandparents: the right of the child to know his/her origin (Art. 59), the right of the child to maintain personal relations with relatives and other persons with whom he/she is especially close (Art. 61. Par. 5) and the right to support from "relatives in the straight ascending line" (Art. 154. Par. 2). In addition, the FL regulates the issues of protection of children without parental care, and, in this connection, the position of relatives in the application of the institution of guardianship and adoption. The said law also contains norms related to special litigation proceedings (among which, for this topic, is relevant the proceeding in the dispute for the protection of the rights of the child, Art. 261-273) and special rules that apply in all court proceedings related to family relations (Art. 202-208). Court proceedings that are not specifically regulated in the FL are subject to the rules of general civil procedure prescribed by the Law on Civil Procedure (LCP, 2011).

Of the international legal documents of a universal character, the most important source of law in the matter of family rights of the child is the Convention on the Rights of the Child (CRC, 1980). With that Convention, member states undertake to respect the child's right to preserve his/her identity, including citizenship, name and family ties, as recognized by law, without unlawful interference (Art. 8. Par. 1). The Convention also requires states to allow parents to exercise their parental responsibility and recognizes that children have the right to express their opinions and to have those opinions heard and

acted upon when necessary, to be protected from abuse or exploitation, as well as to protect their privacy, "and this requires that their lives are not subject to excessive interference" (Stănilă, 2019: 28).

In connection with issues of origin and identity, important is the provision of Art. 64. Par. 2 of the Constitution of the RS, which guarantees every child "the right to know his/her origin and the right to preserve his/her identity". The Family Law, which further elaborates these constitutional guarantees, stipulates that a child, regardless of age, has the right to know who his/her parents are, and from the age of 15, if he/she is capable of reasoning, the right to inspect the documentation that relates to his/her origin (FL, Art. 59). For the purpose of finding out the origin, the Law recognizes the child's right to file a lawsuit in order to establish and dispute paternity/maternity, and this right is not conditioned by any deadline, which eliminates all obstacles to finding out the origin of children who are troubled by uncertainty regarding the origin (Art. 249-252).

Neither the CRC nor the Constitution of the RS limit the child's right to know his/her origin to certain kinship positions, from which it follows that this right includes knowledge of the blood relatives from whom the child originates and with whom he/she is related by blood. And yet, the child's right to know his/her connection with his/her grandparents, as blood relatives from whom he/she originates, is not explicitly contained in the FL. According to the FL, the right to know the origin ends at the first ascending ladder – the parent's generational position. This omission, although "mitigated by the recognition of the possibility for a child over 15 years of age to exercise the right to inspect documentation on origin, and thus find out about his/her connection with other blood relatives" (Vučković Šahović, Petrušić, 2015: 116), reflects on the possibility of judicial protection of family ties between grandparents and grandchildren. Since knowing the origin is a condition for establishing and maintaining personal relationships among family members, a child who does not know about his/her blood relatives will not be able to exercise the right to have contact with them.

On the other hand, the possibility of access of grandparents to grandchildren is not different from the right of access of other persons, and, as a rule, depends on the will of the parents. If the parents do not take care of their child for any reason, the decision on who will be the guardian of the child is made by the guardianship authority (Center for Social Work). Grandparents, in the same way as any other close relative of the child, have priority when choosing a guardian for their grandchild, if one of them (grandparent, who is the father's or mother's parent) meets the legal requirements for a guardian, if they agree to be the guardian and if it is in the interest of the child (Art. 126. Par. 2). Bad personal relations of the grandparent who is a potential candidate for the child's guardian, with the child and/or his/her other relatives, as a result of which he/she cannot be expected to

properly perform the guardian's duties, are the reason for not appointing the grandparent as the child's guardian (Art. 128 (4)).

In Serbian law, kinship is an obstacle for adoption: grandparents cannot be adoptive parents of their grandchildren (Art. 92). This condition serves the function of preserving this intergenerational bond and established clear family positions, in a psychological and emotional sense, and is quite acceptable in a situation where grandparents have accepted the care of a grandchild who was left without parental care, since the status of guardian allows them to exercise responsibility towards the child that corresponds in content to parental responsibility (guarding, raising, upbringing, representing, supporting, taking care of the child's property). In Serbian law, the principle applies that a child left without parental care is primarily cared for in a relative's family, without disturbing/changing the kinship status, if such a possibility exists and if it is in the best interest of the child. Some legal theorists argue that the aim of this condition is to prevent duplication of family obligations arising from kinship relationships, and in the case of adoption, they would also result from that legal relationship (Počuča, Šarkić, 2016: 220).

For the establishment of adoption by third parties, the FL does not require consent of the grandparents, although with the establishment of adoption, all natural family ties are extinguished, the child enters another family – the family of the adopter and acquires all rights towards them and their relatives. Kinship based in this way overwrites natural kinship. Grandparents do not have the legal power to prevent the termination of the family relationship in the event of the adoption of their grandchild by third parties, just as they have no influence on the origin of the relationship either (the birth of a child/grandchild is exclusively decided by the parents, i.e. the mother, FL, Art. 5. Par. 1). "Such a situation can be tragic for a grandparent who wants to keep their grandchild. Especially if that child is a descendant of their deceased child" (Ponjavić, 2015: 539).

When it comes to personal property rights, such as the right to alimony, things are a little different. If the parents are not alive or do not have enough means for support, the child can exercise the right to support from "relatives in the straight ascending line. Since the exercise of the right to mutual support from blood relatives is connected to the rules of inheritance (Art. 166. Par. 2), the child primarily exercises this right from the grandparents. The principle of family solidarity has been consistently implemented in terms of alimony, so even grandparents who do not have enough of their own means for support can exercise their right to support from their grandchild, provided that this "does not constitute an obvious injustice" for the child (Art. 156. Par. 2).

3. Court protection of grandparents' right to preserve personal relationships with grandchild

It has already been stated that the right of a grandparent to preserve personal relations with a grandchild is not recognized in the FL as a right that should be specially protected. In addition, neither the child's right to personal relations with grandparents in the sense of Art. 61. Par. 5 is differentiated from the child's right to personal relations with other close relatives. The paradox is that it is not differentiated from the child's right to personal relationships with third parties who are close to the child, although the relationship with close friends is not a family relationship and, essentially, it is not a relationship regulated by family law. The preservation of this intergenerational family bond, as a rule, depends on the will of the child's parents, i.e. guardians. They have the power and control of access to the child.

The child's right to contact with grandparents can also be violated when state authorities, by their decisions, limit access to a child who is placed outside the parental home, in a social institution or foster family, to an extent that is not usual, i.e. which does not allow to preserve the normal relationship between grandparents and grandchildren through mutual contacts (see: *G.H.B. v. UK*, 2000; *Price v. UK*, 1988). According to the understanding of the European Court of Human Rights (ECtHR), respect for family life implies the duty of the state to act in a way that would allow the relationship between grandparents and their grandchildren to develop normally (*Marckx v. Belgium*, 1979, par. 45).

The stated positive obligation also applies to Serbia. And yet, there are several factors that limit the right of grandparents to have personal relationships with their grandchildren. Some can be attributed to the absence of legal rules that would ensure effective legal protection. Others relate to the interpretation of legal norms.

Since the FL does not regulate the rights of grandparents toward grandchildren from a relationship of a personal nature, the substantive legal basis for exercising those rights is derived from the right to family life under Art. 8. of the ECHR. Considering that it does not regulate only substantive law, the FL does not contain norms on special procedure for claims by grandparents (and other relatives) for judicial protection of personal relations with the child, although special rules of procedure are prescribed for other family disputes. That is why the provisions of the LCP, which regulate the rules of procedure for providing judicial protection during the settlement of civil disputes (LCP, Art. 1), are applied to the proceedings in case of the grandparent's claims seeking judicial protection of the right to family life. This type of procedure, given that it is not adapted to the subject matter of the dispute, cannot provide the protection that is provided in other lawsuits from

family relations in which there are special rules (on local jurisdiction of the court, on special duties of the court, collision guardian and temporary representative of the child, on prohibition of contumacious rulings, etc.).

Another limiting factor for judicial protection of grandparents' right to personal relationships with grandchildren is the very material definition of the autonomous term "family life", as interpreted and applied by the European Court of Human Rights (which is followed by domestic courts In several of its decisions, that court concluded that "family life" within the meaning of Article 8 of the ECHR can exist between grandparents and their grandchildren when there are "sufficiently strong family ties" between them (*Kruškić et all v. Croatia,* 2014, par. 108; *Lawlor v. UK*, 1988). In order for "sufficiently strong family ties" to be constituted, it is necessary that there has been personal contact between grandparents and their grandchild of such frequency and intensity, on the basis of which the required quality of the family bond has been established. This category includes relationships between the child and his/her grandparents with whom the child lived for some time (*Bronda v. Italy*, 1998; *Adam v. Germany,* 2008). Completely different rules apply to the protection of child-parent relationships: the status of child and parent is in itself constitutive of family life, without the need to prove any other condition. According to the understanding of the ECtHR, the relationship between grandparents and their grandchildren is of a different nature and degree of connection compared to the relationship between parents and children and therefore by its nature generally requires a lower level of protection (*Kruškić et all v. Croatia*, 2014, par. 110). Thus, when a parent is denied access to a child with whom he/she does not live, this would in most cases constitute an interference with the parents' right to respect for family life, which is protected by Article 8 of the ECHR, but this would not necessarily be the case when it comes to grandparents. I In legal theory, it is also emphasized that the standards that apply to parents do not apply to relatives and that "relatives should be recognized as having the right to respect family life if they have formed a family life with the child, recognizing that the child's relationship with relatives takes place within the scope of parental rights" (Janjić-Komar, 2001: 475). Contrary to this position, in foreign literature one can also find the position that a child by birth has the right to respect family life with members of the extended family, including aunts and uncles (Herring, 2007: 332)

As already mentioned, the FL does not recognize an independent right of grandparents to file a claim for the purpose of maintaining personal relations with grandchildren, but this right is derived from the right to family life in the sense of Art. 8. of the ECHR. In a situation where a parent or other person who has parental responsibility, and thus the "power" to influence the establishment of a "sufficiently strong family bond" between grandparent and grandchild, i.e. when access to the child is prevented from birth,

so that the relationship has essentially not even been established, the grandparent's claim under Art. 8 of the ECHR will not be effective. In such a situation, the only thing left for grandparents is to refer to the right of the child from Art. 61. Par. 5 of the FL. Why is this problematic? First of all, because Art. 61. Par. 5 of the FL requires the existence of a relationship between grandparents and grandchildren characterized by "special closeness". Another, but no less important, obstacle is reflected in the fact that grandparents do not have active legitimation in lawsuits for the protection of children's rights. The right to sue for the protection of the child's rights belongs to the child, his/her parents, the public prosecutor and the guardian (FL, Art. 263. Par. 1). Since parents have the power not to allow contact and, in such a case, an interest in not initiating court proceedings – in order to gain access to their grandchild and the personal relationships necessary to preserve this intergenerational relationship within the meaning of Art. 61. Par. 5 of the FL, grandparents are forced to turn to the guardianship authority and ask for help in exercising their rights. In such a case, the guardianship authority appears as the protector of the child's rights and can file a claim to initiate court proceedings to regulate the personal relations of the grandparents with the grandchild, if it concludes that this is in the best interest of the child. Whether court proceedings will be initiated depends solely on the assessment of the guardianship authority.

Case law seems to be somewhat different. Courts in Serbia are inconsistent in their actions when it comes to determining the grounds and admissibility of grandparent's claims, since there are examples of accepting grandparent's claims filed for the protection of the child's rights within the meaning of Article 263 of the FL, with the explanation that "the court in this kind of litigation must base its decision on the best interest of the minor child" (see Reasoning for the Decision of the Court of Appeal in Kragujevac, Gž2-225/11). Although the ECtHR has emphasized in several of its rulings that a restrictive or purely technical approach should be avoided with regard to the representation of children before the court (*Kruškić et all v. Croatia,* par. 101; *A.K. & L.* v. *Croatia*, par. 47), it must be taken into account that grandparents are not authorized by law to initiate court proceedings on behalf of the child, because the child, as a rule, has his/her legal representative in the form of a parent or guardian (FL, Art. 263. Par. 1). Nevertheless, the right of the child to maintain personal relations with the grandparents is most often prevented by the parent who lives with the child and has the power to independently observe and interpret the child's interests (in the light of his/her own interests) and not to allow the grandparents access to the child. The right of the child then exists only if it is in line with the interests of the parents. Parents who prevent contact have no interest in filing lawsuits to secure that contact. Some legal authors believe that all this "obviously renders ineffective the child's right to maintain personal relations with relatives, i.e. grandparents, since the

request will not be submitted by the holder of that right nor by his/her legal representative" (Ponjavić, 2015: 546). In order for the endangered child's right to be exercised, the legislator provided the court with the possibility to initiate proceedings *ex officio* in order to protect the best interests of the child. In principle, in lawsuits from family relations concerning a child, the court is not bound by the limits of the claim and is authorized to *ex officio* initiate adhesion proceedings and decide on an issue that was not an element of the claim of the litigants (Vujović, 2019: 169). It should be emphasized, however, that the court can use this authority to initiate adhesion litigation, according to the FL, in a limited way, with proceedings in a matrimonial dispute, paternity or maternity dispute or proceedings in a dispute from the relationship between parents and children, including litigation for the deprivation of parental rights and the protection of rights of a child – when it determines that there are reasons for the complete or partial deprivation of parental rights or for the determination of protection measures against domestic violence (Art. 226, 260 & 273) but not when it determines the existence of reasons for the protection of some other rights of the child. In addition, in order for the court to be able to act in that direction, it is necessary that it has certain knowledge about the violation of the child's rights, and that is the problem - who will inform the court that the child's right to personal relations with grandparents has been violated, if the litigants in the main case are not interested in that issue, and neither the child nor the grandparents have the status of a party in the proceedings? The Serbian legislator has therefore provided for an additional protection mechanism: protection provided through guardianship authorities. The legislator gave the right to seek judicial protection of the child's rights to the guardianship authority, which exercises its right to sue as a party in a functional sense, when it assesses that a child's right requires protection, and the child's legal representative shows no interest in it (Vujović, 2018: 312). In practice, there are almost no examples of the guardianship authority using this procedural authority to enable the child to have personal relationships with grandparents.

Grandparents are most often instructed to demand the protection of their right to contact with their grandchildren by filing a lawsuit for violation of the right to family life from Art. 8 of the ECHR, in "ordinary" civil litigation. In order to succeed in their claim, they must first prove the existence of "family life". In this respect, Serbian courts generally adhere to the legal protection standards established through the practice of the Court in Strasbourg: "For the maintenance of personal relations of a minor child with close relatives, the existence of personal relations is of crucial importance, while for the maintenance of personal relations of a child with a parent with whom the child does not live, the condition is blood kinship" (Judgment of the Appellate Court in Belgrade, Gž2 1078/12). In another domestic decision, it is emphasized that for the right to protect the personal

relationships of grandparents with their grandchildren, “besides the existence of blood relations, other factors are also important, such as the psychological and emotional connection between these persons, i.e. the actual existence of close personal ties, which is in any case a factual question” (Judgment of the Supreme Court of Cassation, Rev 2401/10).

The existence of family life between grandparents and their grandchildren in the form of a “sufficiently strong family bond” is a necessary condition for exercising the right to personal relationships, but not a sufficient one. The mere fact that the existence of “family life” between grandparents and grandchildren has been established is not a guarantee that personal contacts will be approved. Time is also important - how long the violation of rights lasts, how long the child has had no contact with grandparents, especially if it is a very young child. The perception of time and the time factor in the life of a child and in the life of an adult do not have the same effect. The changes in a child's life that growing up inevitably brings happen in very short periods of time and must be taken into account when making decisions concerning the child’s family life (Vujović, 2019a: 67). Over time, the circumstances in which the child lives change, as does the child's needs and interests (including the need and interest to meet or maintain contact with grandparents). Therefore, the court is obliged to determine whether in each specific case the maintenance of personal relationships is in the interest of the child (Fl, Art. 6. Par. 1; Art. 266. Par. 1). In the General Comment of the Committee on the Rights of the Child No. 14 (2013) on the right of the child to have his or her interests of primary importance, it is pointed out that the concept of “best interests of the child” is actually a three-layered concept, and that it includes: essential, fundamental interpretive legal principle and the rule of procedure, and it is especially emphasized that: “if one legal provision can be interpreted in several ways, the interpretation that is most in the best interests of the child will be accepted” (Par. 6 (b)). In the case of the “best interest of the child”, the connection between the legal principle and the rule is not established by a legal norm, but by the creative activity of judicial practice. Given the absence of legal definitions that would more closely determine the content of the “best interests of the child”, the courts are in fact in the position of creating legal rules based on the aforementioned principle (Vujović, 2019: 177). In the case of grandparents, in the obscure legal literature on this topic it is rightly pointed out that “if the maintenance of personal relationships is viewed only from the point of view of the child's rights, this can be especially dangerous also for the child in situations where his/her best interest is only a “disguised”' interest of one of the parents who wants to exclude from the child's life an entire line of relatives related to the other parent” (Ponjavić, 2015: 546). In one case, the Supreme Court of Cassation concluded that it is in the child's best interest to have personal relationships that are productively reflected in the further development of the child and the preservation of the memory of

the deceased parent: “It is in the interest of a minor child to maintain personal relationships with his grandmother and maternal aunt.” There is no risk of introducing personal relations between the child and the plaintiffs, because they would have a productive effect on the further development of the child and positively reflect on the development of his personality, since they would enhance the memory of his mother” (Rev. 4054/2018). Similarly, in another case, in which the child's personal relationship with the deceased paternal grandparents was decided, the Appellate Court in Novi Sad reasoned: “Maintaining regular contact of a minor girl with the plaintiffs is desirable for the child's development, because it is expected that it has a stimulating effect on her further emotional development, that is, it will not threaten or compromise the established emotional relationships of the child” (Judgment of the Appellate Court in Novi Sad, Gž 2.187/12).

In connection with the best interest of the child, according to the case law, is also the right of the child to know important facts about his/her family, such as religion and customs: “Maintaining personal relations between minor children and their paternal grandparents is in the best interest of the children because they are assessed as adequate persons with appropriate socio-economic conditions, and the paternal grandparents, as plaintiffs, have the right to maintain personal relations with the children on the day of their baptism every odd year, since maintaining personal relations more often, taking into account children’s age and the relationship between the mother of the minor children and the paternal grandparents is not in their best interest at this time (Judgment of the Supreme Court of Cassation, Rev. 3673/19).

The developed antagonism between the parents who exercise parental rights and the grandparents who want personal relations with the grandchild requires special attention, especially in terms of determining the authentic opinion of the child (which may be obscured due to a conflict of loyalty), as well as in terms of representing the child (due to the highly pronounced risk of the conflict of the interests of the child and the interests of the parents as legal representatives of the child in court proceedings). In one revision case, despite the position of the lower instance courts that the request of the child's grandmother (the deceased father’s mother) was founded, “that it is in the child's interest and that it is high time for him to finally meet his paternal grandmother and grandfather and to establish and maintain contact with them, because in that way he would learn about his origin and preserve his identity”, the claim was still rejected in the legal remedy procedure, due to the mother's negative attitude towards her late husband's parents, an attitude “which was projected within the primary family from mother to child, in the sense of completely denying the existence of paternal grandparents in the child's life” (Judgment of the Supreme Court of Cassation, Rev. 2401/2010). Apart from the fact that the review court

indicated that the existence of "family life" was not proven in the first-instance proceedings, for which "it is of crucial importance to determine whether there really are close personal ties between the plaintiff and the minor child", at the same time it considered the issue of conflict of interest: "In this case, there are two conflicting rights to respect for private life. On the one hand, there is a request from relatives - the grandmother for the protection of the right to respect family life through the maintenance of personal relations with the child - an underage grandchild. On the other hand, such a request encroaches on the sphere of respect for the right to family life of the person to whom the request is directed. It concerns two conflicting rights regarding respect for family life. This conflict can only be resolved by assessing the best interests of the child" (Judgment of the Supreme Court of Cassation, Rev. 2401/2010). The few articles related to the topic of this paper contain the position that the subjective rights of the child must not override the rights of adults, even in the case when the conflict over the maintenance of personal relationships must be resolved in favor of the child. The existence of a conflict between the child's parents and grandparents must not be a sufficient reason for preventing these relationships, nor participation in their upbringing and education (Ponjavić, 2015: 550).

In the previously mentioned case, from the statement contained in the first-instance ruling: "that it is in the interest of the child and that it is high time for him to finally meet his paternal grandparents and to establish and maintain contact with them, because in this way he would learn about his origins and preserve its identity" it can be concluded that the first-instance court, accepting the request of the grandparents to establish contact with the grandchild, had in mind the child's right to preserve the identity and family ties, i.e. the right to origin – which derives from Art. 8. Par. 1 of the CRC and Art. 62. Par. 2 of the Constitution of the RS. What is a problem in this case (and for which, among other things, the review court overturned the lower-instance rulings) is that the said regulations provide that these rights are exercised in the manner recognized by national law, and the national law limited the right to origin to the child's right to know who his/her parents are.

The conflict between the child's grandparents and parents regarding access to the child and maintaining personal contacts also raises the issue of representing the child in litigation. Especially in lawsuits initiated to protect the rights of grandparents from Art. 8 of the ECHR. The Law on Civil Procedure does not contain special rules on the representation of a child. The general rule, according to which the court is obliged to react when it notices that the legal representative of the party in the proceedings does not show the necessary attention, concerns only the situation related to the representation of persons under guardianship (LCP, Art. 79. Par. 4) and does not include children under parental care. In addition, according to the LCP, the court has the authority to appoint a temporary

representative in the form of a lawyer, following the order from the list of the Bar Association, when it determines that there are conflicting interests of the defendant and his/her legal representative in a lawsuit (LCP, Art. 81). What makes this norm inapplicable in lawsuits initiated by grandparents for the protection of rights from Art. 8 of the ECHR is that in these lawsuits, as a rule, the defendant is not the child, but his/her parent(s). Given that the proceedings on the grandparent's claim within the meaning of Art. 8. The ECHR are subject to the general rules of the LCP that are not adapted to a specific legal matter, and that the common rules that apply to all judicial proceedings from family relations contained in the FL (Art. 202-208) do not necessarily foresee the participation of the guardianship authority in each of these proceedings, it may happen that the court does not invite the guardianship authority and does not inform it about the existence of a dispute between the grandparents and the child's parents regarding the maintenance of personal relations with the grandchild. In such a situation, this conflict could be resolved both to the detriment of the plaintiffs and to the detriment of the child.

We will also consider the issue of conflict of interest in litigation for the protection of children's rights, for which special rules prescribed in the FL apply. In case of a conflict of interest between a child and his/her legal representative in a lawsuit for the protection of the rights of the child, the Family Law prescribed the obligation to appoint a collision guardian for the child to conduct the litigation (Art. 265. Par. 1). The collision guardian is appointed by the guardianship authority, at the request of the child (FL, Art. 265. Par. 2) or on its own initiative (FL, Art. 132. Par. 2 (3)). The Family Law stipulates that the court itself has the duty to appoint a temporary representative for the child, when it finds that the child was not properly represented in the litigation for the protection of the child's rights (FL, Art. 266. Par. 2). This can also be requested from the court by a child who has reached the age of 10 and is capable of reasoning (FL, Art. 265. Par. 3). The first-instance courts generally avoid this duty, as often indicated by the instance courts in the proceedings under legal remedies: “The defendant T., as the mother and legal representative of the child, opposes the maintenance of personal relations between the plaintiffs and the child, and whether the maintenance of such relations is in the best interest of the child or not, is a factual question that must be resolved precisely in this litigation. This means that there is a possibility that in the litigation the conclusion can be reached that it is in the best interest of the child to make contact with the plaintiffs here as grandparents, from which it would follow that in that case there would be conflicting interests between the child's mother as the legal representative and child himself. In such a case, Article 265 of the Family Law prescribes the obligation to appoint a collision guardian for the child to conduct such a lawsuit, which the first-instance court did not do

in the proceedings, and which is justifiably stated in the plaintiff's appeal" (Decision of the Appellate Court in Kragujevac, Gž2-225/11).

It is already clear from the cited explanation that the courts in Serbia are not consistent in terms of the rules of procedure they apply in lawsuits initiated by grandparents in order to protect their rights from Art. 8 of the ECHR. In the absence of special procedural norms that would be applied in those lawsuits, and in order to ensure a more complete protection of the procedural rights of the child, the domestic courts resort to the combined application of general rules from the LCP and the application of special rules created in FL for the needs of the procedure in lawsuits for the protection of the rights of the child. Although the motive for such action is essentially indisputable, formally speaking, the incorrect application of the provisions of the procedure in a specific matter is a reason for refuting the adopted decisions.

4. Conclusion

The family generational structure consists of a network of connections between generational positions, which cannot exist without each other. The relationship between child and parent is the central point in that network and the basis of all other intergenerational relationships. Therefore, this relationship deserves priority protection. However, maintaining the unity and stability of the family structure must also take into account the interests of close relatives, which certainly include grandparents, because relationships in the family are by no means one-way. On the contrary, they are very intertwined and conditioning.

A child's ties to the family are important for identity. Therefore, the child's right to know his/her origin is not exhausted by his/her right to know who his/her natural parents are. Knowing about the origin implies knowing about other blood relatives from whom he/she descends. Acknowledging that a child can, despite the parents' opposition, maintain personal relations with relatives he/she knows undoubtedly narrows the scope of parental rights, but, at the same time, expands the concept of the child's capacity to independently decide on the manner and extent of maintaining personal relations with his/her close relatives. Recognizing the importance of intergenerational family ties, the most important international document on the rights of the child, the CRC, prescribed the child's right to know the origin, as a necessary prerequisite for achieving and preserving family ties. In Serbian family legislation, as we have seen, the child's right to know his/her connection with other blood relatives is not prescribed as such. The Family Law, it is true, prescribes the right of a child who has reached the age of 15 and who is capable of reasoning to inspect the documentation related to his/her origin, but the right to origin is

guaranteed only in terms of knowledge of the personality of the parents, with exceptions provided by law.

The right of grandparents to establish and preserve personal relationships with their grandchildren is not recognized as a special right either. Either in international legal documents, or in domestic law. Grandparents' personal relationships with their grandchildren are viewed exclusively from the point of view of children's rights. In addition, the child's right to personal relationships with grandparents is not differentiated from the child's right to preserve other family ties with close relatives, or from the child's right to preserve personal relationships with third parties with whom he/she has established close ties, and who are not family members. The legal position of the grandparents is conditioned, therefore, by the rights of the child.

This intergenerational relationship, provided it is established and meets the requirement of "sufficiently strong family ties", can be protected in two ways. The first is a direct reference to the right to preserve family life from Art. 8. Par. 1 of the ECHR, which gives grandparents the right to sue, in ordinary litigation. The second possibility to protect this family bond requires the initiation of a complex mechanism for the protection of the child's right to maintain personal relationships with relatives and other persons with whom he has/she has a special bond (FL, Art. 61. Par. 5), and this procedure is characterized by special rules which, as we have seen, do not give the grandparents the legal position of the plaintiff. The rules of general civil procedure that are applied in lawsuits under Art. 8 of the ECHR are not sufficient to ensure the protection of this family bond, while the realization of the judicial protection of the rights of the child from Art. 61. Par. 5 of the FL is rendered ineffective. It has already been pointed out in theory that if the issue of preserving the bond between generations is viewed only from the point of view of the child's rights, it makes the relationships in the family, understood in a broader sense, one-way, which is contrary to their nature (Ponjavić, 2015: 546).

The failure to recognize the child's right to find out about his/her relationship with other blood relatives and to recognize the right of grandparents as close relatives to establish and maintain personal relationships with their grandchild indicates that domestic law has not established a balance between the personal rights of the child, parents and grandparents. This balance is disturbed by the existing case law, according to which protection can only be provided to those relationships that have already been established and that meet the criterion of "sufficiently strong family ties". Domestic courts in these cases only follow the practice and standards established by the European Court of Human Rights regarding the protection of grandparents' right to family life.

A child's right to know his/her origin does not end at the parents' generational position. The generational structure is much more complex, and positive law, both domestic and international, does not pay the necessary attention to this generational relationship.

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THE ELDERLY AND PRISON IN ITALY: A PROPOSAL TO OVERCOME DISCRIMINATION[***]

Starting from the data provided by the Council of Europe's latest Space Report, in which Italy ranks first among the countries with the highest number of over-65s in prison, the paper is poses as a snapshot of the conditions of elderly inmates in Italian penal institutions. Through a review of Italian and European norms and jurisprudence on the incarceration of the elderly person, between systematic overcrowding and health protection, it analyzes the compatibility of elderly status with the prison regime as a whole, especially with regard to those convicted of serious crimes and with long sentences, for whom it is more difficult to obtain home detention. The work proposes a de lege referanda solution that strengthens the protection of the elderly with a presumption of prison incompatibility upon reaching an established age, even for those inmates convicted of serious crimes.

Keywords: *senior prisoners, prison overcrowding, inhumane treatment, re-education, equality*

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1. Italy tops the European countries with the most elderly people in prison

In recent decades, the Italian prison system has recorded a constant and persistent increase in the age of the inmate population and this has been due not only to a lengthening of life expectancy, but above all to a lengthening of the duration of trials, which often already by the time they start are against persons who are advanced in age, as well as to the regulatory provision of high sentences and the survival in the Italian legal system of life imprisonment. Italy, in the last Council of Europe Annual Penal Statistics (Space Report, 2022: 44), was recognised among the countries with more than one million inhabitants as having the highest percentage of elderly people in cells.

According to the data of the Council of Europe Report, of the countries with more than one million inhabitants, the average age of the prison population varies between thirty-one and forty-four years, with a decrease in Bulgaria (31 years), Denmark (34) and France (34.5) and an increase in Georgia (44), Italy (42), Portugal (41), Estonia (40) and Spain (40). Approximately 16.5 per cent of prisoners in Europe are aged fifty or older and 3 per cent are aged sixty-five or older. Taking into consideration countries with more than one million inhabitants, the highest percentages of prisoners aged over fifty are found in Italy (28%), the Autonomous Communities of Spain (25%), Portugal (24%) and Norway (24%). This result, at least from reading the report, seems to be a consequence of the provision of a rigid penalty system for certain offences. It is no coincidence that Italy, Portugal and Spain are among the countries with the highest percentage of prisoners over fifty: these are the same states that have high periods of detention, with an average duration of custody that in Europe is eleven months, while in these countries it reaches up to eighteen.

The alarming figure, at least for Italy, remains, however, the one relating to prisoners over sixty-five years of age, whose highest percentage of presence is precisely in our penal institutions, followed by North Macedonia, Serbia and Bulgaria. The presence of such a significant number of elderly persons in prison - emerges from the statistical analysis - frequently seems to be linked to the fact that they belong to organised crime and, therefore, to the fact that they are condemned to very long sentences or to life imprisonment, in the 'obstructive' formula, with strong limitations to access penitentiary benefits and alternative measures of detention, even in the presence of very serious health conditions, with a preclusion (although today no longer absolute, but relative) to die away from prison (see § 4 below).

The same Space 2022 report highlights, among other things, that Italy is one of the countries in which life imprisonment is applied most frequently and harshly and in

which - in the statistically low cases of so-called 'simple' life imprisonment - the length of imprisonment before early release is highest, unlike in Switzerland, for example, where someone who is sentenced to life imprisonment can apply for parole ('simple' life imprisonment) the length of imprisonment before early release is higher, unlike what happens, for example, in Switzerland where a prisoner sentenced to life imprisonment can apply for parole after ten or fifteen years, depending on the circumstances, or in Denmark (12 years), Germany (15 years), Sweden (10 years, but the sentence can be converted into a fixed sentence after 10 years), France (18-22 years) and Belgium (15, 19 or 23 years).

2. Elderly detainees: from pre-trial measures to the execution of prison sentences

In conducting this research, one cannot avoid, *first of all*, briefly outlining the Italian legislation concerning the condition of the elderly in the penal system, focusing attention on the treatment this condition receives within the prison circuit. It will then be appropriate to ask the question as to whether prison can be the only or the prevalent means of serving a sentence - taking into account the re-education and health protection needs of the elderly in particular - and even before that whether prison itself can be the only effective system for meeting the precautionary needs, again with specific reference to persons of senile age.

The discussion cannot but start from the preliminary investigation phase, during which - as is well known - custodial measures are widely applied in Italy, because they are considered to be the only ones that provide maximum guarantees for safeguarding the needs for which they are intended[1], even though Article 275(3) of the Italian Code of Criminal Procedure states that they are only ordered when all other measures are inadequate. Regarding the applicability of these measures to the elderly, there is no absolute prohibition, although Article 275, para. 4 of the Code of Criminal Procedure itself states that 'custody in prison cannot be ordered, unless there are particular important precautionary needs, if the person is over seventy years of age'. On the basis of this rule, it is clear that the Italian legislator wanted to give seniority a tendency to autonomous relevance, which therefore disregards the subject's health conditions, appearing as an explication of the more general criterion of adequacy that presides over the judge's choice of the precautionary measure to be applied (Bellantoni, 2017: 86). Moreover, as just written, this is not an absolute legislative choice, but a tendential one, because the same Article 275, para. 3, Code of Criminal Procedure, *in subiecta materia* removes all discretionary

[1] These requirements are the danger of evidential pollution, the danger of flight and the danger of repetition of offences.

power from the precautionary judge when it comes to offences that are to be considered particularly serious (Articles 270, 270-bis and 416-bis of the Criminal Code)[2], sanctioning for such cases a sort of obligation to apply pre-trial detention in prison, unless elements have been acquired from which the non-existence of precautionary needs can be deduced (Orano, 2011: 3044). This provision has generated perplexities of constitutional legitimacy, as it is always a very delicate and often difficult assessment due to a series of factors, necessarily to be considered, that go in the opposite direction. The Italian Court of Cassation, however, could do no more than note that "the presumption of inadequacy of precautionary measures other than custody in prison for the offences indicated in Article 275, para. 3 of the Criminal Code entails the impossibility of replacing custody in prison with house arrest", without prejudice to the release of the offender when the judge ascertains that the precautionary requirements have ceased to exist[3]. The potential conflict between the two rules, moreover, has been the subject of the case law of the Court of Cassation, according to which the presumption enshrined in paragraph 4 of Article 275 of the Code of Criminal Procedure which prohibits detention in custody for those over 70 years of age unless there are particularly important precautionary needs, since *in bonam partem* prevails over the other presumption *in malam partem in* para. 3 of Article 275 of the Code of Criminal Procedure, which instead imposes preventive detention for offences that are considered more serious. Therefore, what follows is that for the pre-trial detention of a person over seventy years old, the judge must assess the pre-trial needs as exceptional and that in the absence of these extraordinary situations he has the power-duty to order measures that are less afflictive than imprisonment[4].

At this point, however, the question arises as to when the precautionary requirements can be considered so exceptionally serious as to justify the precautionary measure in prison even in the case of an over-70 year old. The Supreme Court also intervened on this issue, recognising the exceptional nature not in the particular seriousness of the offences committed, but rather in the high probability, bordering on certainty, of the risk of reiteration of the same offences[5].

It is quite clear, therefore, that in the Italian penal system the attempt, at least in the legislator's intentions, was to limit the imprisonment of the elderly, so much so that

[2] Subversive associations, Associations for the purposes of terrorism, including international terrorism or subversion of the democratic order, Mafia-type associations, including foreign ones.

[3] Cass. pen., 9 July 2010, no. 32222.

[4] Cass. pen., 3 November 1999, no. 3506; Cass. pen., 2 December 2014, no. 1; Cass. pen., 19 March 2015, no. 15911.

[5] Criminal Cass., 8 June 2010, no. 32472.

the legislator himself set the threshold of seventy years of age beyond which it should be more difficult for the judge to order imprisonment.

The fact of reaching the age of seventy also produces limits on the executability of the sentence, finding a basis in Article 163(3) of the Criminal Code, according to which the time limit for sentencing is two years and six months for offenders under the age of twenty-one and for those over seventy, the Court of Cassation clarifying that the sentence imposed must not exceed two years and six months and that the offender must have reached the age of seventy at the time the offence was committed and not at the time of the trial[6]. This rule also produces other effects in relation to the possibility of the second application of the benefit of the suspended sentence, which, as laid down in Article 164(4) of the Criminal Code, would be prohibited. The judge, in imposing a new sentence, may order a suspended sentence if the sentence to be imposed, cumulated with the previous sentence, does not exceed the limits of Article 163(3) of the Criminal Code. In the case of persons over 70 years of age, therefore, the suspended sentence may be granted even if the sum of the sentences of the two convictions exceeds two years, but never if it exceeds two years and six months[7].

So far we have seen that there is a tendency towards favourable treatment of the elderly, at least in the original intentions of the legislator, but the same cannot be said for the execution phase, since the rules regulating the mandatory or optional postponement of the execution of the sentence do not provide for privileged treatment for the elderly over seventy, since the age of the convicted person, considered in itself, is not sufficient to obtain postponement of the execution of the sentence[8]. In truth, the Court of Cassation has expressed its opinion on this point, setting out the fundamental principle that inspires, or should inspire, the rules governing the relationship between the elderly and prison, stating that there is a kind of presumed incompatibility with prison for the subject who has reached the age of seventy, implicit in the current Italian system, so much so that in

[6] Cass. pen., 31st January 2009, no. 11230; Cass. pen., 19th October 2017, no. 746; Cass. pen., 05th July 2018, no. 49700; Cass. pen., 12th April 2019, no. 28374.

[7] Criminal Cass., 26th June 1974, no. 128429.

[8] In Italy, deferment of enforcement of a penalty means that the possibility for a person already sentenced by a judgment that has become irrevocable to postpone the enforcement of the penalty. Postponement of punishment may be mandatory or optional. Compulsory postponement of the enforcement of a prison sentence may be requested in all the cases provided for in Article 146 of the criminal code, i.e.: a pregnant woman, mother of a child under one year of age, a person suffering from full-blown AIDS or other serious immune deficiency, or another illness incompatible with the prison regime. On the other hand, an optional postponement of the execution of the sentence may be requested in all the cases provided for in Article 147 of the criminal code, namely: application for pardon, mother of children under three years of age, person suffering from serious physical infirmity.

the hypothesis of execution of the sentence in the face of a request for deferment of sentence or home detention for health reasons, it is not the investigation carried out by the judge to determine the degree of infirmity that is decisive, but rather the ascertainment of the presence of exceptional circumstances that impose a mandatory nature of the execution or that are capable of counteracting the possibility of making the sentence less afflictive[9]. The reasoning adopted by the Court of Cassation seems to suggest to the trial judges, with reference to the convicted person aged over 70, a decidedly broad assessment of the requirement of serious infirmity, which, under Article 147(3) of the Criminal Code, can justify an optional postponement of the execution of the sentence, almost as if to fill what appears to be a gap in the system. In reality, the legislature's choice not to provide in general for the possibility of a deferment of execution based solely on advanced age could be justified by the logic that it would appear unreasonable to postpone execution to a time when the offender is even older, in addition to the fact that such a possible general rule would have led to a disapplication of criminal penalties for a large section of the criminal population, thus undermining the deterrent effectiveness of the penalty.

However, the legislator's choice to limit prison terms for the elderly as much as possible is also confirmed in the regulatory system that regulates the execution phase and, in particular, in the provision of art. 47 ter, co. 1 of the law of 26th July 1975, n. 354, modified by art. 7 of the law of 5th December 2005, n. 251, according to which 'the sentence of imprisonment for any offence, with the exception of those provided for in Book II, Title XII, Chapter III, Section I, and in Articles 609 bis, 609 quater and 609 octies of the Criminal Code, Article 51(3-bis) of the Code of Criminal Procedure and Article 4 bis of this Law, may be served in one's own home or in another public place of care, assistance and reception, when it concerns a person who, at the time of or after the commencement of the execution of the sentence, is over seventy years of age, provided that he has not been declared a habitual, professional or trendy delinquent, nor has he ever been convicted with the aggravating circumstance referred to in Article 99 of the Criminal Code". In relation to this legislative provision, moreover, it must be emphasised that there is no automatism in the granting of the benefit of home detention to persons over seventy years of age, but that, on the contrary, the assessment remains at the discretion of the supervisory magistrate[10], as is also the case for the granting of the alternative measure in the case of an application made by a sentenced person, over seventy, with health problems, with the obligation for the magistrate to give specific reasons as to the compatibility of keeping him in prison with the protection of the right to health, the re-educative function of the

[9] Cass. pen., 12 February 2001, no. 2043.

[10] Cass. pen., 2 February 2007, no. 10308.

sentence and the sense of humanity[11]. Again, according to a recent law by the Constitutional Court, the absolute ban on home detention even for repeat offenders appears unreasonable, especially in relation to the principles of re-education and humanity of the penalty. The supervisory magistracy, therefore, will now have to assess, case by case, whether the convicted person is worthy of access to the alternative measure to detention, taking any residual social dangerousness also into account. According to the Court's reasoning, the judgement on recidivism is formulated solely for the purpose of quantifying the sentence to be imposed and, therefore, is neither current nor specific with respect to the reasons that could justify the granting of home detention. One cannot disregard, according to the Constitutional Court, the changes that have occurred in the offender and the possible re-educational path in hypothesis already undertaken in prison, as well as the greater suffering caused by detention on an elderly person[12].

Immediately after the aforementioned 2005 amendment, case law raised the question of whether Article 47b of the Penal Code was also applicable to the offences referred to in Article 4a of the same legislative text, but came to the conclusion that it was not[13].

3. The elderly between systematic prison overcrowding and health protection

In Italy, as in other European countries, there has been an increase in the prison population since the first decade of the 2000s, as a result of a tightening of legislation and the massive use of prison coercion for the repression of crimes. In our country, in essence, the principle of *tough on crime has* been applied (Simon, 2007), which has gradually led to a rise in the number of inmates, reaching a peak in 2019 of 68,258 inmates[14]. This figure, albeit slowly, began to decrease, particularly following the condemnation of the

[11] Cass. pen., 13 July 2016, no. 52979.

[12] Cort. const., 31 March 2021, no. 56.

[13] Cass. pen., 5th July 2006, no. 24699. With Legislative Decree No. 152 of 13th May 1991, later converted into Law No. 203 of 12th July 1991, Article 4-bis was introduced into the Italian penitentiary system, in which the legislator identified the conditions under which persons convicted of offences considered particularly serious - many of which can be traced back to organised crime - can have access to alternative measures to detention, extra-curricular work and premium permits. At the heart of the provision of Article 4-bis was the new regulation on the granting of alternative measures to detention for all convicted persons presumed to be socially dangerous, as well as the provision of different treatment to other prisoners. In addition, the new system associated important provisions for collaborators with justice, who could count on favourable treatment.

[14] According to the data from the Italian Ministry of Justice as of 30th March 2023, there are 56700 inmates in the various penal institutions throughout the country, 9000 more than the regulatory capacity.

Italian State by the European Court of Human Rights in the well-known Torreggiani judgment[15]. The Italian phenomenon is quite anomalous in that the growth in the number of prisoners is not matched by the growth in the number of offences, which have decreased more than the continent's average (SPACE Report; 2022: 50). The reason for this increase in the prison population, even compared to a well-defined regulatory capacity, does not lie so much in the constant and linear increase in crime, so much so that the number of prison admissions is falling (Antigone Report, 2022). Such a high number of detainees, then, seems to be explained, on the one hand, by the longer duration of custody, due to inefficient and inadequate legislation, e.g. and in particular that on drugs, which is one of the main causes of entry and stay in prison[16]; on the other hand, it is also explained by the low use and investment on alternative measures to detention. The problem of prison overcrowding, moreover, is not just an Italian problem but a European one and has, therefore, prompted many Community States to experiment with some remedies to the problem (SPACE Report, 2022: 74).

Even today, the numbers of prison overcrowding in Italy and the absence of useful tools to at least contain the phenomenon are very worrying, as they lead to a condition of forced promiscuity in penitentiary institutions that are now collapsing and this mortifies the dignity of human beings, who find themselves serving their sentences in asphyxiated structures (Chiola, 2020: 159).

The European Court of Human Rights, as is well known, has been called upon several times to intervene in cases in which the insalubriousness of detention environments, overcrowding and treatment detrimental to the dignity of the person have been denounced[17]. In the case of Lind v. Russia, the Court, for example, considered it an inhuman and degrading treatment that a person suffering from chronic kidney disease was detained in overcrowded conditions and without the necessary medication[18]. It is precisely the protection of health, often linked to old age, that is one of the most problematic issues in Italian prisons. The lack of adequate medical care presents itself, in the prison circuit, as a further affliction, which seems to confirm the Foucauldian thought on prison understood as corporal punishment, since "to claim that prison is the place or instrument for suffering the pain of the sole loss of liberty is to lie or to lend faith to the lies of jurists" (Pavarini, 1983: 2). There is a close relationship between health and detention, which can

[15] ECHR, 8th January 2013, nos. 4357/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, 37818/10.

[16] The of the Ministry of Justice of 30th June 2019, in www.giustizia.it, shows that among the categories of crime involving the highest number of Italian and foreign subjects in detention are crimes against property (33,709), crimes against the person (24,541) and drug offences (21,337).

[17] ECtHR, 16th July 2009, no. 22635/03.

[18] ECtHR, 6th December 2007, no. 25664/05.

become progressively frictional the more serious the pathologies are, to become an incompatibility difficult to overcome if the condition of seniority is added. The Italian prison reality seems to deliver us an idea of prison as "a place that sickens more often than it heals" (Ceraudo, 2019: 83), because the guarantee of the right to health of prisoners passes through the environmental salubrity[19], often unfortunately not ensured in Italian penal institutions. The 'photograph' we have of these institutions, also in the light of the phenomenon of overcrowding, in fact, legitimises the assertion that in prison the right to health (art. 32, Const. it.) is not ensured: the environment in which the sentence is served is, in most national realities, dilapidated, cramped, unhealthy (Relazione Garante nazionale dei diritti delle persone private della libertà personale, 2022: 168). Therefore, in order to protect the health and physical integrity of persons in detention, *a fortiori* if they are elderly, the release would be justified, especially through the granting of alternative measures or transfer to hospital facilities, when the illness is particularly difficult to treat, all the more so in those situations of chronic pathologies, which often become such with the advancing of age (Bellantoni, 2017: 36).

4. The relevance of age in the enforcement of sentences in Italian and European case law

It has already been written that the status of an elderly person is not in itself determinant for the postponement of the execution of the sentence, to the point that in Italy there is a very high percentage of inmates advanced in age, also and above all due to the absence of an automatism that in these cases converts the execution of the sentence in prison with a less afflictive measure. It is precisely the advanced age of the prisoner and its compatibility with the prison regime that have been the subject of decisions by both the Italian Court of Cassation and the European Court of Human Rights. The Italian jurisprudence, in this regard, has marked an important opening towards mandatory and optional deferment of sentences, as well as towards home detention under Article 47 ter, para. 1, ord. pen.[20]. In the case examined by the Supreme Court, the Supervision Court, despite the fact that the subject was very old, had rejected the detainee's application for deferment of the execution of the sentence (Articles 146 and 147 of the Penal Code), also in the form of home detention (Article 47b(1) of the Penal Code), an application based on the real risk that dramatic events might occur because of the various pathologies from

[19] Cass. civ., 6 October 1979, no. 5172.

[20] Cass. pen., 22nd March 2017, no. 34451.

which the detainee was suffering, also in relation to his age[21]. According to the Surveillance Judge, however, an interpretation of the "sense of humanity" referred to in Article 27 Const. it.[22], as the right to 'extinguish' oneself outside prison was not admissible and this was especially so because the detainee had an important criminal background and was the bearer of a very high rate of social dangerousness, being at the top of a mafia organisation. The Court of Cassation, for its part, traced the issue back to several principles already developed in the case law. *First of all*, that according to which the mandatory deferral of the execution of the sentence cannot be limited to the pathology that leads to the presumption of a danger to life, but must take into account the physical deterioration, in compliance with a minimum threshold of dignity; then, the principle according to which the optional deferment of punishment for physical infirmity is linked to the pathology that causes a serious danger to life or the likelihood of significant and harmful consequential events, which can be eliminated with treatment not practicable within the prison circuit; finally, the principle according to which the prohibition on granting the benefit of home detention to persons convicted of hostile offences (art. 4 bis ord. penit.), is not applicable when there are conditions of serious physical infirmity such as to justify the postponement of execution pursuant to Article 147 of the Criminal Code, thus making the application of the alternative measure to detention a balancing act between the need to protect the community and respect for the principle of the humanity of the penalty. On the basis of these considerations, then, the Italian Supreme Court annulled the order under appeal.

The second ruling of the Court of Cassation, on the other hand, addresses the issue of the extension of the differentiated regime (so-called 'hard' prison)[23] for an elderly

[21] This is the case, with a strong media clamour, concerning the Sicilian mafia boss Totò Riina, 86 years old and suffering from serious illnesses, particularly cardiac, which rendered him non-self-sufficient and posed a danger to his life. The boss, believed to be at the top of the mafia syndicate that decreed the assassination of important Italian magistrates, died in the prison ward of the Parma hospital following two emergency surgeries and in a coma.

[22] Pursuant to Article 27(3) of the Italian Constitution, 'punishments may not consist of treatment contrary to the sense of humanity and must aim at the re-education of the convicted person'.

[23] The differentiated regime ex art. 41 bis, ord. pen. in Italy is referred to in jargon as 'carcere duro' (hard prison); this makes it very clear that the establishments housing the prisoners subjected to this special detention are of maximum security and within them the strictest face of the State is shown. The application of the special detention regime is made by reasoned decree of the Minister of Justice, also at the request of the Minister of the Interior, whenever there are serious reasons of order and security, with reference to the capacity of certain detainees to maintain links with the criminal, mafia, terrorist or subversive association to which they belong. Prisoners or internees who have been granted the 41 bis prison regime come from the so-called 'high security' circuits, but once they enter the 'hard prison' circuit, they have to start dealing with a series of severe limitations. The custody and surveillance of this category of prisoners is managed by selected agents, who guard the twelve 41 bis wards distributed throughout Italy.

person, also invoking the case-law of the European Court of Human Rights[24]. The Court of Supervision had rejected the complaint made by a very elderly detainee against the ministerial decree extending his stay in the 'hard' regime under Article 41 bis of the Penal Code, because, according to the judge, the danger of contact with the mafia organisation to which he belonged remained. The Court of Cassation, however, upheld the appeal, specifying that "the contested decision ends up avoiding to deal with a relevant issue, represented by the "possible incidence" of the health conditions, combined with the particularly advanced age, on the overall legitimacy of the extension of the differentiated regime, both in terms of prohibition of inhuman and degrading treatment, and in terms of analysis of the current conditions of dangerousness of the inmate in relation to the necessary inhibition of potentially criminal contacts". The Italian Supreme Court, moreover, traced the issue to the 'overall legality' of on the basis of of Article 3 of the European Convention on Human Rights, which, as interpreted by the Strasbourg Court, establishes that one cannot disregard, for the evaluation of the extension of the deferred regime, the objective factor of the deterioration of health conditions, correlated to the age of the inmate[25].

The Edu Court, on the other hand, has dealt with the protection of the rights of particularly elderly prisoners always through the instrument offered by Article 3 of the ECHR, in an assessment of the compatibility of the conditions of detention with the European Convention (Ferrari, 2017: 2). The broad scope of the Convention provision has allowed the European Court to identify different *species of* violation of the prohibition of torture and inhuman or degrading treatment or punishment (Della Casa, 2004: 3490). In order to better understand how, through this prohibition, elderly detainees are also indirectly protected, it is necessary to retrace, albeit succinctly, the most significant jurisprudential approaches relating to Article 3 of the ECHR.

The ruling in Priebke v. Italy, which required the European Court to examine the manner in which the sentence was carried out against an over-80 year-old detainee and whether it infringed his fundamental rights. In the judgment, the Court, bringing the matter back under Article 3 of the ECHR, recognised that maintaining an elderly person in detention for a long time can be relevant from the point of view of inhuman or degrading treatment[26]. The same Edu Court, in a subsequent judgment in Papon v. France, seems to have wished to circumscribe the terms of the question, expressly stating that advanced age does not in itself constitute an obstacle to detention in prison, attributing to the high

[24] Cass. pen. 23rd February 2017, no. 32405.

[25] Edu Court, 25th September 2018, No. 55080/13.

[26] Edu Court, 26th October 2000, no. 302110/96.

age the character of a relevant element of judgement on a par with other factors, starting with the state of health[27].

On the basis of, some questions must now be asked: can the particularly advanced age of the prisoner render the sentence to be served devoid of re-educative meaning? Does seniority, again, affect the assessment of the humanity of detention provided for in Article 27 of the Italian Constitution?

5. Conclusions: a proposal to overcome discrimination of the elderly in prison

It is hard to doubt that the elderly, especially those with serious pathologies, feel the sufferings of prison more keenly, as they need assiduous care, which often cannot be guaranteed in penal institutions. The decision not to allow access to the alternative measure of home detention - even though by now absolute preclusion has fallen even in cases of recidivist offenders[28] - seems in conflict with the principles of re-education and humanity of punishment enshrined in Article 27 of the Italian Constitution (Moccia, 1992:39; Dolcini, 2019: 5; Dolcini, 2019: 1671). It is precisely this constitutional provision that favours home detention for the elderly, who if are ill and continue to live in the prison circuit, are subjected to treatment that can take on the characteristics of inhumanity and degrading humiliation.

Old age and illness, moreover, are conditions that frequently link one to the other, as the old aphorism «*senectus ipsa est morbus*»[29] reminds us, according to which old age is in itself an illness. Old age being, from a biological point of view, the decay of organic functions, the prison system cannot fail to take this into account, adapting the sanctioning responses to this particular physical state. The Italian Constitution recognises both the good of health as a «fundamental right of the individual and interest of the community» (art. 32), and the full formal and substantial equality of citizens, through the removal of obstacles that stand in the way (art. 3), thus promoting effective equality, under this point of view, between free persons and prisoners.

The rights of prisoners are also affected by another fundamental provision of the Italian Constitution: Article 2, which recognises and guarantees - implicitly also to prisoners - the inviolable rights of man, of any man, both as an individual and in the social formations where his personality takes place, which may include the prison environment

[27] Edu Court, 7th June 2001, No 64666/2001.

[28] Cort. const. 31st March 2021, no. 56.

[29] Publius Terentius Aphro (2nd century BC), cf. *Formione*, *Comedies of Publius Terentius*, edited by M. Vannucci, Parma, 1785, p. 45.

(Neppi Modona, 1976: 173)[30]. The rights recognised by Article 2 of the Constitution are therefore part of the «irretrievable heritage of the human personality: rights that belong to man understood as a free being»[31]. The inalienable value that the dignity of the human person assumes in the Italian Constitution - which unites both Article 2 and Article 27 - makes inadmissible, at least on paper, a prison system understood as a place where a regime differentiated from the fundamental guarantees ensured by the welfare state and the rule of law is in force. What comes to the fore once again is Article 3 of the Constitution, which, by affirming the principle of formal and substantive equality, which cannot but extend to the reality of prisons, does not allow forms of discrimination on fundamental rights and guarantees (Matić Bošković & László Gál, 2021: 166). In fact, it is not possible to think of the prison system as a set of rules completely separate and independent from the general system. If this were the case, the prisoner would not have access to the fundamental guarantees offered to him by the latter. On the contrary, the prison regulations must be understood as a special discipline, but one that nonetheless forms part of the state order and as such must be «in a necessary relationship of compatibility if not of continuation and development with the Constitution» (Ruotolo, 2002: 12).

What has been written so far on the treatment that elderly prisoners receive in Italy, compared with the rights recognised to free citizens, allows some conclusive reflections on the effectiveness of the guarantees recognised within prison walls. If it is true that, on the one hand, the inviolable rights of man under Article 2 of the Constitution are subject to the limits legitimately imposed in view of the application and consequent execution of prison sentences, on the other hand, this condition can in no way justify their annulment[32]. The premise from which to start, therefore, is that the restriction of personal freedom cannot entail the disavowal of subjective positions through a generalised subjection to the prison organisation that is alien to the current constitutional order, which is based on the primacy of the human person and his rights. The elderly prisoner, from the point of view of fundamental rights and guarantees, must be recognised as being in an equal position with the free prisoner, even more so with particular reference to one of the most important rights of the person such as that to health.

The extension to elderly prisoners of the formal guarantees recognised for the free in matters of health protection, however, does not by itself represent an adequate

[30] The values to which Art. 2 of the Italian Constitution is connected are also in line with the supranational instances for the defence of the human person: Art. 5 of the Universal Declaration of Human Rights of 1948; Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; Art. 10 c. I International Covenant on Civil and Political Rights, part. I of the European Prison Rules, Recommendation R (2006) 2.

[31] Constitutional Court, 3rd July 1956, No 11, in *Giur. cost.*, 1956, p. 612.

[32] Constitutional Court, 11th February 1999, No 26, point 3.1.

solution to cope with the peculiar needs physiologically connected to the detention status of the elderly. An interpretation of the principle of equality that does not stop at the threshold of mere form, in fact, entails, as is well known, not only a uniform treatment of the equal, but also a reasonable diversified treatment of the different. It is not possible, therefore, to disregard the concrete circumstances in which prison life takes place and, above all, to equate formally and *sic et simpliciter* the free subject with the one who is not free. For a real relationship of equality, it is first of all necessary to assess the differences linked to the peculiarities of prison life. A 'penalising' environment such as prison, in fact, already from the outset requires a surplus of prudence in its use by the state with regard to particularly vulnerable subjects such as the elderly.

In conclusion, given that *senectus ipsa est morbus*, the *de lege ferenda* proposal that we wish to put forward is that of a strengthened protection of the elderly prisoner who, on reaching a certain age reasonably established by the legislator (e.g. 80 years), should benefit from a presumption of incompatibility with the inframural prison regime in favour of alternative measures, such as home detention, perhaps with special prescriptions useful to guarantee social security. This is true even when the sentence is linked to serious offences, such as organised crime, without prejudice to the prosecution's right to prove that the offender's conditions are fully compatible with the concrete situation in which detention takes place. We propose, therefore, a reversal of the paradigm, an inversion of the evidentiary burden linked to the compatibility of the inframurary prison regime, placing that burden on the State that wishes to keep an offender in prison even after he has reached a particularly advanced age, and also making the prisoner benefit from the doubt as to that compatibility.

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II

The Specificities of Elderly Persons in Criminology and Victimology

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FORENSIC INTERVIEW WITH ELDERLY ABUSED PEOPLE

As the number of elderly people in global population continues to grows, the number of elderly people abuse cases increased dramatically. Majority of those cases were done behind the closed doors by their intimate partners, family members and caregivers, and only a small percent are recognized, disclosed and reported requiring official criminal investigation. Even when reported the alleged accusations are accepted with suspicion, based on assumptions of diminished capacity and competences of elderly person to present the case on legally acceptable fashion. With no age-appropriate forensic interviewing approaches, protocols and methodologies elderly people's quest for justice and protection is usually left with no appropriate support.

The purpose of this paper is to discuss conceptualization of an evidence-based, trauma-informed and strength-based protocols, methodologies and practices of unique forensic interview of elderly abused people promising to be effective in delivering legally defensible information.

Keywords: *Elderly neglect and abuse, Forensic interview, Evidence-based methodologies, Edge sensitive approaches, Capacities and competences of elderly victims and witnesses.*

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Introduction

Development and establishment of comprehensive, coordinated, multidisciplinary and multiagency and sustainable policy, regulation, prevention and intervention system for social protection of elderly people from neglect and abuse requires in dept understanding of elderly people needs and potentials as well as expert knowledge of evidence-based forensic interview methodologies with alleged elderly abused people.

1. Elderly people neglect and abuse

Elderly abuse is considered as wide spread, important end "a complex cluster of distinct but related phenomena" … due to which "requires a coordinated multidisciplinary, mule-agency, and multisystem response" (Connolly et al., 2014, p. 5; Kambovski, 2021). According to World Health Organization,[1] the number of elder abuse cases is projected to increase reaching a much as 320 million victims by 2050 (WHO, 2023). Process of development research-based prevention of elderly abuse is still slow, especially in developing countries.

1.1. Elderly people abuse definition

Term "elderly people" (EP)[2] refers to very diverse population of persons aged 65 and older.

There are no universally accepted definition elderly people abuse (EPA)[3], but there are two key elements of elderly people abuse (1) *injury* (some injury, deprivation, or dangerous condition has happened to the elder person) and (2) *trustful relationship* (caregiver, other familial, intimate partner, or professional relationship where a person bears or has assumed responsibility for protecting the interest of elder person), (Heisler, C., 2017).

World health organization, (WHO)[4]define EA as "a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person. This type of violence constitutes a violation of human rights and includes physical, sexual, psychological and emotional

[1] Here and thereafter WHO

[2] Here and thereafter EP

[3] Here and thereafter EPA

[4] World Health Organization, WHO here and thereafter

abuse; financial material abuse; abandonment; neglect. And serious loss of dignity and respect". (WHO, 2022, p 2).

1.2. Scope and forms of elderly people abuse

EPA has become serious social, public health, and human rights issue. One recent systematic review (52 studies in 28 countries) estimated that almost 16% persons aged 60 years and older were subjected to some form of abuse, with alarming 64.2% staff member in long term care institutions reporting some form of abuse during last year. (Mikton, Y.Y., et al, 2017). Finally, increased public awareness of EPA accompanied with improved EPA awareness of their rights, knowledge of abuse, and resources available will definitively increase reporting EP abuse.

Forms of EPA include but are not limited to (a) physical abuse: "Intentional use of physical force that results in illness, injury, pain or functional impairment"; (b) sexual abuse: "Non-consensual sexual contact of any kind;" (c) neglect by a caregiver: "Caregivers or other responsible parties failing to provide food, shelter, health care, or protection;" (d) financial abuse: "Misappropriation of an older person's money or property;" (e) emotional/psychological abuse : "Inflicting mental pain, anguish, or distress on a person; "and (f) multiple or poly victimization "When a person aged 60+ is harmed through multiple co-occurring or sequential types of elder abuse by one or more perpetrators …" (Ramsey-Klawsnik et al.,2014, p. 15).

1.3. Elderly people abuse dynamics

Most of EPA have been exposed to some very harmful forms of ageism, biases and stereotypes. Those widely accepted prejudices are responsible not only for discriminatory attitudes, policies towards EP but also for making EP ready to accept those prejudices themselves. Dr. Diehl, (202) provided ample scientific evidence that even though some declines are to with aging most of them can be prevented, minimized and even compensated with positive changes that will also take place. (APA, 2023). By providing scientific foundation for more complex and positive, empowerment approach dr. Diehl (200201) set up foundation for embracement of strength, empowerment approach to policy, regulation and methodology for prevention of EPA.

It is important to highlight strong believe that EP have capacity to remember, recall and to communicate reliable narrative about their alleged abuse experience if they were interviewed by competent interviewer using evidence-based protocols and methodologies.

All those lifespan experiences and dynamics affect EPA awareness of, willingness to report, and readiness to fully participate in a forensic interview. Only a small percentage of EPA report the case to officials. According to Adult Protective Services (2029) For instance, among 1.7 million reports of adult maltreatment in the US in year of 2018, majority of those cases 57.8% were referred by professionals, 10.7% by relatives and only 5.2% were self-referred. Reasons for not reporting include inability to report due to cognitive or physical limitations, isolation, hiding, destroying, or removing means to report by caregiver, victim's fears to not being believed, loosing independency or love and support needed, increase further abuse, guilt and shame, uncomforted with negative publicity and many other.

Most of EPA cases were committed by people in ongoing and trusted relationships with EP victims, but such a relationship may also be initiated and formed through a process of grooming and befriending. The perpetrator knows the victim's vulnerabilities, assets and personal history and use that to commit abuse acts, avoid detection, and undermine the victim's credibility. Due to such relational issues EPA may be additionally reluctant to openly disclose, tend to minimize offending behavior, to self-blame and even defend and protect the alleged offender.

1.4. Consequences of elderly people abuse.

EPA may be complex and last for long period of time. Such an extended suffering may undermine well-being and cause several serious and long-term physicals, mental health, financial consequences (premature mortality, depression, cognitive decline, financial devastation) for both EAP as well as for their families, but also for local and wider society, (Dong Q.X., 2015).

1.5. Prevention and interventions.

Establishing coherent and efficient of EPA prevention and protection system is very slow even in developing countries. In US, for instance the Elder Justice Act was introduced on 2002 and passed on 2010.The Elder Abuse Prevention and Prosecution Act, which was adopted in 2017 finally addressed the forensic issues. Currently law enforcement and APS are working together to develop best practices to pursue both civil and criminal remedies, to provide justice for all older adult victims (American Bar Association…2021).

Some promising programs were developed during past couple of decades such as caregiver support interventions, many management programs for vulnerable EP, helplines and emergency shelters; and multi-disciplinary, multi-sectorial teams as well as intensive, intergenerational interaction programs (Pillmer, K., et al., 2016, Diehl., 2023).

WHO (2022) introduced five priorities are: (1) Combat ageism as it is a major reason why the abuse of elder people receives so little attention; (2) Generate more and better data to raise awareness of the problem; (3) Develop and investment case focusing on how addressing the problem is money well spent; (4) Make an investment case focusing on how addressing the problem in money well spent, (5) Raise funds as more resources are needed to acle the problem.

2. Forensic interview with EP definition and characteristics

2.1. Purpose and characteristics of forensic interview with elderly people

Main purpose of forensic interview (FI)[5] with elderly people (EP) is to gather authentic, comprehensive, detailed, reliable and legally sound factual information about alleged abuse incident from EP by carefully avoiding secondary traumatization of victim as well as any violating rights of alleged perpetrator.

FI presents a unique type of interview, different than any other type of interview aiming to fulfill legal, mental health and methodological standards. The essence of FI can best be described by analysis of its key features according to which FI is supposed to be: (a) l*egally sound*, conducted in context of wider, comprehensive, multiagency criminal investigation of EPA cases intending to provide factual data that can be accepted to be used on court; (b) *objective and neutral*, by embracing neutral and objective approach to method of data gathering in order to demonstrate full respect to the rights of both alleged victim and perpetrator; (c) *victim-centered*, aiming to protect well-being and the best interest of the EPA, while avoiding any violation of the rights of the alleged perpetrator; (d) *multicultural*, by taking in consideration ethnic, racial, cultural, socio-psychological, medical, and any other issues that can diminish or enhance EPA ability to provide reliable testimony, and is ready to adjust its methodology to those idiosyncratic characteristics of EPA; (e) *evidence-based*, is based on sound theoretical concepts, protocols, methodologies and practices with strong empirical evidence of effectiveness; (f) m*ultidisciplinary*, is based on multidisciplinary approach, and coordinated collaboration of all agencies and professionals involved in legal process, and social, medical and mental health support to alleged EPA; (g) *competent interviewer*, conducted by trained, supervised and supported

[5] Forensic Interview - Here and thereafter FI

professionals with appropriate, high level of knowledge, skills and attitudes; (h) *safe,* follows "non nocere" ethical principal by providing safe, comfortable, but neutral interviewing environment, avoiding secondary traumatization and multiple, repeated interviews (Gibson S., 2017. Heisler C., 2017).

Therefore, the FI has three essential features (a) focus on fulfilling its purpose, (b) trauma-informed approach and (c) strength-based perspective with regards to ability of EPA to provide reliable testimony.

2.2. Conceptualization and establishment of forensic interview

Development of specific FI with EP, similar to FI with children, is marked with dynamic spiral path of ignorance, controversies and progress (Faller, 2015, Saywictz K.L & Camparo, 2014).

Issues related to EPA were for a very long time misunderstood, underestimated, and ignored by both public and professionals. EPA were rarely cooled up on court to testify, and if they were their testimonies were accepted with reservation due prejudices about their diminished competence, and capacity.

During last couple of decades of 20th century, a number of significant research-based findings about prevalence, dynamics, consequences, and weaknesses of existing policies and practices were published, offering opportunities for advancement in the broad area of a quality of EPA prevention and practice. Unfortunately, most of them were simply ignored by policy makers and practitioners. Publication of several serious cases of EPA, have brought EPA abuse to the focus of public attention requesting appropriate professional reactions.

FI with EPA emerges as an adaptation of already well-established FI with children, accepting three phases semi-structured interview protocol with belonging methodological framework. Conceptualization of FI with EPA however took pathways, different approaches, protocol and methodologies, which brought some overlaps, confusion and power struggle. On other hand it also opened opportunities for comparison, exchange, collaboration, identification, clarification establishment of basic principles, standards, protocols, methodologies, and training curricula all adapted to unique needs and potentials of EPA (Geronto Society of America 2012, OJJDP 2015).

3. Forensic interview process and protocol

FI with EPA is performed in context of three investigative phases (a) pre-interview, (b) direct interview and (c) post interview (OJJDP, 2015, Brubacher S. & Powell M., 2029). Two of them are conducted by interagency MDT members and the middle one

- direct FI is preferably performed by single professional with opportunity for MDT member to observe and to participate in interviewing process.

The purpose of *pre-interview phase* is to set up all conditions (time, space, equipment, ambient etc.), to outline general goals and objectives of FI, to distribute responsibilities of MDT members, and to make adaptations necessary in order to enhance the ability of EPA person to give its best in safe and protective ambient.

Post-interview phase focuses on wrapping around main phase (debriefing, explaining further steps and procedures, assessing risk, and needs for medical, mental health and social-welfare help and support), and preparing EP for court appearance if that is required to happened.

Direct FI with EPA also consists of three interrelated phases including (a) rapport, orientation and preparation phase, (b) substantial-free narrative phase and (c) closure phase. All of which will be described in more detail.

3.1. Rapport, orientation, and preparation phase.

FI presents great and multiple challenge for both EP and interviewer. Studies (Hershkowitz et al, 2015, Geiselman & Fisher, 2014)) however demonstrated that they can be diminished by carefully preparation of EP. Key component of this phase are: (1) unconditional acceptance, orientation and providing information about necessity, purpose, process and methods to be used; (2) establishing rapport and communication capacity, style and preferences assessment; (3) introducing and working-through main rules; (4) truth-lie discussion; and (5) episodic memory training. All those activities provide great opportunity to both sides to get to know each other, as well as to help EP to become familiar and to exercise typical features of essential phase of FI.

3.2. Substantive- main phase.

This - essential phase is fully devoted to eliciting authentic, comprehensive, detailed and reliable free narrative about alleged abuse incident(s). Substantive phase is complex itself and includes the following steps (Stakic, 2019) : (1) graduate transition to main issue; (2) open and neutral invitation for input free narrative; (3) elaboration of free narrative using neutral, open-ended questions and prompts; (4) searching for specific details, and explanations specific and closed question; (5) short working brake with opportunity to MDT members for consultation, suggestions and inputs; (6) thorough elaboration and clarification including introducing external information; (7) alternative hypothesis testing and (8) announcement of the end of FI. Each of those activities is based on well-structured protocol and evidence-based methodology.

3.3. Closure phase.

This phase provides respectful ending to EPA by (1) announcing closure; (2) summarizing and checking out accuracy of main findings; (3) invitation for additional information; (4) giving opportunity to EPA to ask questions; (5) providing information about further steps and activities; (6) quick risk assessment; (7) introducing and discussing neutral themes to assist EPA to get back to its regular state of mind and everyday activities and (8) expressing gratitude to EP for effort and collaboration during FI.

4. Forensic interview strategies and methodologies

In order to ensure input free, noncontaminated recall and narrative forensic interviewers use general strategies and specific methods and techniques that have been carefully evaluated and consistently demonstrated proof of efficiency.

4.1. General forensic interview strategies

Strategies present framework for organizing, putting in right order and combining different methods and techniques to achieve the best results in obtaining forensically important data (Brubacher, S. & Powell m., 2019)

4.1.1. Funnel strategy. Numerous research studies confirmed that open-ended questions generate comprehensive but not always detailed narrative, as well as that close ended questions provide specific but less accurate narratives. Funnel, or *funnel-shaped hierarchical* strategy (aims to put together complementary advantages of both open and closed questions by using neutral, open and input free questions at the beginning and then progressively moving towards more focused, close ended questions. Specific and somewhat more complex form of this strategy is known as *the hourglass strategy* wherein open-ended questions are used at the beginning, followed by more focused and close ended questions, after which interviewer return again to open ended, elaborative questions. The process may take several spiral cycles so that each important topic will be comprehensively and thorough worked through.

4.1.2. Sandwich strategy, or *pairing principal technique* uses verbal contextual cuing to elicit specific information followed by open questions for further elaboration. Verbal cues are generated from EP' answers on open and focused questions therefore presents authentic EP perspective.

4.1.3. Cognitive interviewing strategies, present classical cognitive forensic interview strategies such as *"mental reconstruction," "chancing an order"* or *"changing perspective"* etc. (Stakic, 2019). Some of those strategies may be too challenging for most of EP, especially those with cognitive impairments and declines.

4.2. Forensic interview methods and techniques

Contemporary FI uses rich set of evidence-based methods and techniques but mostly lean on questioning, using minimal encourages and reminders, reflection and clarification techniques.

4.2.1. Questions posting. According to Walker (201) effective using questions require in depth understanding benefits and limitation of different type of questions, abilities of the EPA interweaved to answer, and sensitivity and skills of interweaver to much those two. FI uses combination of open and close ended questions, both neutral and non-suggestive.

Open ended, neutral and input free questions are the most effective and preferable especially on the beginning of FI and for elaboration of any new specific topic or issue. Open ended questions provide freedom to EP to choose who to answer and can take form of general invitations, follow-up invitations, cued invitations, or temporal invitation (Geisel0man R., & Fisher. P., 2014). Some open-ended questions may be ineffective for EP with cognitive and memory declines therefore should be used carefully and in combination with focused and close ended questions.

Close ended questions can be answered with "yes or no", of with single fact. Close ended questions do not give much opportunities for elaboration but help to collect specific, concrete, detailed and forensically relevant information. They are not pleasant for EP, and may force wrong answer.

Questions can also be specific, focused, following up, multiple - forced choice, suggestive and other. It is crucial that questions are neutral, non-suggestive and not to include external information based on external resources or interviewer's hypothesis or biases. The way of questioning is responsible for mistakes, collecting untrue statements and recantation of already given narrative. FI should use open ended, neutral questions for collecting neutral narrative, and neutral focused and closed questions for elaboration and clarification.

4.3. Minimal encourages, are simple but extremely efficient technique, or better say variety of techniques, used for assisting to EP to continue focusing, recollecting and reporting what they have already started taking about. Besides helping EP to keep up focus and rhythm minimal encourages are letting know to EP that interviewer is listening, and is interested for wat EP is talking about. Minimal encourages may have different forms and are used frequently during the interviewing process.

4.4. Reflection techniques, consists of two complementary reflecting content (cognitive) and reflecting feelings (emotional) technique. *Reflecting content*, uses paraphrasing and

summarizing for reflecting essence of what EP has said which help to both EP and interviewer to clarify and better understand of key points of EP narrative. It also motivates EP to continue exploring and talking. *Reflecting feelings* helps EP to become aware and neutralize his/her emotions, to connect its feelings and content, and to let EP know that interviewer is listening, understand and empathize with him/her.

4.5. Clarification techniques. Clarification techniques, sometimes called *confrontation techniques*, help with addressing and working through discrepancies and controversies in EP statements. Those techniques Clarification techniques are considered to be "heavy" for usage with vulnerable and traumatized EP, and are not used with the beginning of FI, but only when trustful relationship was already established.

4.6. Supporting techniques. In some FI models different kind of supporting tools including drawings, anatomical diagrams and dolls are used in order to assist to EP to express or/and to more precisely describe their memories. Even though those techniques may increase amount of information they also may, and usually do, increase number of mistakes, so they should not be used without appropriate training.

Generally speaking, skillful use of all above discussed evidence-based protocols, strategies, methods and techniques have proven potential to enhance readiness, motivation for active participation and ability of EP to recollect, report and clarify memories on critical event, as well as amount, details and accuracy of EP free narrative. Most importantly it would definitively dramatically increase probability of acceptance of narrative by court.

Conclusion

All conceptual, research and practical findings and experiences reviewed above thought us about: (a) prevalence, forms, dynamic and painful consequences of elderly people neglect and abuse; (b) reasons why EPA tend to delay disclosure, reluctant to report and uncomfortable to participate in official investigative proceedings; (c) ageism related stereotypes and prejudices but also about more complex and positive view of aging and real capacities and limitations of elderly people to provide comprehensive, rich in details and credible testimony; and (d) establishment of forensic interview as an evidence-based mean created to assist abused elderly people to use their full potentials in their quest for justice avoiding harming rights of allegedly accused perpetrator.

More than anything else we learned that much more creative and hard work need to be done in order to develop, and establish a coherent system for prevention and protection of vulnerable elderly people from neglect and abuse.

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Zoran Pavlović*

ELDERLY DEFENDANTS IN CRIMINAL PROCEEDINGS

Human rights norms do not provide for age as an obstacle to criminal prosecution or detention of elderly persons, and criminal prosecution and punishment of the elderly have the same goal of general and special prevention. Elderly persons must be treated in a manner consistent with human rights even when accused or convicted of criminal offences. These rights include non-discrimination, access to justice, fair trial, respect for dignity, humane treatment etc. According to the general rules of criminal procedure, the prosecutor's office and the courts should take into account age in the context of the presence of the defendant's procedural capacity for legitimatio ad causam and capacity for legitimatio ad processum, regardless of the criminal offense and the consequences during the entire procedure. It is necessary to establish adequate solutions and eventual special measures of support where necessary for victims of criminal acts and for elderly defendants, in order to properly and legally conduct criminal proceedings. This also requires the obligation of the criminal procedure authorities to have the necessary knowledge in order to enable elderly defendants to actively participate in the age and capabilities of the elderly.

Keywords: *elderly persons in criminal proceedings, special knowledge of procedural authorities about the elderly, adaptation of procedural rules to age.*

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Initial consideration

The science of criminal procedural law, legislation and jurisprudence still do not treat the issue of older persons in criminal proceedings separately. Increased interest in older people in other scientific disciplines is the result of socio-demographic and other changes in the modern world. Declining child mortality, increasing average life expectancy, and more means that older people are increasingly a regular category of the population whose numbers are increasing. This is a sign that the possibility of their appearing in criminal proceedings as witnesses, defendants, etc. is also increasing.

Human aging is a process, and old age is only the result of that process (Smiljanić, 1987: 17). Aging becomes visible after reaching maturity at 21, 23 or 25 years of age, and it is very individual to determine when an individual begins to be old. And regardless of whether it is 60, 65 or 70 years of life, in any case it is a period when signs of stagnation and regression appear in the biological, psychological and social plan (Hrnjica, 2005:155). But, as old age is not a disease, but a condition, appreciating the differences between people, we find that it is necessary to appreciate the consequences of physiological and pathological aging in people. This is especially so, because it is indisputable that older people appear as parties in court proceedings just like all other adult citizens.

Numerically, the number of elderly people in Serbia is increasing, and that is why the issue of not their status, but their position in criminal proceedings really deserves increased attention (Solarević and Pavlović, 2019:54). According to the results of the last census in Serbia, the share of persons aged 65 and over of the 6647003 total population increased from 17.4% (2011) to 22.1% (2022).[1]

The rights of the elderly are defined, but not explicitly, in international human rights conventions that relate to economic, social, civil, cultural and political rights. The rights of the elderly are certainly protected in a general sense (the right to equal protection before the law, the right to own real estate, the right to education, the right to work, the right to participate in government and other rights guaranteed by the Constitution of the RS). Although the protection of human rights has been established in the domestic legal system and is implemented through positive legislation, we also accept the law, the so-called soft law, which provides guidelines for the relationship with the elderly, such as the UN Principles for the Elderly (1991), the Madrid International Action Plan on Aging (MIPPA) (UN, 2002), Regional Strategy for the Implementation of the Madrid International Plan of Action (RIS) (UN, 2002) and others.[2] Although not legally binding, they

[1] https://www.stat.gov.rs/sr-latn/vesti/20230525-starost-i-pol/?a=0&s=1904

[2] https://www.redcross.org.rs/media/1672/jacanje-prava-starijih-serbian.pdf

are considered strong recommendations. In all these documents, there is a common thread that emphasizes the special attitude towards this category of residents. This leads to the conclusion that one could talk about the right to old age as a special human right. If they were to take such a position, it would mean the recognition of a special relationship in the criminal proceedings that the elderly should enjoy., The elderly are only mentioned in the criminal proceedings in the category of particularly sensitive witnesses, but unlike the rights of the child, the right to old age is still was not recognized in the criminal court proceedings. Nevertheless, the psychological processes that occur with aging affect a person's ability to perceive, remember, think and communicate (Aćimović, 1987:205), which must then affect the relationship of authorized state bodies in the judicial and prosecutorial treatment of the elderly. , taking into account all their characteristics and possibly a different relationship during the trial in the criminal procedure, and even after it.

In our legislation, there are no criminal offenses against the elderly, nor special procedural rules that would apply to the elderly, so we conclude that there is no criminal offense against the elderly. In order for such a conclusion to be scientifically discussed, it would be necessary to record every case where an elderly person appears as the perpetrator or victim, which has not been the case so far. This is the only way to determine the level of protection and the extent of the rights of the elderly in criminal proceedings, and in procedural terms determine their status in the proceedings.

Some general notes about the elderly

Contemporary criminal law theory and legislative solutions have implemented several categories of defendants in criminal law today, namely minors, younger adults, as a transitional solution from juvenile to general criminal law, and adults. Younger adults in the criminal justice system are recognized as persons who are formally of legal age, and are more than 18 and less than 21 or at most up to 25 years old, and the rules of general criminal law apply to them. We interpret the special group of younger adults in the criminal justice system as referring to persons who are formally of legal age, but due to the recognition of the fact that the processes of social, psychological and even physical maturation do not formally end with the age of 18 and adulthood, this should automatically open the possibility of partial application of certain special rules of juvenile criminal law. And if we would like to avoid a possible polemic due to the expression, we will label these persons here as persons in age transition. If they were to mark them as matriculation not/mature, that would make this topic much wider.

The age transition of the still under-recognized category of participants in criminal proceedings - older persons, requires us to ask whether the processes and consequences of social, psychological and physical aging in adults require the opening of a discussion on whether these elderly persons should, regardless of whether 60, 65 or an even higher age is taken as the limit (Pavlović, Sančanin - 2021:89), to enable action and decision-making in criminal proceedings according to the rules of general criminal law, but according to a procedure adapted to their age.

The legislator in the Republic of Serbia has, without any doubt, recognized the need for minors and younger adults that judges and public prosecutors, who act in cases where minors and younger adults appear as subjects of the proceedings, must also have special knowledge and skills in their work with this group of persons in the age transition. But, in the case of elderly people, nothing special is said about it.

Until the legislation specifically deals with the requests of accused and convicted persons who fall into the category of elderly persons, it is up to the court to supervise assessments of the physical and mental health needs of elderly accused persons and prisoners and the adequacy of institutions for receiving such convicts, but that is already the second, penological topic. Prosecutions of older defendants may not always comply with victims' demands for punishment, but they must send a message of condemnation of the conduct, regardless of the defendant's age.

An elderly person - the defendant is obliged to participate in the criminal proceedings according to the rules prescribed by law. The procedure for determining the existence of guilt in the case of older defendants does not and cannot jeopardize the respect for justice. Restrictions on the human rights of participants in criminal proceedings are always determined in accordance with the law, regardless of the age of the defendant, and he must participate in the proceedings in the manner prescribed by law, we emphasize regardless of age if he meets the general procedural requirements for participation in the proceedings.

Some questions are open regarding the criminal acts of older defendants: what are the implications of the trial and punishment on the human rights of these defendants, what can such actions mean for the realization of justice, and more.

By reviewing the relevant scientific literature and positive legal regulations in the country and in the comparative legislation of Spain, Greece, the Russian Federation, Germany, France, etc., we can assert without a doubt that there are no norms that would exclude the trial or detention of elderly persons, regardless of their age. which criminal acts are charged to the defendants.

At the same time, according to the general rules of criminal procedure, courts should take into account age in the context of the existence of the defendant's capacity

for legitimatio ad causam and capacity for legitimatio ad processum, regardless of the criminal offense and the consequences during the entire procedure. What may accompany old age - such as mental incompetence or serious illness - requires human rights obligations to correct the pace and structure of trials, sentencing decisions, and conditions in penal institutions, if the sentence were custodial. It is indisputable that during the entire duration of the criminal proceedings, it is necessary for the older person - the defendant, to understand what the subject of the proceedings is, and to actively participate in the proceedings alone or with the help of a professional (defense counsel).

Procedural protection of victims of crimes, including the elderly, is already quite well resolved in our country, but also in most other countries with similar criminal law traditions and cultures (such as Croatia, Hungary, Romania, Slovenia), through various measures of institutional and non-institutional support for victims. and witnesses of criminal acts, regardless of their age.

Are there such high-quality solutions for older defendants, and to the extent that is necessary for the proper and legal conduct of criminal proceedings! The explanation of the position of accused elderly persons, i.e. persons in the (upper) age transition, and the consideration of their procedural position should be seen as a whole in criminal law, through special measures whenever necessary, during the duration of the criminal procedure, the decision-making process and the decision on punishment. If we compare it with the treatment of minors, who are a special category in court proceedings, here the situation in relation to the achieved legal standards of human rights is complicated. We claim this because in the law itself, apart from the obligation to monitor the procedural abilities of the defendants, there are no other obligations of the procedural authorities!

As gerontology has struggled to gain its right to citizenship in medicine, it is also necessary to work on the education of judges, prosecutors, and lawyers so that they can accept the challenges brought by age in correlation with criminal proceedings. At the same time, newspaper coverage of such cases is full of discriminatory announcements, which can influence public opinion, as well as the attitudes of professionals. That's why let’s start by looking at the position and procedural possibilities of the accused elderly person.

Two examples and a few questions about them

In the famous film story HBO - The Wizard of Lies from 2017, it is about Bernie Madoff and his Ponzi scheme, so even though it is the biggest financial fraud in the USA, we will not analyze the Madoff case from the aspect of the criminal offense of fraud or money laundering and whether is about 15, 20 or 65 billion USD of damage that he caused

to individuals and companies from many countries of the world.[3] In the film version, part of the plot is shown about how a large number of natural persons, companies and non-governmental organizations were defrauded over the course of several decades.

After Madoff admitted to his sons in 2008 that it was a fraudulent company and fraudulent investments, they reported him to the authorities. On June 29, 2009, defendant Bernard L. Madoff was sentenced to a term of imprisonment of 150 years.

Madoff has served approximately 10 years of his sentence. On February 5, 2020, Madoff filed a motion with the Court for a sentencing reduction pursuant to 18 U.S.C. § 3582 and the First Step Act. In a court filing Madoff's lawyer said the 81-year-old uses a wheelchair, often requires oxygen, and suffers from cardiovascular disease, hypertension, insomnia and other chronic and serious medical conditions. He is too old for a transplant and has been moved to the Federal medical center prison in Butner, North Carolina.[4]

At Madoff's sentencing in 2009, Judge D. Chin called his crimes extraordinarily evil. At least four people connected to Madoff, including his son Mark, killed themselves. "Madoff does not dispute the severity of his crimes, nor does he seek to minimize the suffering of his victims," his lawyer wrote in the filing. "Madoff humbly asks this court for a modicum of compassion."

Madoff is perhaps the most prominent federal prisoner to seek compassionate release under the First Step Act, a bipartisan law signed by Donald Trump in 2018 that lets some older prisoners end their sentences early, often for health reasons. Judge Chin invited about 520 victims of Madoff's fraud to testify at his request, and about 500 of them said they were against his early release. Among the victims who opposed the early release were Nobel laureate Elie Wiesel, producer Steven Spielberg and others. The competent public prosecutor also opposed this request and explained that he has such a position because it is a case of criminal acts unprecedented in terms of scope and size in the USA.

The court rejected the request of the convicted Madoff and in the explanation of the decision pointed out that the convicted never fully accepted responsibility for his criminal acts, although he pleaded guilty to all 11 counts of the indictment at the trial. What was important in this particular case was that the impaired health of a convicted elderly person was extremely unfortunate, but that compassionate release was not justified in the Madoff case.[5] At the age of 82, convicted Madoff died in federal prison in April 2021, and regardless of age, illness and the circumstances that some of the victims

[3] https://www.imdb.com/title/tt1933667/

[4] https://apnews.com/article/bernie-madoff-dead-9d9bd8065708384e0bf0c840bd1ae711

[5] https://www.justice.gov/usao-sdny/programs/victim-witness-services/united-states-v-bernard-l-madoff-and-related-cases

received compensation, he still did not receive parole.[6] The defendant's age was not taken into account either when sentencing, or when deciding upon the convict's request for parole.

Another example and a case whose consequences cannot be compared with criminal offenses in the field of economic and financial crime refers to a criminal offense against sexual freedom, committed by an accused over 80 years old in Novi Sad.[7]

The victim of this crime was an 8-year-old boy, so he was mentioned in the reporting as a child born in 2012, and the defendant as M.J., 82 years old. The indictment of the Higher Public Prosecutor's Office in Novi Sad charged the defendant that on May 7. In 2020, in Novi Sad, on the Šodroš beach, in order to satisfy his sexual urge, he forced the victim to sexually satisfy him by force and threat, with the threat to the boy that he would throw him into the Danube if he did not agree. The victim gave his statement from the screen room, fully in accordance with the rules of procedure and the Law on juvenile perpetrators and victims of criminal acts. This type of threats by elderly persons is otherwise very common in this type of criminal offense[8] (Petković, Pavlović 2022: 344).

During the trial, the defendant was in custody and was brought to the court building in a wheelchair, in which he was also in the courtroom. By the first-instance verdict of the High Court in Novi Sad from October 20, 2022, he was sentenced to life imprisonment for the criminal offense of rape. Since the public was excluded, we do not know how the questions were asked to the defendant and how he was explained what was happening in procedure. Did he understand that! These are very delicate questions that open up a whole host of other dilemmas. The Appellate Court in Novi Sad, after the session of the panel held following the appeal of the defendant's counsel, on March 20, 2023, issued a verdict in which it overturned the verdict of the High Court in Novi Sad and sentenced the defendant (85 years old) to a prison sentence of 20 years, which includes time spent in detention.[9] Looking only at the sentencing decision, the question arises as to whether courts should treat older offenders more leniently than younger criminals, because they have less time left to live and because their physical frailty might make it harder for them to survive prison time. punishment

[6] https://www.politika.rs/scc/clanak/477052/Umro-Berni-Medof-mozak-jedne-od-najvecih-finansijskih-prevara-u-istoriji

[7] https://time.rs/c/19389aad4d/bruka-i-sramota-sudija-mitric-osudio-silovatelja-decaka-na-dozivotnu-robiju-apelacioni-sud-to-oborio-i-castio-ga-malom-kaznom.html

[8] https://www.blic.rs/vesti/hronika/starac-zbog-silovanja-osmogodisnjaka-umesto-dozivotno-provesce-20-godina-u-zatvoru/cyx0rmr

[9] https://www.novosti.rs/hronika/sudjenja/1229696/umesto-dozivotne-20-godina-robije-silovanje-decaka-apelacioni-sud-preinacio-kaznu-novosadjaninu-84

What connects both of these cases is the age of the defendants, because both are over 80 years old and in poor health at the time of the court decision on their rights and responsibilities. Whether age should have elements of mitigating circumstances for sentencing is not the subject of this paper, but the procedural position and treatment of the defendants could be taken into account, and whether it should be considered for all older defendants, or it must be determined on a case-by-case basis, that's a question we'll try to answer further. This answer also depends on how the human rights of the elderly are respected in court proceedings, considering the fact of their age, as well as all other rights that belong to them, regardless of the gravity and type of criminal offense they are accused of.

But, in answering this question, let's start in order.

Between old age and justice

Age does not protect anyone from accusations, but it does provide a unique context that must be carefully considered in the pursuit of justice. Defendants and witnesses who have entered the category of elderly persons have the obligation to participate in the criminal proceedings, like all other participants. This means that the court must enable them to participate in a fair and legal procedure, which implies that fairness and the humane dimension of old age (Solarević, Pavlović - 2018: 55) can only be achieved through fair conduct of the procedure, with all the peculiarities of this category of subjects who are there in certain process roles.

Criminal law with procedural rules of procedure has not yet systematically dealt with the connection between age and justice, in the context of the existence of a relationship that would call into question the prosecution, handling and punishment of older perpetrators of criminal acts. In the field of criminal law, there are very few scientific works devoted to the elderly, who can very often appear as accused of various criminal acts. There is no doubt that there is a need to clarify the human rights limitations inherent in the trial and punishment of older criminal defendants. At the same time, there is no international human rights norm that excludes the trial and even imprisonment of elderly defendants based solely on age, regardless of the criminal offense charged against them. The court is not forbidden to take into account the age of the defendant, the issue of the sentence and the conditions related to the execution of the sentence, regardless of what and what kind of criminal offense it is. Therefore, questions of procedural capacity are questions for the court, but they mean that the court constantly takes into account, ex officio, the possibilities of the defendant to participate in the proceedings. A certain analogy between the protection of the rights of elderly witnesses on the one hand, and the

protection of the rights of the elderly defendant on the other hand must exists,. Additions of age that accompany us, such as serious illness or other incompetencies, imply the court's decisions starting from the pace of the trial, all the way to the suspension of the trial, the decision on the sentence and or something else. All this can lead to a deviation from the general rules in the criminal procedure, which has been resolved so far only in the case of witnesses of criminal acts and victims, if they fall into the category of especially sensitive witnesses. The question is whether this could, to a certain extent, also apply to the elderly in the status of defendants. Not in relation to privileges, but in relation to the way they are treated, with respect for legal rules and issues of fairness. Certain specialization is also necessary for such work. So far, this has proven to be very successful in the work for juvenile offenders and juvenile victims of criminal offenses, where prosecutors and judges for juveniles must undergo the necessary training in working with particularly sensitive participants in the proceedings, regardless of their role in the proceedings. It is time to find and foresee a different solution to this type of special knowledge in working with elderly persons in criminal proceedings compared to the current situation.

Peculiarities of procedural rules related to the testimony of elderly persons

Examining old persons as an evidentiary act, that is, testifying in criminal proceedings, can be very specific. Persons in the age transition certainly fall into the category of particularly sensitive witnesses. It is clear that for the realization of the evidentiary act of questioning elderly persons as witnesses, it is not enough only to know the legal provisions, nor criminal tactical skills, but also special knowledge in psychology and gerontology. This is possible only if the authority leading the procedure has adopted and acquired that special knowledge. Additional protection of the elderly implies a different way of questioning and a different relationship in general in criminal proceedings. The act of testifying cannot be successful unless this protection is achieved. We believe that it is possible to achieve the desired result even before changing the relevant parts of the procedural legislation, but the reform itself is urgent.

Elderly persons have individually different psychological functions that are related to the event from the past in relation to their interpretation at the time of conducting the procedure (Brkić, 2012:195). But this cannot exclude them from testifying, because there are great individual differences in old people. This means that they should be checked by the authority conducting the procedure to see how well their senses are pre-

served. This does not automatically mean their expert examination by psychological expertise, but only the assessment of the potential of the witness as an elderly person, how capable he is of credible testimony. This means that in the case of psychological expertise, it should only be determined whether the elderly person was capable of certain perception, but the assessment of whether the witness perceived something is up to the body conducting the criminal proceedings.

Elderly persons, as well as children, have the legal possibility to give their testimony in a privileged form, in relation to other witnesses. The elderly can be a particularly sensitive category for many reasons, starting with age greater than 60 or more, but also due to health status, gender, life experience, education and more. Sensitivity can also be the result of circumstances related to a specific criminal offense, where the consequences, regardless of the status in the proceedings, can affect the victim - the witness, as well as the perpetrator. Let us cite as an example the criminal offense of domestic violence, where both participants are elderly, there are close family relationships between all participants in the proceedings, etc. Such a solution from the Code of Criminal Procedure[10] was previously recognized as such in practice, but now it is additionally envisaged as the possibility and designation of a representative (lawyer) for the victim of a criminal offense. With this kind of protection, the legislator wanted to reduce the secondary victimization of the elderly to the smallest possible extent (Pavlović 2019:175). Observing things through the rules of procedural formalism, the procedural authority determines the status of a particularly sensitive witness to the victim (it can be both the prosecutor and the court), and the relationship that the victim witness has with the defendant is determined. The witness, here an older person, must be explained the role and importance of the testimony, how to properly behave before the authority of the procedure, and what are the rights and obligations of the witness before the state authority conducting the proceedings in connection with the criminal offense. The witness, like all witnesses, is warned that he is obliged to tell the truth, what are the consequences in case of giving a false testimony - that it constitutes a criminal offense, that he is obliged to take an oath, and that he must inform the authority of the procedure about any change of address. Practically, all the lessons that are normally given, are also given to a particularly sensitive witness.

Although the witness can give his testimony before the main trial, but also after the start of the main trial, the witness statement he gives integrally can be checked by the other side, through cross-examination, or by asking one or more additional questions. The questions asked in this way should not be such as to mislead the witness, nor should they

[10] Art 103 Code of Criminal Procedure, Official Gazette RS No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 - Decission of Constitutional Court of Serba No 62/2021

be capricious. (confusing). The general rules on the prohibition of coercion apply to all witnesses, as well as all other rules.

The possibility that an elderly witness can be questioned outside the main trial when he is unable to attend the main trial due to illness or other justified reasons (Article 357 of the Criminal Code), refers to the stage of preparing the main trial. This rule also applies when it is known at the main trial that the witness cannot attend the main trial for the same reasons (Article 404/1 of the CPC), that is, when his arrival is significantly difficult (Article 404/1 of the CPC).

These general rules in the procedure are also linked to the rules on the testimony of particularly sensitive witnesses, in this case elderly persons (Article 98 paragraph 1, Article 400 paragraph 1 of the CPC). Even if they do not have visible indicators of fear or insecurity, if there is no external or real danger from the defendant or a third party, persons in age transition should have special treatment in the process of giving a statement. What is currently missing in the Criminal Procedure Code, apart from what has already been stated, is the existence of protection measures that would refer not only to the immediate duration of the criminal procedure, but also before and after this period.

The question is, in whose jurisdiction would it be according to positive legal regulations: in adversarial criminal proceedings, the only answer would be derived indirectly, that it is the obligation of the prosecutor in whose jurisdiction the proceedings are located. However, bearing in mind the fact that this is not directly stated in the Code of Criminal Procedure, the protection of elderly persons as victims and witnesses could be reduced to non-governmental organizations, which certainly does not have adequate importance in criminal proceedings. The danger to the elderly witness, be it of an objective or subjective nature and in connection with the giving of testimony, must be removed from the victim, and this must be the responsibility of the state authority. This refers to the exclusive competence of state authorities.

Assigning a proxy to an elderly witness is already a legal standard that must be respected, but the protection procedure must have its own schedule as long as special protection and treatment towards the witness or the victim is needed. In appointing a proxy, the procedural authority must cooperate with the competent bar association and that the proxy for such witnesses is determined in accordance with the rules provided by the acts of the Bar Association.

The consequences of the pandemic caused by the covid19 virus have led to the examination of witnesses “at a distance”, through technical means for image and sound transmission, but the current solutions are still not satisfactory. The question is, to what extent it is possible to apply them in situations where elderly persons appear as witnesses. Especially sensitive witnesses cannot be confronted with the defendant, except when the

defendant's defense insists, and the procedural authority must allow it, taking into account the sensitivity of the elderly person on the one hand, and on the other hand, the rights of the defense must be taken into account.

If we were to turn things around in relation to the status of an elderly person, and if we were to observe the procedural relationship of the authorities leading the proceedings towards the elderly defendant, we are of the opinion that most of these specificities in the criminal procedure should also be applied to elderly defendants. All this, of course, with the aim of fair treatment, but also to protect the right of defense. But that would be another topic now.

If they were to consider an elderly person as a defendant, and if he is in a special relationship with the witness-victim, then the authorities conducting the criminal proceedings should also, and in the interest of justice and fair proceedings, require different treatment. Here we are referring to older defendants who live with the victim in a marriage, common-law or other union, if they are relatives and the like. The question is pro futuro whether there are special factors that the court should take into account when conducting the proceedings. To be specific, this would primarily refer to criminal acts with elements of violence, and especially to the criminal act of domestic violence. Elderly people can be charged with this crime under different circumstances. It does not have to be just a misunderstanding, but also a false accusation, although real crimes also occur. Based on the reviewed annual reports of the Provincial Ombudsman of Vojvodina for the period 2016-2022,[11] it is obvious that there is a problem of domestic violence where older persons appear as victims as well as perpetrators.

Thus, when it comes to caring for an elderly family member, it can result in threats (endangering safety), arguments and conflicts, resulting in accusations of domestic violence. Likewise, problems with cognitive decline or dementia in the elderly can lead to aggressive behavior, which family members interpret as intentional abuse. We notice that in order to resolve property matters between spouses, there is often a hidden motive of a financial nature, which then results in the filing of a report for domestic violence.

The potential implications for elderly defendants from such and similar situations are numerous, so the court would have to have a balanced view on all of this when conducting criminal proceedings. This means that even by conducting such a procedure, the quality of the elderly person as a defendant could be adversely affected in advance because he is victimized as a defendant. In order to reduce this to the smallest possible extent, we believe that the rule of mandatory defense of elderly persons in cases of do-

[11] https://www.ombudsmanapv.org/ombapv/sr/izvestaji.php

mestic violence should be introduced, regardless of the severity of the threatened punishment. Navigating the legal maze for an elderly person as a defendant is not easy. When determining guilt or innocence, the court will take into account the position of the defendant in the age transition during the proceedings. This means that they will take care of the mental capacity and physical health of the accused elderly person.

This does not mean that the defendant's age and age provide protection from criminal prosecution and a possible conviction, but rather require a professional and careful attitude towards the elderly in the process of determining justice.

Instead of a conclusion

The increase in the average length of a person's life, and the processes of age transition and everything that it entails, regardless of whether we mark the beginning of old age with 60, 65 or some older year of life, bring an increasing possibility that older people will appear as subjects in criminal proceedings, either as defendants, or as witnesses or victims of a criminal act. The characteristics of the elderly should therefore be respected during the entire procedure, regardless of their status and position, if they meet the general procedural requirements to be able to participate in the procedure. That is why it is necessary for judges and prosecutors who act in criminal matters to study the basic psychophysical characteristics of the elderly. Although this subject has not been specifically written about in the professional literature so far, there is no doubt that in order to conduct a fair procedure and make a legal (Stanila L., 2018:138) and correct decision, rules must be established that would be applied when it comes to on older persons in criminal proceedings, similar to the special rules that apply to children and younger adults, as a specific category also of persons in age transition.

This problem from the aspect of criminal procedure norms is not completely solved by granting the status of particularly sensitive witnesses to elderly persons, because it is necessary to take into account the rights of elderly persons as defendants. Current problems at the moment with the aforementioned procedural solutions can be partially solved by appointing a representative or a defense attorney, but that is not enough. In each specific case, the court or the prosecutor's office must determine measures to ensure equal treatment of all subjects (elderly persons). This is especially so, as it is possible to find a considerable number of elderly people who are very active and productive even in their eighth or ninth decade of life, but also those who are inactive or unproductive even before their 65th year.

The legal invisibility of the described problem - the formal procedural position of older persons in criminal proceedings - does not mean that in the future it should not

be taken into account much more, all with the aim of realizing the principle of fairness and the ideal of justice.

Only by singling out older persons in criminal proceedings in relation to the way of proceeding will we be able to achieve the desired results with the necessary specializations. In this way, we will be more certain, in accordance with the principle of legality, what to do with an elderly convict who is in the terminal phase of the disease or with an elderly accused for whom it was not certain whether and to what extent the treatment procedure was adapted to his age. This does not mean amnesty or pardon or exculpation from guilt, but only the realization of the principle of legality in its entirety.

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THE LEGAL FRAMEWORK OF THE CRIMINAL PROTECTION OF THE ELDERLY IN THE LEGISLATION OF THE REPUBLIC OF SERBIA

In this paper, the authors deal with the term the elderly in the legislation of the Republic of Serbia, with a special emphasis on the position of the elderly and their protection in the criminal legislation of the Republic of Serbia. Also, this paper analyzes, in short lines, some articles of the Criminal Code that indirectly sanction violence against the elderly, and give possible guidelines for the introduction of special articles that would criminalize violence against the elderly more concretely and adequately.

Keywords: *elderly, violence, neglect, protection, criminal legislation.*

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1. Introduction

The aging process implies an inevitability for every human being, which brings with it significant changes in the person's physical and psychological condition. In theory, there is no precise definition of a person's aging precisely because it is an individual process through which each person goes through differently, so it is not possible to specify the age when old age begins, nor what the aging process inevitably entails, nor how long it lasts. However, what science, following statistical data from year to year, has determined is that aging on a global scale brings major changes to the entire society, that the share of elderly people in the world population is increasing, and that "population aging" is a phenomenon that should be recognized, accepted and adequately responded to by society. It is for this reason that in this paper, in addition to the part in which the demographic aging of the domestic population is dealt with in more detail, the position of the elderly in the Republic of Serbia is shown, i.e. the rights and forms of systemic protection they enjoy through positive regulations and ratified international acts. Special emphasis in this paper is placed on the criminal legal protection of the elderly and the analysis of criminal acts which, by their nature, are directly or indirectly aimed at the protection of the elderly as a vulnerable category of society, along with proposals for possible changes to existing legal solutions, to strengthen this type of protection.

2. On the term "elderly person" and the demographic aging of the population in the Republic of Serbia

The term "elderly person" implies different age limits of a person according to different criteria.

Although in science there is no precise time from when old age begins and how it is calculated, in theory, the criteria of the World Health Organization are most often used, according to which old age is divided into early (65-74 years), middle (75-84 years) and deep age (85 and over). It can be concluded that the number of years of age associated with entering the "age of old age" most often refers to the legal condition of retirement, which means that a person is considered to be entering the circle of the socially passive part of the population. However, what is primarily important for understanding the term "old" and "elderly" is that it refers to a particularly sensitive category of society which, considering its age, i.e., psychophysical health, requires special social treatment. The population of the Republic of Serbia is among the oldest populations in the world, with the fact that there is also a pronounced trend of demographic aging of the population in the last 10 years. Demographic aging could become a threat to social stability through generational tensions, which could occur due to the decreasing working-age population,

which will "have" to support an increasing number of elderly people (Solarović, Pavlović, 2018: 54).

According to the statistics of the Republic Institute of Statistics, from 2011 to 2021, the percentage of people over 65 increased from 17.3% (2011) to 21.3% (2021) (Statistical Yearbook of the Republic of Serbia, 2022: 25). Also, the projections of the trend of the demographic aging of the population may even better indicate the importance and need for a more regulated position and mechanisms for the protection of the elderly population, given that it is projected that in the Republic of Serbia in the period from 2011-2041. the share of people over 65 will increase from 17% to 24%, and at the end of the projection period, almost every fourth resident will be over 65 (Statistical Yearbook of the Republic of Serbia, 2022: 26).

Table 1. Population estimation by age in the Republic of Serbia (https://publikacije.stat.gov.rs/G2023/Html/G20231179.html,):

	Estimated number of citizens in the middle of the year	
Age	**2002.**	**2022.**
65-69	459.274	506.963
70-74	389.532	430.492
75-79	249.995	237.075
80-84	104.500	176.344
85+	44.105	118.390

A special aspect of demographic aging is aging within the elderly population itself (Petrusic, Todorovic, Vracevic, 2015: 8). Namely, based on the table, we can confirm that the share of the elderly population is increasing year by year and that the largest number of the elderly population is made up of people between the ages of 65 and 69, however, what is particularly striking is that, although there is the least number of people aged 85 and over, this number has more than doubled in the treated period, i.e. the aging of the population is pronounced, with the fact that it is a particularly vulnerable category of the population that, due to their age, needs special care and concern from society.

3. Legal position of the elderly in the Republic of Serbia

The legal position of the elderly in the Republic of Serbia is regulated both by domestic acts of the Republic of Serbia and ratified international acts that relate to the rights and protection of all residents of the Republic of Serbia regardless of their age, as

well as by some special regulations or provisions that refer exclusively to the elderly population.

Although international human rights provide a system that formalizes human rights and enforces them ("hard law"), there is a body of "soft law" that guides how to treat the elderly, such as the United Nations Principles on Older Persons (1991), Madrid International Plan on Aging (MIPAA) (UN, 2002), MIPAA Regional Implementation Strategies (RIS) (UN, 2002), which are not legally binding, but are supported by strong recommendations (Solarović, Pavlović, 2018: 55). One of the most important international documents with a focus on the importance of population care is the Strategic Framework of the World Health Organization on Active Aging (WHO, 2002). Also, it should be noted that the European Union in its Charter of Fundamental Rights (2000), to strengthen the protection of fundamental rights in the light of changes in society, in Article 25 "Rights of the elderly", specifically recognized and undertook to respect the rights of the elderly to dignified and independent life and participation in social and cultural life. By the MIPAA, the Republic of Serbia on September 7, 2006. adopted its most significant strategic document dealing with the elderly population and the effects of population aging in Serbia - the National Strategy on Aging, which largely maintains the content of MIPAA and RIS, but at the same time, focuses on the specific needs of the elderly population, and its goals relate both to improving the position of the elderly and to responding to the aging population in Serbia (Babovic et. al, 2018: 11). Given that the modern understanding of the elderly as a "burdensome/useless" part of society is noticeable in the world, they face a series of prejudices and discrimination in their regular life activities. The adoption of the special term "Ageism", whose meaning is precisely a stereotype, a prejudice about a person based on his age, speaks of this phenomenon (Petrusic, Todorovic, Vracevic, 2012: 24).

The practice of the Commissioner for the Protection of Equality in the Republic of Serbia has shown that age as a basis for discrimination is among the most numerous personal characteristics during the entire period of the institution's work and that this basis of discrimination was among the first five grounds in terms of the frequency of complaints filed, with the number of complaints increasing from year to year, or at least remains stable (Commissioner for the Protection of Equality, 2021: 18). In this sense, in the Republic of Serbia, primarily the Constitution, as the highest legal act guaranteeing basic human rights and freedoms, prohibits discrimination, among other things, based on age[1] and gives a special status to the elderly in terms of health care, where they are guaranteed

[1] Article 21, paragraph 3, The Constitution of the Republic of Serbia

the right on health care from public revenues[2]. Furthermore, the Law on the Prohibition of Discrimination, in addition to the general prohibition of discrimination and its forms and cases, dedicates a special article [3] within Chapter III "Special Cases of Discrimination" which concerns exclusively the prohibition of discrimination based on age and which prescribes the right of the elderly to dignified living conditions without discrimination. The Law on Labor and the Law on Social Protection belongs to the circle of regulations that directly protect the elderly from various forms of discrimination. Namely, the Labor Law prescribes age as a special basis for the prohibition of indirect or direct discrimination of persons seeking employment, as well as employees[4], while the Law on Social Protection, with its principle of prohibition of discrimination, prohibits discrimination of beneficiaries of social protection, among other things, based on age[5]. The Law on Social Protection, in addition to the above, most directly provides systemic assistance and protection to persons whose well-being, safety, and productive life in society are threatened due to old age[6], providing various types of social protection services, of which the most important for the elderly are: daily services in the community - assistance in the home, accommodation service for the elderly, as well as material support.

About the position of the elderly in civil or criminal proceedings, it can be concluded that the relevant procedural laws recognize the particularly sensitive position of the elderly and in this sense foresee certain reliefs in legal proceedings, so the possibility is prescribed that persons who cannot respond due to their age at the summons of the court, they can be heard as witnesses in their apartment, or their written statement can be read or examined via a conference call[7], i.e. they provide for familiarization with the content of the record of the witness's statement, by inspecting it, if the appearance of the person being examined before the court is impossible or significantly more difficult because of age[8]. In criminal proceedings, old persons, under certain conditions, and certainly taking into account their health status, can be assigned the status of particularly sensitive witnesses[9], in which case their interrogation is carried out according to special rules. Namely, questions can only be asked to a particularly sensitive witness through the authorities of the procedure, who will treat him with special care, trying to avoid possible

[2] Article 68, paragraph 2, The Constitution of the Republic of Serbia

[3] Article 23, Law on prohibition of discrimination

[4]Article 18, Labor law

[5] Article 25 Law on social protection

[6] Article 41, paragraph 3, Law on social protection

[7] Article 253, Law on Civil Procedure

[8] Article 406, paragraph 1, item 1, The Criminal procedure code

[9] Article 103, The Criminal procedure code

harmful consequences of the criminal procedure for the personality, physical and mental state of the witness, and the questioning can also be carried out with the help of a psychologist, social worker, or other professional. Also, a particularly sensitive witness can be questioned using technical means for image and sound transmission, without the presence of the parties and other participants in the proceedings in the room, as well as in their apartment or another room, i.e. in an authorized institution that is professionally trained for the examination of particularly sensitive persons[10].

In addition to the above, the elderly are often exposed to various forms of violence due to their vulnerability and inability to protect themselves. The increased vulnerability and risk of victimization of the elderly are influenced by physical and psychological changes that occur with aging, as well as social isolation (Ignjatovic, Simeunovic-Patic, 2011: 69). The protection of the elderly in the criminal legal sense implies protection from violence and neglect, both within their family and outside it. The World Health Organization defines elder abuse as "a single or repeated act or lack of appropriate treatment occurring in any relationship of expectation and trust that results in harm, pain, inconvenience and/or distress to an older person" (WHO, 2002). Likewise, the Criminal Code of the Republic of Serbia contains criminal offenses in which the passive subject is a powerless (which includes the elderly) person who requires special protection, which will be discussed in more detail later in the paper.

4. Criminal protection of the elderly according to the legislation of the Republic of Serbia

The Criminal Code does not criminalize acts of violence against the elderly or acts of neglect of the elderly as separate criminal acts, but the provisions of certain criminal acts directly, and more often indirectly, provide criminal legal protection to the elderly. In the following lines, according to the systematics of the code itself, a summary of those criminal acts is provided with a special emphasis on the provisions that can be applied to protect the elderly.

4.1. Abandonment of a disabled person from Art. 126. CC

Criminal offense Abandonment of a disabled person from Art. 126 of the Criminal Code is in the group of crimes against life and body and is the only criminal offense from this group of crimes that indirectly protects the elderly. It is a criminal offense that has one basic and two qualified forms. The basic form of the criminal offense (paragraph

[10] Article 104, The Criminal procedure code

1) incriminates the act of any person who leaves a helpless person who is entrusted to him or whom he is otherwise obliged to care for without help in a state or circumstances of danger to life or health. Although the act of this criminal act consists in leaving, which is associated in some way with a certain act of doing, it should be emphasized that it is a true act of inaction. Namely, that inaction is precisely reflected in the act of leaving without help a helpless person entrusted to him or whom he is otherwise obliged to take care of in a state or circumstances of danger to life or health. The act of leaving primarily implies not providing assistance or failing to provide certain assistance.

The perpetrator of this criminal act can be any person who is entrusted with a helpless person or is obliged to take care of that helpless person. This obligation of trust, i.e. duty, can be based on the law, legal work, performance of a certain profession, and possibly on some legal basis, even if there is some factual relationship (Stojanovic, 2021: 495). Not providing help can also be based on special moral duties, such as the Hippocratic Oath (Mrvic-Petrovic, 2016: 79). A passive subject can only be a powerless person, i.e. a person who, due to their physical or mental deficiencies, but certainly also due to their age, i.e. senile infirmity, is not capable of removing the corresponding danger to their life and health. (Srzentic et. al, 1986: 176)

Therefore, in this sense, an elderly person who is unable to react appropriately due to his age should be considered an infirm person. Such is the case, for example, when an old and sick person who is entrusted to be looked after is left without food or necessary care for a long time (Lazarević, 2006: 401). Numerous situations in life can lead to those situations and conditions that are dangerous for people's lives and health, and even often situations and conditions that can be caused by the elderly themselves. For the basic form of this criminal offense, a prison sentence of three months to three years is prescribed.

Qualified forms of this criminal offense incriminate the same action as the basic form, with more severe consequences. The first qualified form (paragraph 2) implies the occurrence of a consequence in the form of serious impairment of health or other serious physical injury to the abandoned, infirm person, and for that form, a prison sentence of one to five years is prescribed. The long-qualified form is reflected in the occurrence of a fatal consequence, for which a prison sentence of one to eight years is prescribed.

4.2 Violation of equality from Art. 128 CC

Criminal offense Violation of equality from Art. 128 of the CC is found in the title of the CC which protects the freedoms and rights of man and citizen, and through this incrimination, the criminal protection of the elderly is also achieved indirectly. Namely, in paragraph 1 of this article, in addition to a large number of alternative grounds (national and ethnic affiliation, race or religion, political or other conviction, gender, disability, sexual orientation, gender identity, language, education, etc.), it is prescribed that to sanction a person who, due to some personal characteristic of another person, denies or limits that person's right prescribed by the Constitution, laws or other regulations or general acts or confirmed international agreements. The basis of incrimination comes primarily from the Constitution of the Republic of Serbia, but also from numerous international conventions that protect human rights and freedoms and that prohibit discrimination on any basis. Although the act of committing this criminal offense can be realized alternatively, i.e. by denying or limiting the rights of citizens, as well as by giving citizens privileges or benefits based on a certain personal characteristic, for the purposes of this paper, we have emphasized only the denial or limitation of certain rights. Deprivation represents complete deprivation of a right, while limitation is its reduction, i.e. partial deprivation (Corovic et. al, 2020: 80). It is indisputable that the most dilemma among the prescribed grounds of this criminal offense is caused by "another personal property" because it is unclear what is meant by it (Lazarevic, 2006: 407). However, it should be pointed out that this incrimination represents, above all, the implementation of the constitutional prohibition contained in Art. 21 of the Constitution of the Republic of Serbia, which prohibits any discrimination, direct or indirect, and among other things, especially discrimination due to age. The basic meaning of this prohibition is to ensure the basic assumptions that all other human rights guaranteed by the Constitution are exercised under equal conditions (Pajvancic, 2009: 32). In this regard, any limitation or denial of certain rights due to other personal characteristics, as incriminated by this criminal act, should also be considered such discrimination due to the age of a certain person. In addition to the basic form, this criminal offense also has a qualified form that incriminates actions from the basic form committed by an official in the performance of official activities. A prison sentence of up to three years is prescribed for the basic form and a prison sentence of three months to five years for the qualified form.

4.3. Sexual abuse towards an incapacitated person from Art. 179 CC

This criminal offense incriminates rape or an act equivalent to it by taking advantage of a mental illness, retarded mental development, other mental disorder, infirmity, or any other condition of the person due to which he is unable to resist. Therefore, the basic characteristic of this criminal offense is related to a passive subject and exploiting a state of helplessness. This weakness can be realized in two ways, as a psychological or as a physical weakness (Mrvic-Petrovic, 2016: 136). On this occasion, it should be emphasized that in practice, persons who are unable to resist due to mental weakness, i.e. mental illness, retarded mental development, or other mental disorders, appear as passive subjects. However, it should be emphasized that there are also persons who, due to physical incapacity, physical exhaustion, old age, or illness, are unable to resist (Babic, Markovic, 2018: 126). It is necessary to point out that in the case of rape, acts of intimidation or an act equivalent to it are undertaken with coercion, while in the case of this criminal offense coercion is not required, but these actions are undertaken by taking advantage of some state of inability to resist. The passive subject of this act does not accept these actions of his own free will, because he is either not aware of the sexual act or is in such a state and is unable to offer active resistance to the person who commits the act (Lazarevic, 2006: 514). In this sense, it is necessary that, in addition to the fact that one of those conditions exists, there is also a subjective attitude on the part of the perpetrator, that is, the awareness that he is using one of those conditions in order to commit a crime or an act equivalent to it. In contrast to the exploitation of mental illnesses, retarded mental development, or other mental disorders, where the problem of the existence of a real delusion may arise on that subjective level (Stojanović, 2021: 576), it should be emphasized that this problem should not arise in practice in the case of the flatter a weak person by taking advantage of that person's age, because that weakness can and must be seen at first glance. In addition to this basic form, for which a prison sentence of five to twelve years is threatened, there are also two qualified forms. The first qualified form (paragraph 2) refers, among other things, to the existence of serious physical injuries to a helpless person, or if the act was committed by several persons, or in a particularly cruel or particularly humiliating manner, or was committed against a minor or resulted in pregnancy, which form is punishable by a prison sentence of five to fifteen years. The second qualified form (paragraph 3) incriminates the actions referred to in paragraphs 1 and 2 in case of death consequences or if it is committed against a child and a prison sentence of at least ten years is prescribed. It is noted that as the most serious form of this criminal act, the legislator has also criminalized the actions of the basic form committed against a child. In that case, the concept of a helpless person, in addition to those conditions from the basic form, according to the understanding of judicial practice, also refers to the case

when there is a very young child who, due to his age, is physically and mentally incapable of resisting. We will agree with the opinions of some authors who believe that this should be considered justified, but that in any case, it is not acceptable that the concept of a disabled person in this sense is tied to a fixed age limit, but it is a factual issue that should be resolved in each case. (Stojanovic, 2021: 577) Consequently, and when determining the impossibility of resistance by older persons, it is certainly not possible or expedient to determine any fixed age limit for those elderly persons. As we pointed out in the previous lines, it is necessary that this infirmity, that is, that condition, including age, should be such that the elderly person is unable to offer resistance, so this infirmity should certainly be determined in each case.

4.4. Domestic violence from Art. 194 CC

Domestic violence occurs in all societies and cultures and therefore represents a serious transnational problem of modern society. It is indisputable that every family member has the right to the protection of his basic rights, just like every other person, however, many authors question whether he also has the right to additional criminal protection from members of his own family (Stojanovic, 2021: 650), that is, why greater protection would be provided to a family member than to a citizen who is not related to the perpetrator (Delibasic, 2018: 513). Domestic criminal legislation, regardless of the previous incrimination of certain behaviors that also protect lives and bodies, as well as the tranquility and mental state of individuals, following the example of numerous international acts, found it necessary to protect the family as the basic cell of society and thus provide enhanced protection to the member families, so it prescribed a special criminal offense for such actions by individuals (Mrvic-Petrovic, 2016: 154).

The crime of domestic violence from Art. 194 CC has one basic (paragraph 1), three qualified (2, 3, and 4), and one special form. The basic form stipulates that anyone who threatens the peace, physical integrity, or mental state of a member of his family by using violence, by threatening to attack life or body, or by insolent or reckless behavior will be sanctioned. The concept of physical integrity is not controversial, but the meaning of tranquility and especially mental state can cause certain dilemmas. Tranquility means, as a rule, a feeling of physical and psychological security, the absence of disturbance on the part of a person, the belief that no danger threatens and the like, while the mental state can be considered peace of mind, i.e. the absence of fear, insecurity, excitement and the like (Lazarevic, 2006: 550). The act of committing this criminal offense is thus reflected in the use of violence, a qualified threat, as well as insolent and reckless behavior that endangers the tranquility, physical integrity, or mental state of a family member. Depending on the form of the act of execution, a criminal offense can exist even if the act is

undertaken only once, as is the case with gross violence or a qualified threat, while, for example, endangering the tranquility, physical integrity or mental state, it is necessary to repeat an insolent and reckless act several times behavior. The passive subject of a criminal offense is a family member, which concept is regulated by Art. 112, paragraph 28 CC. Namely, that provision stipulates that family members are considered to be spouses, parents, children, adoptive parents, adopted children, breadwinners, but also siblings, their spouses and children, ex-spouses and their children, and parents of ex-spouses, provided that they live in a joint household. For the basic form of the criminal offense, a prison sentence of three months to three years is prescribed. The first qualified form (paragraph 2) exists if a weapon, dangerous tool, or other means of seriously injuring the body or severely impairing health was used during the commission of the crime, for which a prison sentence of six months to five years is prescribed. The second qualified form (paragraph 3) exists if, as a result of the act from paragraph 1 or 2, serious bodily injury or severe damage to health occurred, or it was committed against a minor, and for this form, a prison sentence of two to ten years is prescribed. The third qualified form (paragraph 4) exists if during the act the death of a family member occurred, where a prison sentence of five to fifteen years was threatened, or the death of a minor family member occurred, where a prison sentence of at least ten years was prescribed. Also, in addition to the above, it should be pointed out that there is a special form of this criminal offense that incriminates the violation of the measure of protection against domestic violence, which was issued based on the law regulating family relations, and for this form, a prison sentence of three months to three years.

Therefore, it is evident that the legislator, regulating this area, provided stronger criminal protection to family members, that on that occasion, concerning other family members, he singled out minors in particular, which is certainly justified, however, the question arises whether similarly could be provided stronger criminal protection for older family members. We believe that this is supported by numerous statistical studies that show that in an increasing number of cases, the oldest family members appear as victims of domestic violence. However, it should be emphasized that these data should also be taken with a grain of salt, given that other studies indicate an even higher percentage of older family members who suffer domestic violence, but that violence is harder to detect and less reported, due to the shame of older people reporting it, and also certainly because elderly people are bedridden due to illness and exhaustion and do not have much contact with the environment (Petrusic et al., 2012: 50).

This is precisely why we believe that in the coming period, primarily because this is a particularly vulnerable category of persons, more adequate protection of older family members should be considered. In this sense, it is irrelevant whether those actions

would be criminalized as a separate criminal offense or as a separate form of an already existing criminal offense. If it were to be approached in this second way, which we consider more realistic, then when prescribing the punishment, that qualifying circumstance could be treated as in the case where the victim is a minor. Until such a legal solution, the fact that an older family member appears as a victim of domestic violence should be treated as an aggravating circumstance when sentencing. What is not in favor of incriminating violence against elderly family members as a special form of this criminal offense is the fact that there is no fixed limit as to what is considered an elderly person, which ambiguities exist even among numerous authors so, in that sense, the problem of determining this essential element of the existence of a criminal offense could arise (Ljubicic, 2020: 41). The solution should be sought in the regulation of this border, and perhaps above all in the equable attitude of court practice.

4.5. Failure to provide support from Art. 195 CC

Legal maintenance is the right and duty of family members, which is regulated by the Family Law. Since situations often arise in practice where these obligations are not fulfilled, and since other legal means are often not sufficient to realize this right, its criminal protection is certainly justified. Criminal law protection indicates that the importance of this right is not only in the property interest but that there is also a wider, social interest in protecting individual persons in this way, primarily children or other family members who are not able to support themselves (Lazarevic, 2006: 552). Criminal offense Failure to provide maintenance from Art. 195 of the CC in its basic form (paragraph 1) criminalizes the action by sanctioning anyone who does not provide support for a person who is legally obliged to support, and this duty is determined by an enforceable court decision or an enforceable settlement before a court or other competent authority, in the amount and the manner determined. A fine or a prison sentence of up to two years is prescribed for the basic form. The qualified form of this criminal offense (paragraph 3) consists of the occurrence of severe consequences for the dependent person.

For the existence of this criminal offense, it is not enough that there is a legal obligation to support, but there must be a duty that is established and specified by a court decision concerning a certain person or by an executive settlement before the court (Stojanovic, 2021: 655). What is new about some older legal solutions is that paragraph 2 of this article provides a special basis for the exclusion of illegality, which stipulates that this offense will not exist if the perpetrator did not provide maintenance for justified reasons. It is indisputable that this provision has its justification, however, some authors point out that one should be particularly careful when commenting on it. Namely, the duty of maintenance has already been determined by a court decision, i.e. a settlement,

which means that a procedure has been carried out in which the economic strength of the perpetrator has already been determined, so the question arises as to what criteria will be used by the court when determining this basis for the exclusion of illegality (Corovic, 2008: 375). In any case, alimony is determined according to the needs of the creditor and the possibilities of the debtor of alimony, whereby the minimum amount of alimony is calculated, with the creditor's needs depending on his age, health, education, property, income, and other important circumstances. As a rule, maintenance is determined in money, but the debtor and the creditor can agree otherwise, and when determining maintenance, the possibilities of the maintenance debtor are taken into account.

The perpetrator of this criminal offense can be any person who has to support another person, determined by an enforceable court decision or an enforceable settlement before a court or other competent authority, in the amount and the manner determined. The injured party, that is, the passive subject, is the person whom the executor is therefore obliged to support, so it can be any person, including the elderly. The Family Law in a separate part regulates which persons can be supported, however, for this paper, we have analyzed the provisions that regulate the maintenance of parents. Namely, situations can often arise in practice when parents are unable to work because of their age, that is, old age, that they do not have even the most basic means of living, that they are lonely, and they are on the edge of existence. In those situations, parents have the right to support from an adult child or another blood relative in the direct line of descent, but also from a minor child if that child earns an income or has income from the property. The only exception is the situation if the maintenance of the parents would represent an obvious injustice for the child or another blood relative. Therefore, it is a criminal offense not to provide maintenance from Art. 194 CC provides, among others, indirect criminal protection to elderly persons, all on the condition that there is an enforceable court decision or an enforceable settlement before a court or other competent authority.

4.6. Violation of family obligations from Art. 196 CC

In the previous lines, we mentioned that family law regulates a large number of rights and duties of family members, starting with those elementary rights and obligations of mutual respect and ending with rights and obligations that threaten the existence of another family member. Our criminal legislation follows the example of other comparative laws by introducing the criminal offense of Violation of family obligations from Art. 196 CC provided certain criminal protection for the most drastic violation of those obligations.

This criminal offense has one basic form (paragraph 1) and two qualified forms (paragraphs 2 and 3). The basic form consists in sanctioning anyone who, by violating

family obligations established by law, leaves a family member in a difficult position who is unable to take care of themselves. The act exists regardless of whether it is temporary or permanent abandonment (Lazarevic, 2006: 554). Therefore, the act of execution is reflected in leaving a family member in a difficult position, thereby violating family obligations established by law. Often the omission of this obligation is realized by spatially distancing the perpetrator from the threatened family member, but this is not necessary because the non-fulfillment of the obligation may occur even when the perpetrator remains next to the family member who needs help (Srzentic et al., 1986: 391). It is about the family obligations of spouses, parents, children, and other family members to help each other, support each other, and take care of infirm members, but also all other obligations established by family law. A difficult position means a serious mental or physical illness of a family member, endangerment of life or health in any way, such as endangerment due to an accident, natural disasters, lack of food, heating, etc. (Stojanovic, 2021: 659). For this criminal offense to exist, it is necessary to leave a family member who is unable to take care of himself in a difficult position, with the fact that it is irrelevant whether this inability existed before that difficult position or the difficult position possibly caused the inability of a family member to take care of himself. For the basic form of this criminal offense, a prison sentence of three months to three years is prescribed. The first qualified form of this criminal offense exists when there is serious damage to the health of a family member and a prison sentence of one to five years is prescribed. Another qualified form of criminal offense exists when the death of a family member occurs, and for this, a prison sentence of one to eight years is prescribed. Therefore, it is a criminal act that aims to provide criminal legal protection to family members who are unable to take care of themselves. In this regard, the most common passive subjects are newborns, small children, but also very old people who, due to their age and accompanying illnesses, are unable to take care of themselves (Babic et al., 2016: 157). This is all the more so because both qualified forms of this criminal offense refer to the occurrence of serious consequences for life and health, which are more real and more frequent in elderly sick persons, compared to other family members.

4.7. Abuse of trust from Art. 216 CC

In the previous parts, we highlighted how the elderly are exposed to various forms of violence and neglect, and which instruments are used to protect their physical, mental, and psychological integrity. It should also be noted that protection of their property was provided indirectly through the criminal offense of Abuse of trust from Art. 216. CC. Namely, this criminal offense has one basic form (paragraph 1) and three qualified forms (paragraphs 2, 3, and 4). The act of execution of the basic form consists of the abuse of given powers by a person who represents the property interests of a person or takes care of his property, to obtain a material benefit for himself or another or damage the person whose property interests he represents or whose property is in question old. Therefore, it is an abuse of authority, which consists in taking certain actions that are against the interests of the person whose property the executor takes care of (Stojanovic, 2021: 725). For the basic form of this criminal offense, a fine or imprisonment of up to three years is prescribed. Qualified forms of this criminal offense (paragraphs 2 and 3) exist when a benefit has been obtained, or damage has been caused in a larger amount, and a prison sentence of six months to five years, or one to eight years, has been prescribed for the same. The most serious form of this criminal offense (paragraph 4) exists if the same was committed by guardians or lawyers and for which a prison sentence of two to ten years is prescribed.

It is clear that in practice different life situations can arise and can lead to the commission of this criminal act, but we should certainly not ignore the possibility that elderly people can also appear as injured ones. Namely, it is not rare that elderly people, due to their old age, illness, and other disabilities, are often not in a situation to represent their interests and take care of their property independently, and they hire certain persons for these needs. These are usually persons who have earned a certain amount of trust from the elderly, but there may also be situations when the property of the elderly is taken care of by their guardians or a lawyer within their profession.

5. Conclusion

Taking into account the previously highlighted data on the demographic aging of the domestic population and the projection of a significant increase in the share of the elderly population in the entire society, it is clear that the position, with an emphasis on the rights and protection, must be determined more directly and precisely. The Ministry of Family Care and Demography of the Republic of Serbia recognized such a need and initiated the drafting of a Strategy Proposal for the Improvement of the Position of the Elderly for the period from 2024 to 2030, which will be aimed at creating legislative and

other preconditions for the elderly, regardless of year, to be achieved in all areas of social life.[11]

Also, it is indisputable that the Criminal Code does not incriminate acts of violence against the elderly or acts of neglect of the elderly as separate criminal acts, but in the paper, we specifically pointed out that there are provisions for certain criminal acts that directly, and more often indirectly, also provide criminal protection, elderly persons. It is for this reason that we believe that in the coming period, primarily because this is a particularly vulnerable category of citizens, we should also think about more adequate, i.e. more immediate protection of elderly persons, and in this sense, an appropriate proposal was made that as a qualified form the aforementioned criminal acts include the form committed against elderly persons.

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ONE LOOK AT THE ELDERLY IN PRISON: CASE STUDY OF THE CORRECTIONAL FACILITY IN NIŠ

The paper deals with the elderly in prison, as it has become a global issue, rather new one in Serbia. The elderly persons in general still face discrimination and ageism in Serbia, so it was quite challenging to take a look at specific category of the elderly - elderly in prison, having in mind the complicated and not-universal definitions of old age and the elderly, lack of accurate data, as well as the specific life conditions in prison context. The authors put in focus two categories of convicted persons - those who came to prison in younger age to serve longer prison sentences, but they have reached the age of 65 when the research began, and those who came in prison for the first time in older age (65 or 65+ years). The focus was on the criminal offences they have been perpetrated, their characteristics, the quality of ageing in prison, especially through the prism of relations with family members, and medical care issues. The authors examined the perceptions of elderly convicted persons related to their criminal past, as it is also one of the important issues in treatment and resocialization. As this category of inmates is a specific one, the special-preventive effects of prison sentences are particularly considered. Relevant data for the study were gathered at the Correctional Facility in Niš.

Keywords: *elderly person, elderly convict, prison, criminal offences, family relations, special prevention*

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1. Introduction

At the international scientific conference which was held last year (October, 27-28) in Novi Sad, organized by the Institute of the Criminological and Sociological Research and the Provincial Protector of Citizens - Ombudsman, just a small number of papers (six out of 40) were dedicated to the elderly and ageing, although the theme of the conference ("From Childhood to the Right to a Dignified Old Age - Human Rights and Institutions") explicitly included this topic. This year's international gathering is dedicated exclusively to the elderly, which undoubtedly indicates the importance of the issue, i.e. the importance of the problems that the elderly face, and to which there is no adequate social response. However, international attention is becoming increasingly focused on the elderly, due to the rapidly ageing of population globally (WHO, 2022)[1] and lot of problems that can't be ignored. It seems that in most countries, especially in poorer ones, such as Serbia (with one of the most rapidly ageing populations in the world[2]), a discriminatory approach to this population prevails, as it is usually seen as a burden that is difficult to bear and that costs a lot. In this regard, it seems a reasonable requirement to adopt internationally binding instruments that will pay special attention to the elderly (Tilovska-Kechedji, 2022: 443-444), as it has been done with other vulnerable categories (e.g. women, children).

Serbia is late when it comes to these topics, but as in many other cases, under pressure from international actors primarily, the state is making steps forward. In the first place (as usual) the strategic framework was created - National Strategy on Ageing 2006-2015[3], but in practice not much has been done on its implementation, and in the current social discourse discriminatory attitude towards the elderly remains dominant (Knežić, 2010; Solarević, Pavlović, 2018: 61-62; Pavlović, 2019: 182-195; Ljubičić, 2021: 526; Radaković, 2020: 551-567; Ljubičić, Ignjatović, 2022: 446-447, Jovanović, 2022: 492-498).

It seems that the problems of the elderly in Serbia deserve attention in several (internationally recognized) days of the year (e.g. International Day of Older Persons or World Elder Abuse Awareness Day) or in connection with tragic events (brutal elder abuse cases) portrayed in the media in a sensationalist manner. Decision makers think

[1] The United Nations General Assembly declared 2021-2030 the Decade of Healthy Ageing and asked WHO to lead the implementation (WHO, 2021).

[2] According to the latest census, in the current population of Serbia, 22% of persons are aged 65 and over (Statistical Office of the Republic of Serbia, 2022: 21).

[3] National Ageing Strategy 2006-2015, Official Gazette of the Republic of Serbia, No. 76/2006

about the elderly and their problems most frequently (and conveniently) on special occasions as on October 1st or June 15th when they prepare suitable speeches, declarations and promises. Usually without fulfilment. (Jovanović, 2022: 498). On the other hand, the state/society seems to be very hypocritical in its reluctance to legalize euthanasia that would secure the right to a dignified death especially for the elderly who are terminally sick and deprived of adequate medical and other types of care, tired of undignified life (Jovanović, 2020: 547-548).

Even with declarations, it does not go smoothly. The National Strategy on Ageing expired in 2015, and a new one has not yet been adopted. But it was promised, too. The Minister of Family Care and Demography, in conversation with the Regional Director of the United Nations Population Fund for Eastern Europe and Central Asia, Florence Bauer, stated that "the development of the National Strategy on Ageing represents one of the strategic goals of the Ministry of Family Care and Demography, in order to create conditions for an even better quality of life and improvement of the position of the elderly in Serbia" (V.C.S. 2023). So, eight years have passed since the expiration of the Strategy 2006-2015 (its goals have not been satisfactorily achieved either), and the new one is in the preparation phase, promising an "even better quality of life" for the elderly. Let us conclude that the life of the elderly in Serbia is, according to the Minister, of good quality already. Is that really so? The quality of life of the elderly in Serbia today is best known by the elderly themselves, and something was said about it last year at the conference in Novi Sad, while this paper will be dedicated to a specific category of the elderly, those who are in a special (worse?) living conditions - in prison, because the interest in this topic is on the rise.

2. Ageing in Prison

In addition to issues related to healthy and active ageing, violence against the elderly in the family and institutional setting and ageism that have been brought into focus globally due to the intensive ageing of the population, a special topic is the ageing of the prison population and the elderly in prison (especially in countries with overcrowded prisons such as the USA, China, Brazil, Russia, Romania, Cyprus, Italy, France... (Penalty Reform International, 2022: 8-10; Aebi et al: 2023: 5-6). The problems associated with it are, in the first place, the health and medical services (Abbing, 2013: 5; Jovanić, Ilijić, 2015: 163; Ricordeau, 2021, Milićević, Ilijić, 2022: 509-512), followed by the specifics of the treatment of old convicts, adaptation of prison infrastructure to their needs, but also many others - such as maintaining ties with the family (Veković, 202: 178-181; Milićević, Ilijić, 2022: 512:514).

Pragmatic systems such as those from the Anglo-American areas (with a large prison population sentenced to long-term prison sentences) deal in particular with the issue of the cost of caring for the elderly in prisons, and pay attention to promoting solutions such as compassionate release (U.S. Department of Justice, Federal Bureau of Prisons, 2013)[4]. It seems that the elderly persons, especially as part of the prison population, are perceived as even heavier burden, because their antisocial behaviour resented the community.

2.1 Who is an Elderly Person (in Prison)?

There is no universal answer to this question. "Old age" is a loose term that applies most often to everyone of the age of 60 or 65 and over (but sometimes even lower, due to different criteria). The chronological age denoted as "old age" varies culturally and historically, so it is not quite clear what we could name an elderly stage. The United Nations agreed cut-off is 60+ years to refer to the older population, although it should be lower in e.g. Africa: 50, 55 years (World Health Organization, 2013).

There is also a notion "pure ageing" which refers to the inevitable, irreversible decline in organ function that occurs over time even in the absence of injury, illness, environmental risks, or poor lifestyle choices (Stefanacci, 2022), while the literature also points out the necessity of taking into account other correctives (of psychological or social character), so both psychological and social notions of ageing are distinguished[5] thus indicating complications in determining the notion of elderly people, i.e. the impossibility of exact determination of the threshold for the old age in different systems and contexts, or for different purposes.

There is also a difference when it comes to women and men, because they also age differently, and undoubtedly, living conditions are important when choosing the age threshold, so it is also important whether one lives in low-income country or in high-income one (World Health Organization, 2022)[6].

[4] It is interesting that in the Report on the State of Prisons at the European level there is no mention of old prisoners (except in the sense that they are most often not engaged for work, because there are no suitable jobs for them (p.49)), while women and children, as well as foreigners, are recognized as particularly vulnerable groups (European Prison Observatory, 2019).

[5] About different definitions and dilemmas about old age: Milanović-Dobrota, 2017; Solarević, Pavlović, 2018: 58-59; Pavlović, 2019: 171-172; Batrićević, 2022: 464.

[6] It is worth mentioning that International Network for the Prevention of Elder Abuse (INPEA) supports a single age based standard of 60 years and older only in developed countries. In the case of less developed countries, where old age starts at a younger age any definition of age should allow for a lower treshold as appropriate, but in the case of widows living in less developed countries, no minimum age should apply.

One of the criteria for determining the age threshold can be the criteria for retirement (age), which is 65 years in Serbia (although there are deviations in this regard, because the insurance period is also important, and for women the limit is has been gradually rising: in 2023 - 63 years and 6 months of age, and there is also a category of early old-age pension)[7]. Most developed Western countries set the retirement age around the age of 65. Reaching this age is commonly a requirement to become eligible for senior social programs (Stefanacci, 2022). It is believed that this threshold (65 years and over) was set more than a century ago, when Prince Bismarck, the Chancellor of the German Empire selected age of 65 as the age at which citizens would be able to participate in the national pension plan, for he might have expected that most people would die before reaching this age (Orimo et. al., 2006: 149) which is not the case at present, as the lifespan has increased.

Indeed, the old persons have been defined most often as those of a chronological age of 65 years or over (subdivided into groups of young-old (65 to 74 years), middle-old (75 to 84 years) and oldest-old persons (≥85 years) or in similar slightly different subdivisions, especially in geriatric medicine (Zizza et al., 2009: 481).

Some researchers (e.g. in Japan) advocate changing the definition and raising the limit to over 75 years (Orimo et al., 2006: 149 and 158). In the same line are experts in demography who "complicate" the definition of ageing and the elderly by pointing out the importance of the thanatological dimension of age (in addition to the chronological one). Namely, for an individual, age across the life course consists of two components: time since birth and time to death, the chronological[8] and thanatalogical dimensions of age, respectively. In the aggregate, thanatological age is determined by the mortality rate schedule to which a birth cohort is subject until its extinction (Riffe et al., 2016: 2), so the traditional age measure is a backward-looking one (Scherbov and Sanderson, 2019: 20).

We encounter additional complications when it comes to prison population. The definitions of the elderly and the old age are different due to specific conditions, i.e. "accelerated ageing"[9] in prison, so the most common age threshold is lower. Age thresholds for prison population used by different organizations vary widely, from 45 to over 70 (Codd, 2018). However, the most commonly mentioned is the 50 or 55-year threshold

[7] Art. 19-20 of the Law on Pension and Disability Insurance, Nos. 34/2003, 64/2004 - Decision of the Constitutional Court, 84/2004 - the Other Law, 85/2005 , 101/2005 - the Other Law, 63/2006 - Decision of the Constituional Court, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 73/2018, 46/2019 - Decision of the Constitutional Court, 86/2019, 62/2021,125/2022 and 138/2022.

[8] Chronological age is the dimension most commonly referred to, but it only gives information as to the number of years a person has lived, not his/her individual condition. Besides, there are biological, psychological, functional and social age discussed in Gerontology (International Committee of the Red Cross, 2018: 8-9).

[9] More about varios prison studies on prison population ageing and different problems: Milićević, Ilijić, 2022.

(International Committee of the Red Cross, 2018: 13). In England and Wales, the age of 50 has been adopted by Her Majesty's Prison and Probation Service, in so far as the age of prisoners is recognised for operational purposes, for the most of the research literature, prison scrutiny bodies and third-party organisations working in this area adopt this definition, which is based on evidence that the health needs of prisoners are advanced by about 10 years (a 50 year old prisoner would likely have the needs of a 60 year old person in the community (Ministry of Justice, Department of Health and Social Care, Public Health England, NHS England and Improvement[10]). In the U.S., the rapidly growing (old) prison population is also a problem[11] and the threshold for the old age is also set at 50 years (Skarupaski et al., 2018: 157), with basic arguments related to the phenomenon of accelerated ageing.

The accelerated ageing process may be caused by both lifestyle choices and social deprivation affecting a prisoner prior to custody, and by the effects of incarceration itself. The phenomenon can be questioned in the case of those who enter prison for the first time in later life, and were in excellent health. However, a commitment to standard definition is needed in order to establish a strategic approach. However, whatever age threshold is used, it should be based on solid evidence, and should be kept under review.

2.2 Elderly Convicts in Serbia

Serbia has also opted (judging by the latest official document related to the topic - the Strategy for the Development of the System of Execution of Criminal Sanctions for the period 2022-2027[12]) for a lower age limit. It pays more attention (at least declaratively) to old prisoners[13] which is commendable, bearing in mind the aforementioned (about marginalization and discrimination of the elderly in general, when it is to be expected that old prisoners will receive even less attention).

Namely, the Strategy for the Development of the System of Execution of Criminal Sanctions for the period 2022-2027 in the part related to the presentation of the current situation in the field of execution of criminal sanctions reads as follows: "By the

[10] Written evidence from the Ministry of Justice, Department of Health and Social Care, Public Health England, NHS England and Improvement, committees.parliament.uk/publications/1740/documents/16889/default/, accessed on: 1. 7. 2023.

[11] There is no global data on the number of older persons in prison. Known rates vary from 1.8% of prison populations in Indonesia to as high as 20% in Japan (Penal Reform International, 2021).

[12] Official Gazette RS, No.142/2022.

[13] In the Strategy for the development of the system of execution of criminal sanctions for the period 2013-2020 (Official Gazette RS, No. 114/2013), the elderly persons are listed as a particularly sensitive category, but their number or increase in number wasn't presented, and the emphasis was more on the training of employees, while in the new strategic framework a step forward has been made.

representation of persons over 50 years of age in the total prison population - 16.7%, Serbia is among the group of European countries that exceed the general statistical averages, and as the percentage of this category of sentenced persons is constantly growing, this requires consequent adjustment of the system of execution of criminal sanctions." Alongside the fact that the standard of 50-year threshold used in European framework wasn't used in calculation (which affects the rate of the population in question), it is not entirely clear how this percentage (16.7%) was obtained, i.e. how it was calculated. It seems that the data refers to all persons who have been deprived of liberty (because the data on persons deprived of liberty are previously presented in total and in subdivisions: persons who are detained, those who have been sentenced to imprisonment for a misdemeanour offences, etc.). On the other hand, the same sentence in text indicates the steady growth of "this category of sentenced persons". However, "sentenced persons" (according to terms used in Strategy 2022-2027) are exclusively adult persons who have been sentenced to imprisonment for a criminal offence. According to the Table 1 (taken from the Strategy), it could be even concluded that the total number of sentenced (incarcerated) persons is decreasing, but according to the stated (unclear) claim in the Strategy - the number of elderly persons sentenced to imprisonment (who are 50+ years old) is increasing.

Table 1: Number of Persons Deprived of Liberty as of 31 December 2013-2021

Deprived of Liberty	**2013.**	**2014.**	**2015.**	**2016.**	**2017.**	**2018.**	**2019.**	**2020.**	**2021.**
Sentenced persons	7330	7737	7670	7980	8081	7934	7862	7301	7230
Security Measures	213	387	429	489	549	657	679	639	680
Detained persons	1894	1593	1538	1732	1616	1691	1903	1959	2046
Juvenile prison	24	14	17	19	20	27	25	21	20
Educational Measures	215	228	194	199	192	177	190	183	171
Persons Punished for Misdemeanours	355	329	216	253	349	385	418	437	407
Total	**10031**	**10288**	**10064**	**10672**	**10807**	**10871**	**11077**	**10540**	**10557**

However, according to the (latest) available published report by the Administration for the Enforcement of Criminal Sanctions (2013) on persons sentenced to imprisonment, who are (again) older than 50 years, the rate is 14.3%, compared to 12.9% in 2012

(Ministry of Justice of the Republic of Serbia, Administration for the Enforcement of Criminal Sanctions, 2013: 112). So, we might really talk about the increase of the older prison population. It indicates that the aforementioned percentage (16.7%) might be accurate, which underlines the claim that the number of this category of prisoners is growing.

However, in European penal institutions - sixteen percent (16.1%) of the inmates were aged 50 or over. But, due to the problems in exact and comparable data collections - it wasn't possible to confirm the hypothesis that prison populations are ageing across Europe (such analysis will only be possible once a few more years of data are available) (Aebi et al., 2022: 3-4).

Official statistics in Serbia offer data on the number of sentenced perpetrators (for criminal offences) by age and in the last five years there are no significant changes. The percentage of those who have reached the age of 50 or over ranges between 19% and 20% (2018-2022) (Statistical Office of the Republic of Serbia, 2023: 2), but all of them are not sentenced to prison (suspended sentence is one of the sanctions, even the most common one). So, we cannot speak about the growth of the prison population, based on this data.[14] But, this rate was lower ten years ago: in 2003 it was 16.9%, while in 1999 it was - 14.7% (Statistical Office of the Republic of Serbia, 2004: 3), which certainly suggests the conclusion of an increase in the rate of older perpetrators sentenced of criminal offences (but not necessarily sentenced to prison). In short, it is necessary to carry out more focused research, with a threshold of 50 years in order to keep up with the European standard in prison studies.

The data on the imposed sanctions also speaks in favour of the growth (but not dramatic) rate of prison sentences in the structure of imposed sanctions: in 2018 it was 24.9% (and in the following years it moved even below this number), and in 2022 it was 27.5%. When it comes to the length of prison sentences, it was found that the rate of prison sentences lasting over 1 year in the observed period increased slightly, between 9 and 11% (e.g. in 2018 it was 9.3%, 2019 - 10.1% and in 2022 - 10.9%), so it could (only) be assumed that more elderly people were sentenced to longer prison sentences. Comparisons are made with the period 1999-2003 when imprisonment participated in a higher

[14] Inaccuracies in the presentation of data are also present in the Statistical Releases of the Statistical Office of the Republic of Serbia. For example, the last 2022 Statistical Release (in English) provides data on convicted adult perpetrators by age and sex, which could confuse researchers, because convicts are often also known as "prisoners" or "inmates", while the Statistical Office of the Republic of Serbia, in the interpretation of certain terms, does not give an interpretation of the term "convicted person" at all, but it gives an explanation of the term "sentenced person" (which is not even used in the Statistical Release (Ibid: 12). Therefore, it is not surprising that data (on the increase of the elderly prison population) can be misinterpreted (see: Milićević, Ilijić, 2022: 504).

percentage in the structure of the imposed sanctions (in 2003 as high as 32%), but there was also a higher rate of shorter prison sentences (Statistical Office of the Republic of Serbia, 2004: 2). However, a significant, faster increase in the rate of the so-called house arrest has been observed - in the last observed year (2022) it amounts to 11.2% in the structure of imposed sanctions, while in 2018 it was 7.4% (Statistical Office of the Republic of Serbia, 2023: 3). This increase, very interesting in general (especially regarding preventive effects of the house arrest) needs to be particularly addressed.

The unequivocal answer to the question - whether Serbia has a problem with the increase in the rate of elderly convicts is overshadowed by the latest report on the state of prison population in Europe (Aebi et al., 2022). According to this report, Serbia is among the countries with a low percentage of persons aged 50 or over in the prison population (the score is between 5.1% and 25% lower than the European median value) (Ibid: 4). The latest report on Serbia's progress in European integration does not highlight this problem, although it deals with topics such as detention, prevention of torture and access to medical care in prison, but in general) (European Commission, 2022: 36-37).

However, according to the allegations (in the presentation of the current situation in the system of enforcement of criminal sanctions in the Strategy 2022-2027), Serbia made efforts to improve the position of elderly convicts and those with disabilities in terms of infrastructure adaptation - in 2015, parts of the Correctional Facility in Požarevac were renovated for their accommodation. Elderly convicted persons are mentioned in the part related to measures and activities for the improvement of human rights of particularly vulnerable groups of convicted persons (through improvement of accommodation conditions taking into account their specific needs; training of employees in institutions for the execution of criminal sanctions in order to improve the treatment of elderly persons). The improvement of the position of the elderly in prisons could be expected through the Strategy 2022-2027 goals elaboration and implementation. Recognition of the elderly convicts as a sensitive category that requires special attention is certainly commendable. In the Strategy 2013-2020, they were not given so much attention, so we can conclude that a significant step forward has been made in strategic framework, and as stated previously improvement has been made regarding adapted accommodation of elderly convicted persons.

It is also important to mention that (in 2019) the possibility of early dismissal was envisaged (according to the enforcement judge's decision, upon the proposal by the warden at the correctional facility[15]) for elderly convicts (and those with serious illness or disabilities, although old age is usually associated with these problems). It is in line

[15] Art. 184a Law on Execution of Criminal Sanctions, Official Gazette RS, No. 55/2014, 35/2019

with the goals of compassionate release promoted in other systems due to increase of the elderly prison population.

3. Study on the Elderly in Prison - Correctional Facility in Niš

3.1. Methodological Framework of the Study

The research on the elderly in prison was conducted in July 2023 in the Correctional Facility in Niš[16] by taking insight into the official records and files of convicts. The age of 65 years was taken as a threshold. We collected data on criminal offences committed by old convicts, their past (criminal), attitude towards the offences they committed, and special preventive effects of punishment, as well as other characteristics, i.e. differences in relation to other convicts. In particular, the relationship with the family was taken into consideration, bearing in mind the importance of family ties in the treatment process and post-penal acceptance and support. We started from the assumption that the relationships of the elderly with family and loved ones are often damaged even in the population outside the prison walls, more often due to the discriminatory attitude towards older family members as evidenced by research at the international and at the national level (the elderly are often victims of abuse and neglect in a domestic setting, but also in an institutional one (which replaces the family - in nursing homes for the elderly, etc.) (World Health Organization, 2022; Jovanović, 2022; Ljubičić, 2021).

However, we have opted for the "standard" threshold for entering the world of the elderly - 65 and 65 + years, bearing in mind the previously presented critiques of the standard criteria for determining old age, and the proposals to raise the threshold. If the "prison standard" of 50 years was taken as a threshold, old convicts from our sample would be classified as average old.

Our sample included those who were 65 years old at the beginning of the research, although some came to serve the sentence earlier, as well as those who came to serve the sentence at 65 years or older. However, we didn't have pretentiously set goals, except for the idea to draw attention to this category of the elderly, which is found in specific living conditions, and its peculiarities. They were male exclusively, as women serve their sentences in Correctional Facility for Women in Požarevac, and in a far smaller number participate in the total number of convicted persons.

[16] The survey was conducted with the approval of the Director of the Administration for Enforcement of Criminal Sanctions, Mr. Carević. In the process of data collection, authors had help of Nikola Ninković (sociologist) and Jelisaveta Đorđević (psychologist) to whom they thank a lot.

3.2 Research Results

On July 7, 2023 when the research activities began, there were 53 convicts who were 65 years of age or older, which is 3.45% of the total convict population in the facility on that day. Convicted persons who, at the time of arrival at the facility, met the set criteria in terms of age, i.e. they entered the facility with 65 years or older, make the majority of the sample - 66.04%, while those who entered the facility in younger age, but at the time of the start of the research turned 65 or older make 33, 96%.

Table 2: Criminal offences[17] of the old convicts

Criminal offence	Number of inmates
Art. 113 CC - Murder	8
Art. 114 CC - Aggravated Murder	13
Art. 121 CC - Serious Bodily Injury	1
Art. 178 CC - Rape	4
Art. 179 CC - Sexual Intercourse with a Helpless Person	2
Art. 180 CC - Sexual Intercourse with a Child	2
Art.181 CC - Sexual Intercourse through Abuse of Position	1
Art. 182 CC - Prohibited Sexual Acts	1
Art. 194 CC - Domestic Violence	1
Art. 204 CC - Aggravated/Compound Larceny	1
Art. 208 CC - Fraud	4
Art. 223 CC - Fraud in Conducting Business Activity	1
Art. 227 CC - Abuse of Position of a Responsible Person	1
Art. 229 CC - Conclusion of a Restrictive Agreement	1
Art. 246 CC - Unlawful Production and Circulation of Narcotics	8
Art. 348 CC - Illegal Production, Possession, Carrying and Circulation of Weapons and Explosives	4
	53

[17] Criminal Code (hereinafter: CC), Official Gazette, Nos. 85/2005, 88/2005 - correction, 107/2005 - correction, 72/2009, 111/2009, 121/2012, 104/ 2013, 108/2014, 94/2016, 35/2019 .

The most common criminal offences are those with elements of violence (62.26%) of which one in three (30.3%) committed a criminal offence against sexual freedom. The following are offences against human health (15.09%), against property (9.43%), against public order and peace (7.55%) and offences against economic interests (5.66%). Almost half of the sample are recidivists (49.06%). The majority were sentenced to prison terms of at least five years or more - 73.58%. The harshest sentences were imposed on those convicted of crimes against life and body, followed by the offences against sexual freedom. Lower sentences (less then five years of imprisonment) are more common in the categories of those convicted of crimes against property, economic interests, against human health and against public order and peace (three years of imprisonment is the most common conviction).

3.2.1 Offences against Life and Body

(Art. 113 CC, Art. 114 CC, Art. 121 CC)

The elderly inmates were most often convicted of crimes against life and body (41.51%). Half of them came to serve their sentences at the age of 64 or under. Half of them are recidivists (most often their previous sentences were suspended sentences or fines, while two convicts were previously convicted of murder (in one case of murdering a spouse). Most of them (95.45% - all but one convict) are in the category with a medium or low degree of risk (a high degree of risk was determined in one case, in which the medium level was determined subsequently).

The longest prison sentences dominate in this category of convicts, and the most frequent one is that of 10 years of imprisonment or more (four sentences of 20 years, one of 30 years and one of 40 years of imprisonment). Just in one case (for serious bodily injury) it was three years in prison. They rarely confess to their criminal acts (most of them overemphasize the influence of situational factors and minimize their own responsibility).

The victims are people they previously knew - most often wives, common-law wives, ex-wives/common-law wives or emotional partners, or other family members, neighbours, colleagues. The offences were usually preceded by long-standing poor, dysfunctional relations with victims.

Rare visits and receipt of packages were recorded. The problems with alcohol as well as problems in the primary family were also recorded. Educational attainment is poor: 40.91%: completed primary school (40.91%); 18.18% of convicts have incomplete primary education; 36.6% - secondary education and one convict has higher school education. Most of them have developed work habits, they were employed (as merchants, drivers, house painters), but a small number of them work at the facility, due to limited

work ability, and health problems (characteristic for the general population of older age). Their behaviour is adapted to the house rules of the facility.

3.2.2 Offences against Sexual Freedom

(Art. 178, Art. 179, Art. 180, Art. 181, Art. 182 CC)

Offences against sexual freedom were committed by 18.87% of the elderly convicts. The majority (70%) came to serve sentences at age 65 or older. Five (the half) of them have been convicted before (three persons of criminal offences with elements of violence). The most common offence is rape, followed by the sexual intercourse with a helpless person and sexual intercourse with a child. Long prison sentences prevail - the shortest is five years of imprisonment (just in one case - four), and the longest are 17 years and five months and 18 years of imprisonment (for sexual intercourse with a helpless person).

The majority of convicts (60%) are medium-risk offenders, while others are high and very high-risk offenders. For one convict, the degree of risk was not determined (during the survey), because he was in a Special Prison Hospital. Everyone completely denied the crime, and everyone knew the victim previously. The victims were most often from a close, familiar environment (except in one case).

Most of them have family problems. One in three were married or in a partner relationship at the time of the crime commitment, and all of them were married or married at some time in their lives. Although most of them grew up in a complete, functional family, visits and packages are most often absent.

The educational attainment is poor. Most of convicts completed primary school, 30% completed secondary school, and one has uncompleted primary education. Most of them have developed habits, and they had employment prior to conviction. However, a small number of them work, mostly due to limited working ability and health problems (common for the elderly population). Half of the convicts have problems with alcohol. Their behaviour is adapted to the house rules, and violations occur rarely.

The elderly convicted of sexual offences against helpless persons or children are the most vulnerable category due to widespread odium from other convicts and even staff members (e.g. employees of the security service). They are easy targets of other convicts due to frailty of old age and inability to adapt to prison life and defend themselves (employees of the security service manage to turn a blind eye when these convicts are molested by other inmates).

3.2.3 Offences against Marriage and Family
(Art. 194 CC)

Only one elderly person was convicted of the domestic violence. He came to serve his sentence at the age of 70, and at the time of conducting the research he was 73 years old. He was sentenced to eight years in prison. He is a multiple recidivist (attempted murder, domestic violence). He committed the offence against his ex-wife and daughter, after he served the prison sentence for the attempted murder of his ex-wife. He has a high degree of risk (66 on a small questionnaire), and subsequently - high (109 on a large questionnaire).

He grew up in a dysfunctional family. His parents divorced when he was a child, and he saw his father several times in his life. He had a tumultuous and troubled emotional life, he had aggressive outbursts towards all partners and some other family members He has been on records of the Centre for Social Work since 1976 due to violence against his sister, first wife, son, second wife and daughter. There are no visits and packages. He denies committing a crime, and felt no remorse. He is a beneficiary of financial social assistance, and a problem with alcohol is recorded. Also, he is verbally aggressive (but he has not been disciplinary sanctioned). He doesn't work at the facility due to limited ability to work.

3.2.4 Offences against Property
(Art. 204 CC, Art. 208 CC)

Criminal offences against property (the most common offences in the general population of convicted persons) were committed by five persons from the sample (9.43%). Four of them came to serve their sentences at the age of 65 or older.

All of them are multiple recidivists (of various criminal offences). Committing criminal acts is a pattern of their behaviour. No one confesses to the commission of criminal offences. They overemphasize the impact of the situation, and minimize their own responsibility.

A turbulent emotional life, frequent changes of partners and infidelity were recorded, especially expressed in the perpetrator of the criminal offence referred to in Art. 208 KZ. However, periodic or frequent visits by family members are recorded, the reception of packages is relatively common. In the case of the perpetrator of fraud (Art. 208 CC) high education, developed work habits and long-term work experience (as entrepreneur) are recorded.

A small number of them work at the facility, mostly due to limited working ability, and health problems (nothing that differs from problems affecting the general population of older age).

3.2.5 Offences against Economic Interests

(Art. 223 CC, Art. 227 CC, Art. 229 CC)

Three convicted persons committed criminal offences against economic interests. Two came to serve their sentences under the age of 65. All convicted persons were previously convicted. Different degrees of risk were determined: one person is low-risk offender, one medium and one high-risk offender. All of them diminish their responsibility, denying criminal activities. They all have high or higher education, they were employed prior to conviction, but they are not fully engaged at the facility due to limited ability to work. They have health problems, common in the population of older age.

They have good family relationships and family support. Their behaviour is in accordance with the house rules of the penitentiary institution.

3.2.6 Offences against Human Health

(Art. 246 CC)

Crimes against human health were committed by eight convicted persons (15.09%) and the majority (six of them) came to serve their sentences at 65 years of age or older, 50% were recidivists.

Most persons (six) are medium-risk offenders, one person has low and one high degree of risk. All persons minimize their responsibility in the commission of a criminal offence, transferring responsibility to other persons or justifying themselves by the situational factors. One person committed a criminal offence by selling a psychoactive substance, while the others committed a criminal offences by growing marijuana or installing a laboratory on their property to grow the plant. They committed crimes for material gain.

All convicted persons are divorced, have multiple marriages behind them, and children. They come from complete primary families. Visits and packages are rare.

Five convicted persons completed primary school, one has incomplete primary education, and two convicts have higher education. Most of the convicted persons have developed work habits, one person is a social assistance beneficiary. At the facility, a small number of them work, mostly due to limited working ability, and health problems (but nothing that differs from the problems that affect general population of older age).

3.2.7 Offences against Public Order and Peace

(Art. 348 CC)

Four persons were convicted of offences against public order and peace and all of them came to serve their sentences at the age of 65 or older. Three persons are recidivists. Two persons are medium-risk offenders, and one is high-risk offender (one convict is still in the admission department).

Just one convict confesses to the commission of the offence (he concluded a plea agreement). However, he stated that he has been a passionate collector of firearms and "he saw nothing controversial" in the commission of the offence, thus expressing the denial.

All convicted persons have children, one is still married (but the marriage is dysfunctional), and two persons are divorced. Periodic visits and occasional receptions of packages were recorded. One person has a problem with alcohol, and three convicts originated from a dysfunctional family. Their behaviour is in accordance with the house rules.

3.3 Discussion

Most convicted persons are medium-risk offenders (74.51%), a high degree of risk was found in 15.69%, low level of risk participates with 7.84% and very high with 1.96% (two convicted persons had no established degree of risk). This data indicate that committing criminal offences does not constitute an adopted lifestyle for most of old convicts. The adopted pattern is clearly emphasized in those who committed a criminal offences against property. Also, 49.06% of the elderly prison population were previously sentenced, which is 20% less than the average percentage at the facility - 69.81%.

On the other hand, they usually do not confess to the criminal offence, they diminish their own responsibility and overemphasize the impact of the situation and other people, thus indicating that they do not have a clear insight into the consequences their behaviour has caused. The same results are presented in other studies, especially those dealing with the problem of domestic/partner violence (Jovanović, 2010: 237; Simeunović-Patić, Jovanović, 2013: 32-33). The most prevalent offences of the old convicts are offences with elements of violence, while the most common offences in general prison population are property crimes (Aday, Krabill, 2006: 237).

The elderly convicts predominantly committed offences with elements of violence against closest persons (most often female, actual or ex-spouse and children or other family members, neighbours). As most of them have dysfunctional relationships in the family (family of origin as well as in family of procreation), it could be concluded that the violence was most likely present before (prior to conviction and admission to prison), as it is one of the well-known characteristics of domestic / partner violence or violence against children (its duration, under-reporting and dark figure of crime). It certainly indicates the dangerousness of these offenders (for family members and other vulnerable persons from their closest surroundings) as well as serious failures in state/social response to the problem in earlier stages. That fact also characterizes the domestic/partner violence (Jovanović, 2010: 35-58; Simeunović -Patić, Jovanović, 2013:143-169).

As previously stated, family relationships of elderly convicts are considered problematic. Dysfunctional relationships in the family of origin are recorded, and the relationships in their own family are also broken, superficial, and distant; some convicts were already on the records of the centre for social work due to violence, neglect, etc. Therefore, it is not surprising that the majority of convicts lacks support of the family. There are no visits and packages (or they are extremely rare), which is to be expected given the previously mentioned (about dysfunctional relations in the family, and violence). However, broken family ties are only further worsened by prison deprivation, so this problem is a special challenge from the aspect of treatment, special-preventive effects, and post-penal acceptance.

One of the features of the old convict category is that they came to serve their sentences with developed work habits, although most often they are not engaged at the facility due to limited working ability caused by age and health conditions. As they reached age for pension, they could decide if they would be engaged in available activities or not. Most of them opt for no as an answer, which probably couldn't be the option if they were not deprived of liberty. There is clear demarcation line between the elderly prison population and the rest of convict population which most often commits criminal offences for material reasons.

The highest percentage of elderly convicted persons completed primary school (41.51%), 30.19% completed secondary school, 11.32% completed higher school or faculty. The rate of those with incomplete primary education is 16.98%. Regarding educational attainment, this category of prisoners also differs from the rest, since the prison population is significantly less educated than the general population, while the older prison population is somewhat closer to the national average educational level[18]. Given that this category is not particularly interested in acquiring new skills, and knowledge, this data does not seem so bad (in addition to fact that they were employed prior to incarceration more often than other prisoners, who committed offences for material reasons).

[18] The results of the 2022 Census show that more than half of the population aged 15 and over completed secondary school (53,1%), primary school (eight years) was completed by 17.8% of population, 22.4% gained a diploma of the high or higher school, while 6.3% of population are without school or completed less than eight grades of primary school.(Statistical Office of the Republic of Serbia, 2023).

4. Concluding Remarks

Population ageing is a problem that raises a number of questions that require well-tailored solutions. Some of them are discrimination against the elderly, inadequate care and even violence in the institutional and family settings. One of the questions that is recently raised is related to prison conditions and specific needs of the elderly convicts. Namely, the ageing of the population in general and the tightening of penal policy are inevitably reflected on penitentiary institutions, so it is important to draw attention to the elderly in prison conditions. This issue can be viewed from the aspect of costs, as do the systems with a growing population of elderly convicts, and wider implementation of the compassionate release, but also from the aspect of protecting their human rights and their recognition as vulnerable category.

One of the problems of the elderly convicts (based on our small survey, as well as on comparative studies) is the tearing of family ties that have already been dysfunctional, and additionally violated by the commission of (violent) offences against family members or other close persons. The question is how to restore the relations that are generally relevant in the treatment of the convicted persons, and how to prepare them for the release and post-penal acceptance. The situation is additionally complicated by the fact that convicts deny or diminish their own responsibility for the criminal offence, so it is seems that is too late to work on the broken relationships, as the great contribution to that has been given by convicts themselves. It is clear that the promotion of non-violent communication, tolerance in interpersonal contacts, and timely and adequate (preventive) response when it comes to dysfunctional family relationships and domestic violence at early stages are of great importance.

Limited working abilities of older convicts, due to age and health problems, are also a challenge, thus finding adequate forms of work engagement, and their promotion would certainly be important. When it comes to medical care, we could even conclude that the elderly are even in the better position in prison than outside it, because special attention is paid to the health care of the convicted persons in general (they have basic health care at the facility, and the necessary specialist examinations and interventions do not have to be scheduled and waited for several months or even years).

Bearing in mind that these are persons who are not fully capable of work, and would most likely be in poorer living conditions outside facility, without family support and acceptance, with poor chances to obtain adequate medical care, it seems that at least some of them are not in such a bad situation in prison (they certainly should be asked about that, so this could be the topic of some future research). Namely, it is a well-known phenomenon that those who are on social margins and do not have much choice, even

rationally choose to commit a crime in order to spend at least some critical period of time (e.g. winter) in prison.

In the worst position are the elderly convicted for sexual offences against helpless person or children. They are the most vulnerable category in prison (regarding their safety) as they are targeted by other convicts (as well as by some staff members) who had odium towards sexual offenders whose victims are children and helpless persons. Safety of this category of elderly convicts is a special challenge for penitentiary institution, because they are not able to adapt and defend themselves due to old age frailty and lack of criminal experience (unlike younger offenders of the same offences).

Staying in a prison could be compared to staying in institutions of another nature, designed for the care of the elderly in which the elderly often do not come voluntarily (Ljubičić, Ignjatović, 2022), and in which there is violence and suffering due to inadequate care by those closest to them, as well as by those professionally in charge of providing care (Ljubičić, 2021; Jovanović, 2022). Old convicts are undoubtedly one of the responsibility of the society and especially of the penitentiary system, but their position must also be addressed within the wider context of preventive activities and care for the elderly, taking into account the challenges that incarceration brings.

The conviction and incarceration must not be a basis for forgetting about the obligations of respecting human rights of this specific and more sensitive category of the elderly. In the first place (and having in mind the inability to establish the exact definition of an "older person/convict"), the most important thing to bear in mind is that convicts (in general) need as far as is possible to be treated as individuals and receive approaches that are tailored accordingly. Consideration of whether a prisoner was "old" and required different approach within custody should be based on an assessment of individual needs, rather than chronological or other age.

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Milana Ljubičić[*]

AGEING FROM THE PERSPECTIVE OF THE EXTREMELY POOR ELDERLY: A CASE STUDY[**]

Like a large number of other European countries, the Republic of Serbia is facing the process of population ageing. According to demographic estimations, the elderly could soon make up a quarter of our country's population. Ageing goes hand in hand with the increased needs of the elderly for care and nursing, but also with prejudices. A decline in the quality of life is expected unless the old person has enough social, cultural, and especially material capital. If such capital is unavailable, the old are exposed to material and other forms of deprivations. How those old people in situations of extreme poverty perceive the ageing process, and whether they have capacities to alleviate the deprivations they face, were two research questions that we tried to get an answer to in our case study. We conducted an in-depth interview with an old person in a situation of absolute poverty. Analysis showed that our respondent meets existentially important issues, without social support. However, she possesses defines mechanisms/strategies for coping and solving some of the deprivations.

Keywords: *extreme poverty, old age, strategies*

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Introduction

The ageing of population is a global demographic trend that directly stands witness to a significant civilizational step forward - the extension of expected longevity. According to the projections, the number of the elderly will continue to increase, particularly of the extremely elderly ones (75 plus): in 2030, as many as 434 million people will be older than 65, while two out of three old persons will live in a developing region (*Income Poverty in Old Age: An Emerging Development Priority. social.un.org/ageing 1*). Therefore, it is small wonder that the policy creators in this domain, and in particular the governments of the developed countries, recognize the ageing process as a special economic, social and community-based challenge (Kwan, Walsh, 2018) that directly affects the whole series of the rights of the elderly, e.g., the right to dignity (see: Ljubičić, 2020; Simović, Simović, 2020).

One of the most pronounced problems is definitely the poverty of the elderly. In the scientific field, this issue was brought up more than three decades ago by Stone (1989), who noticed that the number of poor Americans, both young and old ones, was on the rise, although poverty was generally believed to have been more or less eradicated[1] (Filipović, 2018: 13). At the time, this author already noticed two, conditionally speaking, difficulties that are of particular concert nowadays. The first one is that it is necessary to resolve the problem of resource allocation: who should be more important to help - the young or the elderly, because there were no sufficient resources for either category of population.[2] The other challenge refers to the feminization of the population, particularly in the case of the elderly.[3] Finally, current data also indicate that poverty in the old age is primarily a female issue (Roig, Maruichi, 2022) in almost all countries,[4] including our country[5] (Babović, Cvejić Stefanović, 2018), as well as that women older than 75 are

[1] At the time, it was believed that poverty is the residue of general progress (Filipović, 2018: 13) - a marginal phenomenon, while the poor are personally non-adapted and responsible for the failure to participate in social progress.

[2] This dilemma was openly re-actualized at the beginning of the coronavirus pandemic, when the question arose as to who should be given priority for medical treatment in the situation of limited resources (see: Ljubičić, 2021; Polinesi, Ciommi, Gigliarano, 2023).

[3] Stone (1989) states that 15% women and 7% men in the USA lived below the poverty line in the 1980s.

[4] With the exception of Hungary, Luxembourg, the Netherlands, France, Belgium and Malta, where the poverty of the elderly is relatively low (*https://www.un.org/esa/socdev/ageing/documents/PovertyIssuePaperAgeing.pdf*).

[5] Women at an older age (in 16.9% cases) are more exposed to the risk of poverty than their male peers (13.3%) (Babović, Cvejić, Stefanović, 2018).

exposed to a particular risk of poverty (between 24% and 40%[6])(*https://www.un.org/esa-/socdev/ageing/documents/PovertyIssuePaperAgeing.pdf*).

The strategies and practical policies that should reduce the risk of poverty in the case of persons in their third life age are of a more recent date. For example, in the document *Millennium Development Goals* (2015), the UN General Assembly sets the goal of reducing social exclusion and poverty, but does not emphasize the specific age characteristics of material and any other deprivation (Kwan, Walsh, 2018). That age is an additional risk for becoming or remaining poor is not clearly emphasized until the *Madrid International Plan of Action on Ageing*.[7] Namely, it is only in this document that the reduction of the poverty of the elderly is stated as one of the key goals of the governments (Roig, Maruichi, 2022).

It was recognized that the insufficiently developed social protection system and economic insecurity (*Income Poverty in Old Age: An Emerging Development Priority*) can put the elderly into the situation of poverty, while risk alleviation strategies mainly point out the necessity of working on pension policies. Namely, in the EU member-states there is a declarative consent regarding two goals: 1. that pension income should be sufficiently high for senior citizens to avoid being exposed to the risk of poverty, and 2. that they should be at such a level as to ensure the living standard similar to the one prior to old-age pension (Zaidi, 2010). However, not much has been done in that respect: public allocations for social protection vary from one country to another, and it is stated that, in global terms, only 42% of the future pensioners can expect a social pension (*Income Poverty in Old Age: An Emerging Development Priority*), although it has been revealed that this income, although generally low, acts protectively when it comes to the poverty of the elderly and everything pertaining to it[8] (Kwan, Walsh, 2018). It is particularly concerning that there is no adequate policy for those working in the grey zone and running the risk of being left with no income at all in their old age (Zaidi, 2010).

Furthermore, there are no cross-nationally comparable data about how profound and widespread the poverty of the elderly is, not even in the EU member-states. The research in this domain is mostly related to the local context and, in addition, the researchers use different definitions, operationalization and indicators of poverty (Kwan, Walsh, 2018). Finally, despite the fact that the *2030 Agenda for Sustainable Development for*

[6] The former percentage shows the average risk of poverty in the EU member-states in the case of the elderly 75 plus, while the latter refers to the countries in which poverty incidence is high above average.

[7] The Madrid International Plan of Action on Ageing adopted in 2002 constitutes, according to Babović et al. (2018: 10), the most significant international document elaborating on the ageing policies at the global level.

[8] For example, poor mental and somatic health.

reliable data calls for the collection of reliable data, there are few countries with the mutually comparable data bases about the elderly (*Income Poverty in Old Age*: An Emerging Development Priority).

However, regardless of the above-listed methodological difficulties, there are assessments of poverty incidence. This incidence is believed to range from 2% in the Netherlands (in 2013) and 3% in Czech Republic (data for 2012), 34% in Australia (2014), 50% in Korea (2009) up to 80% in Zambia (in 2009) (Zaidi, 2010). The difficult social position of the elderly is graphically shown by the data from Indonesia. Namely, in this country, as many as 85% people over 65 do not have any income whatsoever (Muis, Agustang, Adam, 2020).

A high percentage (18%) of the EU citizens in the third life age is also exposed to the risk of poverty: 16 million elderly or on average one in five citizens of the EU member-states (Zaidi, 2010: 3). In that respect, the elderly in Romania (26%), Spain (29%), Lithuania (29%), the UK[9] (30%), Bulgaria (34%), Estonia (39%) and Cyprus (49%) are in the most unenviable situation.

In our country, the elderly, particularly female, also face poverty (*Research on the Position of Older Women in Serbia*), which is to a certain extent alleviated by the pension-based income (Babović et al., 2018). In fact, it is thanks to the guaranteed income that the persons over 65 (19.1%) run the lowest risk of poverty in the general population.

The above-mentioned leaves little room for optimism when it comes to the well-being of the elderly in global terms. On the one hand, the data show that poverty of the people in their third life age is rather widespread, while, on the other hand, only a small number of studies is dedicated to the evaluation of strategies and policies of poverty reduction among the elderly according to which potential changes in this domain could be monitored (Kwan, Wang, 2018). Furthermore, we must agree with Kwan and Wang (2018) that the studies about the elderly mostly focus on the difficulties encountered by them. Those are illnesses, deprivation, deficit, abnormalities and disorders. We know very little about the personal strengths possessed by the elderly.

Does old age necessarily take away resilience?

[9] These data refer to the period before Brexit.

1. Personal strategies and strengths of people in the third life age

The authors rarely deal with the personal strengths and resilience[10] of the elderly in relation to the difficulties inevitably encountered by them.[11] It is the primary reason why a whole series of tactics used by the elderly in order to live their everyday life (and survive) remains unrecognized. Some of them are culturally based and belong to the corpus of traditional solutions to the problems such as the poverty of the elderly. For example, Korean studies show that family ties reduce the risk of material deprivation because cultural norms dictate the obligation of relatives to look after the elderly.

Furthermore, Rodrigues Lemes et al. (2019) assert that, based on the analysis of 27 studies on resilience of the elderly facing illness or natural disasters[12], resilience to challenges varies also depending on public policies in the domain of ageing. According to these authors, this thesis is corroborated by the example of high resilience of elderly Australians to personal and natural disasters. Namely, they live in the state with the most stable pension system in the world, which ensures avoiding the risk of poverty and providing a dignified life in the old age.[13]

Apart from the solutions offered for typical challenges accompanying old age at the local level, in the form of tradition and collective expectations, or system efforts, some refer to the optimistic conclusion that the elderly are not necessarily helpless, even when facing significant life challenges (illness, natural disasters, death of close family members), but they possess personal strengths also acquired through life experience. Although some of them, for example, avoidance tactic, which is essentially reduced to the pretence that the problem does not exist or, for example, the manifestation of hostility or helplessness, isolation, keeping quiet about the problem, are not adequate, there are also coping models that help an elderly person to overcome life difficulties (Hildon et al., according to: Portella Fontes**,** Liberalesso Neri, 2019). Those who manage to integrate difficulties in their everyday life, learn how to live with a problem, direct their attention to different contents, apart from those personally upsetting ones, or seek help from others, will be quite likely to remain resilient. In addition, resilience to challenges also strengthens the

[10] Needless to say, the concept of resilience is not unique and it is defined in different ways in practical policies and scientific studies (Rodrigues Lemes et al., 2019).

[11] Mainly in those studies related to active ageing (Knežić, 2011; Dragišić Labaš, 2016).

[12] The analysis included the studies from 11 countries that measured resilience with the aid of the Connor-Davidson scale.

[13] However, it should also be noted that the experience of trauma and its frequency can also reduce resilience. For example, the lowest resilience rate according to the Connor Davidson scale is found in Japan, among the elderly who survived natural disasters, i.e., earthquakes, which are exceptionally frequent in this country (Rodrigues Lemes et al., 2019).

old person's willingness to actively search for more information about a specific problem bothering him/her, to connect more closely with other people, to pray and/or have faith that God or some higher entity will help him/her, and to be ready to learn from that experience.

A recent research study (Stanojević, Ljubičić, Filipović, Marković, in the process of preparation for printing) applies the positive deviance method to establish that a number of the elderly have the capacity to adapt successfully to health, economic and family challenges by building new and maintaining old social networks. Moreover, it transpires that the feeling of personal wellbeing and resilience to life challenges is reciprocal to their expression of solidarity with and providing concrete help to those who are of poorer material status and health.

In her study that includes seven poor elderly women (between 50 and 69[14]) from a village in Bangladesh, Sultana (2011) also finds that, despite these women's expectations did not come true,[15] they possess certain strategies for surviving loneliness, hunger, the feeling of being disrespected and life failure. Some of the modes of surviving everyday life are found negative by this author, e.g., an old person's conflict with the family members, while others are found positive. These would include the avoidance of conflict, the failure to express one's opinions or wishes, the tolerance of the lack of power within the family and posing no requests to others (Sultana, 2011). Furthermore, a small number of studies dealing with this topic have establish that being religions has a special place in facing life difficulties, particularly poverty[16] and illness. It helps to redefine the circumstances and difficulties and to interpret them as God's benevolences (Pargament 1997, according to: Black, 1999).

Therefore, researching the resilience of women in South Sudan, who found their shelter in the refugee centres in Uganda, Isaac Waanzi Hillary and Bruno Braak (2022), establish that these women have devised ways of surviving, reconciling and accepting the unenviable existential circumstances. Speaking of conflict, losses (of family members), dreams that did not come true, displacement and why they say that they live in the world inverted upside down, all these indicate that resilience does not imply returning to old ways, as it is usually believed, and money and material possessions are not its backbone.[17] Resilience is much more than that. It implies devising everyday practices (personal effort,

[14] The author included 50-year-old women in the elderly, justifying it by the fact that the life of village women is rather difficult and that the changes typical of old age emerged as early as the fifties.

[15] All of them imagined that their old age would be different and that their children would respect them more.

[16] In fact, some research studies show that the poor have stronger religious beliefs in comparison to those who are better off in material terms (Joshi, Hardy, Hawkins, 2009).

[17] The thesis promoted by the FAO and the UNDP.

independence, work) whose sole goal, at least in the event of the respondents in the study of Isaac Waanzi Hillary and Bruno Braak (2022), is keeping common sense. It becomes possible thanks to their belief that everything is in the hands of God and their ancestors and that it is necessary to hold on and exert oneself.

How important religiosity is in devising ways to accept difficult life circumstances (poverty, illness, marginalization based on the colour of skin, gender and age is also shown by Helen Black (1999). Four old Afro-Americans, her respondents, see their connection with God as a personal, reciprocal and empowering connection. It is a partnership in which everyone has their own roles. They tell God about all the small and big things in their lives and see Him as someone closest to them. He knows everything about them, loves them in a concrete and personal way and know the intimate details from their lives. They trust that God will take care of them: He is always there when they need help. The permanent presence of God is the key mechanism of the struggle against poverty; it keeps despair away and confirms the attitude that their everyday routine and life, albeit not so easy, are actually organized by God's will. It gives hope and faith in future, so they define difficulties as accomplishments and as God's intention and expression of personal love for them (Black, 1999).

2. Methodological part of the paper

Within our context, very little is known about how old people, particularly those facing difficult life challenges - extreme poverty - survive their everyday life and what mechanisms they use for that purpose. Serbian authors, except for the above-mentioned study by Stanojević, Ljubičić, Filipović and Marković (in the process of preparation for printing), and the research focusing on active ageing (see: Knežić, 2011; Dragišić Labaš, 2016), do not deal with the topic of the resilience of the elderly. Such absence of researchers' interest is unusual, since our country faces an increasing number of the elderly in the total population, which brings along a whole series of challenges typical of that life age (illness, poverty, loneliness). Since this topic is socially relevant, we believe it is necessary to open it not only out of scientific curiosity, and particularly not for the sake of exclusivity, but also because of practical needs - to delve into the problems brought by reality, especially of those people who are by definition on the society's margins. Those are poor people, in particular women.

The research task we set before us was to understand how an old person living in extreme poverty perceived challenges in his/her life and what mechanisms he/she applied in order to deal with them. At the same time, those were two research questions we have been guided by in our study, while the goals, apart from the descriptive ones - to

describe the difficulties in old age and survival strategies, were also explanatory - to understand how to organize everyday life characterized by extreme material deprivation and everything it brings with it.

In order to describe and understand personal strategies, we used two research methods: the in-depth interview and observation with participation. We conducted an interview with Bosa[18], a 74-year-old woman who has been a street beggar for 38 years.[19] We spoke to her while sitting in her workplace: on the shopwindow sill - her decades-long workplace, in one of the busiest streets in Belgrade. In this way, we also got an opportunity to observe the relationships Bosa established with the passers-by and the ones she had with her friends and acquaintances. Bosa wanted to finish the interview on several occasions - first at the beginning of the interview, and every time when we asked for her particulars, e.g., how old she was and whether she lived in town or in the country. That is why our strategy was to let our respondent talk about those aspects of her everyday life that will turn out to be important for her personally as well. We directed the interview to a minimal extent, not wanting to jeopardize the possibility to hear her story or to contaminate the course of Bosa's narrative ranging from the past to the "here and now". Although, formally speaking, we distanced ourselves from the researchers' role, stopping ourselves from directing the interview towards previously prepared topics, as observers and careful listeners we had the opportunity to hear this woman's authentic voice. We wrote down parts of the interview with Bosa's approval and after the interview, we added our personal observations and comments.

2.1. Findings of the analysis

Bosa shared with us several things from her biography. In that respect, she was rather succinct: she was afraid that her particulars might be posted on social media or on *YouTube*. She revealed her personal data during our interview, at times quite accidentally, while talking about other topics. Her narrative meandered between returning to the past and then back to the present, and is quite rich in various details giving further colour to the picture of Bosa.

In her narrative, we recognize a whole series of challenged faced by her throughout life and those that currently constitute her everyday life. In the past, she had experienced being abandoned (by her partner and relatives), her son's illness, difficult material

[18] The respondent's name was changed for the purpose of anonymity.

[19] In contacting her, we were helped by a mutual acquaintance who also recommended us to Bosa. She otherwise refuses to talk to journalists, while she puts researchers into the same category with journalists.

deprivation and violence. The topic of being abandoned/rejected by others frequently recurs in Bosa's experience. First, she was left by her partner just before their son's birth and afterwards her family requested that she should "leave her son because he was ill". Since she did not do it, her siblings threw her out of the family home. She had no help and support from "anyone", in her own words, and she ended up in the street "with a sick child".

Another important topic is her job - begging. Being unemployed, she had nothing to live from, so after her son's birth she decided to start begging in the street. Almost four decades have gone by since then. Working in the street, Bosa has been exposed to various forms of violence: from law enforcement officers, passers-by and other beggars. She says that the communal police "takes her to the station every now and then". She feels that she is an object of injustice: "They keep arresting me while they leave the Gypsies alone", she says. Then she adds that she is treated in a most inhuman manner: "They keep me in the (police) station all day long… without giving me any water or letting me use the toilet". In addition, she has the impression that passers-by very often record her.[20] She is sure that they place those videos "on the Internet and write who knows what. They can cause me problems just as the thing that happened earlier". Bosa does not want to talk about what happened earlier.[21] Furthermore, she was also a victim of physical violence when she was attacked by "our woman and by a Gypsy". Two of them asked her to give them all the money she had earned and when Bosa refused to do it, they pushed her, so she fell down and broke her hip. With the broken hip, she lay in the street "for an hour, until a girl called the ambulance". All others passed by paying no attention.

Currently this woman faces more or less the same difficulties. Those are her illness, her son's illness and material destitution. Furthermore, she is still exposed to violence from law enforcement officers, passers-by and beggars. Bosa suffers from diabetes, she cannot see well and, due to the hip fracture, she moves with difficulty. She does not seem to take sufficient care of her health. She says that "she hasn't eaten the whole day" and that it is much more important to feed the sparrows in the nest above her workplace. To prove it, she takes a piece of bread from her large bag, crumples it and leaves the crumbs on the windowsill for her pets - the sparrows. Bosa is much more concerned about her son's health than her own. She says that it is important for her to collect money for "his diapers and expensive medications". Nevertheless, this woman is an optimist; she

[20] During our interview, she suspected that a passer-by was doing it. Visibly upset, she took her walking stick and waved it in a threatening way. He did not notice it.

[21] It seems that her fear is related to what happened when funds were raised for her son's treatment. At the time, a man who organized the fundraising took all the money, but Bosa was accused of it. It is likely that the media reported about this event, but we have not been able to find any information about it.

thinks that an operation could help to improve the health of "the little one" and she is putting her best efforts to provide the money for his treatment.

Because of her material destitution, she goes to work in the street every day - when it is cold and rainy and when it is hot. "I must do it because of my son", she says, adding that she has no possessions: she did not even buy the clothes she wears. "I'm wearing male trousers. I got them, and my grandma bought me the jacket three years ago". She is particularly offended by the behaviour of the passers-by. They do not pay attention to her or just look away. "A dog is worthier than a child. They will give money for a dog, but not for a child here", she says in a resigned way, pointing her walking stick to the box with the written text about why she collects money.

However, although facing such challenges, Bosa manifests an enviable degree of resilience. Bosa's resilience is founded on her religiosity, on the one hand, and on the active defence mechanisms from the assault of others, on the other hand.

In fact, Bosa's eloquence was particularly manifested only when we mentioned the topic of God. She talked openly and eagerly about her relationship with Him. As a matter of fact, it turned out that this relation was profoundly personal: God is omnipresent in her life. She says: "Everything belongs to God! I have nothing of my own. If God hadn't wanted me to be born, I wouldn't be here now. Am I right?" She is certain that God helps her in everything: "You think that He won't help you", she poses a rhetoric question and immediately answers it: "He will!". She then adds: "God is in everything. There's no place where he doesn't exist and He can do things that no one can". Bosa illustrates her deep conviction by a number of examples. She says that "there are always good people because God sends them to help you". She is certain that God sent her to her grandpa and grandma, the people she lives with, who accepted her and her son "like next of kin", after they had been expelled from their own home. "God also sent them one boy who paid their electricity bills when electricity was cut off in their home". Thanks to Lord, "a sister from the church bought the medications for the little one and drove her home", while "the Turkish guy working here in the street gave 700 Euros for her son's operation". That is all "given by our good God".

Bosa goes on to say that she never gets angry with God, despite her extremely difficult life: "I wouldn't want God to give this life to those snakes under the stone, although they are speechless creatures". God gives her what she needs: "As much as He wrote down to give me. As much as He intends to give me, and that's it". She is grateful for all life challenges given to her by God: "I am looking forward to suffering because He is making a road for me to heaven and not to hell". This is how she justifies it: "Every illness that strikes you is God's will because Gods wants to make your faith even

stronger". Referring to her son's illness, she thanks God: "Thank you, good Lord for the gift (my son). If it is your will, then let it be".

She lives her life with the permanent presence of God: "Not a millimetre, not a moment without Him". He is the one who comforts. "When everything is black before you, Lord will make it become light." She constantly prays to God in a wise prayer: "I can speak to you, but He is with me. First God and then everything else, always and in every place". When asked how to address God, this woman gives the following advice: "Just like that! Who else will you call if not Him?! It is the smartest thing to call Holy Mother. She is the Mother that propitiated the son (Jesus Christ), and no one else can do that". It can be noticed that people have drifted away from God. "We are as stupid as it gets. Many problem arise because the human mind does not understand what God means. The devil rules, and laughs straight into Lord's face because of holding people the way he likes".

Apart from Lord, Bosa's resilience to life challenges is also founded on the defence mechanism whose name we have borrowed from the theory of Sykes and Matza about neutralization techniques (Ignjatović, 2009). It is the judgment of those who judge, and this strategy is applied by Bosa primarily towards other people who, in her opinion, attack her. For example, when dealing with the formal social control bodies, Bosa finds successful strategies to defend herself. When she is kept in the station the whole day without being allowed to use the toilet, she even resorts to threatening that she would urinate in front of them. "I will take off my trousers and they can decide what to do". She is no milder to judges either: she reminds them that she is not the only one working in the street, but some people are protected. In her narrative, both judges and police officers, as well as other beggars she despises, are depicted as not being her equals when it comes to adroitness and intelligence. She is also intolerant towards passers-by, primarily because of their lack of interest: "People walk like cattle. They do not know themselves, let alone the one that is hungry. They have everything and I have nothing. It is unlikely that they don't have ten dinars to spare. They think that a beggar is worthless, but I'm smarter than them", she adds. This woman is also resentful of the clergy. It is not rare that priests try to send her away from her workplace in front of the church. "I see everything, and that's why they don't like me", she says and adds: "When they saw the photos of me, who I am and what I am, they began hating me". The only positive person is priest D., who "has never entered the church without greeting us (beggars). *God help you!* He's a very good man. I pray for him".

Apart from the above-mentioned strategy, in order to overcome everyday troubles, Bosa finds helpful the fact that she also helps others in similar troubles. She gives the example of two sisters (one of them previously greeted Bosa and asked her if she

needed something) who sell souvenirs. She says that one of them became ill during the coronavirus pandemic, while the other complained of not having any money for medications. Then Bosa took out her daily earnings and gave them to her. "She doesn't need to pay me back". Another moving story is about the sparrows above her workplace. They have known her for a long time; they have been friends for so many years, and Bosa feeds them every day, sharing breadcrumbs with them. In addition, if she is sick or must stay with her son, she also takes care of her much older landlord and landlady, whom she calls "grandpa and grandma". She looks after them, and she stayed with grandpa "when he was bedridden".

Finally, Bosa recalls who she was earlier. Those identity threads are quite vivid and make this woman special: she was her father's best-loved child, she danced folk dances and travelled all over Russia; she imitated her brother; she visited monasteries and helped nun, and also often spoke to Patriarch Pavle who, according to her, respected her highly: "With him, beggars were never hungry. He always shared his salary with us"; she says. Moreover, Bosa has two special talents; she can sing (every now and then throughout the interview) despite everything, and she spends time in the street thinking about life and its meaning. From these philosophical self-negotiations, in the full meaning of this phrase, she creates her poems. She shared one of them with us.

"The street is empty.
There is no one around
except for Prince Mihailo,
dozing on his horse.
Both when it rains,
or in springtime
Prince Mihailo will never
dismount from his steed".

Instead of a conclusion

Population ageing is a global demographic trend, which brings up a whole series of challenges that call for both system answers and for a more comprehensive scientific approach in the research of this topic, which would not be directed exclusively to difficulties, but also to the personal strengths of the elderly. If we limit ourselves to the scientific-research approach, we believe that qualitative participatory research would be of special importance.

It was exactly this approach that we applied in our case study. We dealt with two questions: what challenges are brought by life in old age, in the situation of extreme poverty, and what strategies an elderly person has for overcoming such difficulties. We have also observed that our respondent's difficult and almost lifelong circumstances - poverty, being abandoned, illness, violence, do not necessarily affect her resilience but, absurdly, serve as encouragement for searching for solutions/struggle against troubles. Bosa, the woman who has been begging in the street for the past four decades, has a whole set of tactics with the aid of which she responds to exceptionally complex life circumstances. The most important among them is her religiosity. By creating an intimate and deeply personal relationship with God and a strong belief in His providence guiding her through challenges, helping and taking care of her, and with a reward awaiting her in the end - a place in the heaven, this woman manages to give a meaning to her suffering. Moreover, she has also developed tactics for opposing what she experiences as violence that comes from other people (law enforcement officers and the formal social control, other beggars, passers-by and even priests). Her resilience to difficulties is undoubtedly strengthened by her fostering of solidarity with those who have less than her - in that way, she gets the opportunity to show her humaneness, i.e., goodness, as well as referring to those identity threats that do not show her only as a beggar who has never been anything else. Furthermore, this woman spends time in the street watching passers-by and contemplating about existential issues about which she has plenty to say. Giving a meaning to suffering and thinking of the reasons why challenges arise are the key elements of her resilience.

Although the findings we obtained in this study, and the limitations of which we have already indicated, cannot be general, we believe that they should encourage other researchers to deal with this topic more thoroughly. We believe that it is the only way of collecting a reliable corpus of knowledge that could be turned into practical activities with preventive goals (reduce poverty, alleviate the suffering due to illness, loneliness…) as well as aimed at empowering the elderly through sharing personal experiences. Moreover, we believe that it is necessary to build the bridges of intergenerational solidarity and reduction of prejudice. Our hypothesis, the future in which old age and ageing will be ever more present, will otherwise not be bright whatsoever.

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OLD AGE, PUNISHMENT AND FORGIVENESS: FROM MITIGATING CIRCUMSTANCE TO EARLY CONDITIONAL RELEASE. SOME CRIMINAL LAW SOLUTIONS

Throughout the history of criminal law, the advanced age of the perpetrator represented a reason that, as a rule, led to a mitigation of criminal liability. The evolution of the importance of old age has depended on the socio-political context, or sometimes only on criminal policy reasons.

Old age, latin named "senectutem" represented, according to the Constitution of Emperor Carol the Fifth (1535), the second reason for reducing the sentence, after minority, therefore a particularly important and priority one. Over time, state authorities gave up setting an age limit above which the aged person would deserve leniency.

In modern criminal law, as is also the case regarding the Romanian Criminal Code, if minority is a reason for establishing a special sanctioning regime, based only on educational measures and different from punishments, the old age of the perpetrator represents only a general criterion for individualization, in the punishment limits prescribed by law. Age is no longer a mitigating factor in itself. It is thus left to the discretion of the judge.

However, certain reminiscences can be identified. Thus, the court will not impose life imprisonment if the person turned 65 years old before or during the trial, and if he turned this age during the execution, the sentence will be transformed into imprisonment for 30 years.

In addition, the person serving a prison sentence will have after reaching the age of 60, the possibility of faster release from detention than a person who has not reached this age.

So, what is the critic age for criminal law forgiveness? Or can we talk about this? We will observe, in a comparative introductory presentation, the evolution of the criterion of the advanced age of the accused throughout history, then focusing on the valences of this situation in contemporary Romanian law. We will present the objectives of UN regarding a future Convention. Also, the goal is to observe, in a comparative research, the position of ECHR regarding ageing in prison.

Keywords: *advanced age, mitigating circumstance, non-applicability of life imprisonment, commutation of life imprisonment, parole for the elderly*

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1. An old and unresolved problem

"The law is equal for all" is a statement with a principle value, almost dogmatic. Certain differences can only be provided if they are justified. However, criminal law provides a series of exceptions, so it can be said that, here, for similar situations, the law must be similar. The key is the similar prerequisite. And similar situations are, for example, those caused by certain age categories of perpetrators.

No one can currently dispute that minors have the "benefit" of a privileged criminal regime, because this is the position of legal systems worldwide. Regarding the elderly, however, we cannot say that they would be in the same "favourable" position, except in particular situations, which we try to identify precisely.

Since Roman Antiquity, some differences in criminal treatment can be observed between delinquent minors and adults in the same situation. Thus, the Law of the XII Tables divides minors into two age categories, the age of puberty being 14 years for boys and 12 for girls. At the same old times, the law provides for a reduced criminal liability of the underage, but not in the sense of being completely protected from punishment (like it is today), but in the sense of bearing lighter sanctions. Justinian's legislation provided that minors up to 7 years of age are considered incapable of criminal responsibility, between 7 and 14 years of age they are only responsible if they have committed the act with discernment until they reach the age of 18 and only at 25 are they assimilated in all aspects to adults (Brutaru, 2015: 403).

In addition, if the majority of criminal legislations provide for the situation of minors under distinct chapters in Criminal Codes, not the same cannot be said about the elderly.

United Nations adopted in 1990 the Convention on the rights of the Child[1], but we can observe the international comunity does not manifest such an interest on the rights of elderly people. On the other hand, there is an abundent literature regarding juvenile delinquency, being said that such literature points to a series of variables which bring about delinquent behaviour, where it is rightly pointed to the fact that examination of risk factors can be of signifiance for a succesful reaction in the aim of prevention of juvenile criminality (Stefanović, Vijičić, 2019: 255).

Attempting to remedy the potential loss of dignity in older populations, the General Assembly of the United Nations on December 14th, 1990 passed a resolution that established October 1st as the International Day of Older Persons. It was hoped that such recognizable action would bring forth conversations about the living conditions of older

[1] https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child

populations and encourage member countries of the UN to enact regulations that protect their dignity. By celebrating the International Day of Older Persons every year, the international community has been using this occasion to evaluate successful frameworks that have enabled dignity in older persons while also illuminating common pitfalls and unaddressed problems in such frameworks

As our main goal is identifying the legal and jurisprudential situation in Romania, first of all, we observe the regulation of a minimum age of criminal liability (in Romanian legislation it is 14 years)[2]. Further, for minors between 14 and 16 years of age, a presumption of lack of discernment operates and the authorities must, through an medical expertise, prove the child's responsibility. Then, up to 18 years, even if the presumption is of discerning, the scientific evidence to the contrary is accepted.

Moreover, in all cases, special criminal sanctions, called "educational measures", are intended for minors, even if during the process they passed the age of 18. The focus of these measures is that of social reintegration with the prevalence of educational and reintegration programs. This measures are considered different from the classic punishments, but, in reality, we can affirm there is only a denomination problem, so the two traces can not be separed, because they belong to the represive system.

It has to be observed that the minority, in opposition to that of senescence, presents a series of special sanctioning valences.

2. When does old age begin?

We remark that serious difficulties existed regarding the minimum age from which the minor is criminally liable. Agreeing on a specific age is difficult. It will be 15, 18 or 21 years? There will always be criticism that the age is too high or too low.

The same discuttion can be drafted on the old age. But the dificulty is, we think, generated that the perception in different cultures is also different from the point of wiew of what an old person means, and, on the other hand the perception of criminal liability.

We believe that the main reason why old age cannot be given, in the mirror with minority, sanctioning valences is that it is impossible to agree on an exact age from which it can be said that old age begins. It is 60 years, 65 or 70 years? The answer is difficult.

Bible gives us a clue. "The days of our years are threescore[3] years and ten: and if by reason of strength they be fourscore years, yet is their strength labor and sorrow; for

[2] According to art. 113 (1) Criminal Code, "the minor who has not reached the age of 14 is not criminally liable".
[3] Sixty.

it is soon cut off, and we fly away", sais Psalm 90:10[4]. So, the age of seventy is an important milestone.

Dante Aligheri refers to this, in 1300, when he was 35, in Cant 1 of "Inferno"[5]: "midway upon the journey of our life/I found myself within a forest dark/for the straightforward pathay had been lost".

It was affirmed that "In the broadest sense, aging can be viewed as part of a natural process that consists of two phases: the first phase (evolution) comprises growth and development while the second phase (involution) begins with the weakening of physical functions and results in the final period of life - old age. Definitions of aging differ depending on the scientific field that studies it and so the main influences on the definition of aging can be categorized as biological, psychological, and sociological. However, the general public typically defines aging as processes that begin after the age of 65, which is a heavily debated number in the scientific and professional literature" (Milanović-Dobrota, 2017:125-144).

Although the exact definitions of aging elude even the experts, there is little doubt that at least some form of the aging process begins with the moment we are born. Old age, on the other hand, is a distinct period of life that is characterized by a continuous series of losses - loss of hearing, memory, best friends… - that perniciously chip away at the happiness of older citizens and eventually lead to feelings of sorrow, pain, boredom, loneliness, and rejection. It is no surprise then that such a state can lead to a loss of self-perceived dignity as older individuals begin feeling inadequate and heavily dependent on others even in tasks they easily performed until recently. Receiving help and care in a family setting may ameliorate such feelings; however, it can also lead to misunderstandings and feelings of rejection due to generational gaps that cement the preconceived notions of the loss of dignity and stand in the way of reestablishing a life of dignity with the help of family members (Radaković, 2020).

So, we can conclude and affirm the old age begining can be situated arround 70 years. But reality will prove that it can be taken into discuttion even earlier.

3. From old legal times to present

In medieval law, perpetuated until the Age of Enlightenment, as we have shown, old age was a mitigating factor.

[4] https://www.biblegateway.com/passage/?search=Psalm%2090%3A10&version=NIV.

[5] https://poets.org/poem/inferno-canto-i.

Benedict Carpzow, a classic of medieval criminal law (Practica..., Q. CLXIV) said that old age is the second cause of mitigation, after minority - we thus deduce its importance. then states that it can be assessed from age 50, but is complete from age 70.

Italian penalist Julius Clarus wondered if "senectus excusatus" and said the answe is negative, that it does not defend against punishment at all, but it only justifies a lesser punishment - "mitius punitur". in the same sense Jacob Menochius (Tanoviceanu,1924, I: 741).

Another medieval criminal law author, Jacob Novel, admits that the old man is like a child, protected from the heavy punishment of murderers if he is of an advanced age. Jousse imposed two conditions: it must not be a capital crime: it must be a very old age.

Then, Philippe Renazzi summarizes the problem: it will be appreciated *in concreto* whether the old man is like a child or not.

Bernardino Alimena, the italian positivist, at the end of the 19th century, proposed reducing the responsibility of the elderly, by reintroducing a mitigating excuse.

The essential question is whether the role of punishment can still be the same for an elderly person. Passing from the idea of utility to that of justice, can an old man bear a punishment as well as a young man; can the same suffering be imposed when for the same deed an identical punishment is applied to both?

Scholars said that the moral reformation of an old man is almost impossible, and even if it were considered possible, it would be so difficult because just as it begins to be accomplished, the aged offender, by the law of nature, will die. it is futile to ask the punishment to work as effectively against an old man, that is why, Tanoviceanu also says, custodial sentences must intervene to a lesser extent, so that the difference in duration equates his suffering with that of of a young man, and according to the execution regime, he must be gentler (Tanoviceanu, 1924: 744).

The romanian classic penalist Tanoviceanu stated at the beginning of the 20th century that even at that time, old age was not considered a reason for absolution or reduction of punishment, however finding that the executioner softened the regime of execution of punishments for those over 60 years old. (Tanoviceanu, 1924: 740).

It was said that the law (we talk about the 1865 Criminal Romanian code) was wrongly drafted, by a provision similar to that of today, it was said that hard labor did not apply to those who had reached the age of 60 when the sentence was pronounced. it was not foreseen, and this is criticized by Tanoviceanu, the fact that the situation is not similar for those who reach the age after the sentencing.

4. The role of dignity in old age approaches

At its most basic, the concept of human dignity is the belief that all people hold a special value that's tied solely to their humanity. It has nothing to do with their class, race, gender, religion, abilities, or any other factor other than them being human.

The term "dignity" has evolved over the years. Originally, the Latin, English, and French words for "dignity" did not have anything to do with a person's inherent value, like nowdays. It aligned much closer with someone's "merit." If someone was "dignified," it meant they had a high status. They belonged to royalty or the church, or, at the very least, they had money. For this reason, "human dignity" does not appear in the US Declaration of Independence or the Constitution. The phrase as we understand it today wasn't recognized until 1948, when The United Nations ratified the Universal Declaration of Human Rights[6]. The text has a special force[7].

The concept of human dignity has a history of 2,500 years (Barak, p. XVII). Over the centuries, it has been the subject of concern by many theologians and philosophers who have influenced its evolution. Among them, "the father of the modern concept of human dignity" is considered to be the philosopher Immanuel Kant, who in the work "Foundations of the metaphysics of morals" (1785) made the following important considerations from the perspective of this study: "Respect for others or the one that another can show me *(observantia aliis praetenda)* is, moreover, the recognition of a dignity *(dignitas)* in other people, such as a value that has no price, no equivalent, in exchange for which he can The judgment of a thing as having no value is contempt, and as such, every man has a rightful claim to respect from his fellows, and reciprocally, he is also obliged to respect each one. among them" In the opinion of the German philosopher, pride, slander and mockery are vices that damage the duty of respect for other people. According to the philosopher from Königsberg, man must be seen as an end in itself, not just as a means to be used by another will (Bratiloveanu, 2020:3).

A United Nations Convention on the rights of older people is crucial if we want to ensure that as we grow older, our rights and well-being are protected and respected.

As societies continue to age, we must address the unique challenges faced by older people[8].

[6] What is Human Dignity? Common Definitions, accessed on https://www.humanrightscareers.com/issues/definitions-what-is-human-dignity/

[7] According to art. I, *"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."*

[8] https://www.helpage.org/what-we-do/rights-of-older-people/un-convention-on-the-rights-of-older-people/ accessed on 24.07.2023.

So, dignity cannot be taken out of context, because the elderly require respect for their dignity more than other persons, we believe.

5. United Nations and the Convention on the rights of old people

According to UN, a Convention on the rights of older people would:

1. Provide a comprehensive framework to promote and safeguard their rights, covering areas such as healthcare, social protection, employment, and participation in decision-making processes
2. Serve as a powerful tool in combating ageism, discrimination, and neglect, while fostering an inclusive and age-friendly society for all
3. Address the pressing issue of elder abuse and neglect, which remains a global concern
4. Establish clear guidelines and mechanisms for preventing, detecting, and addressing instances of abuse, whether physical, emotional, or financial
5. Promote the importance of dignity, autonomy, and independence for older people, while ensuring that they have access to justice and support systems.
6. Contribute to a shift in societal attitudes and practices by raising awareness and setting standards for the treatment of older people, ultimately fostering a culture of respect and care for our older population.

Amnesty international sais that[9] "most people think of age as a number. Many think that a person becomes "older" when they reach the national retirement age, which is usually 60 or 65.

However, older age is a social construct that changes in given contexts and situations. This is particularly true given that people are living longer and healthier lives, changing perceptions and stereotypes about older people in many societies.

People in their late 40s or 50s might be perceived as older workers and face discrimination when applying for a new job. However, that same person might not be perceived as an older person in their social circle, or at the doctor's office".

This is why Amnesty International applies a "context-specific approach" to older age that takes all these factors into consideration when investigating human rights violations. We identify older people by how they're perceived in society and how they see themselves, not by their numerical age.

[9] https://www.amnesty.org/en/what-we-do/older-people/, accessed on 24.07.2023.

Amnesty International uses the more neutral term “older people” rather than “elderly,” which can cast stigma on older people by associating them with frailty and dependence.

Certain groups are protected by international conventions, including children, women, people with disabilities, and racial and ethnic minorities. By their nature, some of these treaties also afford protections to older people, including older women and older people with disabilities.

However, older people face discrimination that is not explicitly prohibited by existing laws.

For example, an older person may face discrimination in the workplace. An employer may assume that they are unable to master new technology, or that they will require more sick days than others.

Discrimination based on the assumption that people who are older must have a chronic illness impacts anyone who is older, regardless of whether they actually have a disability. Laws created to protect people with disabilities do not apply if the discrimination is based on perceived disability. This is one of many examples of the ways in which current laws do not protect older people, and why we need a separate convention to protect their rights.

A UN convention would be a key step toward protecting older people’s rights. It would lay out the areas in which older people are most in need of legal protection, whether it’s abuse or neglect in care homes, discrimination in employment, or lack of adequate pensions.

An international convention would also force state parties to take proactive steps to prevent age discrimination and the abuse of older people.

According to a 2014 report by the World Health Organization, only 40% of countries had laws against the abuse of older people in institutional settings such as care homes. Only 59% of countries had laws that protect older people against abuse generally. Just one-third of countries had adult protection services in place to investigate possible cases of elder abuse.

A convention would likely lead to an improvement of legal protections at the national level.

A convention would also empower older people around the world to better advocate for their rights. And it would improve how human rights violations against older people are recognized and reported on, raising visibility on issues that have long been overlooked

In 2014, Council of Europe drafted a Reccomendation[10] (Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons). The Reccomendation says, at §51 that "in the determination of their civil rights and obligations or of any criminal charge against them, older persons are entitled to a fair trial within a reasonable time within the meaning of Article 6 of the European Convention on Human Rights. Member States should take appropriate measures to accommodate the course of the judicial proceedings to the needs of older persons, for example by providing, where appropriate, free legal assistance and legal aid".

Further, the document enacts that the competent judicial authorities should display particular diligence in handling cases in which older persons are involved. In particular, they should duly take into account their age and health.

It is said that Member States shall ensure that detention of older persons does not amount to inhuman or degrading treatment. The assessment of the minimum level of severity for a treatment to be considered inhuman or degrading depends on several factors, including the age and health of the person. Consideration should be given to alternatives to detention of older persons.

Also, the document drafts that Member States shall safeguard the well-being and dignity of older persons in detention. In particular, they should ensure that the health of older persons is monitored at regular intervals and that they receive appropriate medical and mental health care. Moreover, member States should provide older persons in detention with conditions appropriate to their age, including appropriate access to sanitary, sports, education and training and leisure facilities. Member States should ensure social reintegration of older persons after release.

As good practice, European Counsel remarks that in *Greece*, the sanctions system provides various advantages to older persons as regards alternatives to imprisonment and the calculation of the length of detention. For instance, for a 70-year-old person sentenced to life imprisonment, it is sufficient to serve sixteen years rather than twenty in order to obtain parole. Moreover, after 65 years of age, any outstanding period of imprisonment is reduced by half.

Serbia adopted special rules covering the detention of older persons, regarding for instance health care, accommodation (with persons of the same age, in areas allowing easy access to other facilities of the detention centres, etc.), planned activities, nutrition and social care in particular with a view to their release. A specialised detention centre

[10] Détails du résultat (coe.int) .

provides for specific geriatric treatment, facilitation of contacts and visits with the families and support to the latter, in particular where other family members are older or disabled.

The *United Kingdom* has developed an "Older prisoner care pathway" to assist the delivery of individually planned care for older prisoners, followed by successful resettlement back into the community. A voluntary organisation (RECOOP[11]) offers care and support to offenders aged 50 and over. A number of prisons in the country have a dedicated unit for prisoners who require palliative care. The organisation AGE UK has set up several local projects to run social engagement sessions and to provide training to staff and older prisoners.

6. The Romanian Criminal Law

Trying to identify provisions in the Romanian criminal law that deal with the situation of elderly people, we identify: the general criterion of individualization of age, the non-application of life imprisonment to those who have reached a certain age, the possibility of replacing the sentence of life imprisonment with prison, after completion, in detention, of a certain age, as well as easier conditional release after reaching a certain age, even though the premise is life imprisonment, whether it's a fixed term prison.

So, according to Art. 74 Criminal Code, named "The general criteria for individualizing the punishment", establishing the duration or amount of the punishment is done in relation to the seriousness of the crime committed and the dangerousness of the criminal, which is evaluated according to the following criteria (...):

g) level of education, age, state of health, family and social situation.

Application of this disposition is the power of the judge, so, nobody can claim that law was not respected in applying a term of inprisonment.

As art. 57 Criminal Code, called "Life imprisonment exception" sais that if, at the moment when the judgment to convict is returned, the defendant has turned 65 years of age, the sentence of life imprisonment shall be replaced by a prison term of 30 years and a ban on the exercise of certain rights for the maximum duration of the prison sentence.

Another interest for old age provides the special law regarding executing the criminal decisions. According to art. 35 of the Law no. 254/2013 regarding the execution

[11] https://www.recoop.org.uk/.-supporting older people with convictions. They are Promoting the care, resettlement, rehabilitation and mutual aid of older people in the Criminal Justice System, through the delivery of good practice service delivery and support..

of sentences, "The maximum security regime does not apply to the following convicted persons:

a) who have reached the age of 65 (...)"

Moreover, according to art. 40 (3) of the Taw, the Individualization Commission within the penitentiary will order the change of the maximum security regime to a closed regime in the case of convicted persons who have reached the age of 65. The maximum security regime applies to those with sentences of life inpriconment, more than 13 years, prison, or those with lower sentences but who present a particular danger.

According to Art. 58 Criminal Code named "Replacement for life imprisonment", in case the defendant sentenced to life imprisonment turns 65 years of age during the serving of that sentence, life imprisonment can be replaced by a term of 30 years of imprisonment and a ban on the exercise of certain rights for the maximum duration of the prison sentence, if they had good behavior throughout serving their sentence until that point, were in full compliance with all their civil obligations as ruled in the judgment to convict them (except for the case when proof is brought that they had no avenue to comply) and they made constant and visible progress towards social reintegration.

We observe that the replacement is not automatic, so, many conditions addes to the age have to be completed. Some of yhem (progresses, payment of the debts) are difficult to comply. They are similar to the conditions of parole.

Comparatively observing the institution of replacing life imprisonment in the previous regulation (Art. 55 §2 Criminal Code 1969) and in the current regulation (art. 58 Criminal Code), the court finds that the legal provisions of the old law are more favorable to the petitioner, having in view of the fact that, unlike the 1969 Criminal Code, which provided for the replacement of life imprisonment in a mandatory manner at the time of reaching the age prescribed by law, the current Criminal Code establishes that the replacement is optional. Also, the old regulation is more favorable in terms of the conditions that must be met by the convict in order to benefit from these provisions (the convict turns 60 years old, and not 65 years old, there is no need to analyze the conduct during the execution of the sentence nor the fulfillment of civil obligations).

Contemporary Romanian authors (Pașca, 2015: 449) remark that the new penal code creates a more difficult situation, the old law forbidding the application of life imprisonment to those who have turned 60 years old, and the already applied punishment is no longer replaced by 25 years, but by 30 years.

We conclude it is true, because we also believe that the current legislation presents certain elements that are more severe than the old criminal code. Obviously, *mitior lex* will apply, related to the moment of the crime.

Parole is used frequently in Romanian criminal practice. Modern criminal legislation on the rights of inmates serving time in prisons can almost not be imagined without the instrument of parole, and rules on its application. Not only in the greater public but also amongst practitioners this right, originally developed by Alexander Maconochie and his "mark system" (Ignjatović, 2016: 177), is often viewed as a kind of privilege, i.e., a benefit for persons who committed crimes for which they have to face social-ethical reprehension in the form of spending some (life) time in prison. This explains the fact that there is a certain resistance against the implementation of this instrument in court practice (Vujičić, 2018)

According to art 100 CriminalCode, ("Conditions of parole in the case of a prison sentence"):

"(1) Conditional release in the case of imprisonment may be ordered, if:

a) the convicted person has served at least two-thirds of the sentence, in the case of imprisonment that does not exceed 10 years, or at least three-quarters of the sentence, but not more than 20 years, in the case of imprisonment of more than 10 years;

b) the convicted person is serving the sentence in a semi-open or open regime;

c) the convicted person has fully fulfilled the civil obligations established by the sentencing decision, except for the case when he proves that he had no possibility to fulfill them;

d) the court is convinced that the convicted person has reformed and can reintegrate into society.

(2) In the case of the convict who has reached the age of 60, conditional release may be ordered, after the effective execution of half of the sentence, in the case of imprisonment that does not exceed 10 years, or of at least two thirds of the sentence, in in the case of imprisonment for more than 10 years, if the conditions provided for in para. (1) lit. b)-d)"

So, some conditions can be observed: the minimul part of the penalty; the regime; the payment of the obligations and the accept from the judge. The last condition, in practice, is the most difficult to deal with.

We remark some judicial practice regarding the above.

Observing the age of the accused, a Court decided that, related to the criteria presented previously, to the advanced age of the defendant and to his possibilities of intervention, also taking into account the position of the injured person who understood not to exercise the civil action in the criminal trial, resulting from his procedural attitude that he does not want his father to receive an exemplary punishment but only to take measures so that his peace and the integrity of his patrimony will no longer be affected, the court

considers that the application of a prison sentence of 2 years and 2 months is sufficient for the defendant's re-education[12].

Another court also applies in the following the criteria of individualization: "it is also highlighted that the defendant is not known to have a criminal record, as can be seen from the general situation of the criminal record as well as the personal situation of the defendant, his advanced age, his medical condition, the fact that he is a well-integrated person socially and included in the work. Therefore, taking into account all the real and personal circumstances highlighted, it is considered that the crimes committed by this defendant are of low gravity, and in relation to the person of the defendant, the conduct before and after the commission of the crimes, as well as his possibilities of correction, the court considers that the establishment or application of a punishment would be inappropriate because of the consequences it would have on the person of the defendant, the application of a warning being sufficient to correct his conduct, so that the request of the prosecutor to order the postponement of the application of the prison sentence is considered as unfounded[13].

In other case, the court finds that the conditions are met, considering that the prison sentence applied does not exceed 3 years, that the defendant was not previously sentenced to a prison sentence of more than one year, that the defendant expressed his agreement to performs unpaid work for the benefit of the community, that he did not evade the criminal investigation or the trial and did not try to thwart the discovery of the truth, he admits the blame during the trial and also taking into account his advanced age and state of health, the court appreciates that the chances of the defendant's correction are high, even without the execution of the prison sentence in the detention regime[14].

When determining the amount of the penalty, the individualization criteria provided for in art. 74 of the Criminal Code, respectively the short route traveled by the defendant, the not very high blood alcohol levels, the fact that the defendant did not cause any road accident, the purpose pursued by the defendant by committing the crime, that of reaching home, as well as the personal circumstances of the defendant, respectively advanced age, honest attitude, lack of criminal record and the fact that he is employed. Based

[12] Hotarâre nr. 305/2023 din 24.07.2023 pronunțată de Judecătoria Slatina, cod RJ 72764555g (https://www.rejust.ro/juris/72764555g)

[13] Hotarâre nr. 1036/2023 din 07.07.2023 pronunțată de Judecătoria Oradea, cod RJ 23e934852 (https://www.rejust.ro/juris/23e934852)

[14] Hotarâre nr. 1119/2023 din 06.07.2023 pronunțată de Judecătoria Brașov, cod RJ 62367558e (https://www.rejust.ro/juris/62367558e)

on all these criteria, the prosecutor assessed that the defendant should be sentenced to 8 months in prison[15]

Another decision, taking into account the provisions of art. 74 of the Criminal Code, it will take into account the circumstances and the manner of committing the crime, as well as the means used, the state of danger created for the protected value, the nature and seriousness of the result produced, the nature and frequency of the crimes that constitute the criminal history of the criminal, the conduct according to the commission of the crime and during the criminal trial, the level of education, age, state of health, family and social situation of the defendant. The court will not retain the provisions of art. 75 §2 Criminal Code, related to art. 76 of the Criminal Code, for lowering the penalty applied below the special minimum, there being no sufficient data in this regard. It will take into account that according to the criminal record sheet, the defendant has no criminal record, the fact that he has admitted the commission of the act, he is integrated in society, having an advanced age and suffering from medical ailments. Related to these aspects, the court appreciates that the application of a prison sentence towards the average of the legal limits (limits reduced by one third due to the application of the provisions of art. 396 paragraph 10 of the Code of Criminal Procedure), will be able to lead to the re-education and sanctioning of the defendant[16].

On the other hand, we can remark a decision where old age was not very important for the judge. So, the Court found that, even though he is 77 years old, the defendant got behind the wheel after consuming a rather large amount of alcohol, which, combined with the defendant's advanced age, increases the degree of danger of the act held in his charge, considering that reflexes are weakened with age anyway. By referring to what was presented, namely the concrete social danger of the crime, the real and personal circumstances retained by the court, the court will sentence the defendant to 1 year in prison for committing the crime of driving a vehicle on public roads under the influence of alcoholic beverages, prev. of art. 336 §1 Criminal Code[17].

Ultimately, in a very important case for the justice in Romania, regarding crimes against humanity comited during comunist regime in early sixties, the Court affirmed: “From this point of view, although the punishment that would have been due to the defendant due to the particular gravity and consequences of his crime, would have been life imprisonment, however, considering the lateness with which the state authorities chose

[15] Hotarâre nr. 169/2023 din 09.06.2023 pronunțată de Judecătoria Oltenița, cod RJ de3g76687 (https://www.rejust.ro/juris/de3g76687)

[16] Hotarâre nr. 1169/2023 din 31.05.2023 pronunțată de Judecătoria Ploiești, cod RJ 9895de699 (https://www.rejust.ro/juris/9895de699)

[17] Hotarâre nr. 98/2023 din 18.05.2023 pronunțată de Judecătoria Huși, cod RJ 59ggg2599 (https://www.rejust.ro/juris/59ggg2599)

to start the legal proceedings and also the age especially submitted by the defendant, the Court appreciates that the application of the prison sentence, at its special maximum, is likely to satisfy all the purposes of the punishment, but especially the preventive one, with express reference to the general prevention, to the exemplary that the punishment must offer it to anyone who would be tempted, in the name of a political regime, to commit such atrocities again".[18]

7. Older prisoners ant their situation. Life inprisonment

In Romania, life imprisonment replaced the death penalty, which eas abolished by Decree-Law no. 6/1990, immediately after the falling of the communist regime. The abolition of capital punishment was constitutionally enshrined in 1991, in art. 22 para. (3): "the death penalty is prohibited." The current constitutional order no longer allows the reintroduction of the death penalty because no revision of the Constitution can be made if it results in the "suppression of fundamental rights and freedoms" (art. 148 §2) (Pașca, 2015:446).

The idea of perpetual punishment was preferred by the Beccarian penalists, as an alternative to the death penalty, being embodied in modern penal codes in different forms: severe imprisonment, daily labor for life (Tanoviceanu, 1924, vol. III: 361-364, Pașca, 2015:446).

The advantage of imprisonment *versus* the death penalty is recognized in giving the convicted person the opportunity to change and improve his or her behavior while serving the sentence, which later on creates the basis for taking into account the fulfillment of conditions for granting release. Nevertheless, this is not always the case, since, in the context of life imprisonment, there is a distinction between life imprisonment with and without the possibility for release (Paunović, N., Pavlović, Z, 2021: 181).

In the case of life imprisonment with the possibility for release the convicted person must serve the minimum required time of imposed life imprisonment sentence in order to be considered eligible for release. After the expiration of that period, the convicted person may be released, if the court assesses that he/she behaved well while serving the sentence. Additionally, if he or she commits a new crime meanwhile, this person will be reinstated.

[18] Hotarâre nr. 58/2016 din 30.03.2016 pronunțată de Curtea de Apel București, cod RJ 9de38896 (https://www.rejust.ro/juris/9de38896)

On the other hand, life imprisonment without the possibility of parole means that the convicted person shall not have the right to get release. In other words, the convict sentenced to this punishment will spend the rest of his or her life serving sentence without the possibility of reducing imposed sentence on the basis of a pardon, amnesty, or similar criminal law institutes (Willis, Zaitzow, 2015:560)

Old scholars said "Il carcere est mala mansio adeo quod morti aequiparatur si perpetuus" or "carcer est sepultura vivorum, consummatio bonorum, consolatio inimicorum et experientia amicorum" (Carpzow, Pars III, Q, CXI, 2.)

Some statistics say that older prisoners are the fastest growing age group in prison systems around the world (In the US, 14% of prisoners are at least 55 years old (U.S. Bureau of Justice Statistics, 2021)[19], an increase from 4% in 2000 (U.S. Bureau of Justice Statistics, 2021). 17% are over 50 years old in the UK in June 2022 which is an increase from 6% in 2002.

Concomitantly to this phenomenon, the number of life sentences continues to dramatically increase. In the US, the sheer number of people serving life is staggering: one in seven people in prison today has a life sentence and approximately one-third have no opportunity for parole England and Wales impose more life sentences than Germany, Russia, Italy, Poland, the Netherlands and Scandinavia combined.

The increase of life sentences and the growth of the older prisoners' sub-group coincide so that the older life-sentenced prisoners are the fastest growing sub-group in the prison estate in the US and the UK. In England and Wales, 33% of those serving a life sentence are aged 50 and over. This is nearly identical to the US, where 30% of those serving life with parole, life without parole, and a 'virtual' life sentence amounting to 50 years or more in prison, are 55 years old or more.

In Bodein v France (2014*)*, Judge Nussberger, similarly concluded that: "jurisprudence guaranteeing the right to a review of a life sentence in relation to the life expectancy of the person concerned would privilege those who commit crimes or are arrested only at an advanced age and would then endanger the principles of equality in criminal sentencing".

In R v. Sampford (2014),[20] the Crown judges explained that "neither Troughton nor any other case, nor the schedule, suggests that a court has to do what it can to ensure that a defendant does not die in prison. If nothing else, no court would be in a position to conduct the necessary actuarial exercise. Even if it were, it would not override the re-

[19] https://bjs.ojp.gov/library/publications/federal-justice-statistics-2021.

[20] *R v Sampford* (*2014*) EWCA Crim 1560.

quirement of the sentencer to reflect the circumstances of the killing in setting the minimum term. If those circumstances require a minimum which may result in the offender dying in prison, then that will be the minimum term".

This approach to minimum periods in the context of old life-sentenced prisoners was applied also in UK legal system in R v Lowe (2014)[21]. A 82-year-old defendant was found guilty of murder and sentenced to life imprisonment with a 25 year minimum period before parole eligibility. For van Zyl Smit and Appleton (2019: 121) "There appears to be no way in English law in which Lowe could be released (…) before he dies". A case like Lowe would breach the ECHR decision held in *Vinter* prohibiting irreducible life sentences. Reducibility of a life sentence carries greater weight for old offenders in order not to become a mere illusory possibility.

Old age has propelled new interest for parole reform in the US in particular. This legal dilemma was raised in the US amidst rising and expanding punitive policies (Rikard & Rosenberg, 2007: 120).

The claim is that old prisoners may be less dangerous and less likely to engage in criminality upon release whilst being more likely to suffer from disability or various physical and psychological pains Louisiana recently released several men who had served more than 50 years and were previously denied parole. Sentencing review units have been introduced by prosecutors in a number of cities including Baltimore, Maryland; Seattle, Washington; and Los Angeles, California. In New York, the legislature has been considering legislation that would expand opportunities for older prisoners who have served long sentences to petition parole boards for release (e.g. the Fair and Timely Parole Act[22])

Prison populations across the world are increasing. In the United Kingdom, numbers have doubled in the last two decades, and older prisoners now constitute the fastest growing section of the prison population. One key reason for this shifting prisoner demographic is the growing numbers of men convicted of 'historic' sexual offences, many of whom are imprisoned for the first time in old age, and housed in prisons not suited to their needs. These demographic changes have profound consequences, including increased demand for health and social care in prison, and rising numbers of anticipated deaths in custody. Using the findings from a recently completed study of palliative care in prison, this paper proposes that older prisoners face a 'double burden' when incarcerated.

This double burden means that as well as being deprived of their liberty, older people experience additional suffering by not having their health and wellbeing needs met. For some, this double burden includes a 'de facto life sentence', whereby because of

[21] https://jade.io/article/350064

[22] NY State Senate Bill 2019-S497A (nysenate.gov)

their advanced age and the likelihood that they will die in prison, they effectively receive a life sentence for a crime that would not normally carry a life sentence (Turner M, Peacock M, Payne S, Fletcher A, Froggatt K., 2018: 163).

8. Some statistics

According to World prison brief[23], in Romania, in december 2021, total prison population was 22921, at an estimated total populatin of 19 milion. At this moment, according to the officials, in Romania there are 23564 persons in prison.

According to National Institute of Corrections (US)[24], "The number of prisoners age 55 or older sentenced to more than 1 year in state prison increased 400% between 1993 and 2013, from 26,300 (3% of the total state prison population) in 1993 to 131,500 (10% of the total population) in 2013"[1]

Older adults in prison often exhibit physical and mental health problems, including dementia, and histories of trauma and chronic stress. Over 3,000 of these men and women will die each year in prison.[2]

Accorded to the Special Report drafted by US Department of Justice[25],

"In 2013, 35% of the 29,100 prisoners age 65 or older were under the jurisdiction of the three largest state prison systems (13% in California, 12% in Texas, and 9% in Florida). However, in each of these states, prisoners age 65 or older made up less than 3% of the total prison population (not shown). In 2013, males accounted for 97% of prisoners age 65 or older. Sixty-one percent of males in this age group were non-Hispanic white, 23% were non-Hispanic black, and 15% were Hispanic (table 3). Almost three-quarters of the female state prisoners age 65 or older were white (73%), 18% were black, and 8% were Hispanic.

In 2013, 31% of state prisoners age 65 or older were serving life or death sentences. An estimated 6,300 state prisoners age 65 or older were sentenced to life imprisonment (including those with and without the possibility of parole and those sentenced to life plus additional years) for violent crimes (30% of violent offenders in this age group). Older offenders can have longer criminal histories than younger offenders, making it possible for some of these life sentences to be the result of enhanced prison terms from multiple strikes laws. A third of state prisoners age 65 or older (33%) had served 5 years or

[23]https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_13th_edition.pdf.

[24] https://nicic.gov/resources/resources-topics-and-roles/topics/aging-prison.

[25] https://bjs.ojp.gov/content/pub/pdf/aspp9313.pdf

less of their current term at yearend 2013, while 50% (about 14,700 prisoners) had been in prison for more than 10 years".

Between 1993 and 2013, the percentage of sentenced state prisoners with a violent crime as their most serious offense increased from 46% to 53%. Over the same period, more than 65% of state prisoners age 55 or older were sentenced for a violent offense (65% in 1993, 68% in 2003, and 66% in 2013) This was the highest percentage of all age groups that were in prison for violent offenses in 1993, 2003, and 2013. The proportion of prisoners age 55 or older convicted of property crimes (11% to 12%) remained stable from 1993 to 2013 (figure 9b), but the growth in the number of prisoners age 55 or older meant that five times as many prisoners age 55 or older were imprisoned for property crimes in 2013 (16,200) than in 1993 (2,900). (See appendix table 9 for the full offense distribution.) Sentenced drug offenders accounted for a decreasing proportion and number of state prisoners in all age groups from 2003 to 2013, except for those age 55 or older). As with property crimes, the overall growth in the number of persons in this age group contributed to an increase in drug offenders age 55 or older between 1993 (4,100) and 2013 (13,600), despite the decline in sentencing for these crimes (16% of all prisoners age 55 or older in 1993, compared to 10% in 2013)

According to the study, there were almost 2 million fewer arrests in the United States in 2012 (the most recent year for which national arrest estimates by age are available) than in 1993 (down 1,851,900 or 13%), with all of the decrease attributed to fewer arrests for persons age 39 or younger (table 12). Over the same period, arrests of persons ages 40 to 54 increased 44% (up 739,000) and arrests of persons age 55 or older increased 77% (up 260,800). As with prison admissions, growth in arrests between 1993 and 2003 was greater for persons ages 40 to 54 (up 47%) than for those age 55 or older (up 9%). Between 2003 and 2012, however, arrests of persons ages 40 to 54 decreased 2% compared to those age 55 or older (up 63%). The total number of arrests for violent offenses declined 11% (down 214,100) between 1993 and 2012. Over the same period, arrests of persons ages 40 to 54 increased 58% (131,200) and arrests of persons age 55 or older increased 88% (40,500) for violent crimes. The number of arrests of persons age 55 or older for drug offenses increased 375%, from 9,600 in 1993 to 45,600 in 2012, compared to a 26% increase for persons ages 18 to 39 (from 892,100 in 1993 to 1,120,200 in 2013).

According to the studies we consulted, in US, 30% of the life-sentenced population is 55 or older. The imprisonment of an aging population has become a fiscal and humanitarian crisis the country must confront. The urgency of this crisis grows ever greater as the COVID-19 pandemic disproportionately jeopardizes the lives of older Americans in prison. Reoffending by persons released after serving long terms is rare,

making the need for expediting releases for older lifers the only humane public health and public safety approach (Nellis, 2021).

- One in 7 people in U.S. prisons is serving a life sentence, either life without parole (LWOP), life with parole (LWP) or virtual life (50 years or more), totaling 203,865 people;
- The number of people serving life without parole - the most extreme type of life sentence - is higher than ever before, a 66% increase since our first census in 2003;
- 29 states had more people serving life in 2020 than just four years earlier;
- 30% of lifers are 55 years old or more, amounting to more than 61,417 people;
- 3,972 people serving life sentences have been convicted for a drug-related offense and 38% of these are in the federal prison system;
- More than two-thirds of those serving life sentences are people of color;
- One in 5 Black men in prison is serving a life sentence;
- Latinx individuals comprise 16% of those serving life sentences;
- One of every 15 women in prison is serving life;
- Women serving LWOP increased 43%, compared to a 29% increase among men, between 2008 and 2020;
- The population serving LWOP for crimes committed as youth is down 45% from its peak in 2016;
- 8,600 people nationwide are serving parole-eligible life or virtual life sentences for crimes committed as minors.

Ashley Nellis dedicated another research to this problem (Nellis, 2022). The conclusion is that almost half of the people serving life without parole are 50 years old or more and one in four is at least 60 years old. Because of the disadvantages affecting people in prison prior to their incarceration and the health-suppressing effects of imprisonment, incarcerated people are considered elderly from the age of 50. Under current trends, as much as one third of people in U.S. prisons will be at least 50 years old by 2030, the predictable and predicted consequence of mass incarceration.

Because compassionate release, whether based on chronological age (geriatric parole) or diagnosis of a terminal illness (medical parole), typically excludes people serving life sentences by statute, the only option for an early release for people serving LWOP is executive clemency. While clemency was common for older people serving life sentences sixty years ago, it was nearly terminated by the 1970s, and is still rarely used today.

The reccomendetions for a reform, regarding to Nellis are:

- Reinstate parole or resentencing opportunities for those currently ineligible.

- Give added weight to advanced age at review hearings. Advanced age considerations should begin at age 50 in light of the accelerating aging process that accompanies imprisonment.
- Allow immediate sentence review with presumption of release for people who are 50 and older and have served 10 years of their LWOP sentence.
- Revise medical parole release statutes to include all incarcerated people regardless of crime of conviction and age.
- Upon release, transition elderly persons, including those who have been convicted of a violent crime and those who are serving LWOP and other life sentences, to well-supported systems of community care if they are too frail to live independently.
- Require states to disclose the cost of incarcerating elderly people, including the cost of all medical care, as well as projections for future costs. Failing in such fiscal transparency keeps taxpayers in the dark about the true cost of mass incarceration.
- Expand clemency release opportunities to reflect their higher usage in earlier eras.

9. ECHR and the perspective of releasing from life inprisonment

As a rule, life imprisonment is compatible with the European Convention on Human Rights, as long as prisoners have some chance of being released and it is possible for their sentences to be reviewed. According to the European Court of Human Rights, national laws concerning life imprisonment must be sufficiently clear and certain.

In Vinter and others vs the UK[26], (§119-§122), the Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.

According to §120, however, the Court would emphasise that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing, it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to

[26] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-122664%22]}

determine when that review should take place. This being said, the Court would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter.

So, continues the Court (§121), it follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention.

Also, although the requisite review is a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 in this regard. This would be contrary both to legal certainty and to the general principles on victim status within the meaning of that term in Article 34 of the Convention. Furthermore, in cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.

In Lazlo Magyar vs Hungary[27], The Court acknowledged that those convicted of a serious crime could be sentenced to indeterminate detention where necessary for the protection of the public. However, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense that national authorities should be allowed to review life sentences in order to assess whether life prisoners had made such significant progress towards rehabilitation that their continued detention could no longer be justified. Moreover, from the beginning of their sentence, life prisoners should be entitled to know what they have to do to be considered for release and under what conditions.

The Court distinguished the case from a former Hungarian one which concerned a life sentence with eligibility for parole and noted that the regulation and practice of the presidential clemency warrants a stricter scrutiny where it is not complemented by the distant but real possibility for release on parole. Firstly, Hungarian legislation did not

[27] 20Laszlo%20Magyar%20v.%20Hungary%20-%20life%20sentences.pdf

compel the authorities or the President of the Republic to assess, whenever life prisoners request pardon, whether their continued imprisonment was justified. Secondly, although the authorities had a general duty to collect information about life prisoners and to enclose it with their pardon request, the law did not provide for any specific guidance as to what kind of criteria were to be taken into account in the gathering of such personal particulars and in the assessment of the request. Finally, neither the Minister of Justice nor the President of the Republic had to give reasons for their decisions about such requests. Therefore, the Court was not persuaded that the institution of presidential clemency would have allowed any prisoner to know what they had to do to be considered for release and under what conditions. Moreover, the law did not guarantee a proper consideration of the progress towards rehabilitation made by life prisoners, however significant. Therefore, the Court concluded that the sentence of Mr Magyar could not be regarded as reducible, which amounted to a violation of Article 3.

In case of Marcello Viola v. Italy[28] (no. 2) (application no. 77633/16) the European Court of Human Rights held, by a majority, that there had been: a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights.

Mr Viola, sentenced to life inprisonment, in order to be eligible for and be granted release, namely to cooperate with the judicial authorities' investigative and prosecution activities. The Court acknowledged that the domestic rules offered convicted prisoners a choice as to whether to cooperate with the judicial authorities. However, it had doubts as to the free nature of that choice and the appropriateness of equating a lack of cooperation with the prisoner's dangerousness to society. Hence, the Court noted that Mr Viola had decided not to cooperate with the judicial authorities. According to one of the third-party interveners in the case, the main reason why prisoners refused to cooperate was the fear of endangering their own lives or those of their families.

The Court inferred from this that the lack of cooperation was not always the result of a free and deliberate choice, nor did it necessarily reflect continuing adherence to criminal values or ongoing links with the Mafia-type organisation. The Court also observed that a situation could reasonably be imagined whereby a convicted prisoner cooperated with the authorities without this signifying any rehabilitation on his or her part or a genuine severing of contact with criminal circles. Regarding cooperation with the authorities as the only possible indication that a prisoner had broken off contact with criminal circles and been rehabilitated failed to take account of other indicators that could be used to assess his or her progress. It could not be ruled out that the severing of ties with

[28] file:///C:/Users/User/Downloads/Judgment%20Marcello%20Viola%20v.%20Italy%20(no.%202)%20-%20irreducible%20life%20sentence%20breached%20the%20Convention.pdf

Mafia circles might be expressed in ways other than cooperation with the judicial authorities. The Court pointed out that the Italian prison system offered a range of progressive opportunities for contact with society - such as outside work, release on licence, prison leave and a semi-custodial regime - designed to ease the prisoner's resocialisation. However, Mr Viola had not been granted these opportunities despite the fact that the reports on his conduct in prison submitted in support of his applications for release on licence had reported a positive change in his personality. Moreover, Mr Viola pointed out that he had never had any disciplinary sanctions imposed on him since his conviction and had built up entitlement to be released five years early; however, he had been unable to take advantage of this owing to his refusal to cooperate. In the Court's view, a convicted prisoner's personality did not remain unchanged from the time of commission of the offence. It could evolve in the course of his or her sentence, as reflected in the resocialisation process, which enabled individuals to review their criminal past critically and rebuild their personality. In order to do that, convicted prisoners had to know what they needed to do in order to be considered for release. Lastly, the Court considered that the lack of cooperation with the judicial authorities gave rise to an irrebuttable presumption of dangerousness which had deprived Mr Viola of any realistic prospect of release.

By continuing to equate a lack of cooperation with an irrebuttable presumption of dangerousness to society, the rules in place effectively assessed the person's dangerousness by reference to the time when the offence had been committed, instead of taking account of the reintegration process and any progress the person had made since being convicted. The presumption of dangerousness also prevented the competent courts from examining applications for release on licence and from ascertaining whether the person concerned had changed and made progress towards rehabilitation, such that his or her detention was no longer justified. The Court recognised the fact that the offences of which Mr Viola had been convicted concerned a particularly dangerous phenomenon for society. However, efforts to tackle that scourge could not justify derogating from the provisions of Article 3 of the Convention, which prohibited in absolute terms inhuman or degrading treatment.

Hence, the nature of the offences of which Mr Viola had been accused was irrelevant for the purposes of examining his application under Article 3. Moreover, the Court had previously found that the ultimate aim of resocialisation was to prevent reoffending and protect society. 4 The Court stressed that it would be incompatible with human dignity - which lay at the very essence of the Convention system - to deprive persons of their freedom without striving towards their rehabilitation and providing them with the chance to regain that freedom at some future date. Thus, the Court considered

that the life sentence imposed on Mr Viola under section 4 bis of the Prison Administration Act (ergastolo ostativo) restricted his prospects for release and the possibility of review of his sentence to an excessive degree. Accordingly, his sentence could not be regarded as reducible for the purposes of Article 3 of the Convention. The Court therefore concluded that the requirements of Article 3 had not been satisfied. However, the finding of a violation could not be understood as offering the applicant the prospect of imminent release.

10. Concluding remarks

As a conclusion, we note the following:

In comparison and also in contrast to the situation of minors, advanced age perpetrators do not receive special relevance in criminal legislation, and Romanian law follows this pattern.

In the historical context, old age has in the past presented a greater importance, sometimes being a mitigating circumstance.

The difficulty of identifying a specific age that provides relevance is a false problem. It is, we believe, about the lack of a real will.

Age has rather valences of leniency, in relation to not applying life imprisonment or hoping for a faster release. In reality, the effect is far from the one hoped for.

Statistics from some countries say that delinquency among the elderly has increased. The solution is not, we believe, that of applying detention for extended periods, but the emphasis on the social programs of these persons.

We believe that a European Commission document on the rights of the elderly in criminal proceedings is necessary, as is the UN Convention.

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Dragan Obradović*

ELDERLY PEOPLE - VICTIMS OF CRIMINAL OFFENSES WITH ELEMENTS OF VIOLENCE (ONE JUDGE'S VIEW)

Elderly people are exposed to a high risk of various types of violence, and under difficult conditions they obtain protection in the field of criminal law. Apart from the Law on Road Traffic Safety, which pays special attention to improving the safety of the most vulnerable categories of road users, which includes the elderly, in the current criminal regulations in Serbia, elderly persons who are victims of violence do not enjoy special legal protection, unlike certain other categories victims. In the paper, the author analyzes the most important obstacles during criminal prosecution and trial on the examples of individual court cases, where he points out the vulnerability of old people - victims of certain criminal acts. In addition to the need to protect and empower elderly persons in criminal proceedings in Serbia, it is necessary to improve the protection of elderly persons through amendments to the criminal law regulations.

Keywords: *old people, victims, crimes, violence*

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Introduction

Violence in its various forms is a global phenomenon nowadays. As such, the occurrence is also present in all its forms in Serbia. Victims of all types of violence can be persons of both genders and all ages. The first connotation of the word 'violence' is that of a form of physical violence, though an increasingly larger number of people are citing other forms of violence, such as sexual, psychological, economic, and in the 21st century, digital violence. The World Health Organization (hereinafter: WHO) defined violence as the global use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, which results in or has a high probability of injury, death, psychological damage, instability or poverty (WHO, 2002).

This paper focuses on one particularly complex category of violent crime victims - the elderly. Violence against the elderly (elder abuse) was noted for the first time in British scientific journals in 1975. Elder abuse in general (in domestic as well as in institutional settings) is widely recognised as a growing problem, due to ageing of population. (Jovanović, 2022: 488). The reason for that is that the issue of violence is one of the everyday problems that older people face in different situations - such as within the family, on the street, in public transport and generally, in ordinary life. Another singular problem faced by the elderly is institutional violence, i.e. that may occur in various public institutions - hospitals, social welfare institutions and other establishments where the specific needs of the elderly are ignored and neglected (Satarić, 2016:59). Due to the increase in the general standard of living, the improvement of health care and a reduced birth rate, there has been an increase in life expectancy and a cumulative share of people over the age of 65 in the entire world population. Elderly people represent a specific and vulnerable group and as such are often potential victims of violence. In fact, ageing people with functional and mental problems that are dependent for care by others are at a greater risk of violence. Older women are also at a higher risk (Vujović, 2017: 63). Some authors suggest that old age should be divided into 3 stages: 1) early old age (persons who have more than 65 but less than 75 or 80 years); 2) average old age (persons who have more than 75 or 80 but less than 90 years) and 3) late old age (persons who have more than 85 or 90 years) Batrićević (2022: 464).

Elder abuse includes all forms of behavior (spoken or done) by a person of any gender or any age that uses their dominance to affect an elderly person in any way. Also, in 2002, the WHO published the results of an international study on how older people perceive violence. The findings included neglect, including isolation of older persons, abandonment and social exclusion, as well as abuse and violation of human, legal and medical rights, and a denial of the older persons' choices, decisions, status, finances and

a lack of respect (Neno and Neno, 2005). In addition, elderly people are often victims of abuse. Elder abuse is defined by the WHO as "a repeated action or lack of appropriate action, which occurs in any relationship of expectation and trust, and which causes harm, pain, inconvenience and/or distress to an elderly person" (WHO, 2002). Also, elder abuse is often a hidden phenomenon with many obstacles for its detection (Buri et al., 2006).

In the Republic of Serbia, violence is increasingly discussed at public meetings, and it is covered by the electronic and print media outlets. In particular, the media most often report acts of physical violence, which by their features represent crimes. This is due to the fact that these articles or reports always attract the attention of readers or viewers, depending on the type of media outlet that publishes them. The fact that violence is a part of everyday life compels the media to report on it as much as on any other social phenomena. However, violence is presented in the form of sensational rather than crime news, and it is on the front pages of the daily press, often in the entertainment section, with a perceptible absence of empathy in the reporting that violates the dignity of the victims (Glomazić, Pavićević, 2016).

In addition to physical violence, all the other forms of violence mentioned apply to all categories of the population, including the elderly, along with the fact that the former are often victims of abuse and neglect as a specific form of violence. When referring to the abuse of the elderly, we should take into account the fact that this involves actions aimed at the loss or reduction of self-esteem in the elderly, who are the victims of domestic violence, and on the other hand, the abuse also violates their basic human rights that have been guaranteed by various international and domestic regulations. There are a high number of cases of violence against the elderly, though many go undocumented. Often it happens that the victims themselves deny and cover up the abuse due to a sense of shame, as well as the need to protect the abuser, feeling that they themselves are to blame for the violence, or due to a fear of the abuser, as well as certain doubts about the possibility of resolving the situation, etc. (Petrušić et al., 2012).

When elderly people are victims of violent crimes, the media frequently shows headlines such as the following: *THESE ARE THE MURDERER AND THE OLD WOMAN FROM ŠABAC: Grandson suspected of drowning and burying grandmother in order to receive an inheritance, crime discovered after one year*,[1] or *MOTHER AND*

[1] https://www.novosti.rs/c/hronika/zlocin/1247449/ovo-ubica-starica-sapca-unuk-osumnjicen-udavio-za-kopao-dobio-nasledstvo-zlocin-otkriven-tek-nakon-godinu-dana-foto, Novosti Online, 9 June 2023 at 5:22 pm.

DAUGHTER ARRESTED FOR THE MURDER OF A RELATIVE IN SMEDEREVO: Their defense was silence.[2]

This paper provides, as preferred by the author, a brief overview of the most relevant international and domestic regulations related to the elderly. The domestic regulations point out, while bearing in mind the topic of the paper, the vulnerability of the elderly who are victims of certain crimes by analyzing of the most relevant legal regulations. The obstacles encountered in relation to this category of victims during criminal prosecution and trial was also pointed out by using the examples of certain court cases. Some proposals were also made with the aim of changing the legal regulations and improving the protection of the elderly.

2. Protection of elderly persons according to certain regulations

Various aspects of the protection of the elderly are reviewed in numerous international and domestic legal regulations. Bearing in mind the topic of the paper, only some of these regulations have been highlighted, without any pretensions that it is possible to mention all the regulations from this area in a paper with a limited scope.

2.1. International regulations

The United Nations (hereinafter: UN) General Assembly adopted the basic UN Principles for Older Persons (Resolution 46/91) in 1991. These principles are considered to be independence, participation, dignity, caring and self-fulfillment.[3] Apart from this document, the UN Millennium Declaration was adopted in 2000 (Resolution 55/2), which regulates the status and quality of life of elderly people everywhere in the world. The following are cited as fundamental values: freedom, equality, solidarity, tolerance, respect for nature and sharing of responsibilities.[4]

From the aspect of criminal law, the Toronto Declaration for the Global Prevention of Elder Abuse, adopted in 2002, is also a significant UN document. This declaration calls on member states to take action in preventing the abuse of the elderly.

Among the documents of the Council of Europe, the most significant is the European Convention on Human Rights (hereinafter: the Convention), adopted in 1950 and

[2] https://www.novosti.rs/c/hronika/zlocin/1242403/pritvor-majci-cerkama-zbog-ubistva-rodjaka-smederevu-branile-cutanjem, J. L., 26 May 2023 at 1:48 pm.

[3] United Nations Principles for Older Persons.
http://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx

[4] United Nations Millennium Declaration http://www.un.org/millennium/declaration/ares552e.htm/

ratified by Serbia in 2003.[5] The Convention stipulates basic rights and freedoms, which the High Contracting Parties, or EU members, guarantee to individuals under their jurisdiction. Some of these rights are the right to life, the prohibition of torture, the right to freedom and security, the right to a fair trial, punishment based only on the law, the right of respect for private and family life, the prohibition of discrimination on any basis, etc.

A new advancement in terms of a more comprehensive protection of sexual freedom, sexual integrity and privacy of women is marked by the adoption of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence[6] (hereinafter: CETS 210). The Republic of Serbia as a candidate country for EU membership has signed and ratified this convention,[7] although it has not fully implemented it. It is completely clear that this convention applies to females of all ages, including older women.

2.2. Domestic regulations

The Constitution of the Republic of Serbia (hereinafter: the Constitution)[8] guarantees basic human rights and freedoms, such as the right to inviolability of physical and psychological integrity and the prohibition of torture, the right to equal legal protection without discrimination, the right to judicial protection in the case of violation or denial of a human or minority right guaranteed by the Constitution and the right to remove the consequences caused by the violation, the right to life, the inviolability of mental and physical integrity, the right to a fair trial, to rehabilitation and compensation for damages, as well as the right to equal protection of rights and to a legal remedy. In addition, it guarantees the right to appeal to international institutions for the protection of freedoms and rights and guarantees that ensure respect for these rights. However, the Constitution fails to mention the elderly population as a separate social group. Nevertheless, Article 21 of the Constitution prohibits discrimination, direct or indirect, on any basis, including age, as one of the separate grounds of discrimination.

[5] European Convention on Human Rights amended in accordance with Protocol No. 11**,** Off. Gazette of the RS - International treaties, nos. 9/2003, 5/2005, 7/2005 (amendment), Off. Gazette of the RS - International treaties, nos. 12/2010, 10/2015.

[6] Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 7 May 2011, entry into force 1 August 2014), CETS 210 (Istanbul Convention), available at https://rm.coe.int/168008482e./

[7] Law on the ratification of the Convention on Preventing and Combating Violence Against Women and Domestic Violence, *Off. Gazette of the RS - International treaties*, No. 12/2013.

[8] The Constitution of the Republic of Serbia, Off. Gazette of the RS, No. 98/2006

In addition to the Constitution, there are also a large number of legal provisions and by-laws, as well as strategies adopted at the state level that indirectly refer to the elderly population, though they fail to mention it explicitly. The regulations are from different areas, some of which are not directly related to any part of criminal law. Among those regulations, we single out the Law on Social Protection,[9] the Law on Health Care,[10] and the Family Act,[11] which regulates family law protection against domestic violence, as well as the Law on Non-litigation Proceedings[12] and the Law on Prevention of Discrimination against Persons with Disabilities.[13]

Of the numerous strategies adopted at the state level, we distinguish three strategies. These are the following:

The 2021-2023 Gender Equality Strategy (hereinafter: Strategy).[14] The strategy states that the Roma population, women, the LGBTQ community, persons with disabilities, underprivileged and elderly people, migrants, national minorities, Roma women, poverty-stricken women, women from rural areas and elderly women are recognized as vulnerable groups exposed to single and multiple discrimination. The Strategy also states that violence in general, and especially against women, is the most widespread and severe form of the violating of basic human rights.

The National Strategy on Aging (hereinafter: Strategy on Aging)[15] was adopted for the period from 2006 to 2015 in the conditions of a very complex demographic and socio-economic framework of age and aging, considering that at that moment the population of the Republic of Serbia was among the oldest populations in the world. According to the 2002 census, over 1,200,000 people in Serbia were 65 years old or older, or - relatively speaking - one sixth of the total population was over that age. The Strategy of Aging states that the population aging process will be continued in the immediate future, and the further aging of the elderly population will be particularly high.

[9] Law on Social Protection, Off. Gazette of the RS no. 24/2011.

[10] Law on Health Care, Off. Gazette of the RS no. 25/2019.

[11] Family Act, Off. Gazette of the RS nos. 18/2005, 72/2011 and 6/2015.

[12] Law on Non-litigation Proceedings, Off. Gazette of the RS nos. 25/82, 48/88, Off. Gazette of the RS nos. 46/95, 18/2005, 85/2012, 45/2013, 55/2014, 6/2015 and 106/2015.

[13] Law on Prevention of Discrimination of Persons with Disabilities, Off. Gazette of the RS nos. 33/2006 and 13/2016.

[14] 2021-2030 Gender Equality Strategy, Off. Gazette of the RS no. 103/2021.

[15] National Strategy on Aging, Off. Gazette of the RS no. 76/2006.

National Strategy for the Prevention and Elimination of Violence against Women in the Family and in Intimate Partner Relationships[16] - older women are mentioned as particularly vulnerable category of victims.

Certain regulations link criminal law with civil proceedings and family law. In this regard, the Law on the Prevention of Domestic Violence[17] (hereinafter: the Law) is one that stands out and which is recognized in practice. Furthermore, in all parts of Serbia it has found its full application for the protection of victims of domestic violence, regardless of age, and therefore also when it comes to violence against the elderly. This Law is the first step and the suitable reaction of the competent state authorities before initiating criminal proceedings against the perpetrator of the crime of domestic violence. The police and the centers for social work are involved in the application of this Law from the moment of the reporting of the incident of domestic violence. After these, depending on each individual case, ensuing are the competent public prosecutors, and basic courts and, as the last resort, the appeals proceedings.

Of the regulations that are directly related to the position of the elderly in criminal regulations, we list the most important laws, namely: the Criminal Code,[18] (further: Criminal Code - CC), the Law on Misdemeanors[19] and the Law on Road Traffic Safety.[20] It is also important to mention an international document that has become a part of domestic law after its ratification and which protects certain categories of victims in criminal proceedings, including elderly women: the Law on the Ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.[21]

It is also important to mention the National Strategy on the Rights of Victims and Witnesses of Crime of the Republic of Serbia for the period 2020-2025, adopted at the Government RS session on 30 July 2025.[22] The essence is that the victim, within the

[16] National Strategy for the Prevention and Elimination of Violence Against Women in the Family and in Intimate Partner Relationships, Off. Gazette of the RS no. 27/2011.

[17] Law on Prevention of Domestic Violence, Off. Gazette of the RS no. 94/2016.

[18] The Criminal Code, Off. Gazette of the RS nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

[19] The Law on Misdemeanors, Off. Gazette of the RS nos. 65/2013, 13/2016, 98/2016, 91/2019 and 91/2019.

[20] The Law on Road Traffic Safety (Off. Gazette of the RS no. 41/09 from 2 June 2009, put into effect on 10 June 2009, enacted on 11 December 2009, nos. 53/2010, 101/2011, 32/2013 *(Decision of the Constitutional Court)*, 55/2014, 96/2015, 9/2016 *(Decision of the Constitutional Court)*.

[21] Law on the Ratification of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Off. Gazette of the RS no. 12/2013.

[22] National Strategy on the Rights of Victims and Witnesses of Crime in the Republic of Serbia for the 2020-2025 period, adopted at the Government RS session on 30 July 2020.

procedural capacity as the injured party has, in the legal system of the Republic of Serbia, for decades been entitled to a whole succession of rights, recognized and codified by the Directive (2012)029 EU of the European Parliament and the Council of 25 October 2012, which establishes minimum standards regarding the rights, support and protection for victims of crimes, replacing the Framework Decision of the Council 2001/220/PUP (OJ L 315 of 14 November 2012). This strategy states, among other things, that numerous factors such as age, health condition, disability, gender, sexual orientation, ethnicity, religion or a belonging to a certain social group, as well as the status of a refugee or a migrant, can affect the particular liability of a person.

The Law on Road Traffic Safety (hereinafter: LRTS) refers to the protection of the elderly in an indirect manner. The LRTS fails to explicitly define elderly persons, but in the provisions related to the meaning of the expression, certain terms are defined, such as road user, driver and pedestrian (Article 7 (67, 68, 69)), in which roles elderly persons can also appear. The provisions in the traffic rules that refer to the movement of pedestrians (Articles 93-98) are particularly significant, i.e. the obligations of drivers towards pedestrians, although this provision does not specifically mention the elderly (Article 99). However, older persons can also be considered within the category of infirm persons, which are explicitly mentioned, especially if their movements are slow and difficult. With regard to children, the disabled and the elderly, there is a special limitation of the principle of trust to the extent that it could be said that this principle does not apply to them, and thus their unsuitable conduct should not be a surprise to drivers of motor vehicles. Some authors state that there is an increased obligation of motor drivers to act cautiously. Therefore, even when the mentioned persons are near the road but show no intention of crossing it, the motor drivers must factor in the possibility of their sudden crossing.[23] The WHO has declared pedestrians, and especially older ones, to be a vulnerable category of road users.

In accordance with the WHO definition, which classifies persons over 65 years old in the category of older persons, the Traffic Safety Agency of the Republic of Serbia (hereinafter: TSA) in the Report on the Safety of Persons over 65 years of age as Pedestrians (hereinafter: the Report) states that elderly persons are considered to be those 65 years of age and over.[24] The Report states that in the 2019 to 2021 period, 480 elderly people were killed and 6,338 were injured in road traffic accidents on Serbian roads. On average, regarding the same period, about 160 people were killed and more than 2,110

[23] Obradović, D., 2013, C*rimes against the safety of public road traffic*, PhD, Faculty of Law, UNION University in Belgrade.

[24] Traffic Safety Agency, Safety of persons over 65 years of age as pedestrians, review report, October 2022, p. 1.

elderly people were injured in road traffic accidents in Serbia annually. The data shows that people over 65 make up about 21% of the population of Serbia, while on the other hand, they make up about 31% of those killed in road traffic accidents.

3. Protection of the elderly in criminal proceedings and in the Criminal Code

Elderly persons are mostly mentioned implicitly in the provisions of the valid criminal regulations in the Republic of Serbia.

3.1. Elderly persons in the Criminal Procedure Code

Persons who are victims of crimes, including the elderly, have certain rights by the provisions of the Code of Criminal Procedure, which has been applied in relation to regular courts since 1 October 2013 (hereinafter: the Code).[25] They can appear as private litigators, that is, as plaintiffs and as witnesses/injured parties. In the provisions of the Code, the injured party is defined as a person whose personal or property rights have been violated or threatened by a crime (Article 2.1 (11)). Elderly persons most often appear in criminal proceedings as injured parties or as witnesses/injured parties, considering that criminal proceedings conducted in private lawsuits by elderly persons can only be recognized within the margin of error. The shortcomings in the provisions of the Code when it comes to the protection of the human dignity of victims of crime are undisputed. In particular if we are bearing in mind that the injured party is to await two more trials after the final conclusion of the criminal proceedings so that they can eventually collect compensation for the damages resulting from the proceedings (Obradović, 2020: 229). All this also applies to old people as victims in criminal proceedings!

One of the important steps taken by the state in regards to the protection of all victims in criminal proceedings before regular courts has been establishing a service for assistance and support to witnesses and victims in higher courts, as well as in other courts, as determined by the High Judicial Council during 2016 through amendments to the Book of Court Rules. The court is obliged to provide information about this service to injured parties and witnesses in the form of a note on the summons form[26] (Obradović, 2022: 65).

[25] Criminal Procedure Code, Off. Gazette of the RS nos. 72/2011,101/2011,121/2012, 32/2013, 45/2013, 55/2014, 35/19, 27/21 and 62/21.

[26] Amendments to the Book of Court Rules, Off. Gazette of the RS no. 39/2016 from 15 April 2016, enacted on 23 April 2016, Articles 38a and 38b.

The Code contains several provisions that are important for elderly persons who appear as injured parties/victims in criminal proceedings, especially when it comes to violent crimes. This is primarily a provision that refers to particularly sensitive witnesses according to Article 103 of the Code, which stipulates preventing the immediate presence of the perpetrator of the crime within the same room, and consequently a possible secondary victimization of the injured persons. In addition, the Code contains provisions regarding elderly persons appearing as witnesses and being cross-examined in their own residence in the case that they are incapable of responding to the court summons (Article 108). Also, Article 337 contains a provision that the statements of those witnesses who are unable to attend court due to their age or whose presence is difficult to enact can be read aloud in court.

3.2. Elderly persons in the provisions of Criminal Code

The protection of elderly persons who are potential victims of violent crimes is not sufficiently recognized by the provisions of the CC, unlike other categories of victims such as minors or children who are unequivocally provided with increased protection. Namely, the elderly are not explicitly mentioned as victims in any provision of the CC, thus violence against the elderly is not unambiguously recognized. The CC contains certain groups of crimes that imply violence - crimes against life and limb and against sexual freedom, but there are also other groups of crimes stipulated in the CC that are perpetrated by the use of violence in which older persons can be the victims of; e.g. the group of crimes against property, such as robbery, theft, etc.

Relevant provisions for the protection of the elderly, regardless of the fact that this category of persons is not directly mentioned, are contained above all in Chapter XIX of the Criminal Code entitled "Criminal offenses against marriage and family."

Within this group of crimes, legal protection for the elderly is provided by convictions for the following crimes:

- "family violence" from Article 194 of the CC. Bearing in mind the meaning of the term 'family member'[27] in the CC, it can be concluded that the elderly are considered to be family members. Additionally, the protection of elderly victims of this crime, as well as all other victims, is provided by imposing a security measure prohibiting approaching and communicating with the victim;[28]

[27] See Article 112 (28) of the CC regarding the definition of family member.

[28] See Article 89a of the CC - This security measure was introduced in 2009, appearing in its current form in terms of the duration of this measure after amendments to the CC during 2012, published in the Off. Gazette of the RS no. 121/12.

- "failure to provide maintenance" from Article 195 of the CC;

- "a violation of family obligations" from Article 196 of the CC. Namely, Serbian family law stipulates the upkeep of a parent who is incapable of working and has insufficient maintenance support.[29] The law establishes the legal obligations of adults and certain categories of minors for their family members, which applies especially to parents/elderly persons, some of whom fall into the category of infirm persons. A violation of family obligations can even have serious consequences, such as the demise of a family member, especially an elderly person, in terms of the defilement of their physical and psychological integrity. The ultimate consequence in that case may be the legal responsibility of a family member, although unlike the crime of domestic violence, regardless of who is the perpetrator or the victim, there is a low amount of registered cases of this criminal act, according to the data of the Statistical Office of the Republic of Serbia (hereinafter: SORS).[30]

Furthermore, the protection of elderly persons is also recognized in other groups of crimes from the Criminal Code, especially when it comes to the following criminal offenses:

- "abandonment of an infirm person" from Article 126 of the CC. This occurs when the perpetrator abandons a family member who is incapable of taking care of themselves without help. The form of the crime depends on the severity of the outcome to the abandoned family member, or the older person;

- "sexual intercourse with an incapacitated person" from Article 179 of the CC. This occurs when the perpetrator takes advantage of the state of incapacity of a person who is incapacitated to defend himself or herself. As in the earlier theory, it is undisputed that a disabled person generally includes a person with a current or permanent disability, as well as other disabled persons (illness, exhaustion from fatigue, consequences of childbirth or old age) who cannot offer resistance, persons in a coma, under the influence of alcohol or narcotics, or disabled by the actions of another person (not the perpetrator) (who are unconscious, tied and bound and the like); [31]

- "abuse of trust" from Article 216 of the CC, depending on the form of abuse or neglect.

[29] See Article 156 (1) of the Family Act - financially supporting parents.

[30] RIS announcement, 184 Judiciary Statistics - Adult offenders 2022 from 14 July 2023: during 2022, 10 persons were reported as perpetrators of the crime of breach of family obligations, and only 3 persons were convicted as perpetrators of this crime.

[31] Milan Škulić, 'Elder abuse and abuse of the disabled - normative construction, some controversial issues and possible future modifications', *CRIMEN*, vol. IX, no. 1, 2018 (hereinafter: Crime…), 44-45.

4. The elderly - victims in individual cases from court practice

In the practice of the Higher Court in Valjevo, elderly people were most often the victims of the most serious crimes with elements of violence that could be committed against them - murder, rape, robbery. If they survived such events and were able to appear before the court, such persons received the status of particularly reliable witnesses.

We only point to certain cases from court practice where elderly people were victims of criminal acts with elements of violence:

1)In the criminal case, which was legally qualified as the crime of murder committed in Valjevo, the accused, who was 46 years old at the time of the crime, took advantage of his acquaintance with the victim, a very old man at the time, with whom he had good relations, whom he knew He lives alone and knew his financial situation, so on 8.3.2020. came to his house in the afternoon and in the hall with a blunt object inflicted a number of blows on the victim's head and vital parts of the body, resulting in the death of the victim.

2)In a criminal case that was legally qualified as a criminal offense of murder committed in the territory of the municipality of Ub, the accused, who was 37 years old at the time of the commission of the criminal offense, took advantage of his acquaintance with the injured woman, 77 years old, whom he knew and who he knew after her death her husband lives alone, so on 28.8.2017. around 03:00 a.m. he came to her house and first talked to her, after which he left for a short time and returned to her house again, he found him in front of the house on the terrace, where he started to fight with his hands, and then pushed into the house where he beat her with his hands and feet, inflicted numerous injuries on her, resulting in the death of the victim.

3)In the criminal case, which was legally qualified as a criminal act of rape committed in the area of the municipality of Lajkovac, the accused, who was 27 years old at the time of the crime, took advantage of his acquaintance with the injured woman, whom he knew to be a disabled pensioner, and who lived alone in cottage, so on 07.07.2013 around 01:30 he came to her house, entered the house and committed a criminal offense to her detriment, and when the injured party tried to defend herself, he caused her serious injuries in the form of broken nasal bones and numerous minor injuries. During the questioning during the procedure, this injured party received the status of a particularly sensitive witness.

5. Conclusion

Given that there is a high dark crime rate against the elderly, it seems that the priority is to create conditions for them to enable the recognition of the sources of danger and resist sexual abuse, as well as to report it. It would, thereby, be necessary to provide systematic and comprehensive support and assistance to such victims through the proactive engagement of the NGO sector and social services.

It is important to increase the sensitivity of state bodies and courts to the needs of elderly people, who are victims of various criminal acts committed against them. It is necessary, then, to organize training for members of the police and judiciary in order to increase the amount of knowledge about this vulnerable category of victims of criminal acts. Interdisciplinary teams of experts (social workers, psychiatrists, psychologists, speech therapists) should be available to prosecutors and judges who, through joint efforts, can provide appropriate services to the victims in time, gain their trust, facilitate communication with competent state bodies and carry out high quality psychological expertise when necessary in criminal proceedings.

Over the coming period, it is necessary to consider the possibility of providing additional criminal protection for the elderly, as victims of crimes, by amendments to the Criminal Code.

Bearing in mind the provision of Article 193 of the CC, which defines the crime of neglect and abuse of a minor, as one of the vulnerable categories, the possibility of defining the crime of neglect and abuse of the elderly should be considered. Accordingly, it may be necessary to make appropriate changes and additions in regards to other violent crimes against the elderly.

Apart from that, even in the official statistics of the Ministry of Internal Affairs of the RS or Statistical Office of the Republic of Serbia there are no special sections, headings or data that would classify crimes against the elderly into a special group of crimes. Therefore, in the coming period, the Ministry of Internal Affairs of the RS and Statistical Office of the Republic of Serbia should consider the possibility of supplementing their records analogously with the Traffic Safety Agency, which has recognized the elderly as a vulnerable category of road users, and thus focus additional attention to this vulnerable category of victims of violent crimes.

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Jelena Kostić*

VIOLENCE AGAINST THE ELDERLY AND POSSIBILITIES OF PREVENTION

The elderly represents a particularly vulnerable social group. Due to their cognitive and physical predispositions, they are faced with various limitations and very often become victims of violence.

Violence against the elderly is often perpetrated both by family members and employees of institutions for the care and accommodation of the elderly. In this paper, we deal with the phenomenology of this type of violence, as well as the possibilities of its prevention. We start from the assumption that the prevention of violence against the elderly isn't recognized as one of the priority areas both at the global and national level, and that in the coming period, bearing in mind the accelerated aging of the population, it's necessary to improve measures for the protection of the elderly, both from violence, as well as from poverty.

In this paper, we deal not only with the analysis of the existing international and national legal framework, but also with the analysis of reports on the situation and dominant forms of violence against the elderly, which were carried out in the previous period at the international and level of the Republic of Serbia by different institutions and organizations. The goal of such analysis is to make recommendations for the improvement of various mechanisms for the prevention of violence against the elderly.

Keywords: *violence, elderly, prevention, institutions, improvement of protection*

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1. Introduction

There is no definition of age in the literature. Therefore, the authors state that when assessing age, it's necessary to take into account the physiological and socio-psychological characteristics of the personality. There's no doubt that the way of life and cultural circumstances affect the fact that an individual feels old, as if others also perceive him as an old person. Bearing in mind that the retirement age is 65, in our country elderly persons are generally considered to be persons older than the staged age (Knežić, 2010: 66-67).

Elderly persons are susceptible to victimization primarily because of their physical and psychological predispositions. According to the author's conclusions, which are the result of conducted research, violence against the elderly is influenced by various factors. Among them are the characteristics of abusers, lack of services for professional care of the elderly, prejudice against the elderly, dependence of the elderly on other people's care and help, poor housing and economic conditions (Ignjatović & Simeunović-Patić, 2011: 70 and 71).

Elder abuse is defined by the World Health Organization. It's understood as a one time or repeated action or lack of appropriate action in which there is an ecpectation of trust, which causes damage or neglect of an elderly person. According to the World Health Organization, violence against the elderly is present both in the family and in the institutional environment. It can take many forms: physical, psychological, financial, sexual and neglect. According to data from the World Health Organization, one out of six people aged sixty or more experiences some form of violence in the family environment, while in institutions (nursing homes) and other institutions for long-term care, the rates of abuse of older people are even higher. The document of the World Health Organization states that two out of three employees in such institutions stated that they abused an elderly person during 2021 (World Health Organization, 2022: 1).

When talking about violence against the elderly, the authors often refer to the tradition, which, although it was very present in society, represented violence against the elderly. Thus, in south-eastern and eastern Serbia, almost until the end of the 19th century "lapot" was present, i.e. the killing of old people, which was most often carried out by children or the closest relatives when the old member of family was no longer able to provide for the household (Satarić, 2016: 54; Pavlović, 2019: 178).

Therefore, even in such an act, the motives were mainly of an economic nature, although it's stated in the literature that the decline of the mental and physical capacities of the elderly can also affect the appearance of violence against the elderly, because the

newly created situation can cause stress in persons who lived with the elderly and who aren't trained how to react adequately (Ignjatović & Simenunović-Patić, 70).

The consequences of elder abuse are serious. According to research data, elderly persons who have been exposed to abuse are at a much higher risk of death than those who haven't experienced such an experience. Among elderly persons, victims of violence, there is a higher level of psychological stress, worsening of chronic diseases has been recorded, and as a result of stress, high blood pressure, as well as heart problems (Janković *et al.* 2015: 35).

In this paper, we start form the assumption that there is a lack of effective mechanisms for the prevention of violence against the elderly at the global and national level, and that it's necessary to improve the system of protection of the elderly persons. Therefore, in this paper we apply the analysis of the content of various legal documents and reports of different institutions and organizations which show the state of exposure to the elderly to violence.

Starting from the fact that the reduction of each individual risk of abuse of the elderly requires apecial attention, in the first part of the paper, we indicate the risk factors of violence against the elderly. Then, we will look at the content of international standards regarding the protection of older persons from violence, while in a separate section we will refer to national regulations and reports of relevant institutions.

2. Risk factors affecting violence against the elderly

According to research results published in a 2012 study, risk factors are related to both the elderly and abusers. According to them, people with impaired health are more exposed to violence (Petrušić *et al.* 2012).

The presence of cognitive or physical problems in the elderly increases the risk of abuse. According to research, as many as 2/3 of people who use violence against the elderly were family members, children, grandchildren or other relatives. However, it's often pointed out that the stress of caregivers who care for infirm elderly people also contributes to this. The aforementioned problems in the elderly also increase the stress of caregivers, who are often not trained to provide care. The problem is also the social isolation of the elderly, as well as the negative attitude of society towards them, which is reflected in the attitude that the elderly are a burden for society, which often contributes to the formation of prejudices nd sterotypes. Social isolation is most often caused by cognitive and physical problems, so it seems that violence against the elderly is caused by the action of various factors. The lack of "intergenerational solidarity" within the family

is higlighted as a very significant problem. In some families, violence is a frequent phenomenon, because it's a pattern of behavior that's passed from generation to generation. However, it's a response to stress and is a means of control (*Ibid.* 18).

When it comes to the elderly, it seems that there's no institutional mechanism that deals with the prevention od violence against them. If we look at other particular sensitive persons, such as e.g. minors, it can be concluded that they still enjoy a higher degree of protection, at least when it comes to the institutional level. For example, at school, we have different protection mechanisms against minors, i.e. of peer violence (Kostić, 2021 a); Kostić, 2022). Of course, such an approach is completely justified, bearing in mind the needs of minors' personality development. However, the elderly should also enjoy an adequate level of protection from violence, givern that there is a high possibility of victimization when it comes to them.

Violence against the elderly also contributes to the reduction of the value of the elderly by society, the migration of younger family members, the weakening of family ties and intergenerational conflict. Woman (daughters or daughters-in-law) who take care of the victims stand out as the persons who more often commit violence against the elderly. Their unpreparedness for the relief of caregivers also contributes to violence. However, some families are more prone to violence than others, because violence is a learned behavior that is passed down through generations. In such families, it's a way of reacting to stressful situations (Vujović, 2017: 69).

When it comes to the stress of persons who are in the role of caregivers, it's necessary to look at the wider context of the overall relationship between the victim and the abuser. So, for example, when it comes to caring for Alzheimer's patients, the nature of the relationship between the caregiver and the patient prior to the onset of the disease should also be taken into account, as this also contributes to violent behavior. In addition, it's stated that physically aggressive persons more often have a personality disorder or a problem with the consumption of alcohol or psychoactive substances, and because of this, there's an increased risk of becoming abusers of their older family members (*Ibid.* 70).

Bearing in mind the fact that a frequent cause of violence against the elderly is a lack of economic security, as well as that their better material position could eventually contribute to reducing the possibility of their victimization, the elderly should enjoy the right to an adequate standard of living, which was established by international legal standards. Article 2 of the Universal Declaration of Human Rights defines the aforementioned right as the ritht of every member of society to social insurance, the right to realize the economic, social and cultural needs necessary for personal dignity and the free to social insurance, the right to realize the economic, social and cultural needs necessary for personal dignity and the free development of the personality, which should be provided by

the state in various ways, including international cooperation (Ćorić, 2020; Simović & Simović, 2020). However, it depends primarily on the organization of the state, as well as from the resources available to it (Article 22 of the Declaration). In addition, the Declaration provides that everyone has the right to a standard of living that affords him and his family the health and well-being of every member of the family, including food, clothing, furniture, medical care, social services, insurance against unemployment, sickness, disability, widowhood, old age and other cases that can lead to the loss of the possibility of maintenance caused by some other circumstances independent of the will of a certain person (Article 25 of the Declaration, cited according to Kostić, 2021 b): 254). When it comes to the elderly, in most cases, due to low pensions, they lack the funds necessary even for the most necessary life needs. In addition, they are often unable to take care of themselves due to their psychophysical abilities, so they are forced to be taken care of by family members, for whom this ofthen represents a great stress. This can be the trigger for committing both psychological and physical violence against the elderly. However, due to a lack of money due to low pensions, the elderly people aren't able to pay for accommodation in nursing homes where they might be able to receive better care due to the training and experience of the staff. However, on the other hand, one should be careful in such cases, bearing in mind that in the previous period, the witnessed various types of violence and inhumane actions towards the elderly precisely in homes for the accommodation and care of the elderly.

When it comes to poverty, it seems necessary to adopt a new poverty reduction strategy at the national level, in which special attention would be paid to vulnerable categories of the population such as the elderly. The last trategy was adopted in 2003. According to the position of the United Nations Committee on Economic, Social and Cultural Rights, poverty shouldn't only be considered the lack of income, but also the inability to live with dignity due to the lack of resources and the ability to achieve an adequate level of living standards and realize civil, cultural, economic and social rights (United Nations - Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Convenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, 2001: 1 and 2; Sekulović, 2020: 3 and Kostić, 2021 b): 255).

According to the author's research from 2007, which was carried out on the territory of Croatia, men were more likely to comit psychological violence against older members of the household than women, while older women were more often exposed to violence by their husbands than men were exposed to violence by women. Apart from husbands, according to available data, older women were more exposed to violence by sons, grandsons, sons-in-law, and daughters-in-law than older men. Likewise, when it

comes to their own exposure to violence, it's noticeable that women are more willing to talk about it than men. However, even this research doesn't deny the fact that women are mostly perpetrators of violence against the elderly then talking about the violence that comes from the caregivers (Ajduković *et al.* 2008: 16). According to the results of the same research, in relation to the older population, psychological violence was the most common, followed by material, physical and sexual violence. The willingness to talk about the violence experienced doesn't imply the willingness to report the violence to the competent institutions at the same time. Persons who were more exposed to violence were less ready to report it. Therefore, it's necessary to provide more adequate support through various services and relevant programs to elderly people who are victims of domestic violence (*Ibid.* 19).

Some of the measures that can be taken for the prevention of violence against the elderly are counselling or training of family members or persons who provide care and assistance, as well as the transfer of an elderly person from a violent environment while simultaneously providing medical, psychological and financial assistance. As one of the ways to improve assistance to the elderly who are victims of violence, the possibility of setting up hotlines and information centres to inform the elderly about their rights, while organizations specialized in helping the elderly could provide legal advice and legal assistance to victims of violence (Vodič za nacionalnu implementaciju Madridskog internacionalnog plana akcije o starenju, 96-97).

The approach to the prevention of violence against the elderly should be adapted to the type of abuser. Several different types are distinguished in the literature. One type is the "overcrowded" who are well-intentioned and are expected to provide adequate care for the elderly. They have the qualifications, necessary skills and motivation. However, when they are under pressure, they can't adequately care for the elderly, but attack them verbally or psysically, which can contribute to neglect. Then "unsuitable" abusers are mentioned as a special type. They are well-intentioned, but they are people who hav a probem and are unable to take care of an elderly person adequately. A very dangerous type of bully, are the so-called "narcissitic" bullies. Their main motive for caring for the elderly is personal gain, and the elderly are only a means to realize their goals. In addition to them, the so-called "arrogant and aggressive" are particulary dangerous. They are abusers who belive that abuse of other person is justified and know where they can behave violently and wher not. "Sadistic" abusers are the most dangerous category and they feel power through humiliation, intimidation and injury. Such persons don't show a sense of guilt and remorse (Janković *et al*, 27-28).

It's possible to act preventively on the first two categories of abusers in order to reduce their burden if they are employees of homes for the elderly or family members and

to help them solve problems through adequate assistance programs, but also with their cooperation. The third category requires the empowerment of older persons in order to recognize abusers and reduce the possibility of their own victimization which isn't an easy task, especially if, for example, dementia occurred in old people. Therefore, in such cases, the involvement of the whole society is necessary. When it comes to "arrogant and aggressive abusers", as well as "sadistic" abusers, it's necessary to apply special measures of both repressive and preventive nature. Bearing in mind that it requires a special approach, it seems that multidisciplinary research in the fields of psychology, psychiatry, sociology, andragogy and law would help in the application of appropriate measures and the eventual improvement of existing prevention mechanisms.

It should be borne in mind that society can't effectively respond to the problem of the elderly if there is no clearly defined coordination of the institutions of the system, as well as the wider local community. A very important prerequisite for such coordination is the timely collection of relevant data and the establishment of unique databases on violence against the elderly with their regular updating (Janković, *et al.* 2015: 39).

3. International standards

There is no international standard that deals exclusively with the prohibition of violence against the elderly. In general, the prohibition of violence is prescribed by the provisions of various international documents. According to Article 7 of the International Covenant on Civil and Political Rights, no person may be subjected to torture, cruel, inhuman or degrading treatment or punishment.[1] Elderly people usually acquire some kind of disability over time, so from the aspect of their protection, the implementation of the Convention on the Rights of Persons with disabilities is also important.[2] Article 15 of the aforementioned convention guarantees the absence of abuse or cruel, inhuman or degrading treatment or punishment of persons with disabilities, and the contracting countries are obliged to take all appropriate legal, administrative, social, educational and other measures to protect people with disabilities from violence. According to Article 17 of the

[1] International Convenant on Civil and Political Rights is adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. Text in english of mentioned Convenant is available at: https://www.ohchr.org/sites/default/files/ccpr.pdf, 7.7.2023.

[2] The Convention on the Rights of Persons with Disabilites and its Optional Protocol was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was open for signature on 30 March 2007. Text in english of mentioned Convention is available at:

https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html, 7.7.2023.

same convention, every person with a disability has the right to respect for their physical and mental integrity, just like other people.

At the level of the European Union, there is also no standard that would guarantee human rights exclusively to the elderly. The prohibition of torture is also prescribed in a general way. The Convention for the Protection of Human Rights and Fundamental Freedoms in Article 3 prescribes the prohibition of torture.[3] According the Article 9 of the International Covenant on Civil and Political Rights and Article 5 of the Council of Europe Convention on Human Rights, everyone has the right to protection of mental and physical integrity and protection from inhuman and degrading treatment, everyone has the right to personal freedom and security (Sjeničić, 2020: 15 and 16).[4]

In 1991, the United Nations adopted the Principles fot the Elderly. They recognize the reason for which the elderly are most often discriminated against, so in accordance with them, the elderly should be treated fairly regardless of age, gender, racial of ethnic affiliation, disability or other astatus and shouldn't be evaluated independently of their economic contribution. It's precisely this economic moment that contributes to the negative attitude towards the elderly. In addition, the elderly should benefit from family and social care and protection in accordance with the cultural value system of each society. The principles, as an important component of the dignified life of the elderly, also recognize the provisions of access to social and legal services in order to improve their protection, rehabilitation and social and mental stimulation in a human and safe environment. Therefore, older people should be able to enjoy human rights and fundamental freedoms when staying in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy, as well as the right to make decisions about their care and the quality of life. However, the stated principles aren't legally binding, so the rights of the elderly are viewed in a general way, i.e. in terms of human rights that are guaranteed to everyone by international standards, and which are contained in national constitutions.[5]

In 2002, a non-legally binding document was adopted, the adoption of which was conditioned by the consequences of population aging at the global level. It's the Madrid International Plan of Action on Aging, which can be said to be a very important

[3] Text of the Convention is available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG, 7.7.2023.

[4] Text of the European Convention of human rights is available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG, 7.7.2023.

[5] The United Nations Principles for Older Persons were adopted by the UN General Assembly (Resolution 46/91) on 16 December 1991. Text is available at: https://social.un.org/ageing-working-group/documents/fourth/AWAZUNprinciplesforolderpersons.pdf, 7.7.2023.

document of global aging policy. The aforementioned document points out the great influence of the media on attitudes in society towards the elderly and their marginalization by glorifying youth and strengthening negative stereotypes about the elderly. The position of older women in developing coutries is particulary pointed out, which is increasingly unfavourable, bearing in mind political, social and economic exclusion. The media contributes to this to a great extent by promoting the idea that the role and value of the elderly in modern society is very small or insignificant (Vodič za nacionalnu implementaciju Madridskog internacionalnog plana akcije o starenju, 15).[6] And in the Madrid International Plan of Action on Aging is indicated that violent behaviour towards the elderly can be undertaken both by family members and by persons who provide them with care. However precisely because of the non-reporting of this type of violence, especially when it comes to family members, it's impossible to collect adequate data in order to study the prevalence of such behavior. The elderly can be victims of physical violence as well as neglect, ignoring or banning any social contact (*Ibid.* 96).

During 2022, the World Health Organization published the document "Tackling abuse of older people, five priorities for the United Nations Decade of Health Aging (2021-2030)". The adoption of the mentioned document was preceded by cooperation at the global level of the governments of different countries, civil society organizatins, international agencies, professionals, the academic community, the media and the economic sector, with the aim of improving the way of life of odler people and the families and communities in which they live. The aforementioned document singles out several priority areas of action in order to realize the aforementioned goal. Violence against the elderly is recognized as a very important issue, as is the lack of coordinated action regarding its prevention (World Health Organization, 2022: 1).

The main priorities in the document are: changing the way of thinking, experiencing and relating to age and aging, enabling communities to nurture the abilities of older people (work, education, housing, social protection, transport), providing integrated car and health services suitable for older people and ensuring access to long-term care for the elderly who need it (*Ibid.* 2). In addition, at the global level, there's a need to improve the way of collecting data on violence against the elderly in order to assess the risk and propose the application of protection measures, as well as the increased allocation of financial resources to reduce violence against the elderly (World Health Ortanization, 2022: 11-14).

The documents states that violence against the elderly is still at a very low level among world priorities, while the prevention of such violence should be dealt with in a

[6] Translation in Serbian is available at: http://www.zavodsz.gov.rs/media/1254/vodic-za-nacionalnu-implementaciju-mipaa.pdf, 7.7.2023.

more harmonized, sustainable and coordinated manner (*Ibid.* 15). However, the priorities listed in the documents are also not of a binding nature, but their implementation depends on the interest of governments, civil society organizations, academic and research institutions and financiers.

4. Violence against the elderly and available mechanisms at the national level

Bearing in mind that international legal documents generally don't recognize the elderly as a special category, the same approach is included in the Constitution of the Republic of Serbia.[7] The only provision that expressly mentions the elderly is the provision guaranteeing the prohibition of discrimination. In accordance with it, everyone has the right to equal legal protection without discrimination, and it's prohibited on any basis, especially on the basis of race, gender, nationality, social origin, birth, religion, political or other belief, property status, culture, language, age and mental or physical disability (Article 21).

When it comes to violence against the elderly, the Criminal Code doesn't sanction such behaviour with a special provision.[8] In situation when it comes to any kind of abuse of the elderly, it's possible to apply the provisions of the aforementioned Code, which prescribes criminal acts: domestic violence (Article 194), failure to provide maintenance (Article 195), violation of family obligations (Article 196), abandonment of a powerless person (Article 126), defamation of a powerless person (Article 179), abuse of trust (Article 216).

However, it seems that the establishment of a systemic approach based on effective coordination of various bodies and institutions would be of greater importance for the prevention of violence against the elderly. In this context, the adoption of a new strategy on aging would be of great importance. When adopting it, it should be taken into account not only the obligations taken from international documents, but also the results of scientific research from different fields, which deal with different aspects of aging.

The previous Strategy on Aging at the national level was adopted for the period 2006-2015.[9] In it, as one of the goals that should be realized in the mentioned period, the reaffirmation of the role of the family and family solidarity in improving the quality of

[7] The Official Gazette of the Republic of Serbia, no. 98/2006 and 115/2021.

[8] The Official Gazette of the Republic of Serbia, no. 85/2005...35/2019).

[9] The text of the Strategy on aging for the period 2006-2015 is available at: https://www.minrzs.gov.rs/sites/default/files/2018-11/Nacionalna%20strategija%20o%20starenju_1.pdf, 7.7.2023.

life of the elderly in the development of the social community was foreseen. That goal should have been realized through programs of economic, cultural, social and urban development at the level of local self-government and at the level of the republic. In addition, to the staged goal, the Strategy alo envisaged the improvement of the social, economic, political and cultural position and role of the elderly, the improvement of the integration of the elderly by encouraging their active involvement in the community and encouraging the development of intergenerational relations, priority development of forms of social support for the family and assistance to older people in their natural living environment, as well as ensuring more equal access to accommodation services. The last of the stated goals meant overcoming uneven access to housing services in social protection institutions due to capacity deficits and their territorial distribution.

As very important goals in the previous strategy are foreseen: the promotion and support of intergenerational and integration solidarity, as well as the provision of special support to families who care for the elderly and members of family dependent on care and assistance, the development of networks of home treatment and care services, the improvement of social protection services, and especially daycare services and help at home. Support for families caring for their elderly members should have included various types of financial and material assistance, as well as education for family members caring for seriously ill, adult and elderly persons and organizing psychosocial support for caregivers. According to the previous Strategy on Aging, legal and other measure of economic, social and health policy, it was necessary to ensure the protection of women who meet the demands of traditional and modern roles on a daily basis and are the most frequent caregivers of sick elderly family members.

During 2016, the Evaluation of the implementation of the National Strategy on Aging of the Government oof the Republic of Serbia 2006-2015 was prepared and proposals for a new strategic framework were made.[10] The mentioned document states that in the implementation of the planned activities, the greatest progress was recorded in terms of improving the institutional system of social protection (homes for housing the elderly) (Kozarčanin & Milojević, 2016: 11). According to the results of the research, it seems that there is an uneven realization of goals in rural compared to urban areas. Rural areas are somewhat neglected, and at the same time it was noted that not all planned activities were fully implemented at the level of all local local self-government units (*Ibid.* 28).

In the period of analysis of the results of the implementation of the National Strategy on Aging a lack of personnel in the centers for social work was noted, as well as

[10] The text of the document is available at: http://www.zavodsz.gov.rs/media/1230/evaluacija-primene-nacionalne-strategije-o-starenju.pdf, 7.7.2023.

a lack of financial resources for the implementation of the secondary health care system, which includes both permanenet housing for the elderly and their palliative care, so it's one of the general conclusions that the system of such health care is inaccessible especially to people in old age. At the same time, a lack of specialization of future healthcare workers in the field of geriatrics and gerontology was observed, so special attention should be paid to the improvement of knowledge in these fields during regular schooling (Kozarčanin & Milojević, 28-30).

In the observed period, abuses of elderly persons were recorded in the sense of concluding lifetime support contracts with them, as well as complete deprivation of business capacity. In addition, there is a lack of assistance to single elderly households, as well as to informal caregivers, i.e. to family members who take care of parents or relatives (e.g. in terms of domestic help). In this sense, a significantly worse situatin was recorded on the territory of the whole od Serbia than during the adoption of the Strategy on Aging for the period 2006-2015 (*Ibid.* 31). However, special attention shuld be paid to regular monitoring of the work of certain institutions, especially private homes for the elderly, in order to take preventive measures in a timely manner and protect the elderly from violence.

The Commissioner for the Protection of Equality in his annual report for 2022 also indicates the need to improve the position of the elderly, especially the position and economic situation of elderly women who are more exposed to poverty and violence than elderly men (Commissioner for the Protection of Equality, 2022: 22).[11] In the same report, the Commissioner points to the need to encourage activities through which the inclusion of older people in varius areas of social life is carried out equally and in a planned manner, as well as the need to improve the availability of help at home, patronage services, telephone counseling, services of occasional and temporary accommodation for the elderly, services palliative care, as well as services for the elderly with mental disabilities, with an increase in the number of medical workers specialized in working with the elderly (*Ibid*. 32).

Of special importance for the improvement of the position of the elderly is the Special Report of the Commissioner for the Protection of Equality on the discrimination of the elderly. According to the recommendations from the aforementioned report, all authorities at the republican, provincial and local levels should, when designing and implementing various measures and activities related to reduced poverty, should take into account statistical indicators and results of relevant research, as well as previous analyzes

[11] Poverenik za zaštitu ravnopravnosti (Commissioner for the Protection of Equality), Regular Annual Report of the Commissioner for the Protection of Equality for 2022. The text of the Report is available at: https://ravnopravnost.gov.rs/wp-content/uploads/2023/03/RGI-2022_15.3.pdf, 7.7.2023.

of already undertaken measures and with consideration of the long-term effects of the application of all measures in practice on senior citizens. In addition, as a measure of particular importance, the report emphasizes the necessity of developing a system of support for older citizens at the level of local self-government units (Commissioner for the Protection of Equality, 2021: 278). [12] In addition, to the above, the report points out that when drafting strategic documents, action plans and other acts that envisage measures and activitie relevant to the elderly, as well as during their implementation, it's necessary, first of all, to include representatives of elderly citizens and organizations that deal with the human rights of the elderly. In order not to happen that some important measure isn't implemented for many years, regular evaluation of the implementation of the planned measures and activities should be carried out in order to timely assess their effect on different groups of senior citzens and the possible need for their changes (*Ibid.* 348).

5. Conclusion

Prevention of violence against the elderly requires a special approach, taking into account their psycho-phsysical characteristics and greater possibility of exposure to victimization. However, there are still no reliable data on the basis of which precise information can be obtained on the number of elderly persons who have been exposed to violence. According to the research results, the more people were exposed to violence, the less willing they were to report it to the authorities. The reason for this may be risk factors that contribute to the occurrence of violence against the elderly. If persons are dependent on financial, but also physical help and care of family members or relatives, they will probably not report the violence they suffered from those persons due to the fear of losing this kind of help. Therefore, it's necessary to improve accommodation facilities for the elderly and infirm and to improve the coordination of health and social services in order to support the elderly. In addition, the education of the elderly is of special importance, in which various associations and non-governmental organizations can play a significant role. However, their activities should be aimed not only at elderly persons who willinly show interest in this type of cooperation, but also elderly persons who are unable to move or who live in rural and remote household should be informed.

[12] Poverenik za zaštitu ravnopravnosti (Commissioner for the Protection of Equality) (2021) Special Report on discrimination against older citizens. Text is available at:
https://ravnopravnost.gov.rs/wp-content/uploads/2021/09/poseban-izvestaj-o-diskriminaciji-starijih.pdf, 7.7.2023.

International documents don't exclusively deal with the rights of the elderly. There are only a few of them that contain recommendations for improving the position of the elderly, it seems necessary to first analyze the situation and identify both the types of violence and the types of abusers. Not every case of violence requires an equal approach in terms of future prevention of certain behavior. It's certain that family members and caregivers who care for old and sick people require a different approach in the prevention of potential violent behavior compared to people who abuse the elderly solely for lucrative or other motives. When it comes to people who, as family members and caregivers, take care of the elderly, it's necessary to provide them with adequate education and help so that they are exposed to stress as little as possible. In addition, it's necessary to educate th elderly in order to reduce the possibility of their victimization by persons who are prone to abus by concluding contracts on lifelong support and complete deprivation of business capacity. Various organizations of the civil sector would greatly help in this, as well as encouraging older people to become members of such organizations. When it comes to persons who provide care in institutions for the elderly, in order to avoid violence against the elderly, special measures should also be applied. First of all, for this purpose, it's necessary to conduct additional research in order to determine the motives and reasons for such actions. Sometimes they aree the result of misunderstanding the needs and altered state od consciousness of the elderly caused by various diseases. That's why it's undoubtedly important to introduce geriatrics and gerontology into mandatory education programs for future healthcare workers at all levels of education.

Bearing in mind the rapid aging of the population, which according to the estimates of the World Health Organization will increase in the coming period, the adoption of the New National Stategy on Aging would be of particular importance. However, the golas and activities that would be proposed in that document should be based not only on the evaluation of the implementation of the previous Strategy, but also on the basis of research by experts from various fields. In addition, it's necessary to set aside certain financial resources to improve the position of the ederly, so it might be possible to consider securing these funds not only from the budget, but also from varius donations. It should be noted that local self-government units play a major role in improving the protection of the elderly, so it's necessary to improve, adapt or introduce new programs at their level as well.

In raising awareness about the importance of intergenerational solidarity, as well as the role of the elderly in society, the media could contribute to a large extent through various campaigns and shows and programs of an educational nature. In this way, it's possible to affirm the importance of the role od the elderly in society, by promoting the

importance of their role in various activities, such as, for example, sharing experience, with younger people, taking care of grandchildren, etc.

When it comes to the reaction to violence, health workers and police officers should be specially educated in order to develop a specific approach to old people who are victims of violence, bearing in mind that most often the people who ar most abused (and especially in the family) are the least ready to talk about own exposure to violence.

Given that poverty largely affects the elderly, national poverty reduction strategies should specifically identify goals and propose activities for its reduction, especially bearing in mind the possibility of greater exposure to violence from the elderly who live in poor material conditions.

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МОШЕННИЧЕСТВО В ОТНОШЕНИИ ПОЖИЛЫХ ЛЮДЕЙ: ВОПРОСЫ ТОЛКОВАНИЯ УГОЛОВНОГО ЗАКОНА ПРИ КВАЛИФИКАЦИИ ПРЕСТУПЛЕНИЙ

В статье рассматривается вопрос о квалифи-кации мошенничества по субъективной стороне состава преступления. Анализируется умышленная форма вины и основные критерии разграничения, которые существуют в доктрине уголовного права по вопросу отличия прямого от косвенного вида умысла в аспекте толкования неопределенного (неконкретизированного) умысла. На основе правоприме-нительных ситуаций показывается отличие прямого альтернативного умысла от косвенного и неопределенного (неконкретизированного) умысла, предлагаются типизированные правила квалификации и разграничения неопределенного и альтернативного прямого умысла. Автором вносится предложение о том, что неопределенный (неконкретизированный) умысел имеет много общего с косвенным умыслом, и фактически от него неотделим. Поэтому широкому обсуждению подлежит вопрос о том, может ли неопределенный умысел являться прямым. Автор считает, что ответ на данный вопрос должен быть отрицательным.

Ключевые слова: *вина, умысел, прямой умысел, косвенный умысел, неопределенный умысел, мошенничество*

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1. Очень часть мошеннический обман направлен против пожилых людей, которые являются потерпевшими от преступления. Они одалживает деньги своим знакомым и родственникам, а те проигрывают их в карты. Изначально, беря деньги, виновные понимают, что могут как выиграть, так и проиграть деньги. Поэтому пожилые люди становятся жертвами такого обмана. В данной статье будут рассмотрены основные сложности с установлением умышленной формы вины и тех вопросов, которые возникают при отграничении прямого умысла от косвенного.

2. Мошеннический обман имеет многоликие формы и представляет различные очертания. Однако он всегда непременно связан с воздействием виновного на потерпевшего, с тем условием, чтобы ввести его (потерпевшего) в заблуждение и тем самым понудить передать свое имущество в пользу виновного или других лиц. Мошенник действует исключительно с прямым умыслом и имеет намерение всегда присвоить чужое имущество (Pavlovic, 2020).

Тем не менее, в повседневной жизни очень часто встречаются ситуации, которые свидетельствуют о том, что потерпевший, передавая денежные средства виновному, знает каким образом они будут использоваться, но при этом сам потерпевший рассчитывает обогатиться за счет подобной сделки. Эта ситуация характерна для «игроков», т.е. речь идет о случаях, когда лицо одалживает у других деньги на карточные игры (казино, покер, рулетка и т.д.), и впоследствии их не возвращает. Нередко в этой ситуации «обманутые» потерпевшие впоследствии обращаются в правоохранительные органы с заявлением о возбуждении уголовного дела по статье УК о мошенничестве.

И при разрешении данной проблемы для правоохранителей возникает один вопрос: есть ли в таких случаях признаки состава преступления - мошенничества в действиях лица, которое взяло деньги и не возвратило их по той причине, что проиграло в карточные игры.

Первый аспект, который здесь следует обсудить, касается того, обманывало ли лицо потерпевших, когда брало у них взаймы. Иначе говоря, вводил ли виновный потерпевших в заблуждение относительно того обстоятельства, на что именно ему необходимы денежные средства, куда будут тратиться и т.п. Если в этом случае предоставлялась недостоверная информация относительно предмета будущей деятельности виновного, тогда можно ставить вопрос о совершении мошенничества. Если же - нет, то в этом случае и нет признаков мошеннического обмана, как такового. То есть, если кто-либо просто просит одолжить деньги и при этом не оговаривает, на какие именно цели, то ставить вопрос о совершении таким

лицом мошенничества, в случае невозврата денежных средств, всегда проблематично, т.к. факт введения лица в заблуждение относительно обстоятельств совершения сделки отсутствовал. Простое неисполнение обязательства в обусловленные договором сроки нельзя считать мошенничеством (Khiluta, 2021).

Второй аспект проблемы касается формы вины. Предположим, что лицо ввело в заблуждение потерпевшего относительно обстоятельств заключаемой сделки и той цели, которая лежала в ее обосновании. Например, лицо ссылалось, что ему нужны деньги для закупки товара, а на самом деле эти денежные средства это лицо потратило, играя в карточные игры. В этом случае нередко подымается вопрос на предмет того, действовало ли такое лицо с прямым или же с косвенным умыслом. Обще правило здесь сводится к тому, что если мошенничество, есть особая форма хищения, то ввиду наличия специальной (корыстной) цели, такое хищение может быть совершено только с прямым умыслом, но никак не с косвенным.

Эта ситуация (когда лицо одалживает день и проигрывает их в карты) ставит следующую дилемму: действует ли такое лицо исключительно с прямым умыслом? Ведь если игрок играет в карты, он всегда рассчитывает на свой успех, т.е. рассчитывает на выигрыш. Безусловно, он допускает различные варианты тех последствий, которые могут возникнуть от его действий: лицо может выиграть, а может и проиграть в карточные игры. И если он выиграет, то непременно отдаст долг. Именно на это обстоятельство и рассчитывает виновный. Более того, если фактические обстоятельства дела указывают на то, что это лицо уже неоднократно выигрывало деньги и суммы выигрыша были немалые, тогда далее непременно следует рассуждать о том, что это лицо действовало с неопределенным (неконкретизированным) умыслом. Оно прекрасно понимало, что может как выиграть, так и проиграть денежные средства. То есть, оно не желало точно определенных преступных последствий в виде причинения ущерба конкретному лицу, но вполне допускало, что может проиграть деньги, и тем самым их не отдать заимодавцу, в результате чего последнему и будет причинен ущерб. Лицо всегда относится к данному факту безразлично. А раз так, тогда это уже косвенный умысел, а хищение с косвенным умыслом совершено быть не может.

3. Есть еще один деликатный момент в данном вопросе. Он касается того, в какие именно азартные игры играло лицо. Рассчитывало ли оно в данном случае на свои навыки или умения (например, это большинство карточных игр) или же на успех, некое везение (рулетка, спортивные ставки на различные игры и т.п.). И тогда можно сказать, что если лицо объективно рассчитывало на свои личные

способности, когда выигрыш зависел в том числе и от его мастерства, то в этом случае об умышленной форме вины говорить становится сложнее.

Поставленный вопрос порождает уголовно-правовые нюансы квалификации подобных действий. Действительно, можно ли в таком случае вести речь о хищении чужого имущества (мошенничестве), когда лицо полученные денежные средства по договору займа проиграло в азартные игры. Ведь если мы говорим о мошенничестве, которое связано с заключением договорных обязательств, то здесь непременным условием совершения преступления является то, что лицо заранее, до момента заключения договора, должно иметь намерение его не выполнять, т.е. в нашем случае не возвращать денежные средства. Однако любой игрок всегда стремится на выигрыш, по крайней мере, он всегда рассчитывает на то, что ему повезет. Но такой расчет имеет различное основание.

По поводу изложенного есть две позиции.

Первая позиция состоит в том, что в рассматриваемой ситуации необходимо действия такого лица оценивать, как хищение в форме мошенничества. И такой вывод обосновывается тем обстоятельством, что лицо действует с **прямым неопределенным** умыслом.

П.С. Яни в этой ситуации проводит некую аналогию с хулиганом, который находясь в нетрезвом состоянии стреляет в толпу людей. Такой хулиган, производя беспорядочную стрельбу, допускает причинение различных последствий: как смерти неопределенного лица или группы лиц, так и причинения им телесных повреждений различной степени тяжести. Содеянное таким лицом мы квалифицируем по фактически наступившим последствиям. Однако в такой ситуации, по мнению П.С. Яни, хулиган действует с прямым неопределенным (неконкретизированным) умыслом, поэтому его действия следует расценивать как преступление, совершенное исключительно с прямым умыслом (Яни, 2002 : 74-75).

Следовательно, проводя некую параллель, можно допустить тогда, что лицо, беря чужие деньги на карточные игры, также допускает различные варианты развития событий, т.е. предполагает два возможных альтернативных последствия, одним из которых является невозврат взятых денежных средств (их проигрыш в карты), и тем самым здесь возможно причинение ущерба кредитору. В этой ситуации доводы о том, что лицо рискует, не имеют под собой основания, т.к. такое лицо допускает (предвидит) два варианта развития событий (и один из вариантов - это невозврат денег). И раз в таком случае денежные средства не были возвращены, то хищение будет иметь место. И, как заключает П.С. Яни, совершая сами действия, лицо попросту не могло не желать каждого из возможных последствий (Яни, 1997 : 77].

Представляется все же, что ситуация, когда хулиган стреляет в толпу и человек берет деньги и не возвращает, весьма разные, т.к. в первом случае лицо действует с альтернативным умыслом [3, с. 40-44]. А суть такого умысла состоит в том, что лицо, действительно, действует с прямым умыслом, но в этом случае лицо предвидит **обязательные** возможные альтернативные варианты своих действий. Если пьяный хулиган стреляет в толпу, то вполне понятно, что он кому-то причинит вред различной степени тяжести или смерть. Он это не может не понимать и допускать иные варианты, поскольку у него есть огнестрельное оружие. Точно также, если вор проникает в чужую квартиру, он допускает, что может украсть различное имущество, различной стоимости, т.е. такое лицо может причинить ущерб потерпевшему в любом размере. Но при этом он непременно желает украсть и его действия направлены на то, чтобы совершить хищение.

Неконкретизированный (неопределенный) умысел имеет совсем иную окраску. Ключевой момент здесь заключается в неопределенности, неконкретизированности. И эта неопределенность может касаться как характера предвидения последствий (лицо точно не знает, какие именно последствия могут наступить), так и желания их наступления. В отличие от определенного вида умысла, когда лицо желает наступления конкретных последствий, при неопределенном умысле такой ясности и точности нет. И если лицо предвидит возможность как причинения вреда, так и возможность его ненаступления, и к каждому из последствий он относится в равной мере одинаково, то это лицо допускает различные варианты развития событий, но точно не желает наступления конкретного из них. Определяющим моментом здесь является то, что при неконкретизированном умысле (в отличие от альтернативного или определенного) лицо предвидит только *возможность* наступления определенных последствий, но никак не неизбежность их наступления. И если лицо допускает различные варианты их наступления, равным образом безразлично относясь к каждому из предвидимых им последствий, то такое лицо никак не может действовать с прямым неопределенным умыслом. Здесь умысел может быть только косвенный.

При альтернативном умысле лицо действует сознательно и противоправно, имея несколько альтернативных вариантов последствий своего действия. То есть, лицо понимает, что его действия могут привести к различным преступным последствиям и предвидит, а равно желает, различные из них. И если лицо применяет оружие, взрывчатку, иной опасный способ, направленный против жизни или здоровья конкретного лица (или группы лиц), то это лицо не может не понимать о последствиях своего насильственного деяния и, применяя такой способ

совершения преступления, лицо предвидит возможность наступления различных последствий, но он точно желает каждое из возможных.

При альтернативном прямом умысле лицо четко представляет, что преступные последствия наступят. А вот при неконкретизированном (неопределенном) умысле такого четкого и ясного представления относительно возможности наступления общественно опасных последствий - нет. Это может быть связано с неопределенностью обстоятельств, в которых действует субъект, недостаточной его информированностью, неопределенностью самого процесса действия лица. Здесь лицо не осуществляет сознательный выбор определенного преступного результата, и зачастую он к нему относится безразлично.

Тем не менее, если лицо берет деньги в долг с целью осуществления последующей карточной игры, то мы можем говорить о мошенничестве в данном случае лишь тогда, когда это лицо точно знает, что проиграет эти средства и они никогда не будут возвращены. Именно в этой ситуации лицо заранее знает, что никогда их не вернет обратно. Но карточный «игрок» всегда рассчитывает на то, что ему удастся выиграть и это обстоятельство предопределяет его выбор. Он, безусловно, предвидит тот момент, что может выиграть, а может проиграть, но определенно не желает одного из этих последствий конкретно точно. Он безразлично относится к каждому из них. Но если до конца быть последовательным, то такой игрок всегда желает именно выиграть, а не проиграть, и за счет выигранных средств отдать ранее взятое имущество (денежные средства) в долг. Скорее, к факту своего проигрыша, он относится безразлично, не желает этого, но сознательно допускает.

Следовательно, если лицо выигрывает деньги, и в последующем отдает их, то эти действия не являются преступными. А если проиграло деньги, то следуя позиции сторонников наличия в данном случае прямого альтернативного умысла, деяние необходимо расценивать как хищение в форме мошенничества. Однако некий парадокс в этой ситуации заключается в том, что мы делаем вывод на предмет того, является ли совершенное им деяние преступлением или же нет, исходя из фактических последствий (выиграл - проиграл), но никак не исходя из самих действий этого лица. И если занять данную позицию (сторонников альтернативного или прямого неопределенного умысла), то в подобном случае, когда лицо изначально берет деньги на карточные игры под ложным предлогом, оно уже виновно в совершении преступления (такие действия можно оценивать как покушение на мошенничество), т.к. такое лицо допускает, что может проиграть и не отдать деньги. Выходит, что даже если лицо выиграет, и в последующем отдаст

долг, то это не имеет принципиального значения. Но кого же тогда обмануло лицо в данном случае? И кому в такой ситуации причинен ущерб?

Очевидно, что квалификация действий лица, безотносительно факта причинения ущерба потерпевшему, выглядит весьма спорной, если не сказать иначе - крайне сомнительной. Ведь для хищения определяющим является ущерб. А в этой ситуации мы это обстоятельство нивелируем. Это выглядит абсурдно, т.к. потерпевшему еще ущерб не причинен, а мы действия лица квалифицируем как покушение на мошенничество.

Представляется все же, что, если лицо берет у другого деньги в долг, даже под вымышленным предлогом, такое лицо всегда действует с неопределенным умыслом, однако не с прямым, а с косвенным. Его основная цель не причинить ущерб заимодавцу, а выиграть большую сумму денег в карточные (или иные азартные) игры. К факту причинения ущерба такое лицо относится безразлично, оно, безусловно, допускает его, но никак не желает. В таком случае мы вынуждены вести речь о косвенном умысле. Но при косвенном умысле хищение совершено быть не может (Хилюта, 2020).

При этом не вполне уместными будут выглядеть аналогии с финансовыми пирамидами в этом случае. В финансовой пирамиде лицо прекрасно понимает, что деньги выплачиваются за счет других вкладчиков, и когда-нибудь деньги закончатся. Здесь нет никакого расчета и изначально подобные действия направлены на причинение ущерба неконкретизированному кругу лиц. В случае с карточными играми, ситуация совсем другая, т.к. лицо вполне соотносит свои действия с возможным выигрышем или проигрышем и все зависит уже от опыта и умения лица (покер, другие карточные игры) либо же от везения, воли случая (рулетка). При некоторых условиях в данном случае можно вести речь и о легкомысленном расчете на определенные обстоятельства (навыки, умение, опыт карточного игрока), которые воспринимаются играющим лицом как априори важные и именно это поможет (по его мнению) избежать проигрыша. То есть подобные обстоятельства могут быть вполне реальны. При такой постановке вопроса об умышленном деянии вообще тогда говорить не приходится.

По одному из уголовных дел К. был осужден за мошенничество при следующих обстоятельствах. К. у троих граждан под различными предлогами одолжил денежные суммы: у Г. - 210 долларов США; у М. - 3000 долларов США; у К-й - 5500 долларов США. В установленные сроки К. деньги не возвратил всем потерпевшим. Невозврат денег К. обосновывал тем, что им была куплена автомашина с целью перепродажи, однако в последующем она попала в ДТП и по этой причине деньги М. не удалось вернуть. Г. вообще отказывался от взятия 210

долларов США и настаивал на передаче их только через суд. Денежные средства К-й были частично проиграны в игровых автоматах, частично ушли на погашение иных долгов. К. отрицал факт передачи К-й денежной суммы в размере 5500 долларов США. Вынося обвинительный приговор суд указал, что о наличии у К. умысла на завладение денежными средствами потерпевших путем обмана и злоупотребления их доверием свидетельствуют значительный размер сумм, которыми он завладел, в том числе без оформления документов о получении денежных средств на определенные цели; получение им от потерпевших денежных средств без возврата ранее полученных от тех же или иных лиц; неисполнение обязательств перед потерпевшими в установленные сроки либо их частичное в незначительных суммах исполнение после неоднократных обращений потерпевших к нему и в правоохранительные органы; активное посещение К., в том числе сразу после получения денежных средств от потерпевших, различных игорных заведений; приобретение за счет полученных от потерпевшего М. средств имущества без предупреждения об этом самого М.; наличие у обвиняемого многочисленных обязательств по исполнительным документам; длительное отсутствие у обвиняемого каких-либо достаточных доходов, имущества, за счет которых можно было бы взыскать полученные им у потерпевших денежные средства (приговор суда Ивацевичского района Брестской области от 03.04.2023. Дело № 22122110257).

Тем не менее, анализ материалов данного уголовного дела заставляет усомниться в правильности вывода суда. И в большей степени нас здесь интересуют обстоятельства, на которые ссылается ссуд при вынесении обвинительного приговора в отношении К. Само по себе наличие неисполненных обязательств перед другими гражданами, отсутствие достаточных средств, активное посещение игорных заведений, распоряжение полученными денежными средствами в отсутствие согласия потерпевшего М., большой размер полученных сумм и т.д., не могут служить достаточными основаниями для констатации прямого, заранее возникшего умысла на совершение хищения в форме мошенничества.

4. Анализируя настоящую проблему, т.е. выявления неопределенного или определенного умысла лица в ситуациях, когда лицо является «игроком», следует обратить внимание на то обстоятельство, что при мошенничестве мы должны установить заранее обдуманный (установленный) умысел не исполнять взятое обязательство, т.е. в момент заключения договора, лицо должно изначально уже иметь намерение его не исполнять (не возвращать полученные денежные средства, а проиграть их). В ситуации, когда лицо играет в азартные игры и посещает игровые

клубы, установить первоначальное намерение лица не возвращать переданные деньги, весьма сложно. Представляется, что такая позиция всегда будет граничить с объективным вменением (Пудовочкин, Щербакова, 2021). При отсутствии достаточных доказательств, подобное намерение будет выглядеть условным и крайне неопределенным, что только подтверждает тезис о том, что лицо в таком случае действует с неопределенным (неконкретизированным) умыслом. Однако этот умысел не может быть прямым, он является исключительно косвенным.

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FRAUD AGAINST THE ELDERLY: QUESTIONS OF INTERPRETATION OF THE CRIMINAL LAW IN THE QUALIFICATION OF CRIMES

The article discusses the question of the qualification of fraud on the subjective side of the corpus delicti. The article analyzes the intentional form of guilt and the main criteria of differentiation that exist in the doctrine of criminal law on the issue of distinguishing direct from indirect intent in the aspect of the interpretation of vague (unspecified) intent. On the basis of law enforcement situations, the difference between direct alternative intent and indirect and indefinite (non-specified) intent is shown, typified rules of qualification and differentiation of indefinite and alternative direct intent are proposed. The author makes a suggestion that indefinite (non-specified) intent has a lot in common with indirect intent, and is in fact inseparable from it. Therefore, the question of whether indefinite intent can be direct is subject to wide discussion. The author believes that the answer to this question should be negative.

Keywords: *guilt, intent, direct intent, indirect intent, indefinite intent, alternative intent, fraud*

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THE PROTECTION OF THE ELDERLY AND THE ROLE OF CRIMINAL LAW: ANALYSIS OF THE ITALIAN DISCIPLINE AND OF ITS PROBLEMATIC ASPECTS

The article intends to focus on crimes and aggravating circumstances provided for in the Italian Penal Code which, from a practical point of view, are used primarily where the victims of the crime are elderly people.

From the examination of the criminal provisions and the most important jurisprudential cases in which these are applied, the article aims to prove how they are used to protect elderly people; critical observations about the jurisprudential practice and the tendency of Italian Criminal Law to become "victim-centric" will follow, trying to explain that our Criminal Law is now focused more on the victims than on the crime and its perpetrator.

Keywords: *elderly; victims; crimes against the property; domestic abuse; aggravating circumstances*

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1. The elderly as victims of crime: historical and sociological analysis of the phenomenon

The victim of crime has historically been held in low regard by criminal law. A first change occurs at the beginning of the last century, when it started to be the subject of attention from the legislator, the researches and criminal sciences, in the study of the aetiology of the crime and the events following the emergence of the "*notitia criminis*", thus leading Professor Filippo Sgubbi to assert that the victim is «*a modern hero, by now sanctified*» (Sgubbi, 2020:30)[1].

For centuries the crime has been assessed as a "problem" between the offender and society (or the State), looking for the causes of crime in the psyche or in the economic and social environment of the only offender without taking into account the contribution of the victim to the completion of the crime if not for the purpose of the determination of the penalty most appropriate for the case (Cipolla, 2011)[2].

A first sign of this change has been perceived in the second half of the 20th century, when the German doctrine "victim dogmatic" considered useful the analysis of the author-victim dynamics in view of reconsidering the case in question, proposing easing or even no criminal liability in the circumstance of inadequate protection of the victim's own interests.

The "Copernican revolution" occurred, however, afterwards, when the well-known branch of criminology called "victimology" took its first steps analysing crimes from the point of view of the victim, collecting information on the psychological, economic and social impact of the criminal phenomena on the offended persons, in order to overcome the criminal phenomenon.

Restricting the possible victims by reason of the following study, certainly, among the biophysical factors of vulnerability, it has a particular incidence the senile age, period of life that combines the decline in biological function and the onset of psychological syndromes characterised by depression in a context of economic and social decay generally linked to retirement; old age - by scientific literature - is identified from the age of 65[3]. Although there are cases of particularly clear-headed elderly, sometimes there is interest of someone to exaggerate on the intellectual deficiency of over 65, so that it is certainly mendacious the old saying «*senectus ipsa infirmitas*», it cannot be denied that

[1] Sgubbi, F., (2020). *Il diritto penale totale*, Bologna, 30.

[2] This approach has very specific historical causes: the "cancellation" of the offended person from the juridical horizon arose from the affirmation of the monopoly of the higher authority, of state origin, in punitive repression, which implied the overcoming of the traditional practices of settlement/conciliation between the parties, in most cases linked to alternative (even informal) powers.

[3] Tilovoska- Kechedji, E.(2022), *International buman right law and older persons*: 439.

the most fragile constitution and the mental liability that characterizes the seniors (especially if very old) facilitate the perpetration of certain types of crimes at least for the reduced prevention capabilities and physical strength (Cipolla, 2011). In this context, the analysis of the incidence of the elderly victims on the perpetration of crime, induced the scientists to suggest a different assessment of criminal capacity and social danger of the offender, which is assumed to be higher if the target of the attack is an old person. The rise of social alarm over crimes against the elderly has triggered a kind of chain reaction at regulatory level, in the first decade of the 21st century, in order to guarantee safety, which was highlighted in the so-called security packages of 2001 and 2009, that arise from the need to guarantee greater protection for the old people, clearly emerged since 1990s, when observers began to perceive a connection between the progressive aging of the population and the qualitative and quantitative growth of criminal aggression against the elderly (Radaković, 2020).

The undeniable significant phenomenon of criminal offence with regard to the persons concerned, has gone together with a progressive increase - in old persons - in the feeling of insecurity in a way that does not correspond to the actual size of the criminal phenomena.

2. Impaired defence aggravating circumstances

Article 61 of the Italian Criminal Code provides a list of circumstances that, if committed, aggravate the penalty provided for the basic offence - since they can potentially be applied to any crime - and to common effectiveness, as they entail on increase of the penalty up one third of that provided for by the basic offence. Among the various circumstances specified therein is at no. 5 that which provides for an aggravated penalty in the event that offender «*has taken advantages from circumstances of time, place or person, such as to hinder public or private defence*». The need to protect the elderly hinder with the beginning of the 21st century, has thus found an initial answer in article 61, no. 5, which provides an increase in penalty in the event that the offender carries out the conduct in the presence of particular conditions that hinder a prompt and reactive defence of the victim[4]. With Law 94, of 15 July 2009, the social alarm over the increase in crime rates against the elderly was formalized with the inclusion of the age as cause of impaired defence. Now the article says that aggravates penalty «*to have taken advantages from circumstances of time, place or person, also with reference to age, such as to hinder public or private defence*». However, it should be noted, that in the current wording of

[4] The circumstance is compatible with the impulsive knowledge (Criminal Supreme Court, Sez. I, 13.11.2008, no. 48108) and with the eventual knowledge (Criminal Supreme Court., Sez. I, 11.7-25.9.2019, no. 39349).

article 61, no. 5 of the Criminal Code, the 2009 legislature omitted an explicit reference to senile age of the offended as a cause for aggravating the sentence even if the draft law approved by the Senate mentioned it specifically.

Later, in fact, the Chamber of Deputies considered it appropriate to expand the scope of application of the aggravating circumstance by ascribing relevance to the impaired defence also in reference to age without adding more, with the consequence that the rigid penalty treatment is reserved to offenders against the elderly as well as the young people, since both are subjects with particular vulnerability. As regards to circumstances related to person it is now common ground that they consider all those conditions of inferiority of the victim of which the offender takes advantage (illness, mental impairment, drunkenness, pregnancy). So, the "elderly" as a specific offended person, has lost in the Criminal Justice system the independent role that the legislator during preparatory work has granted for the first time; this category, however, remains in the class of vulnerable victim of crime where the need for protection vary also in view of the occasion of crime and the relationship with the offender.

The legislative amendment has brought to light a new problematic that of establishing whether the reference to the age of the offended person involves the integration would lead to automatic integration of the aggravating circumstance or whether the legislator wished to introduce a presumption of impaired defence to the victim's age. According to a guideline that has predominate for long time the jurisprudential scene of legitimacy, the advanced age of the victim on its own, is not capable to incorporate an absolute presumption of impaired defence due to the offended person's reduced physical endurance, as other situations need to be assessed, including the vulnerability of the elderly, the lack of mental clarity and orientation ability thus easing the criminal conduct of the offender. As stated by the Supreme Court «*the advanced age is associated with less physical and cognitive reactivity and is therefore relevant to the offences that require direct interaction with the victim, it is a relative index of vulnerability that must be subjected to judicial evaluation to confirm or devalue its relevance. The ageing process is in fact not homogeneous and while some people may experience rapid (and even abnormal) cognitive decline, others can maintain mental clarity and responsiveness for a long time despite advancing age; less discontinuity is found in the loss of "physical" reactivity unavoidable with the ageing. Tracing advanced age to a non-absolute, but relative index of vulnerability, it will be up to the judge of merit to assess whether victim's age played a facilitating role in the interaction with the offender because of the physical or cognitive*

impairment of the offended»[5]. To the contrary, a different jurisprudential line of legitimacy was expressed, considering that in relation only to the offences assuming an interaction between the offender and the victim, for the integration of the aggravating circumstance referred to in article 61, first par., no. 5, Criminal Code, the criminal conduct helped by the advanced age of the offended person was intrinsic, placing no further additional burden of proof and motivational with regard to the victim's age[6]. In the middle between the two guidelines, a line of thought has emerged capable of balancing the opposing principles underlining the first two guiding principles, on the basis of which the objection of the aggravating circumstance referred to in article 61, first paragraph, no 5, Penal Code, could not be carried out only in relation to the advanced age of the offended persons, but according to the different cases, enhancing, for example, the temporary isolation of the victims (walking alone in the street), a state of illness, previous acquainted, membership of the same party.

Referring to the above findings on the legal debate about impaired defence, the Supreme Judges claimed that the trial judges had failed to recognise the integration of the aggravating circumstance only because of the victim's age (at time of event 69 years old), but by virtue of the methods of the events and of the victim's fragile general condition. In particular the judges had correctly pointed out as the victim made the appointment «unaware that it was a possible fraud», adding how the manner of the criminal conduct was aimed at taking advantage of the offended person's age and sense of loneliness[7]. The analysis of this ruling of legitimacy shows how there is still much uncertainty within the same Supreme Court compared to the automatic configuration or not of the aggravating circumstance of the unpaired defence, in the context of all illegal conduct involving a contact between the offender and the elderly victim of crime. What can, undoubtedly, be considered in order to avoid dangerous judgements of objective responsibility, is how the role of the judge takes an even more meaningful meaning with a precise motivational burden for a correct *decisum*, especially, in those cases, where criminal acts have developed, may lead to excessively severe judgements, depending on the different points of view both for the offender and the victim.

[5] Criminal Supreme Court, Section II, decision 18 January 2011, no. 3598.

[6] Criminal Supreme Court, Section VI, decision 17 June 2020, no. 18485.

[7] Criminal Supreme Court, Section II, decision 2 April 2021, no. 12801.

3. The crimes against property and cases in which they are committed against the elderly

Case studies show that the elderly are often the passive subjects of some crimes against assets, in particular, theft, robbery, fraud and circumvention of an incapable person. These offences will be examined below and attention will be paid to case law.

3.1 The crime of theft, robbery and the provision of specific aggravating circumstances to protect cases where the targets are "fragile subjects"

The crime of theft punishes those who take possession of the mobile object of others subtracting it from those who hold it (article 624, Criminal Code); the crime of robbery punishes who takes away an object from other by the use of violence or threat. These are offences may involve a large number and a wide class of victims but the chronicles attest to be put in place towards elderly people. Consider, for example, the theft committed using fraudulent means, provided for by article 625, par. 1, no 2. In this case the absence of a conscious and intended act of disposition of assets reduces the range of personal conditions conducive to crime and with it the victimological potential of the elderly person: the interpersonal relationship is usually fleeting and instrumental to create a moment of diversion in the victim, characterized by a loosening of the promptness of reflexes generally typical of *senectus*, that represents the *quid pluris* that makes the difference compared to the other offence.

In the theft with dexterity, provided for in article 625, par. 1, no 4, the elderly victimological potential depends on the reduced promptness of reflexes: in this case, however, the technical ability of the offender is predominant and the interpersonal relationship with the victim is practically non-existent. It is also possible that the dexterity and fraudulent means act together to increase the chance of successful criminal action. Reference is made, in particular, to the case of the so called "fake loss", in which the offender draws the attention of the intended victim by simulating to have found an object belonging to him/her, thus enabling, in the meantime, in a lightning-fast way, an accomplice to take possession of assets in the availability of the victim. Also, the so-called theft of the "fake meter reader": while, generally electricity worker, entertains the landlord establishing a conversation, the accomplice sneaks into some rooms and appropriates everything possible, and the so called "Good Samaritan" theft, that is the one who offers a ride in the car to the elderly in difficult, simulating compassion, and with an excuse ask to enter in the house where it will be easy to realise the criminal plan.

As evidence of the statistical frequency and the variety of cases with which the elderly are victims of thefts, the 2009 legislator intervened on this case, as well as on the

one of robbery, by providing for two new aggravating circumstances relating to predatory conduct against persons committed on public transport (Article 625, paragraph 1, no 8-bis Penal Code and Article 628, paragraph 3, no 3-ter Criminal Code), or in the act of using services of Credit Institutions, Post Offices, automatic cash-withdrawals or have just used them, (respectively article 625, par. 1,no 8-ter Penal Code and article 628, paragraph 3, no 3-quarter). Although without explicit references to senile age, these new aggravating circumstances have their own historical roots and find criminological justification in the chronicles, that often report of serious crimes against the patrimony at the expense of older people committed on public transportation, often used by the elderly. The large number of such conducts to the detriment of senior citizens does not make it so imaginative to see in this phenomenon one of the reasons for the reform. In these cases, reaffirming what has already stated at the beginning, from a strictly legal point of view, the elderly person is not considered *ut talis* and yet in the criminological perspective crimes against people of advanced age committed under the above-mentioned conditions, are one of the most frequent events of the circumstantial case *de qua*.

3.1.2. The new crime of house braking and snatching

With law 26 March 2001, no 128, the legislature chose to make autonomous residential and snatching thefts, originally provided for as aggravating circumstances of simple theft in article 625, Criminal Code, and now covered by article 624-bis Criminal Code. This provision, in fact, in the first paragraph states that «*anyone who takes possession of other person mobile thing by removing it from its owner in order to make profit for him/herself or others by entering into a building or other places intended wholly or partly as private home or in its appurtenances, shall be punished*», while the second states that «*the same punishment shall apply to anyone who takes possession of another person movable thing, by removing it from its owner in order to make profit for him/herself or others by snatching it from hand or from the person*».

Although there is no explicit mention of it in the law, it is clear that the legislator of 2001 with such intervention wanted, from one side, to punish more severely, the perpetrators of certain types of theft considered most deplorable (introduction into private home) and aggressive (tearing the thing from the person who holds it) and on the other to protect specific categories of persons most frequently subject to thefts committed in the aforementioned manner, among them, elderly people, that the chronicles often identify as the victims of similar thefts, also proven by the jurisprudential case law. Indeed, the Supreme Court recognized the theft in the home aggravated by the use of fraudulent means, in the conduct of two women who entered into the home of an elderly couple using the

strategy of door-to-door cyclamen plants selling, where they stole 150.00 euro[8]. The Court specified as the reason for the aggravation of penalty underlying the conduct of crime against patrimony in one of the private places set out in article 624-bis Criminal Code consist in the greater participation that the legal system wants to provide for life activities.

As to the second type of theft provided for in article 624-bis par. 2, Criminal Code - it should be considered, *ex multis* the case of a snatching committed against a seventy-five years old person. In this situation the Court of Cassation Judges stated that the crimes that imply an impact on the physical or psychological personal life of the victim from the offender and whose susses counts on the victim's greater or lesser difficulty in reacting to the offence is *in re ipsa* the proof, at least, of facilitation derived from the victim's advanced age, without the judge having a specific and additional motivational burden (relative to the objective fact of age) which seems irrelevant.

In such cases, in fact, the chances that the victim can prevents the commission of the crime are undoubtedly inhibited or at least hindered by the natural dimming of the senses and the reduced mobility due to advancing age.

The same thing it could be said for snatching, where the chances that the victim could feel the imminent danger and prevents the theft of the thing carried on his/her person are undoubtedly very low for the reduced perception of danger, of defence and reaction linked to old age.

3.2. Fraud as a classic crime committed against elderly people

The crime of fraud provided by article 640 of Criminal Code punished who «*with tricks or deception, inducing someone into error, gains to him/herself or others an unlawful profit with damage to others*». This criminal aspect, in practice, is often perpetrated against elderly people, even if only for the greater ease with which the offender can put in place the typical conduct, preparing tricks and deceptions capable of misleading. And indeed, rarely tricks and deceptions against old people require that kind of complexity which is usually necessary to overcome the mistrust of young and also mature people; often, in fact, to a cool-minded observer of average intelligence, appears rather rudimental and yet it is concretely effective, because it appeals to the victimological potential of the senior citizens. In some cases, it is also possible to find a recurring pattern of deception in which it plays a decisive role to create, artificially, a relationship of trust between the offender and the victim. The primitives (pushed to lack of sophistication) of tricks and deceptions raise, however, legal and medical problems in view of a minimum degree of

[8] Criminal Supreme Court, Section V, decision 22 July 2019, no. 32847.

sophistication of the offender's conduct, in any case, unsuitable to produce the same effect in younger and wiser people, whether the recognisability *ictu oculi* of the artifice, in the perspective of a person of average culture and intelligence, makes the fact non punishable for the inequity of the action.

Therefore, it is not surprising that any deceptive conduct is deemed unlawful under criminal law even if it is characterized by a reduce or very reduced degree of insidiousness of the artifices or deceptions when achieving the objective. And such intellectual weakness can be found with a certain frequency in the elderly as a subject burden by a decline in reflexes and in the most serious situation by neuro-vegetative and depressive pathologies, dementia and various psychic liability. The advanced age, therefore, can influence the dynamics of the crime, easing the induction into error in which deception is solved. The dual morphology of trickery and deception in the most common frauds towards the elderly makes it possible to identify the different psychological mechanisms that lead to deception and thus to the asset's disposal, hinged on a double weakness of the victims. There are both frauds in which the false representation of reality induced by the trickery and deception is not perceived as such by the victim because of the intellectual decline linked to advanced age or social isolation and frauds in which the same alteration of reality is facilitated by transient or persistent states of emotional vulnerability. The first group includes scams in which the perpetrator represents an opportunity for the victim to make money or a need (non-existent), by means also of a substitution of person. It is the widespread case in which the offender suggests unreasonable investment income, introducing him/herself as a wealthy person, businessman, laird of ancient lineage. Reference is made to the so called "tobler fraud", in which a fake heir from the family of famous Swiss chocolate makers, proposed to the elderly man he spotted in the street an exchange between a precious gemstone of great value and cash, representing an urgent need for cash. Also, the frequent cases of the sale (on television, door to door, in the street) of valuable jewellery that later turn out to be false. In such cases the victimological propensity of the elderly arise from the intellectual deficit combined with the anxiety of an "easy" enrichment arising from the economic hardship related to reduced living standard compared to the past. In this context, very frequent, though less remunerative for the offender, appear the frauds in which false collectors on non-existent credits - in case exhibiting contracts in which the signature for acceptance appears similar to the one of the victim-claim payments of unpaid sums, not due as the services are not performed. Also, the so called "fraud of the mirror", in which the offender complains of a non-existing damage (usually the break of the car side mirror, but also the damage to a watch or mobile phone) and pretends compensation on the spot. In such cases the victimological propen-

sity of the elderly arises from physical factors (easing reflexes, reduction of reaction capacity), together with a sort of inferiority complex of social origin, resulting from the loss of the active role in society which leads to not assign sufficient weight to one's own reasons in relation to the other's claims. Often the environmental context (isolated places and/or poorly lit) or personal (grim look of the offender), favour the insecurity of the elderly person to the point of producing real intimidation by self-suggestion.

Fall in the second type the frauds in which the perpetrator exploits the victim's family affections by showing acquaintances, friendships and economic relations mostly made up. It is currently quite usual, in which the offender approaches the victim, participates to the purchase of mostly electronic or computer equipment on behalf of a child or nephew and insists on prompt payment, in the case using an accomplice, that by means of the phone, manages to simulate the voice of the insolvent relative, who confirm the purchase and insists on immediate payment: the "mixtum" between parental affection the feeling of discomfort that arises from the supposed debt and the ability to convince of the fake creditor, lead the naïve elderly to believe to recognize the voice. In this "genus" must also be inserted the case where the offender by substitution of person or usurpation of titles etc. manipulates the feeling of charity or altruism of the victim by taking money through the prospect of (non-existing) charitable works or simply take advantage of the spirit of cooperation of the elderly (it is the case of the exchange of counterfeit money with real).

3.2.1. The special aggravating circumstances referred to in Article 640, paragraph 2, no.2-bis Penal

With the clear intention to hit the phenomenon of fraud against the elderly who are too often an easy target for criminals, the same Law 15 July 2009, no.94, has also amended Article 640, Criminal Code - governing the crime of fraud - by introducing a new aggravating circumstance (Article 640, paragraph 2, no.2-bis Penal Code). It is to be counted among the aggravating with special effect and it aggravates the penalty and allows the application of precautionary measures while nothing new in the matter of prosecution given that even in the past the impaired defence (as well as other aggravating factors) determined the pursuit ex officio, as a result of the last paragraph of Article 640 of the Penal Code. The innovation does not seem, however, to significantly strengthen protection against frauds, as it does not widen the prescription terms, it does not remove the new aggravating circumstance subject to knowledge of the state of impaired defence, not being sufficient the ability to known.

Also, in this case wanting to consider a recent ruling, it is taken into consideration the case that has seen accused a subject for having scored numerous frauds taking

advantage of the advanced age of the victims he targeted. And indeed, from the complaints submitted by the victims it is clear that the frauds against people over 65 years old where characterized by procedure in which the offender benefited from a condition of impaired defence of the victims, since the fraudster was stealing the victim's trust offering him for sale some CD who claimed they have been commissioned by his relative with whom he pretended to be in telephone contact at the same time and in so doing he obtained the required payment and quickly left aboard the car with which he had arrived. For the judges is evident that «*the traits characterizing the conduct of the offended person in the interaction with the fraudster were marked by surrender and naivety common to old people*». Basically, «*the offended person behaved incautiously in believing a stranger to whom he had paid money in the street and even failed to carried out a check as simple as calling the relative personally and this irrespective of the role they may have played in society or in their working life, having in those circumstances abandoned all cautions or reserve when faced with the evocation of their son's or daughter's name*»[9].

If on the subject of impaired defence the aggravating circumstance of taking advantage of circumstances of time, place or person such as to hinder the public or private defence must also be specifically assessed with reference to senile age and physical weakness of the offended person, the legislature having wanted to assign relevance to a series of situations that denote a particular vulnerability in the offended person of which the offender consciously takes advantage, since the advanced age of the offended person may constitute the aggravating circumstance for impaired defence, provided, however, that proof is adduced that the public or private defence in fact hindered ", the judges stated that in the case under consideration it was established that " the victim's own conduct denounced his particular vulnerability made the object of conscious profit from the fraudster whose criminal action has, therefore, been facilitated precisely by the ascertained condition of the victim.

3.3. Circumvention of an incapable

Article 643 of the Criminal Code, headed "Circumvention of incapable", punishes «*whoever, in order to procure for himself or others a profit, by abusing the needs, passions or inexperience of a minor, or by abusing the state of infirmity or mental deficiency of a person, even if not interdicted or incapacitated, induces him to perform an act, which amounts to any legal effect for her or others harmful*». This crime is intended to provide protection for people who are in a condition of mental inferiority in the face of

[9] Criminal Supreme, Section II, decision 17 November 2020, no. 32257.

others' conduct of unlawful exploitation. In other words, the disvalue of the crime in question lies in taking advantage of the particularly vulnerable condition of individuals who are in a situation of mental inferiority.

As for the typical conduct, it consists in inducing a person, by abusing and taking advantage of his or her condition of immaturity or mental impairment, to perform an act harmful to her or others. The crime requires the establishment of an unbalanced relationship between the victim and agent, in which the author of the conduct has the ability to manipulate the will of the victim, who, by reason of specific concrete situations, is incapable of resistance due to the absence or diminution of critical capacity and is inducted to perform in a way that imports for him/her or others people harmful legal effect. The conduct of inducement must take place with abuse of the needs of the passions or inexperience of others, in the case where the victim is a minor or with abuse of the state of infirmity or mental deficiency, in the case of an infirm or deficient passive subject. The abuse of the state of vulnerability, which occurs when the agent, aware of this state, exploits its weakness to achieve his end, namely, that of procuring for himself or others a profit; the objective recognizability of the diminished capacity, so that anyone can abuse it to achieve his illicit ends.

Regarding the concept of inducement, already present in the first paragraph of article 643 of the Criminal Code, jurisprudence has affirmed that induction constitutes any activity aimed at convincing and persuading. The concept of induction embraces not only the action of the active subject of circumvention, but also the event of a psychic nature, consisting, according to Article 643 of the Criminal Code, of the resolution of the passive subject of the action to perform the act.

The damage need not be of an immediate pecuniary nature; in fact, the provision generically refers to an act that imposes any legal effect on the victim or on others that is harmful; what matters is that the act produces harm to the victim himself or to others.

Recent jurisprudence of legitimacy[10] has clarified that the typical conduct of abuse referred to in Article 643 of the Criminal Code does not require that the quality of the action reaches the level of artifice or deception provided for fraud, but neither does it exclude them. Therefore, where the conduct of the active party can be abstractly ascribed to both of the aforementioned cases, but the abuse is substantiated by artifices or deception carried out in a unified and circumscribed time frame, marked by the offended person's condition of mental deficiency, circumvention of an incapacitated person absorbs fraud.

[10] Criminal Supreme, Section II, decision 13 January 2016, no. 945.

Recently, the Supreme Court pointed out that the crime in question does not require that the passive subject is in a state of incapacity (minor or interdicted or incapacitated), being, on the contrary, sufficient the existence of a diminished psychic capacity, with impairment of the power of criticism and weakening of the volitional one, such as to be subject to the work of others of suggestion and pressure. For the Judges, therefore, such a crime can also be committed to the detriment of «*a subject in a state of psychic deficiency, meaning by this an alteration of the mental state, ontologically less serious and aggressive than infirmity, dependent on particular physical situations (advanced age, fragility of character) or abnormal relational dynamics, capable of determining an incisive impairment of the intellectual and volitional faculties, invalidating the power of self-determination, criticism and defense of the passive subject from the work of suggestion of others*»[11]. This category, therefore, would include all those people who, although not suffering from an actual pathological condition, known and codified by medical science, are in a condition of impaired defense and frailty due to advanced age. In conclusion, the person in a condition of diminished mental capacity, caused even only by advanced age, who should be a victim of circumvention, may find adequate protection both in the criminal sphere, with the conviction of the offender to imprisonment from two to six years, and in the civil sphere with the declaration of nullity of the act or contract that caused the impoverishment of his or her assets as well as compensation for the moral and material damage suffered as a result of such conduct.

4. Crimes against the family and the personal integrity of the elderly

Elderly people are also a "privileged victim" of some crimes, which see them as a subjected of physical or verbal violence. In addition, sometimes they are placed in conditions of economic, material and moral abandonment due to behaviors of the members of their own family or of people who have their care or custody. Often, in fact, those in charge of looking after of an elderly person, far from protecting the elderly, behave in an improper way, capable of integrating some of the cases that will be described below.

[11] Criminal Supreme Court, Section II, decision 22 January 2021 n. 2727.

4.1. Domestic abuse

The expression domestic violence tends to describe various and heterogeneous attacks on the person, generically including all types of violent behavior that takes place within the family unit. Thus, the crime of domestic abuse, provided by article 572 of the Criminal Code, could be a further case that often finds application where the victim of the crime is an elderly person.

This article, which belongs to the category of crimes against the family, is set up to protect the psycho-physical integrity of people belonging to the family, or para-family, contexts, and punishes those who «*mistreat a person of the family or a cohabitant, or a person subject to his authority or entrusted for reasons of education, instruction, care, supervision or custody, or for the exercise of a profession or an art*».

The legislator, as can be seen from the provision of the norm, has not delimited in precise terms what conduct of mistreatment is necessary to integrate the case, so the definition of it is entrusted to jurisprudential and doctrinal elaboration. The pliability of the norm, in fact, has made possible to ensure a more incisive protection for victims, in a systematic and constitutionally oriented vision, more adherent, therefore, to the changes taking place in the social fabric.

With a concise formula, the notion of "mistreatment" could be defined as that complex of behaviors that are qualified by their suitability to determine an unjust overpowering of the passive subject by the agent, thus requiring, for the integration of the crime, a habitual conduct consisting of a series of continuous harassment and such as to cause suffering, deprivation, humiliation, which constitute a source of continuous discomfort and incompatible with normal living conditions.

Due to this complex and all-encompassing definition, the article has also found application in cases where the victim of conduct such as threats, injuries, acts of contempt and humiliation, insults and deprivation is an elderly person. The crime, in fact can be carried out either by the descendants of the elderly person - and in this context it find application in cases where the violence takes place in a family context *stricto sensu* intended - or by those who, for reasons of care, supervision and custody, have the "management" of the elderly.

As a proof of the abuse committed by the discendants, it is enough even to recall some recent cases under investigation in Italy. And indeed, the Catania Public Prosecutor's Office issued a pre-trial detention order for mistreatment and attempted murder against a young man for the harassing actions he habitually carried out toward his parents: he called his mother using derogatory terms, railed against his father and mother, and

threatened them by telling them he would cause them to die with excruciating suffering[12]. The Judge of Preliminary Investigation of Macerata Criminal Court sentenced a man to imprisonment for mistreating and injuring his mother for throwing a glass at her head[13]. In Bologna a man forced his elderly mother, after several acts of violence, to withdraw money from an ATM machine in order to later buy drugs: he is now under investigation for extortion and mistreatment of the family[14]. A man from Garlasco was recently convicted of extortion and mistreatment of his mother after multiple assaults, both verbal and physical, to her[15].

The Supreme Court, on several occasions, has also affirmed that a son or a daughter who engages in violent behavior, both physical and verbal, with the intention of harassing his family members, causing them to live in a state of terror, commits the crime of domestic abuse, if he or she cohabits with them. With regard to cohabitation, it should, moreover, be pointed out that recently the Supreme Court have noted that the crime in question is also committed in the event of termination of cohabitation or stable cohabitation, provided that the bonds of solidarity arising from the previous relationship between the parties no longer cohabiting remain intact or at least solid and habitual[16].

On the other hand, with regard to cases of mistreatment perpetrated in care facilities, the WHO has recently pointed out the situations of mistreatment of the elderly in nursing homes, residential care, hospitals and day care facilities, which can be found in almost all countries where there is massive reliance on such services, and has enlightened that the phenomena of mistreatment are often attributable to various figures as the employees of the facility, other residents or volunteer workers, as well as their relatives or friends. On a concrete level, the spectrum of possibilities for abuse on the inpatient facilities is very broad and can cover different areas: from care services and an inadequate nutrition to poor nursing care; the list is further enriched by the negligence caused by the lack of practical-specialist training of the caregivers, who can present both difficulties in interacting with inpatients, and inadequacies in communication. It is not surprising that there are numerous and significant pronouncements of the Italian jurisprudence on the subject, that pertain precisely to the profiles of criminal liability referable to a plurality of

[12] 15 September 2021, Newspaper: Catania Today.

[13] 2 November 2022, Newspaper: Centro Pagina Macerata.

[14] 5 luglio 2023, Newspaper: Il Resto del Carlino.

[15] 10 June 2020, Newspaper: Il Giorno.

[16] Criminal Supreme Court, Section VI, decision 25 June 2020, no. 19361.

professional figures who, in various capacities, are involved in the reception of the elderly in facilities outside the family of origin[17].

The Criminal Supreme Court, regarding this crime, after premising that the felony of domestic abuse is inspired by solidaristic principles, stated that it requires a direct relationship between the perpetrator and the victim of the crime. In this regard, it should be noted that the judges of legitimacy, ruled that «*the source of the obligations of custody and assistance derives from the common sense, in respect of which the possibility of providing the necessary security and assistance to the patients of the Nursing Home could only appear to the evidence compromised by the blatant inadequacy and professional inadequacy of the staff employed in that facility*»[18].

4.2. The violation of family support obligations

Article 570 of the Italian Criminal Code, titled "Violation of family support obligations", provides for a number of offenses. Among many hypotheses, the article states that can be punished who «*causes a minor child, or one who is unable to work, ancestors or spouse, who is not legally separated through his or her own fault, to lack the means of subsistence*» [article 570, par. 2, no. 2)].

It is relevant to notice that the article refers also to the "ancestors", alluding to the case in which an elderly person is deprived of the means of subsistence by one's own relative, presumably a "younger" one. This crime can be committed only by those on whom there are obligations of care, established by the Civil Code, towards certain family members. The Supreme Court has made it clear, by establishing that «*the civil obligation constitutes a prerequisite for the crime, pre-existing to it, with respect to which the court must limit itself to ascertaining, any declaratory or constitutive power being outside its duties*»[19]. The sanctioned conduct presupposes a state of need, in the sense that the failure to provide assistance must have the effect of causing a lack of means of subsistence, which includes what is necessary for survive. The legal obligation to provide maintenance is the prerequisite for the crime: in the absence of this obligation, the crime does not exist and the person must be in a position to fulfill (even partially): the proof of inability to do so, according to case law, lies with the person concerned. The economic incapacity of the obligor, understood as the inability to cope with the defaults sanctioned by Article 570,

[17] Ljubičić, M., Ignjatović, D., (2022). *(On) life in an institutional care: the nursing home for elderly - residents'perspective.*

[18] Criminal Supreme Court, Section VI, decision 1 April 2010, no. 12798.

[19] Criminal Supreme Court, Section VI, decision *9 June 2002 n. 36070*.

must be absolute and must also integrate a situation of persistent, objective and unreasonable unavailability of earnings. It is common ground in jurisprudence that on the subject of violation of family assistance obligations, the state of need is not excluded by the intervention of third parties, co-obligors or subordinate obligors, so that the crime is committed even if any of these take the place of the inertia of the person obliged to provide the means of subsistence[20].

4.3. Criminal desertion

The protection of the elderly received in places of care or assistance is ensured not only by the provision of article 572 of the Criminal Code but is further entrusted to the operation of the offense stipulated in article 591 of the Criminal Code, which punishes the conduct of anyone who «*abandons a person incapable* […] *due to old age* […] *of providing for himself and for whom he has custody or must have care*». The crime under consideration punishes any action or omission that conflicts with the legal duty of care or custody, from which derives a state of danger to the safety of the person, unable to provide for himself or herself due to old age or other cause. Thus, article 591 of the Criminal Code protects the ethical-social value of the safety of the incapacitated physical person against certain dangerous situations. In fact, characteristic element of the norm is the express reference to old age as a relevant circumstance for the purpose of the integration of the case, identifying in this condition the cause that may be at the origin of the state of incapacity, of the person, to provide for himself. For this reason, any abandonment must be considered dangerous, and the legal interest is violated even when the dereliction is only relative or partial. The conduct of abandonment is integrated also by the exposure of the abandoned person to merely virtual danger, which is not excluded either by the temporary nature of the conduct determining the abandonment or by the possibility of any aliunde rescue unsuitable for a vicarious substitution of the activities of custody or care borne by the active subject of the crime. The component of danger, although not expressly required by the wording of the rule, is essential to its rationale, even if for the purposes of the existence of the material element of the crime of abandonment of incapacitated persons, even only potential and not actual danger is considered sufficient.

[20] In this sense, Court of Ascoli Piceno, Criminal Section, decision 1° July 2021 n. 366.

5. Conclusions

The instinctive sympathy towards the elderly victim of the crime cannot prevent broader reflections, which concern the fundamental principles of criminal law. It is undeniable that the contemporary penal system in Italy sees a reassessment of the "weigh" of some categories of perpetrators of the crime and of possible victims considered more vulnerable (including minors, the elderly, women, women in a state of pregnancy or people discriminated against for reasons of language, ethnicity, religion and sexual orientation, people with disabilities, etc.).

In the light of the legislative interventions that have taken place since the beginning of the 21st century, some categories of victims, the so-called weak subjects, has become basis for a reconsideration of the victim in criminal law in radical terms with respect to the past. However, this involves a profound change in the way of conceiving the crime and the penalty, with inevitable repercussions also on the procedural sector. Once the indistinct figure of the offender and the victim has been demolished, due to the concretization of the various types of offenders and victims, there is a risk of a process of privatization of penal protection, according to a movement contrary to that which over the centuries has led to the advertising of legal assets protected, even in an authoritative perspective. There is therefore the risk that, once space has been given back to the victim, the conditions will be created for a historical-juridical movement that is the opposite of the one that led to the rationalization and containment of the offended person's need for revenge.

On the other hand, this is demonstrated by the introduction of an organic discipline of restorative justice by the legislative decree 10 October 2022, no. 150 (so-called "Cartabia reform" from the name of the Minister of Justice *in tempore*), with which the Government would like to create a "tripolar" dialectic, such that there is no longer only the State that punishes and the perpetrator of the crime who suffers from the punishment, but there is also the victim who actively participates - if the offender freely consents - in the resolution of the issues resulting from the crime with the help of an impartial third party, thereby overcoming a "public" criminal justice system to transfer it to a private matter between the victim and the one who is indicated as the perpetrator. In this term, the victim, with his family and community, comes to constitute a "socially widespread" source of punitive intervention and becomes the owner of the claim to a broad-spectrum of punitive response.

In conclusion, at the end of analysis it is possible to assert that criminal law is now moving from the offence to the subject (active and passive). In this context there is a subjectivization of the crime (*id est* the return to the types of perpetrator) and of the

enhancement of the victim of the crime (*id est* the re-emergence of the instinct for revenge) that is destined to constitute the inevitable future of criminal law.

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THE ROLE OF COMPLIANCE PROGRAMS IN PREVENTING AGE DISCRIMINATION: AN ANALYSIS IN THE LIGHT OF BRAZILIAN LAW 10.741/03

It is indisputable that contemporary society is marked by mass consumption, which has as protagonists large companies (often multinationals) that operate in the production, distribution and sale of the most varied products. The emergence of these entities that are undeniably complex, powerful and active in the most varied sectors of society, brought with it a greater concern with the crimes committed from this business environment and harmful to the interests not only of the company itself, but also of its employees and third parties. It is precisely in this context that compliance programs have gained prominence as an important instrument for preventing and repressing economic and business crimes. That being said, the object of this investigation focuses on a specific niche of crime that can also be committed from the business environment: elderly discrimination. It is a fact that in each of the stages of the customer chain, there may be facts that are harmful to the interests of the elderly, either by preventing or unjustifiably hindering their access to rights, services, products or jobs, or by displaying or conveying in media, advertisements with information or images that are derogatory or offensive to the elderly person. Aware of this reality, Brazilian legislators approved in 2003 the so-called Statute of the Elderly (Law 10.741/03), which also underwent significant changes through Law 14.423/22. This is a law that provides not only for some fundamental rights of the elderly, but also criminalizes various behaviors that are harmful to the interests of these people. In view of this scenario, the aim of this paper is to analyze the role of compliance programs in preventing elderly discrimination and how they can affect criminal liability, in the light of the Brazilian legal system. To do so, we will initially study the concept, fundamentals and concrete structure of compliance programs. Subsequently, we will analyze Law 10.741/03 (with the modifications brought by Law 14.423/22) in detail, with special attention to the crimes foreseen therein. At the end of the investigation, we will seek to understand how compliance programs should be structured so that they can be effective in preventing crimes against the elderly and how they can be considered in the attribution of criminal responsibility to individuals and legal entities, for the crimes provided for in the Law under analysis.

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Introduction

It is indisputable that contemporary society is marked by mass consumption, which has as protagonists large companies (often multinationals) that operate in the production, distribution and sale of the most varied products. The emergence of these entities, which are undeniably complex, powerful and active in several sectors of society, brought with it a greater concern with the crimes committed from this business environment and harmful to the interests not only of the company itself, but also of its employees and third parties. It is precisely in this context that compliance programs have gained prominence as an important instrument for preventing and repressing economic and business crimes.

That being said, the object of this investigation focuses on a specific niche of crime that can also be committed from the business environment: *ageism*. It is a fact that in each of the stages of the customer chain, there may be facts that are harmful to the interests of elderly people, either by preventing or unjustifiably hindering their access to rights, services, products or jobs, or by displaying or conveying in media, advertisements with information or images that are derogatory or offensive to them. Aware of this reality, Brazilian legislators approved in 2003 the so-called *Statute of the Elderly People* (Law 10.741/03), which also underwent significant changes through Law 14.423/22. This is a law that provides not only for some fundamental rights, but also criminalizes various behaviors that are harmful to the interests of these people.

In view of this scenario, the aim of this paper is to investigate the role of compliance programs in preventing and facing elderly people discrimination. To do so, we will initially study the concept, fundamentals and concrete structure of compliance programs. Subsequently, we will analyze Law 10.741/03 (with the modifications brought by Law 14.423/22) in detail, with special attention to the crimes foreseen therein. At the end of the investigation, we will seek to understand how compliance programs should be structured so that they can be effective in preventing the crimes under analysis.

1. On the origins, foundations and procedures of compliance programs

In the mid-1930s the Securities and Exchange Commission - SEC began to require companies to establish self-policing controls to prevent insider trading, which meant that, in the 1950s, most of the agencies and financial intermediaries were provided with (still primitive) forms of compliance programs. In the 1940s, the Department of Justice - DOJ dismantled a relevant cartel of companies operating in the field of electrical components, starting to demand from these corporations the adoption of compliance programs to prevent competition offenses. These two episodes are, according to Adán Nieto Martín, the beginnings of what we currently understand as compliance programs, although these have undergone significant changes over the decades[1].

With the disclosure of the *Watergate* scandal in the United States in the 1970s, a complex network of illegal financing of political parties and illegal commercial practices by numerous North American companies was also discovered. The complexity of the investigations exceeded SEC's human and financial resources, which is why it began to adopt as a strategy, agreements with companies that collaborated with the clarification of the facts[2].

This case led to the popularization of compliance programs and internal investigations, which ended up being institutionalized through the *US Sentencing Guidelines* of 1991. These provided for the reduction of penalties for legal entities that had, before the commission of the crime, systems of prevention and detection of infractions, in addition to other benefits for those who communicate the facts to public authorities before they become publicly known, cooperate in their investigations and/or confess them[3].

At the turn of the millennium[4], with the disclosure of major financial scandals such as those of Enron, WorldCom and Parmalat[5], these programs became the object of great attention again, especially in the context of the emergence of the idea of *enforced*

[1] Nieto Martín, 2015: 27-28. As pointed out, however, by Eduardo Saad-Diniz (2019: 125), these manifestations of compliance were still primitive, very different from the current configuration of these programs.

[2] Estrada i Cuadras, Llobet Anglí, 2013: 197-198. See also: Coffee Jr., 1977: 1115-1117; Mathews, 1984: 662ff.

[3] Estrada i Cuadras, Llobet Anglí, 2013: 198-199. See also: First, 2010: 36ff.

[4] As Susana Aires de Sousa (2021: 29) points out, it is with the *Federal Sentencing Guidelines* of the 1990s that compliance programs gain truly legal contours, since based on the prior existence of programs with effective application, it was possible to mitigate the penalty applicable to the legal entity. On the evolution of the idea of mitigating the sanction by adopting compliance programs and by the cooperation of legal entities with the authorities, until their "reward" in other procedural moments, prior to the sentence, see: Sousa, 2019a: 12ff.

[5] In this sense, see also: Sousa, 2019b: 125.

self-regulation[6] as the main response to the proven ineffectiveness of the *pure self-regulation* of financial agents with regard to the prevention of illicit acts[7] and the difficulties encountered by the State in its activities of regulation, prevention, investigation[8] and repression of crimes in the corporate context[9]. In other words, the private entities are called upon to participate in those activities, defining their own standards, which are then ratified by the State when in line with public legislation and interests and whose violations can be punished[10].

Within the scope of these enforced self-regulation tools, compliance programs can be understood as instruments of self-supervision and self-regulation inserted in the context of corporate governance, whose immediate purposes are the promotion of a culture of ethics and legal compliance in business activities and the prevention, investigation and repression of illegal practices within the corporate sphere. By its turn, their mediate aims are to maintain or recover the good reputation of the legal person, to secure the continuity of the business with potential profits and, mainly, to protect the corporation, its collaborators and representatives, from eventual liabilities in the most varied spheres, as well as from financial and reputational losses[11].

We observe that these programs have four "fronts" of action in the corporate scope: a) *the regulatory front*, with the establishment of bylaws, ethical standards, competences and internal procedures; II) *the preventive front*, which aims to prevent occurrences that may prove to be harmful to the company, including in terms of subsequent suits; III) *the investigative front*, referring to the occasions in which the corporation finds itself in the position of investigating potentially illegal occurrences that come to its attention; IV) and *the reactive front*, composed of "*post-factum*" compliance procedures, such as internal sanctions and continuous improvement of the program[12].

[6] For a detailed analysis of how society's greater complexity, added to the emergence of increasingly complex technologies, the increase in corporate power and the ineffectiveness of national legal systems, have boosted debates on the most appropriate intervention or self-regulation techniques, especially in the 90s, see: Nieto Martín, 2008: 3, Gómez-Jara Díez, 2016: 92ff, On enforced self-regulation, see: Ayres, Braithwaite, 1992: 101ff.

[7] Sarcedo, 2016: 24.

[8] Neira Pena (2017: 317) lists as some of the difficulties encountered in the investigation of crimes committed in the corporate sphere, the technical complexity of these crimes, the opacity caused by the "veil of legal personality" regarding the concrete actions of its members, the decentralization of decisions, the division of labor , the control exercised by the company over its files and documents and the competent legal advice they have, either beforehand or after the eventual commission of crimes.

[9] Braithwaite, 1982. On the difficulties of prosecuting corporate crimes, see also: Neira Pena, 2014: 198ff.

[10] Ayres, Braithwaite, 1992: 101-107, Coca Vila, 2013: 51, Januário, 2021: 1458-1460.

[11] Januário, 2019: 85-86, Januário, 2023a: 729.

[12] Januário, 2019: 86-87, Januário, 2021: 1461.

As we can see, at the origins of compliance programs lies the pretension of preventing typically economic and business crimes, such as insider trading, cartel, tax evasion, money laundering and corruption[13]. Currently, however, the importance of these instruments is indisputable also for other crimes that do not fit into a strict conception of economic crimes[14]. In this paper, we will analyze the potentialities of these programs for preventing and facing a specific type of discrimination perpetrated through business activities, which is discrimination against elderly people.

2. The protection of elderly people in the Brazilian legal system

Recognizing, on the one hand, the vulnerability of elderly people and the consequent and necessary duty of solidarity for their protection, but also the imperative respect for their autonomy[15], the Brazilian Federal Constitution guarantees, in its Article 230, the duty of the family, society and the State, to support the elderly people and guarantee their participation in the community, as well as to defend their life, dignity and well-being[16]. This is an important innovation of the 1988 Constituent Legislator, especially focused on the protection of human dignity, since the old constitutional focus, prior to this Charter, was guided by patrimonial, productive and economic interests, which prevented any protective approach to this group of people, since they were outside the production chain[17]. The current concept of elderly people, for legal purposes, is brought by Article 1st of the *Statute of the Elderly People*, which thus considers people aged 60 or over[18].

This Statute is certainly the most important law of the elderly protection system in the Brazilian legal order, since, in addition to providing for various rights guaranteed

[13] In a similar sense, see: Sieber, 2013: 70.

[14] There are different understandings regarding the concept of *economic crimes*. Bajo Fernández (1973: 96) understand, based on a *strict concept*, that economic crime is that committed in disfavor of the economic order. Sustaining a broader concept, Schünemann (1988: 529) understands as economic crimes all criminal or administratively punishable actions, committed within the scope of economic life or closely related to it. The author also develops his concept of business crimes, which, according to him, would be economic crimes committed by a company. In turn, Klaus Tiedemann (1983: 61-62), proposes that the branch destined to economic criminal law should encompass not only the transgressions of the so-called "economic administrative law", which would protect the activity of regulation and intervention of the State in the Economy, but also the crimes that violate supra-individual legal interests related to economic life, as well as criminal facts related to the so-called "classic patrimonial criminal law", provided that they are directed against collective legal interests or constitute abuse of measures and instruments of economic life. For a comprehensive analysis, see: Canestraro, Januário, 2022b, p. 74.

[15] Ribeiro (2020: 661)

[16] Brasil, 1988.

[17] Moraes, Teixeira (2018: 2248).

[18] Brasil, 2003.

to this group of people (such as the right to freedom, respect, dignity, food, life, health, education, housing, work, protection, among others), also provides that they will be guaranteed full protection and ensured, by all means, equal opportunities and absolute priority in the realization of their rights[19].

With regard specifically to the right to non-discrimination, it is interesting to note that the Brazilian Federal Constitution is clear in prohibiting, in its Article 3rd, any kind of prejudice based on age[20]. This prohibition is also provided for by Law 8.842/1994, which guarantees that elderly people cannot suffer discrimination of any kind[21], and by Law 9.029/95, which prohibits discriminatory conducts based on age, in hiring and maintaining employment relationships[22]. The latter also provides for that, in the event of dismissal based on age, the employee will be assured, in addition to financial compensation, the choice of reintegration into employment with receipt of all wages for the period in which he/she was away, or, if he/she does not want to be reinstated, receiving double the wages in question[23].

In addition to other important provisions regarding the rights and instruments of protection for the elderly people, the Brazilian *Statute* also typifies several behaviors to be considered crimes against their interests. As for the specific object of the present study, it is important to point out Article 96, which provides for a penalty of six months to one year, plus a fine, for those who "practice discrimination against an elderly person, preventing or hindering his/her access to banking operations, means of transportation, the right to contract or by any other means or instrument necessary for the exercise of citizenship, due to age". The same penalties are provided for those who "disdain, humiliate, belittle or practice discrimination against an elderly person, for any reason"[24].

Article 100 of the *Statute of the Elderly People* also typifies specific acts of discrimination, in the following terms:

> "Art. 100. It is a crime punishable by imprisonment from 6 (six) months to 1 (one) year and a fine:
> I - prevent someone from holding any public office due to age;
> II - deny someone, due to age, employment or work;

[19] Brasil, 2003, Ribeiro (2020: 662).

[20] Brasil, 1988.

[21] Brasil, 1994.

[22] Ribeiro (2020: 664-667).

[23] Brasil, 1995.

[24] Free translation. Brasil, 2003.

> III - refuse, delay or hinder care or fail to provide health care, without just cause, to the elderly person;
> IV - fail to comply with, delay or frustrate, without just cause, the execution of a court order issued in the civil action referred to in this Law;
> V - refuse, delay or omit technical data essential to the filing of the civil action object of this Law, when requested by the Public Prosecutor's Office"[25].

It is also important to mention the crime provided for in Article 105, which establishes a penalty of one to three years and a fine, for anyone who "displays or conveys, by any means of communication, information or images that are derogatory or offensive to the elderly person[26]".

As noted, in addition to other conducts contrary to the interests of elderly people, the *Statute* criminalizes various forms of discrimination against them, whether in terms of hiring, provision of services, advertisements, or any other means. Furthermore, when it comes to crimes committed against elderly people, both the Brazilian Penal Code (Article 61, h) and the Consumers' Code (Article 76, IV, b) provide for that this fact is a circumstance that aggravates the crime and, consequently, the penalty to be applied[27].

3. The importance of compliance in preventing ageism in Brazil

Bearing in mind the aspiration to guarantee elderly people not only their right not to be discriminated against, but also to participate in society on full terms of equality, it is important to pay attention to situations in which they may be victims of crimes related to business activities, either as workers or as *direct* or *indirect*[28] consumers. Based on this possibility, the issue that we will address concerns the potentialities and particularities of compliance programs in Brazil, with regard to preventing and facing discrimination against elderly people.

For that, the first question to be answered regards the incentives for the adoption of compliance programs in Brazil. In other words, since the Brazilian legal system does

[25] Free translation. Brasil, 2003.

[26] Free translation. Brasil, 2003.

[27] Brasil, 1940, Brasil, 1990.

[28] Brazilian legislation extends the protection of consumers to those who are not strictly consumers of the product or service in question, but who have been victims of damages or defects caused by them. They are called "indirect consumers", "consumers by equivalence" or "bystander consumers", and their protection is provided for in Article 17 of Law 8.078/90. See in detail at: Brasil, 1990, Januário, 2023b: 195, Andrade, Masson, Andrade, 2020: 541.

not impose them, one wonders why companies and their administrators would be motivated to make high financial investments in these programs, if, after all, they could even be condemned based on the information collected by themselves.

According to Engelhart, there are six progressive levels of state incentives directed at companies, in terms of implementing compliance programs: I) *self-regulation*, characterized by state abstention, in which incentives for the adoption of these programs would derive solely from potential benefits or market demands; II) *informal state support*, through training and other incentives; III) *rewarding compliance*, through its consideration in non-prosecution or deferred prosecution agreements, or even as a basis for reducing the sentence; IV) *sanctioning the lack of compliance*, which may result in the aggravation of penalties or even in the court order of adoption or correction of the program; V) *excluding responsibility due to compliance*, which is certainly one of the strongest and fairest incentives, reason why it has been progressively adopted by legal systems; and VI) a *general obligation to implement compliance programs*, which would be the strongest level, but it is still not observed in most countries, with the exception of sectorial obligations, such as those directed at activities with high-risk of money laundering[29].

In the Brazilian legal system, not only is there no general obligation to implement compliance programs, but also no incentive can be extracted from corporate criminal liability. That is because not only is it restricted to environmental crimes, but also the *vicarious model* adopted does not take into account the implementation of compliance programs[30]. The major incentives for the adoption of these programs lie, in addition to market interests, or in specific sectors (such as anti-money laundering or anti-corruption), or the obligation of many companies before foreign laws (such as the North-American FCPA).

It is true that, since compliance programs are generally not structured in a *sectorial manner*, aimed at managing only specific risks, but rather, in a broad and general manner, aiming to promote a real change in the corporate culture and to prevent and punish all identified violations, the anti-discriminatory scope will certainly benefit from the existence and effectiveness of these programs, even if the incentives specifically designed for this sector are subtle, in the Brazilian system. However, we believe that the efficiency of prevention and repression of discriminatory acts against elderly people lacks the provision for corporate criminal responsibility for these crimes, especially through models that take into account the adoption of effective compliance programs.

[29] Engelhart, 2018: 21-30. See also: Canestraro, Januário, 2020: 230, Januário, 2021: 1466-1467.

[30] See in details at: Januário, 2018: 211ff.

It is also evident that the mere adoption of a "*paper compliance program*" is not enough, and it is very important to analyze how it should be structured in order to be considered effective. There is no pre-defined model, nor would it be ideal if it existed, since it depends on the particularities of the company, its sector of activity and the legal systems to which it is subject[31]. The Brazilian anti-corruption system, for example, establishes, through Article 57 of Decree 11.129/22, the parameters from which the effectiveness of compliance programs will be evaluated, for the purpose of mitigating the fine eventually imposed on the company. Among others, they are: management's commitment; codes of ethics and standards of conduct; trainings; risk management and periodic evaluation of the program; accounting records audited by internal controls; independence of the compliance department; reporting channels and whistleblower protection programs; disciplinary measures; procedures that guarantee the immediate interruption of infractions and remediation of damages; and due diligence procedures[32].

Bearing in mind the particularities of this scope and starting from the theoretical model proposed by Marc Engelhart[33], it is possible to identify some important aspects to be observed in the *i) formulation, ii) implementation, iii) consolidation and improvement* of compliance programs, in order to ensure their effectiveness in prevention and repression of ageism.

The *formulation* of the program, characterized by the trinomial *detect - define - structure*, includes risk management procedures, approval of a code of ethics and standards of conduct, the establishment of a whistleblowing channel and the definition of competences within the scope of the program. At this stage, it is important that the particularities of the company and its sector of activity be considered, in order to properly identify the risks derived from its activity and the proper procedures for mitigating them. With regard specifically to the object of the present study, it is essential to carry out a prior analysis of how and to what extent the corporation can be involved in acts of age discrimination (e.g., through age-based hiring criteria, inappropriate marketing campaigns or premises without proper accessibility measures) and conducting studies to mitigate these situations (Ljubičić, 2021: 525). Corporate values of inclusion and non-age discrimination in all corporate activities must be expressly included in the code of ethics and be implemented through standards of conduct that ensure that employees promote them daily in their scope of action.

[31] See: Rodrigues, 2020: 102.

[32] Brasil, 2022, Brasil, 2013.

[33] See in details at: Engelhart, 2012: 711-719

The *implementation* of the program, marked by the trinomial *communicate - promote - organize*, encompasses the daily dissemination and promotion of compliance, as well as the training of employees and interested parties. It is essential that all employees be aware of the aforementioned corporate values and concrete standards of conduct to be observed in their respective activities, without prejudice, of course, to the possibility of contacting the help-desk in case of doubts. However, there is no point in providing for abstract rules and imposing them on employees if senior management is not committed (e.g., one could think of the numerous cases of companies that do not have long-term career plans and adopt as a policy the frequent replacement of employees to reduce costs). There must be a true engagement from the latter not only to non-discriminatory values, but to the compliance program itself. This involvement could be observed, for example, in the constant supervision of compliance with the company's policies, in frequent updating and awareness actions, in valuing long-term employees and in strict attention to the needs of the elderly public.

Another important aspect concerns the company's commercial partners. As advantageous as a certain business may be, in financial terms, the company cannot simply ignore any lack of commitment of its commercial partner, with anti-discriminatory values. For this reason, due diligence procedures[34] are essential to assess whether its current or potential commercial partners, as well as its subsidiaries, are engaged, in every way, in the prevention and repression of ageism in their activities.

Finally, the *consolidation and improvement* of the program, characterized by the trinomial *react - sanction - improve*, encompasses the internal investigation and sanctioning procedures, as well as the evaluation and continuous improvement of the company's compliance. It is evident that the creation of several preventive mechanisms is not enough if the corporation does not undertake to investigate and punish eventual violations. For this reason, it is important that denouncements of ageism are properly investigated and, if the facts are proven, the perpetrators are exemplarily punished. In addition, it must be evaluated whether there was a failure in the compliance program and how it can be updated, to avoid similar situations in the future.

Conclusion

As demonstrated throughout the investigation, if, on the one hand, the participation of elderly people in the production chain, either as employees of large corporations or as consumers of the products produced by them, is the realization of their right to full

[34] See: Canestraro, Januário, 2022a.

and equal participation in society, on the other hand, it amplifies the situations in which they can be victims of discrimination in the most varied business activities. In view of this situation, the Brazilian *Statute of the Elderly People* provides for as crimes, several conducts that constitute discrimination in various areas and activities, such as hiring, assuming public offices, providing services, advertisements, among others.

In our view, despite the lack of legal incentives in this regard (e.g., absence of criminal liability for legal entities in Brazil, with the exception of environmental crimes), compliance programs play a fundamental role in preventing and confronting ageism committed from business activities. Either because of the changes in the business culture that they promote, or because of their concrete mechanisms that help in the prevention, detection and internal repression of concrete episodes of discrimination, we understand that these programs are very important in aiding the public authorities to face these crimes.

Bearing in mind not only the *horizontal effectiveness of human rights*, but also the leading role assumed by large corporations in contemporary society, the *neutrality* of these agents in the face of discriminatory acts is no longer enough[35]. It is imperative that they assume an active role in this battle, and effective compliance programs are a fundamental instrument for achieving this objective.

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[35] See: Pereira, Rodrigues, 2021.

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III

Undermining the Basic Human Rights of Older People

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COVID-19 DISCRIMINATION OF ELDERLY PEOPLE

The so-called coronavirus epidemic, which started in 2019 and spread around the world, generated a lot of new measures. There were many who called for the introduction of the strictest possible epidemiological restrictions, including isolation of people - especially the elderly - and restrictions on all aspects of life. The wearing of masks became a requirement, and the uptake of vaccines, which are still in the experimental stage, was increasingly urged. The legislator has also introduced criminal sanctions in the context of disease management.

On the other hand, there were those who tried to fight for the freedoms of all people, especially because the official position on the origin and manageability of the covid19 epidemic was constantly changing. In this situation, the older generation was particularly vulnerable, who often did not have their own right to decide whether to get vaccinated, what protection it would give them or what disadvantages it might cause. In some cases, the need for health care was limited. The presentation tries to show what constitutional problems may arise in connection with epidemic management to the detriment of the elderly people.

Keywords: *epidemic, criminal procedure, discrimination, elderly people, extraordinary legal order, pandemic emergency, fearmongering*

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1. The Prohibition of Discrimination in Hungarian Constitutional Practice

The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognized by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms.[1]

Hungary's constitution, known as the Fundamental Law (*Alaptörvény*), declares, "Every person shall be equal before the law. Every human being shall have legal capacity. Hungary shall ensure fundamental rights to every person without any discrimination on the grounds of race, color, gender, disability, language, religion, political or other views, national or social origin, racial, birth or other circumstances whatsoever. Women and men shall have equal rights. Hungary shall adopt special measures to promote the implementation of legal equality. Hungary shall adopt special measures to protect children, women, the elderly and persons living with disabilities." [2]

According to the practice of the Constitutional Court, the clause on legal equality expresses a constitutional obligation for those exercising public power "to treat all persons with equal dignity and to apply equal standards and fairness toward their individual characteristics. It follows that a specific regulation does not meet the constitutional standards enshrined in the Fundamental Law if it ultimately violates the right to human dignity. In other words, the principle of legal equality does not prohibit all forms of discrimination, but rather only discrimination that violates human dignity." [3]

"Within the same regulatory concept, applying disparate regulations to a given homogeneous group conflicts with the prohibition of discrimination, unless such deviation has a reasonable, sufficiently weighted constitutional reason, i.e. it is not arbitrary. However, according to the standing practice of the Constitutional Court, a legal regulation that establishes different provisions for a group of subjects with different characteristics

[1] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Preamble, paragraph 3.

[2] Hungarian Fundamental Law, Article XV, paragraphs 1-5

[3] Hungarian Constitutional Court Decision 3206/2014 (VII. 21); Constitutional Court Decision 2/2021 (I. 7); Constitutional Court Decision 32/2021 (XII. 20)

cannot be considered disadvantageous discrimination, because unconstitutional discrimination is only possible among persons who are comparable - i.e. belonging to the same group."[4]

It is possible to establish that discrimination contravenes the Fundamental Law - that is, it violates human dignity - in cases where a discriminatory measure is imposed arbitrarily. In general, disadvantageous discrimination is considered arbitrary if it does not have a reasonable, sufficiently weighted constitutional rationale. In order to determine this, it is first necessary to examine the measure's legitimate purpose. It is also necessary to evaluate, on the one hand, whether the measure is suitable for achieving this legitimate goal, and on the other hand, whether the group targeted by this legitimate goal coincides with the group of persons affected by the measure. These questions help shed light on whether differentiation can be regarded as arbitrary and without reasonable grounds.[5] However, in contrast to the Constitutional Court's strict practice, it is also possible to interpret excessive emphasis on equal opportunities as being overly restrictive on legislators.[6]

With respect to the concept of equality before the law, according to the Constitutional Court's decision, legislators can only be guided by considerations beyond equality to a limited extent: For example, they may justify why it is necessary to subordinate the principle of equality to other goals, but this is only possible if the measure in question is proportionate to achieving these goals. On the one hand, this equality-centeredness establishes the framework for the legislator's freedom to discriminate with regard to homogenous groups of people, but even beyond this, if the group of people is not homogenous, but the distinction between different types of cases (documents) may occasionally bring people who otherwise belong to different groups into a single group. However, according to Constitutional Court Judge Béla Pokol, this constraint forces the legal concept of equality-centeredness on democratic legislators and empties out their freedom to make decisions, relegating moral considerations beyond equality (as well as concerns such as economic, cultural, security, etc.) to the background. Equality before the law should therefore not be overemphasized or understood as a "general right to equality," because this would severely limit the manifestation of democratic political will. A decision based on the wishes of millions of voters is voided if the political powers that obtained a majority in Parliament can only formulate laws within a narrow framework, with only the most limited consideration for values and views other than equality. In a political democracy -

[4] Hungarian Constitutional Court Decision 42/2012 (XII. 20); Constitutional Court Decision 2/2021 (I. 7)

[5] Hungarian Constitutional Court Decision 3206/2014 (VII. 21)

[6] See Hungarian Constitutional Court Judge Béla Pokol's dissenting opinion in Constitutional Court Decision 42/2012 (XII. 20)

a state governed by rule of law - this would place unacceptable constraints on the decision-making freedom of the legislative majority; therefore, according to Pokol, this interpretation should not form the basis of the Constitutional Court's jurisprudence.[7]

However, the right to equal personal dignity can sometimes beget a right to the equal distribution of goods and opportunities to everyone (in a quantitative manner, as well). But if a social goal does not breach the Constitution, or a constitutional right can only be enforced in such a way that equality (in a narrow sense) cannot be realized, then such positive discrimination does not qualify as unconstitutional. The limitation on positive discrimination, taken in a broader sense, can be regarded as the prohibition of discrimination toward equal dignity as well as the fundamental rights positively formulated in the Constitution. Although social equality as a goal, as a social interest, can take precedence over individual interests, it cannot eclipse an individual's constitutional rights.[8]

The issue is, of course, very complex. (e.g. Milana Ljubicic 2021:525) In this paper I present only a few selected thoughts. in connection with elderly people.

2. Extraordinary legal order in Hungary in regard to the pandemic emergency

The pandemic caused by the new coronavirus posed serious challenges to the legal systems of affected countries. (Lazar Stefanovic2021:603)

Hungary's government implemented a so-called "extraordinary legal order" that granted it special legislative powers in order to manage the pandemic more effectively (at least that was the justification). As Bartkó points out, science must examine whether these factors have changed the legal-policy ideas behind the regulations that shape the various branches of law, or whether, in practice, they have resulted in new codification principles. (Bartkó, 2022, 11.)

The role of science here is paramount, since many people suspect that states are curtailing existing freedoms in connection with defending the public against the pandemic. It is difficult to speak out against this, since there has been a threat of criminal sanctions against those who express critical opinions about pandemic management from the outset.

Hungary implemented its special legal order aimed at combatting the coronavirus in March 2020. The government's decision-making direction was determined by a new, difficult-to-define aspect - the consideration of pandemic regulations.

[7] Béla Pokol, ibid.

[8] Hungarian Constitutional Court Decision 9/1990 (IV. 25)*

The basis for this deviation from statutory norms is Article 53 (2) of the Fundamental Law, which authorizes the government to declare a state of emergency and, by decree, suspend the application of certain laws, deviate from statutory provisions, and take other extraordinary measures.[9]

In fact, the Government's authority to rule by decree is the subject of debate among legal scholars who specialize in criminal and criminal-procedure law. In accordance with the standards regulating the extraordinary legal order, government decrees may only deviate from statutory rule if they are closely related to treating the sick or mitigating the pandemic's consequences. Such decrees must also be appropriate for alleviating or eliminating the circumstances that necessitated the special legal order. Therefore, extraordinary measures are not worrisome during a period of special legal order so long as they relate to the reasons that the extraordinary situation was introduced and facilitate efforts to conclude it as soon as possible.[10]

During the COVID-19 epidemic, legislation in almost all areas switched to rule by decree. Social relations that could otherwise only be regulated by law also fell subject to government decree. All this raises further questions regarding the prohibition of discrimination, since the legal protection of the most vulnerable social groups, such as the elderly and the sick, may falter in such cases. Examining the guarantees that fall within the scope of criminal law, we see that these protections normally manifest themselves at several levels of society. The primary guarantee of constitutional lawmaking is political will, which requires the maintenance of legality. (Lukács 2022: 200.) However, this becomes very doubtful in light of the rule-by-decree that was introduced to combat the pandemic: Unless there is complete political unity in a country, extraordinary governance raises the possibility that some social strata will feel that the measures harm their interests.

The second requirement is that criminal legislation be enacted by statute. The third layer of guarantees, according to jurist Tibor Király, is the system of legal safeguards that are developed by social sciences, particularly jurisprudence, and are incorporated into criminal law and justice. Among these, Király highlights the principles of individual criminal responsibility, officiality, the presumption of innocence, and *nulla poena sine lege*. Finally, the fourth level of guarantees is social awareness and involvement - that is, for society to understand and recognize its own responsibility. (Király, 1981:359)

However, society cannot be aware and involved if people do not have reliable information about a situation or if the official information is contradictory, uncertain or hastily compiled. Thus, the elderly social stratum, which is the most vulnerable and has

[9] The Hungarian Parliament granted the government emergency authorization with respect to the COVID-19 pandemic in Act XII of 2020.

[10] Hungarian Constitutional Court Decision 23/2021 (VII. 13) [28]

the greatest difficulty obtaining information, cannot make responsible decisions about their own health. The elderly are much more likely to accept as fact what they hear on TV and radio, or perhaps take their doctors' advice at face value. Their situation becomes even more disadvantageous if they cannot readily access news from the medical community - for example, the best ways for individuals to protect themselves against the pandemic.

Government decree 220/2021 (V.1) on action against the misuse of vaccination certificates, introduced during the extraordinary legal order occasioned by the pandemic, added new provisions to the Criminal Code. The law stated, "whoever prepares a public or private document specified in the government decree on certificates of vaccination against the SARS-CoV-2 coronavirus, falsifies the contents of a public or private document, uses a fake, falsified or genuine public or private document in another's name, or, without authorization or in violation of his or her authority, enters data into an information system, or changes, deletes or makes it inaccessible, may be punished by imprisonment of up to five years."[11]

The Constitutional Court heard a complaint aimed at annulling this statute. The plaintiffs argued that it violated the principle of *nullum crimen sine lege*, the requirement for criminal law to be regulated at the statutory level.[12] They also argued that the fundamental right enshrined in Article XXVIII (4) of the Fundamental Law cannot be suspended or restricted beyond the extent set forth in Article I (3), even when a special legal order prevails.[13]

The criminal statutes related to vaccination cards are directly related to possible discrimination against the elderly because they could not get by in many areas of life without receiving mandatory vaccinations - which, as it happened, lacked final approval from medical authorities. The plastic vaccination card confirmed the holders' vaccination status, but did not prove that they were actually protected against the virus. It only affirmed that they had received a jab with uncertain side effects.

People who did not have vaccination cards were restricted in many areas of life. The elderly were particularly affected by limitations on using the healthcare system, access to hospitals, and placement in nursing homes. (This affected the decision whether to get vaccinated or not. e.g. Elena Tilovska-Kechedji, 2021: 617-629)

In the end, the Constitutional Court did not rule on the constitutional concerns surrounding the vaccination cards because the decree that introduced them expired on

[11] Hungarian Criminal Code

[12] Hungarian Fundamental Law Article B (1); Article I (3); Article XXVIII (84)

[13] Hungarian Constitutional Court termination decision 3325/2022 (VII. 21)

June 1, 2022, before a decision could be reached. Since there were no proceedings against the petitioner in which the contested statutes could be applied, the petition could no longer be adjudicated.

Regardless, it can be deduced from the Constitutional Court's previous practice that the constitutional principle of criminal-law legality means that only legislation, not lower-level legal sources, can determine crime and punishment. The designation of a specific act as a "crime" must be necessary, proportionate and based on constitutional grounds.[14] According to Constitutional Court practice, the basic institutions of criminal law cannot be relativized, and no other constitutional right or duty can be imagined that would contravene them.[15] Therefore, the condition of *nullum crimen sine lege* cannot be set aside, not even by the duty to protect constitutional rights and interests. There is simply no place here to consider the historical situation, justice, etc. (Lukács 2022: 200.) Conceptually, an exception to criminal guarantees would only be possible if the guarantees were set aside - but this is precluded by the principle of the rule of law.[16] The requirement that criminal law be regulated at the statutory level thus became part of constitutional criminal law.

3. Fearmongering in the Criminal Code

Due to the COVID-19 pandemic, a decree was issued amending Criminal Code §337, which contains provisions on fearmongering. The new statute read as follows: "During a special legal order, whoever, before a wide audience, states an untrue fact or spreads a rumor, or distorts a true fact, in a manner suitable for obstructing or thwarting the effectiveness of public defenses, shall be punished for a crime with imprisonment from one to five years."[17]

A procedure was initiated at the Constitutional Court arguing that this was unconstitutional. The plaintiffs said it imposed a state of complete uncertainty on practically everyone who speaks out on public affairs, or even just uses social media, when a special legal order is in place. It was not possible to know exactly what kind of speech is punishable under the law, moreover with up to five years in prison. Even during the preparation of the complaint, there was a heated debate among both experts and laymen about whether face masks should be worn in public for protection against the coronavirus, the plaintiffs

[14] Hungarian Constitutional Court decision 1992/77, 87

[15] Hungarian Constitutional Court decision 9/1992 (I. 30)

[16] Hungarian Constitutional Court decision 1992/77, 83

[17] Hungarian Criminal Code §337(2)

noted. The World Health Organization itself did not recommend mandatory face-masking, while other experts did. If someone publicly espoused either side of the debate as an "indisputable professional point of view," and later - perhaps tragically - turned out to be wrong, would they be held responsible?

It was impossible to know what this legal formulation portended during the pandemic. At the moment, we still do not know what the best method of protection against the coronavirus is. We don't even know if any "good" protection exists, or whether our only options range between "bad" and "worse." The same is true for alternative treatment methods and social protocols. In all the ongoing debates, it is impossible to say - with very limited exceptions - what may actually obstruct or thwart public defenses against the virus.

Overall, §337(2) of the Criminal Code is completely unpredictable and provides ample scope for arbitrary application. It is not even clear what groups of potential offenders the law intends to address - scientific experts, the authorities, or everyone? It is therefore incompatible with the basic principles of constitutional criminal law and the relevant practice of the Constitutional Court, so it must be annulled.

The Court rejected the argument that Act C of 2012 §337(2) of the Criminal Code was unconstitutional along with the complaint asking the judges to nullify it.[18] In its reasoning, the Court argued that the difficulties arising from the wording of the norm only pose a threat to legal certainty - thereby making its nullification inevitable - in cases where the legislation is uninterpretable from the outset, making its application unpredictable for the addressees. {Constitutional Court Decision 3106/2013 (V. 17), Justification [10]}.

The Court ruled that there was insufficient basis for concluding that the individual definitions in the Criminal Code's new provision - fact, statement of fact, statement of untrue fact, distortion of fact, the distinction between fair comment and rumormongering, special legal order, wide audience, etc. - were uninterpretable and therefore inapplicable. A court of general jurisdiction may conclude that the subject of the crime cannot be criticism of government measures taken during a special legal order, predictions about future events, or speculation about data withheld from the public in connection with the special legal order.

It is also up to judicial practice to determine what kind of method was used to commit a crime - that is, what kind of act is suitable for "obstructing or thwarting the effectiveness of the public defenses." Neither the effectiveness of the public defenses, nor the obstruction, nor the thwarting are uninterpretable factual elements.

[18] Hungarian Constitutional Court Decision 15/2020 (VII. 8)

Fearmongering can only be committed intentionally. It follows that offenders must be aware that they are carrying out an act during a special legal order; that they have asserted an untrue fact or have significantly distorted a real fact; and that the communication of their assertion is (objectively) capable of obstructing or thwarting the effectiveness of public defenses. Moreover, the perpetrator must intentionally commit the aforementioned conscious communication in front of a wide audience. If the accused's state of mind or intention does not cover any element, or if the statement was objectively unsuitable for obstructing or thwarting the effectiveness of public defenses, a crime has not been committed under the rules of criminal law. Authorities must prove that the fearmongering was carried out as described, covering all elements in the provision.

Therefore, the ban only applies to knowingly untrue (or distorted) statements of fact, not to critical opinions. There is mature jurisprudence to the effect that such critical opinions should be considered protected speech, and since the pandemic is currently one of the most important public matters, the strictest protection must be provided for public debates on this subject within the framework of statutory legal norms. The freedom of criticism is also widely protected by courts that deal with civil cases.

Regardless of the Constitutional Court's decision, it can be stated that the still-unknown nature of judicial practice in this area, along with the threat of punishment, may engender self-restriction in the free expression of opinion. All of this results in the fact that the elderly, who have greater difficulty accessing information than youngsters, are less able to inform themselves, and are informed by fewer sources, are at a disadvantage when it comes to making responsible decisions for themselves.

Naturally, hindsight always makes us smarter when it comes to determining what constitutes fearmongering and what is true fact.

For instance, the number of reported side effects from COVID-19 vaccines, listed under the term COVID-19 in the European Medicines Agency's official database, is staggering. The database contains 1,224,705 reported side effects related to Pfizer-BioNTech's mRNA vaccine (Cominarty), and the list is obviously far from complete.[19]

[19] European database of suspected adverse drug reaction reports (www.adreports.eu), accessed on June 17, 2023.

4. Special criminal-procedure rules during the pandemic

The government first regulated the different procedural provisions - not only with respect to criminal-procedure law, but other areas of law as well - in Government Decree 74/2020 (III.31), which entered into force on March 31, 2020. (Decree)

An example of how the pandemic changed the rules of criminal proceedings can be seen in the issue of trial attendance, which affected various social-age groups differently.

During the state of emergency that was declared in response to the coronavirus, it was already questionable whether trial participants wanted to appear in court in person after receiving an official summons. Not everyone could get to the hearings by car, and people were advised to avoid public transport in order to minimize the spread of infection. The virus posed a particular risk to the elderly and people suffering from chronic diseases, so it was not prudent for such people to appear before the authorities when summoned. (Herke: 2021:179)

The Hungarian Criminal Procedure Act, which went into effect on July 1, 2018, emphasizes procedural self-determination and technological advances. In the situation caused by the coronavirus, reducing the number of human-to-human contacts became a legislative goal.

The 2020 Decree also sought to reduce mandatory participation to a minimum for both authorities and trial participants. The Decree automatically classified people over the age of 65 as "persons requiring special treatment," as their movement was restricted by the new pandemic rules, without the need for a special decision from a judge.[20]

Due to the pandemic regulations, a relatively large number of people were ordered into mandatory quarantine. These pandemic restrictions and the new obligations imposed on citizens obviously affected the issue of trial attendance. The elderly were particularly affected by the quarantine obligation.

In the event that the possibility of violating pandemic measures arose, it became an independent new reason for the suspension of criminal proceedings. It provided an opportunity for the acting authority or court to postpone individual procedural actions. This could happen if other tools of procedural law were unable to make personal presence possible. Such procedural tools included presence by means of a telecommunications device, the use of a video or audio recordings of previous procedural acts, or the authorization of a written statement. In cases of procedural actions for which personal presence

[20] Decree 48 §

would normally have been mandatory, the pandemic rules discouraging in-person contact took precedence.

One such alternative solution was electronic contact instead of paper-based contact. One of the by-products of the pandemic rules was "document quarantine," as a result of which several days passed between the time of postal delivery and the time authorities actually received a document. In order to avoid this problem, paper-based delivery was replaced by delivery to an electronic mailing address, even for people who were not obliged to maintain electronic contact.

The Criminal Procedure Act also allows the use of telecommunications devices under normal circumstances. However, the Decree suspended some of the guarantees on their use during the pandemic. For example, the Decree made it possible to ensure presence in court only through a continuous voice connection; it even became possible for authorities to order the use of a telecommunications device without the consent of the defendant (the accused). The Decree left the decision on whether to use a telecommunications device up to the authorities' discretion, so there was no room for legal remedy against a rejection of a motion to use a telecommunications device, an order for such device to be used, or a motion to ensure personal presence.[21]

During the state of emergency, electronic-document management became standard for personal documents in criminal proceedings. The provision of information on the contents of case files could only be ensured in a way that did not require personal presence.[22]

Thus the rules on the use of electronic devices and the opportunity to use electronic communication were expanded, and sometimes made mandatory. There is no doubt that the regulations during the pandemic sought to limit the consequences of breaking the rules of electronic communication.

However, it is not difficult to see that the requirement to have an email address, which is natural for the younger and middle-aged generations, often posed an insurmountable difficulty to the older generation. The same can be said for telephone or computer-video applications that enable participation in negotiations or other procedural acts. A part of the older age group was hence deprived of the chance to file a claim.

[21] Decree 56 §

[22] Decree 53 §

5. Beyond science (instead of conclusions)

It is also necessary to point out that fear of vaccination (one of the primary tools for pandemic prevention) may stem from religious belief. Many Christians preferred to remain unvaccinated even if it meant they would be unable to travel, shop (or to shop only to a limited extent), visit the theater or cinema, take their home-grown produce to market, or attend public events. They chose not to inject the vaccine into their right arm, although it was advertised as solid protection from the virus. All of this inevitably reminds us of one of the most well-known verses from the Book of Revelations, which foresees the arrival of a supernatural beast who "forced all people, small and great, rich and poor, free and slave, to have a mark on their right hand or on their forehead. No one could buy or sell without this mark, which is the name of the beast or the number of its name. This takes wisdom. Let the one who has understanding find the meaning of the number, which is the number of a person. Its number is 666."[23] It is not difficult to see that religious belief made many people unwilling to accept the vaccination that ensured access to certain services during the pandemic, as they saw the sign of the devil in it. All this has spawned serious debates in scientific literature, but religious matters do not fit neatly into scientific debate: "Allegorical interpretation means that one sees the literal meaning of a text as a sign that points to a deeper reality like spiritual or Christological truth." (Boitumelo B. Senokoane, 2021)

All of this raises further questions about the prohibition of religious discrimination, the free exercise of religion, the possibility of free decision-making based on religious belief, and the compatibility of real or alleged scientific facts about pandemic prevention. It is difficult to have scientific debates with people who have grown old in the honest love of God and say that they believe in God rather than vaccines. On the other hand, the state ideally strives to take the best and most effective measures against the pandemic (although there were significant differences between the measures that different countries took).

Overall, we can conclude that there is a very thin line along which pandemic considerations, legality, common sense, the protection of human freedoms, the prohibition of discrimination, and ultimately the free exercise of religion can be reconciled. For my part, I believe it would be worthwhile to pass on the human freedoms that we have won over the centuries to our children.

[23] The Holy Bible, Book of Revelations, 13:14-18, New Century Version

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Zorica Mršević*

TYPICAL METHODS OF VIOLATION OF HUMAN RIGHTS IN HOMES FOR ELDERLY PEOPLE

The subject of the paper is the analysis of human rights violations in homes for the elderly. There is an increased need for such homes, but those in which the elderly will truly be cared for, without fear that somebody's carelessness or, even worse, malicious intentions, can endanger their lives. The author highlights potential forms of human rights violations in state and private homes for the elderly. The results of the research indicate that users of such homes suffer most often due to violations of dignity and pressures to transfer property rights to their real estate to staff members of such homes. The procedure for admission to a private elderly home is much easier, but in practice this often means bypassing the users' consent for accommodation, amongst other regulations. As one of the solutions of these unwanted institutional treatments, the author sees the intensification and expansion of non-institutional care, whereby the elderly are not displaced from their homes.

Keywords: *state and private homes for the elderly, Serbia, violation of human rights, home as a prison, development of non-institutional care*

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1. Introduction - general situation

The world of the old is a world of
loneliness and sadness, and death is
loneliness that always wins in the end.
(Milić, 2023)

Demographic ageing seems to be one of the greatest social transformations of the 21st century, with a strong impact across all segments of society (Batrićević, 2022: 465). All projections point to an increase in the number of inhabitants over 80 years of age, in particular the near-doubling of the number of women in this age category. Although this process is also present in Serbia, the ageing of the nation and the problems of old people are still on the margins of interest of both the state and society (Helsinki Committee, 2009: 5). Elderly fellow citizens often state that they need help at home, that they have no one to turn to, and that their children are not around, do not have time for them, or are already burdened enough (Poverenik, 2021: 133). It is known that a fear of loneliness and illness is omnipresent amongst the elderly, and it is also stated that depression and loneliness are primary causes of dementia (Milić, 2023). Elderly people are regularly faced by poverty, discrimination and violence, and a particular problem is the lack of specialist services and support, in particular home help services. Neglect and violence against the elderly are still not sufficiently reported, with primary factors in this being the inability of elderly to report, a lack of support for reporting, and an unwillingness to report violence they suffer at the hands of close members of their families, most often their own children, as well as due to an insufficient recognition of their own suffering due to emotional, social and economic violence.

The aforementioned problems are particularly pertinent in rural areas, where older women living in single households or who are usually dependent on other family members to meet their needs are in a particularly vulnerable position, given that they usually do not have ownership rights to immovable and movable property, income, nor adequate access to social and health services in places where traffic and public transport structures have not been established (Zaštinik, 2023: 12-13). It is noted that Serbia is a country of the elderly, a country with more and more infirm and sick people in need of care. In such circumstances, there is an increasing need for homes for the elderly. The ageing of the population, which demographers have reliably established, as well as data on long waiting lists for places in homes for elderly, lead to the need for a critical analysis of the situation in nursing homes. There is no comprehensive record of homes for the

elderly, because their owners often register them with the Business Registers Agency (APR) as guesthouses, hotels, joint-stock or joint-stock companies.

Many homes for elderly people do not have enough staff - or enough adequately trained staff - to provide the required care and support to their users. This can result in lack of attentiveness, neglect or insufficient medical care. A number of homes for the elderly in Serbia have poor infrastructure and insufficiently equipped rooms to provide residential care. The lack of spaces specifically adapted for persons with disabilities and a lack of space for recreation and social activities can negatively affect the quality of life of the elderly. In some cases, the lack of supervision can lead to inadequate treatment or a violation of rights. The lack of adequate inspections and legal mechanisms can further exacerbate the inadequacy of care provision. In Serbia, homes do exist that have excellent conditions and provide a high level of care, but standards vary, and are in no way uniform across different institutions.

Guarantees of users' rights and freedoms are generally insufficient. Although homes for the elderly are social institutions of an open type, the majority of users actually do not have any real possibility to freely choose the way of life that suits them best (Helsinki Board, 2009: 9).

In Serbia, it has long been no longer a shame and a defeat to send a father or mother to a home for elderly (Nastevski, 2022). There are not enough state homes, and there is a mistrust of private facilities: which homes have licenses, whether they will really take care of their users, and an overarching fear that someone's negligence will endanger a resident's health and life.

In the Republic of Serbia, there are 40 registered private ans state gerontological centers and homes for the accommodation of adults and the elderly (most of which are located in Vojvodina), with a total capacity of 9,326 places. With the onset of the COVID-19 pandemic in 2020 and 2021, an abrupt halt of the trend of growth according to needs appeared, so that in 2022 there were significantly more users on the waiting lists than in 2021. In the Gerontology Center Belgrade, there are currently 315 people on waiting lists for homes for the elderly (Tanjug 2023). About 65-70 percent of registered private homes are located in Belgrade. A much smaller number of places than it should be. Surplus space was also sought in private homes until 2015-2017. and then the 'era of mass opening of private homes' began.

2. Insufficient accommodation capacity

In particular, it has been observed that the onus of provision for residences for the elderly is increasingly falling upon healthcare institutions, and, gradually, bed wards

intended for immobile users are commonly used as geriatric wards, even palliative care wings, which have been designed for the end-of-life care of patients with severe malignant diseases. Due to the profile of users, increased average age, and more pronounced infirmity, there is a need to establish specialized homes for the elderly, such as psychogeriatric facilities. The cohort that requires such care is increasing in number, and they are becoming a disproportionate burden on the institutions that currently house them, which are ill-prepared for residents with deteriorated mental capacities, in the late stages of Alzheimer's or Parkinson's disease. In general, late-stage care is somewhat taboo, and only early-stage dementia and degenerative illnesses are discussed, while better-prepared care facilities openly discuss this as a major issue (Zaštitnik, 2011).

Occupancy is 100%, so waiting for a vacancy can take as long as a year and a half. The insufficient number of homes for the elderly in Serbia and the great interest in them from potential users or their family members is the main reason behind investors being increasingly interested in opening them. Private homes represent a source of income, so they are often registered under other business types, such as guesthouses, clinics, catering or tourist facilities, in order for the owners to avoid having to fulfill the legal obligations prescribed for care homes in terms of space, equipment and personnel. In some places in Vojvodina, nursing homes are registered as boarding houses for the provision of tourist services or as various agencies. Due to the fact that they are not officially registered as social welfare institutions, the Ministry of Labor, Employment and Social Policy cannot control their work (Kovačević, Spalević: 2007, 23.04).

Attention is drawn to the fact that in eastern Serbia, where the population is demographically very old, there are almost no homes to accommodate these people. Serbian society is among the ten oldest in the world, with the population in 85 percent of municipalities being demographically very old. In this group of municipalities, Knjaževac, Ražanj, Rekovac, Babušnica, Svrljig, Gadžin Han and Crna Trava stand out as those with the highest median age: In these municipalities, the share of people over the age of 60 is two to three times higher than the number of young people under the age of 20 (Poverenik, 2021).

3. Private homes for the elderly

Many non-conditional (i.e. those whose operations are not controlled by the Ministry of Labor, Employment and Social Policy) private homes for elderly were opened, because the owners saw a good profit in it. Persons with dementia and other degenerative illnesses require particular care and attention. Not only old people with their physical illnesses wait, there is a long list of those waiting for accommodation, especially

for bed-bound persons and those with dementia and other degenerative illnesses (Dnevnik, 2023). There is a very long waiting list for places in homes for elderly everywhere, especially in those institutions where there is a higher standard of accommodation. Where vacancies exist, these tend to be in homes in the Serbian interior, and in those where standards are low. The importance of having a tradition of housing for the elderly has been noted, whereby in areas where institutions for the accommodation of the elderly have existed for a longer period, they tend to be better organized, visible overcrowding in all, and not only in two homes separated by that characteristic; there are still five- and six-bed rooms, the house management tries to rationally use the entire available space, literally 'from the basement to the attic' by placing beds in all the available space; everywhere there is a shortage of employees, especially when it comes to nursing and medical staff, which is partly caused by systemic solutions (normatives), but also some other occupations are in deficit (e.g. social workers) (Zaštitnik, 2011: 3,4). However, one positive can be noted in this respect: on the website of the Ministry of Labor, Employment, Veterans and Social Affairs there is a list of licensed homes, as well as one for those that are prohibited from working, as well as all shelters and a record of by-laws that regulate institutional social protection of the residential type.

There are norms that prescribe that bedrooms must have a certain square footage, that the corridors in the building must be of a certain width, that there are separate rooms for work activities, a living room, a laundry room, an isolation room, a storage area, etc. The presence of a social worker, caregiver, cook, chambermaid, among others, is also required. More evidence is required, more documentation is required when submitting a request, with all of this being aimed toward raising the services to a higher level than before (Dnevnik, 2023).

4. Violations of user rights

The Protector of Citizens (Zaštitnk građana, aka Ombudsman) continuously points out, through its annual reports, recommendations and opinions, the existence of violations of the rights of the elderly, i.e. the rights of the elderly in social and health care institutions, the right to social care services for the elderly, and the right to specialist healthcare provision (Zaštitnik, 2023: 55,57). The work of the Protector of Citizens shows that there are homes for the elderly that do not meet the prescribed conditions for work, do not have appropriate work permits, i.e. they have lost their work licenses and been banned from working by the social protection inspection, and, in spite of measures taken by the Ministry of Labor, Employment, Veterans and Social Affairs, continue to work

and receive users. Their illegal work violates the guaranteed rights of elderly people housed in such institutions (Zaštitnik, 2023: 58).

One problem is that, in order to register a privately run home for the elderly, the key requirement is to fulfill the construction and technical conditions, but conset of the user is somehow neglected or even forgotten. Abuses are also pointed out from many sides when persons are placed in accommodation without their own consent, because the territorially competent center for social work has no role in such accommodation, and people who are accommodated in such homes are rarely asked about their welfare, with their accommodation and residence being solely dependent on the regular payment of the accommodation price, which is usually twice as high as that of state-run homes (Zaštitnik, 2011).

One of the problems is that there is actually no strictly prescribed and in-practice respected legal regulation of all aspects of accommodation in homes for the elderly, partially due to the fact that they are not considered to be 'closed' institutions, and therefore dissatisfied users (or customers) can always leave them. However, many are unable to leave, either because they have nowhere to go physically, or due to obstacles resulting from their own health (illnesses, mobility issues, physical and mental weakness), age, family (the primary family sent them to the home and is unwilling or unable anymore to let them return), fear of loneliness and abandonment, etc. Barriers act sometimes one by one, sometimes in synergies, in combination, so that it could not be considered simple to leave elderly people home.

Perhaps the regulation of the protection of human rights in prisons and offenders' institutions is a framework that can also be applied when it comes to homes for the elderly, primarily for the reason of protecting their human rights. Limitation of human rights of users may be possible only to the extent to which it is necessary for the execution of their institutional care and treatment. Criteria for protection of their human rights are to be processed on the basis of five fields of observation, these being: i) prohibition of discrimination, ii) prohibition of use of coercive measures, iii) use of special measures and procedures, iv) respect of political rights and v) respect of economic rights (Igrački, Ilijić, Stepanović, 2016: 331).

Probably the worst type of residential facility is the so-called 'reception centers' for the elderly, which function in such a way that private persons enter into lifetime maintenance contracts with the residents, which they certify in court, taking over the residents' pensions or their land and other valuable real estate. In return, they take care of residents who are often housed in unheated auxiliary rooms of the house without adequate care (Zaštitnik, 2011).

Taking over apartments and other valuable real estate, a form of abuse conducted by employees in homes for the elderly, although a long-noted phenomenon, is not sufficiently prevented by Serbia's legal framework. Solutions to this do, however, exist in the region; for example, Art. 8 of the 2021 Law on Social and Child Protection of Montenegro lists a series of prohibited actions of employees. The article prescribes that an employee of an institution is prohibited from any form of exploitation of the user, or abuse of trust or authority that they enjoy in relation to the user.

While a comparable solution exists in Serbia, where there is a ban on exploitation, this is not as a legal provision, but a sub-provision of the 2012 Order on Prohibited Behaviors of Employees in Social Protection (Art. 5: General prohibition of taking advantage of users and abuse of trust). The prohibition of exploitation is defined in more detail in the provisions of Art. 10, whereby 'exploitation' can be taken to include the following: the use of coercion, fraud, violent methods of persuasion, the dependent position of the user, their health, property or other condition, as well as the abuse of trust and power, the use of the user by the employee to perform tasks that bring material or immaterial profit, which are not in the interest of the user, but in the interest of the employee, service provider or third party.

The legal protection that exists in Croatia is far more comprehensive. The 2022 Law on Social Welfare contains an explicit prohibition of conclusion of a contract with the beneficiary on the disposal of the beneficiary's property, through Art. 170: (1) *A legal or natural person who performs social welfare activities and a person employed in social welfare activities cannot conclude a contract with the beneficiary that alienates or encumbers the beneficiary from real estate or a life or death alimony contract.* (2) *A contract concluded contrary to the provisions of this article is null and void.*

Apart from drastic cases that endanger the health - and even life - of users, alongside abusive approaches to their property, there are also a number of practices that directly violate the dignity of users. These include inappropriate language (such as addressing the residents as 'grandma' or 'grandpa'), and entering private dormitories without knocking, which poses a significant encroachment upon and undermining of personal privacy. There is a lack of explanation of medicines prescribed and given to users, general infantilization of residents, intra-resident violence, especially by men against women (during the monitoring visit, female users sometimes talked about such cases), users' consent to accommodation often does not exist when private homes are in question, or it is falsified or merely implied, the lack of staff also leads to a lack of adequate therapies and programs against depression and reducing the symptoms of dementia, with those suffering from dementia often being simply locked away, without any access to outdoor areas. Green areas that belong to homes are often neglected, which makes it impossible for healthy and

mobile users to utilize them, with walks and exercises being rarely organized anywhere. Many homes exude a gloomy atmosphere, hygiene is poor, and the smell of urine and feces can be felt (Zaštitnik, 2011: 68). It should be added that even in the best homes, there is depression and fear of death among the users, with only 10% having entered the home under their own volition, and the remainder believing that they were wrongly pressured into spending their twilight years away from their own homes (Zaštitnik, 2011: 9). Dignity implies that each person is worthy of honor and respect for who they are, not just for what they can do (Ćorić, 2020: 31).

5. Users of homes for the elderly

In Serbia, elderly people go to gerontological centers and homes for the elderly, as a rule, only when they become an unbearable burden for their families and when nobody is able to take care of them due to their health and general condition. In Serbia, it is rare for people to enter residential facilities in a state of health and age where they are still relatively capable and strong enough to undertake a (semi-)independent life in the community with their peers, under medical and therapeutic care. The demographics of the users determine the way of organization and the type(s) of service provision in homes for the elderly, which are obvious life's final stop, a place where one only waits for the end of life, and where no radical change or improvement in health-related circumstances is expected.

When making the decision to place an old person in an institution, the needs of that person certainly should be taken into account, at the very least. However, it is often the case that, when making family decisions, priority is given to the needs and interests of other family members, not to the best interests of the old person. The number of 'younger' users of such homes is decreasing, the trend is that people of increasingly advanced age, mostly in their eighties and older, and in increasingly poor health, make up the greatest proportion of new residents. The largest percentage of residents are wholly dependent and semi-dependent, meaning that elderly care homes are increasingly falling within the sphere of institutional accommodation for persons with disabilities, or chronic patients and those recovering after operations. Completely independent and partially dependent users are increasingly rare, with the director of one such institution being quoted as saying they do not remember the last time a completely 'capable' person was admitted to their institution, and in one institution (in the town of Zrenjanin), from 280 users, 240 are immobile (Zaštitnik, 2011: 32).

6. Gender aspects

The position of elderly women in Serbia has a direct impact on their worse position as users of residential care for the elderly. For years, the Commissioner[1] has been pointing to their worse position and more difficult, in first place economic, situation, compared to elderly men, their lesser involvement in decision-making that affects their lives and the need for support measures, as well as the violence they suffer (Poverenik, 2021: 134). Violence, abuse and neglect is a particular problem when it comes to older women. The elderly often decide not to report the violence, preferring instead to 'put up with it', considering themselves to be a burden to both their families and broader society (Zaštitnik, 2023: 161). Discrimination on the basis of age, as the second reason for the frequency of complaints filed to the Commissioner, most often refers to discrimination of persons over 65 years of age. Older women in Serbia are in a worse position compared to older men, as well as compared to women and men from other age groups. The problems they face are numerous: socio-economic position and exposure to poverty, lack of income to meet basic life needs, increased medical costs, inadequate access to public transport, unequal access to healthcare institutions and social and healthcare services, social exclusion and isolation, insufficient political participation, etc. (Petrušić, Satarić & Beker, 2020).

Homes for the elderly are essentially a 'women's story', because women are the noticeable majority of users, outnumbering male residents by two-or-three-to-one. Namely, one quarter of the users are men, and three quarters are women, and in some places even 90% are women. At the same time, both the administrative staff and caregiving employees in the homes are made up mostly of women, because as in all social institutions, the employees have traditionally low incomes, unenviable working conditions, and exposure to a general decline in standards.

As, according to traditional gender stereotypical roles, women are more dedicated to raising children during their lives and are generally more oriented toward family life, the fact of the predominance of women in residential facilities for the elderly indicates that this 'female' life investment probably did not 'pay off' for many, because obviously, when they are getting not old, they do not receive reciprocal care and attention from their descendants and other family members. Instead of expected family care, they become the majority users of those social institutions. Women compose the majority of users of homes for the elderly because, as the institutions' management often points out, they 'easily' make the decision to 'leave their children an apartment or house', and are

[1] Poverenik za zaštitu ravnopravnosti

more lenient, silent, do not complain, and take on a background role in the broader family life (Zaštitnik, 2011: 27). Of course, that decision is not at all easy for them, especially considering that many have never worked outside the house, and that their own house and family is the only environment familiar to them. Adaptation under the pressure of harsh reality is therefore not evidence of 'easier adaptation' but rather the result of the typical socialization of women who, according to gender stereotypes, are expected to primarily serve others, to put the interests of family members before their own, with many of them wanting to spare their offspring the obligation of taking care of them, especially if they are semi-dependent or dependent, fearing that they will contribute to the divorce of their child or, as one beneficiary said, had she stayed in her house, her children's marriages would 'crack' (direct addrress by female users to the monitoring team members in some elderly people's homes).

7. Conclusion: possible solutions

The observed situation in homes for the elderly illustrates the lack of respect for the human dignity of the users, and that there is much work to be done in this area. Individuals and the societies to which they belong have a responsibility to ensure that all people, older persons included, are afforded full human rights and dignity (Radaković, 2022: 566). Dignity is a beacon of freedom for all beings; if that beacon is in the fog, then humanity's future becomes equally foggy and uncertain (Ćorić, 2022: 42). Dignity cannot be earned and cannot be taken away. It is an inseparable component of what makes us human, and every other good thing in life depends on the safeguarding of our basic dignity. The vital role of dignity can be demonstrated by contrasting it with its absence (i.e. humiliation) and the contribution of this to escalations of violence (Ćorić, 2022: 31).

It is necessary to expand the program of subsidized accommodation of users in private homes. Beneficiaries who do not have the means to pay for a home can be accommodated in private homes with the help of the state (Marković, 2020: October 2).

It is necessary to insist on project activities of the elderly people homes' management, and an active approach to donors as a way of securing significant additional funds, which makes a noticeable difference compared to other similar social institutions, in a situation where all tenders for projects are open to others. All employees should undergo training for working with users, not only those who work directly with them, e.g. caregivers and nurses, but also drivers, directors, craftsmen, 'maintenance staff'lawyers, accountants, and similar (Zaštitnik, 2011: 13).

It is also necessary to strengthen the network of formal and informal domestic help providers. Volunteers in the community are an important source of both formal and

informal caregivers, as well as support for elderly persons who do not have anyone to rely on. However, it seems that their potential is not being sufficiently tapped in our country, which is the reason why a support mechanism for volunteers and intergenerational solidarity should be encouraged (Batrićević, 2022: 481). It is necessary to draw up and enforce a legal provision prohibiting the entering into a contract on the transfer of ownership of real estate from users of such homes to their employees, as exists in Croatia. Moreover, it is necessary to legally regulate the protection of human rights in homes for the elderly on the basis of five fields of observation, namely prohibition of discrimination, use of coercive measures, use of special measures and procedures, respect of political rights and respect of economic rights.

In the Gerontological Center in Subotica, once declared the best institution of its kind in Serbia for housing the elderly, users are allowed to keep pets. Veterinary care is provided for these animals, alongside necessary sanitary and hygienic protection (Zaštitnik, 2011: 10). Having pets in the institutions contributes to positive community relations among the users, and also seems to improve the general atmosphere within the institution, as well as the mental health situation of the users. It also has a secondary effect in terms of other broader social issues, such as the rescue of abandoned and stray animals. Moreover, care for pets has been seen to increase the levels of users' self-esteem, trust and self-confidence, and also to alleviate the symptoms of loneliness. Pets in institutions are also important from an ethical perspective, since these programs target a vulnerable and marginalized population (Batrićević 2019: 17-19), i.e. users of homes for the elderly. A variety of elderly people homes are needed, including those that provide specialized care, as well as supported homes for independent living. Both Sweden and Norway have well-developed care systems that support independence and quality of life. In addition to elderly people homes, there is a wide range of support services for independent living.

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HEALTH STATUS OF THE OLDER PRISON POPULATION[**]

The primary objective of this narrative literature review was to provide a broader understanding of the various aspects of the health of older prisoners. Following a comprehensive search, twenty-seven studies published in the last two decades were selected. The studies revealed that the health status and issues related to the health of older prisoners varied considerably. Some studies focused on the health-related quality of life of this group. The challenges of ageing in prison included comorbidities of psychiatric or mental health, physical and psychiatric morbidity, and early mortality. Organizational, social, economic, individual, and family-related factors were found to be the primary barriers to accessing health and social services. Additionally, functional health problems, including those related to activities of daily living, were overrepresented in the older prison populations. Based on the findings, there is a growing need to improve healthcare services and provide specialized health services to this population.

Keywords: *health needs, older convicts, functional health problems, ageing prisoners, comorbidities, healthcare services*

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1. Introduction

The population of older adults in prisons globally has been growing rapidly over the past 20 years, raising significant concerns about their health, social outcomes, and the overall costs of incarceration. This trend has brought attention to the need for adjustments in prison infrastructure to address the changing health needs of older prisoners and promote their well-being and successful reintegration into society (Danely, 2022; Suzuki & Otani, 2023). The process of ageing in prison typically begins around age 50 to 55, highlighting the unique challenges faced by this population (Aday & Maschi, 2019). The inadequate accommodation of their needs leads to consequential financial, legal, and human costs, highlighting the urgency to adjust prison infrastructure with the changing health needs of imprisoned individuals for improved well-being and successful reintegration (Suzuki & Otani, 2023). As highlighted in the earlier literature reviews, understanding the unique characteristics of this population and challenges they face is crucial for researchers, experts in the field of prison studies, and policymakers alike (Milićević & Ilijić, 2022; Nguyen et al., 2022). These unique challenges usually refer to the lack of specialized correctional facilities and difficulties associated with long-term imprisonment and strict parole rules (Kostić, 2014). Furthermore, ageing prisoners also encounter physical and psychological issues, including violence, anxiety, and separation from their loved ones, which can contribute to an accelerated ageing process (Kostić, 2014).

Despite guarantees provided by moral codes and international regulations, older individuals have often been neglected and denied equal dignity. Violations of older persons' right to dignity include financial instability, limited access to healthcare, inadequate social and healthcare services, lack of protection from domestic violence, and limited legal representation. In general, older persons with low or no income struggle to meet basic needs and face long wait times for medical procedures, leading to a decline in their overall well-being (Radaković, 2020). The ageing prison population poses significant challenges for prison administrators worldwide, as facilities were not originally designed to accommodate older inmates. Older prisoners draw significantly higher costs for incarceration compared to younger prisoners, mainly due to healthcare expenses. Once released into the community, older ex-prisoners have lower recidivism rates but face various social and medical challenges, including housing instability, limited job prospects, multiple chronic health conditions, and a higher risk of health-related mortality (Williams et al., 2012). Poor health among older prisoners can be attributed to previous lifestyle and socioeconomic factors, with female inmates having greater demand for medical and psychiatric services (Aday & Maschi, 2019). For example, in the U.S, the ageing of prison population is outpacing the general population, leading to a prison healthcare crisis that

affects both communities and public healthcare systems, as the majority of prisoners are eventually released (Williams et al., 2012).

This narrative literature review aims to explore different aspects of the health of older prisoners, including their health status, health-related issues, quality of life, and daily activities, while also highlighting the challenges they face and the barriers they encounter in accessing healthcare and social services. By shedding light on these topics, this review contributes to the growing body of knowledge on the ageing prison population and informs future research and interventions to improve the well-being of older prisoners.

2. Methods

To gather information on the ageing prison population and various aspects of their health, health-related issues, and factors affecting their quality of life and daily activities the comprehensive literature search was conducted using Google Scholar - Advanced Scholar Search. The search focused on scholarly and peer-reviewed manuscripts published in English since January 1, 2000, using various combinations of keywords "older", "elderly", "ageing", and "geriatric" combined with "prisoner", "convict", "offender" and "inmate", with the exact phrase "health", "quality of life", "activity of daily living". Furthermore, studies that referenced the identified research were examined in more detail through their titles and abstracts. The following studies were considered eligible: studies focused on health characteristics, health status, health-related issues, quality of life, and daily activities of older prisoners; published in English; including males, females, or both; and original, peer-reviewed articles or doctoral dissertations. After exploring the collected papers and applying specific eligibility criteria, 37 relevant studies were included in this narrative literature review, with the search completed in March 2023.

3. Results

3.1. Health and quality of life

Many older prisoners have chronic health conditions, including cardiovascular problems, strokes, diabetes, vision and hearing impairments, and arthritis (Ridley, 2022). When it comes to the prevalence of health problems and relative risks for the health conditions concerning non-offender older adults, data retrieved from 55 studies involving offenders older than 50 years old confirmed that older offenders had a significantly higher

risk of developing hypertension, cardiovascular diseases, respiratory diseases, and arthritis compared to non-offender older adults (Solares et al., 2020). However, the risk of cancer was lower among older offenders. Overall, the prevalence of physical health problems among older offenders varied, with hypertension being the most common (42%) and HIV being the least common (3%) (Solares et al., 2020).

A study found that a high percentage of older male prisoners had major illnesses and chronic conditions, with older prisoners being more likely to report medical problems and receive treatment compared to younger prisoners. The differences in treatment were primarily driven by physical health issues (Omolade, 2014).

In one study conducted in France, the health and quality of life among 138 male prisoners aged 50 and above were explored concerning their physical and mental well-being (Combalbert et al., 2019). The authors highlighted several key findings. Firstly, the findings confirmed that older prisoners expressed significantly negative assessments regarding their physical and mental health, as well as their overall quality of life. Secondly, age was significantly associated with various dimensions of quality of life, yet without significant associations with most dimensions of perceived health, except for poor mobility. Thirdly, as the duration of imprisonment increased, there was a noticeable decline in sleep quality. Finally, older prisoners with higher levels of education showed fewer negative emotional reactions compared to those with lower educational backgrounds.

This study conducted in prison in Primorsky Territory, Russia, from 2013 to 2016 found that the quality of life of prisoners was influenced by socioeconomic factors such as education, income, marital status, and comorbidity index (Kosilov et al., 2019). The findings point out to age-specific effects of socioeconomic status on quality of life. While prisoners with a university degree had higher quality of life compared to those with lower education levels, such a trend was not observed among older prisoners. According to the results, income had a significant effect on quality of life, but only in the 45-54 age range. The authors attributed this finding to restrictions on material assistance in prison (Kosilov et al., 2019). Marital status had a verifiable impact on quality of life measures in the 35-64 age range, indicating the importance of social support for those prisoners. Additionally, the comorbidity index showed a strong correlation with quality of life, with older prisoners experiencing consistent differences in quality of life compared to younger ones.

Other findings indicated that older prisoners in open prison regimes had higher satisfaction with their quality of life and well-being compared to those in training and high-security prisons. Humanity and promoting positive identities in enhancing the quality of life and well-being of older prisoners were identified as important aspects. However, the experience of barriers within the prison system, such as overcrowding and lack

of release preparation, limits the potential of older prisoners, resulting in lower satisfaction with their quality of life and well-being (De Motte, 2015).

A recent non-systematic literature review examined the challenges faced by ageing individuals in prison and forensic services (Peixoto et al., 2022). The study revealed a limited number of studies focusing on elderly prisoners and forensic psychiatric patients. However, higher rates of physical and psychiatric health problems were observed as a part of prisoners' experience, leading to increased morbidity and early mortality compared to peer adults in the community. In summary, older prisoners are at a higher risk of various psychiatric disorders, including depression, psychosis, bipolar disorder, cognitive impairment, personality disorder, and anxiety, with higher rates of suicide compared to their peers in the community.

The overall mortality rate among former inmates had a significantly elevated risk during the first two weeks after release in the study that examined the risk of death among former inmates (Binswanger et al., 2007). Drug overdose, cardiovascular disease, homicide, and suicide were identified as the leading causes of death.

Since there is growing recognition of the importance of assessing the quality of life as an outcome measure for older individuals in various care settings, including geriatric, forensic, and correctional care, a group of authors examined the relationship between variables related to self, body, and social life and different quality of life domains of older prisoners (De Smet et al., 2017). Data was collected through structured questionnaires administered in individual interviews with 93 older prisoners aged 60 and above in 16 prisons in the Dutch-speaking region of Belgium. The study found that individual variables, such as satisfaction with activities, were related to multiple domains of quality of life among older prisoners. Psychopathological symptoms, except for suicidal ideation, did not significantly impact the quality of life.

Combalbert et al. (2018) examined the cognitive performance of older male prisoners and its impact on their perceived health and quality of life. Findings revealed significant differences in cognitive performance, perceived health, and quality of life between older prisoners and a control group from the general population. However, no significant association was found between cognitive impairment and perceived health or quality of life, highlighting the need for systematic screening and support for cognitive disorders in older prisoners. This study revealed that approximately 20% of male prisoners in France exhibited signs of moderate to severe dementia based on executive function test scores, while others showed indications of cognitive impairments. As explained by the authors, these individuals may not recognize or seek assistance for their cognitive issues, putting them at a higher risk of victimization and facing challenges in communicating with prison staff (Combalbert et al., 2018).

3.2. Mental health and medications

In prison, some inmates arrive with mental health issues, while others develop them during their incarceration (Aday & Maschi, 2019). Social maladjustment, caregiver roles, personal physical and mental health problems, and substance misuse are significant factors associated with older prisoners who committed homicide (Nguyen et al., 2022).

A systematic review with meta-analysis that included 55 studies involving offenders older than 50 years found a range of mental health problems in older prisoners (Solares et al., 2020). Alcohol abuse was the most common at 36.5%. Schizophrenia, on the other hand, is less prevalent at 5.3%. Although not statistically significant, older offenders have a 2.2 times higher risk of depression compared to non-offender older adults (Solares et al., 2020). Mental health issues such as depression and anxiety are also prevalent (Ridley, 2022).

Older prisoners are less likely to report needing help with a drug problem compared to younger prisoners, and they have lower rates of drug use before custody (Omolade, 2014). The same research has shown that older prisoners have lower levels of drug misuse compared to younger prisoners. Additionally, older prisoners are less likely to report needing help with an alcohol problem and have lower rates of binge drinking compared to younger prisoners. However, no significant difference was found between older and younger prisoners in terms of general alcohol use (Omolade, 2014).

The findings from the study conducted in two prisons in Northern Ireland in 2016 indicated that a significant majority of prisoners aged 50 years or over were receiving medication for stress, anxiety, or depression. This rate was five times higher than that observed among older men in the community (Lawrence & Devine, 2022).

3.3 Activities of daily living and disability

When older prisoners' ability to perform basic activities of daily living, such as walking, dressing, and feeding oneself were explored, results showed that approximately one-third of participants reported difficulty with at least one activity, with 18% experiencing difficulty with two or more activities, according to Lawrence and Devine (2022). The most common challenges to prisoners aged 50 years or over were related to mobility, eyesight, and hearing. Comparisons with community data revealed similar incidence rates for these difficulties.

To gain insights into the demand and differences in needs between older and younger prisoners regarding their social care needs, face-to-face interviews were conducted with male prisoners in North-West England (Tucker et al., 2021). It was revealed

that a significant number of participants were facing challenges in personal hygiene, mobility, occupation, and forming relationships. Older prisoners had higher needs for assistance with hygiene, and mobility, and reported more physical health and memory problems.

Older prisoners tend to experience a decline in performance in prison activities of daily living before facing difficulties in traditional activities of daily living (Mofina et al., 2022). Focusing on basic self-care and functional mobility, this rapid review highlights that functional performance in activities of daily living tends to decline with age, and the definition and measurement of functional performance vary depending on the environmental context. As predicted, the optimization and facilitation of performance and independence in activities of daily living differ within and outside of the prison context. Furthermore, within the prison setting, there is a focus on basic activities of daily living as instrumental activities of daily living are often considered less relevant.

One line of research showed that the population of older prisoners, who are known to have high suicide rates, is experiencing significant growth. Barry et al. (2020) examined the relationship between functional disability, depression, and suicidal ideation among older prisoners. The findings showed that functional disability was associated with depressive symptoms, and difficulty when climbing stairs and daily living activities were independently associated with suicidal ideation. Depressive symptoms mediated the relationship between functional disability and suicidal ideation.

An earlier cross-sectional study has also examined the relationship between disability in prison-specific activities of daily living and depression and the severity of suicidal ideation in older prisoners (Barry et al., 2017). The findings revealed that disability in prison-specific activities of daily living was associated with higher levels of depression and severity of suicidal ideation, with a stronger association observed in older male prisoners.

The results of a study that followed a group of 2,171 adult prisoners sentenced to 18 months to four years between 2006 and 2007, specifically examining the needs and characteristics of 115 older prisoners (aged 50 and over) when they entered prison, compared to 2,056 younger prisoners (18-49 years old), found that approximately 29% of prisoners reported having a long-standing illness or disability, with higher rates among older prisoners (Omolade, 2014). However, when estimating disabilities using a separate analysis, the rate was around 34% in the sample. Among older prisoners, 54% were assessed as having a disability, mainly physical disabilities, anxiety, and depression. Comparatively, disability rates in the general population are higher, but caution is needed when

comparing the two groups due to differences in age distribution, which may underestimate the difference in disability prevalence between older prisoners and the general population.

3.4. Prison environment

A significant focus in modern criminology revolves around the functioning of correctional or prison systems, particularly the influence of the prison environment on inmates' behaviour and their ability to reintegrate into society, aligning with the intended goals of imprisonment (Ilijić et al., 2020). In the prison environment, specific challenges related to accessing different areas of the prison were further explored, pointing to difficulties accessing toilet facilities during a locked regime. Despite these challenges, the majority of prisoners aged 50 years or over reported receiving no help with their needs, highlighting potential gaps in support (Lawrence & Devine, 2022). A similar observation has been made in other studies that also highlighted the inadequacy of the prison system in addressing the unique needs of older prisoners, further negatively affecting their overall incarceration experience (Peixoto et al., 2022).

Evidence to date highlights the need for more developed and systematic mechanisms to ensure effective prison-to-community transitions for older prisoners (Hagos, Withall, et al., 2022). The barriers and enablers to health and social services for older prisoners transitioning to the community were explored through focus group discussions with corrections and parole officers. The study identified three main themes: organizational, social and economic, and individual and family, along with seven sub-themes (planning the transition, communication, assisting prisoners, transition programs, officers' knowledge and scope of work, social and economic issues, and offenders' conditions).

Ridley (2022) presented and examined a collaborative initiative implemented in prisons located in northern England, which acknowledged the distinctiveness of older prisoners and implemented adaptations to their routines and physical surroundings. Overall, interventions promoting well-being were successful in reducing isolation and facilitating input into wider resettlement (Ridley, 2022). Older prisoners reported being treated respectfully, feeling safe, and having positive relationships with prison officers. They appreciated the calm and friendly environment of the residential unit, contrasting it with other areas of the prison known for noise and intimidating behaviour. The Inside Out Club, designed to enhance purposeful activity and reduce social isolation, received positive feedback, with attendees enjoying the activities, meeting new people, and feeling less isolated. However, the project's impact on resettlement was limited, with prisoners expressing frustration over the lack of support from overall prison-delivered resettlement interventions. While the impact of the project on health and well-being was mixed, there

were opportunities for improvement, particularly in healthcare provision, medication access, and reducing waiting times (Ridley, 2022).

3.5. A change of perspective

To promote the dignity of older persons, in general, several possible actions can be taken. Firstly, there should be improved economic measures to ensure their financial stability, such as providing a monthly monetary sum that meets their basic needs and supplementing the income of those above the age of 65. Restructuring government-funded social security services to coordinate affordable healthcare and assist with out-of-pocket costs can also be implemented. Local governments and social institutions can offer out-patient health checkups and treatments while providing access to affordable mindfulness activities, rehabilitation centres, and socialization opportunities through government subsidies and community initiatives. Creating dedicated spaces and effective communication channels to inform older persons about events and programs can help enhance their social engagement and overall well-being (Radaković, 2020).

However, ageing in prison is a unique and individual process, with the potential for positive changes in the lives of ageing offenders, according to Avieli (2022). Experiences of well-being and ageing in prison, from the perspective of prisoners themselves, originate from comparing ageing in prison with the community, viewing prison as an escape from challenges, the specifics of the role of older prisoners as mentors, and experiences of personal growth and self-discovery.

In one study, interviews were conducted with prisoners before and after their release, and data from nine prisons in the North of England were analysed to examine the healthcare and social needs of older male adults after their release from prison (Forsyth et al., 2015). The main findings were a lack of release planning, poor communication, and discontinuity of care, leading to high levels of anxiety among older prisoners. Those who moved into probation-approved premises had better access to immediate healthcare and social support.

Considering healthy lifestyles and perceptions of health improvement among older men in prison, the recent data revealed that nearly 40% of prisoners identified as living an unhealthy life, compared to 15% of community respondents (Lawrence & Devine, 2022). As explained by the authors, this difference may originate from lifestyle factors imported from the community, such as addictions and poor mental health, as well as the challenges of maintaining a healthy lifestyle in prison. Both groups expressed a belief that they could do something to improve their health, with the most common response being to eat more healthily. However, prisoners also emphasized the need to reduce stress, which was significantly higher than in the community sample. In addition,

there was a notable disparity in the perception of influence over health, with a higher proportion of prisoners feeling they had little or no control compared to older men living in the community, reflecting the limitations on autonomy in the prison environment and the perceived difficulty of making health-related choices.

Despite the stigmatization and challenges faced by older adults in society, the older prisoners viewed prison as a place where they could feel equal to their peers and compared it to a nursing home, reinforcing their perception of being just like any other older person (Avieli, 2022). This perspective, influenced by an adaptive process, allowed them to focus on positive emotional interpretations and optimize their well-being, disregarding the distinctions between ageing inside and outside prison. Despite the negative aspects of incarceration, such as overlooking the darker sides, older prisoners reported finding comfort in having their basic physical and emotional needs fulfilled in prison, which contributed to a sense of psychological well-being (Avieli, 2022).

4. Discussion

Earlier research has consistently demonstrated that imprisoned individuals, regardless of age, report lower levels of perceived health and quality of life compared to the general population (Chung et al., 1998; Lawrence & Devine, 2022). Moreover, both the impact of the prison environment and the necessity of customized healthcare planning to address the specific health needs of older prisoners are emphasized, acknowledging the importance of addressing their unique challenges within the prison system (Lawrence & Devine, 2022). Additionally, there is a need for improved release planning and addressing the specific needs of older prisoners (Forsyth et al., 2015).

Older prisoners commonly experience health issues such as alcohol and substance abuse, depression, anxiety, dementia, and various psychiatric disorders. They also have a higher prevalence of non-communicable diseases like hypertension, cardiovascular diseases, diabetes, respiratory diseases, and cancer (Lawrence & Devine, 2022; Peixoto et al., 2022; Ridley, 2022; Solares et al., 2020). These findings highlight the increased burden of mental health disorders and non-communicable diseases among older persons in prison.

De Smet et al. (2017) recommended creating approaches that will allow older prisoners to express their interests, experiences, and emotions in prison. Furthermore, addressing psychiatric and age-related symptoms in older prisoners should be taken into account as one of the possible approaches, as they may not be effectively communicated by the prisoners themselves, who may be less assertive compared to their younger counterparts. Prison healthcare services should implement systematic screening for cognitive

disorders and neurodegenerative conditions (Combalbert et al., 2018). For those with advanced cognitive disorders and neurodegenerative pathologies, questions were raised about the suitability of continued imprisonment and the need for alternative solutions (Combalbert et al., 2018).

Based on the previous results, as an explanation, the unavailability of services for a significant proportion of prisoners or their inadequate provision is mentioned in the literature, including mental health support (Fazel, 2001). On the other hand, the educational level of old prisoners probably plays an important role in shaping their perceived health and quality of life (Combalbert et al., 2019). Neglected health needs within the prison system often result in more extensive and costly treatments upon release into the community. This is particularly impactful for older prisoners, as unaddressed health issues can impede their ability to reintegrate into society and function independently (Lawrence & Devine, 2022).

Nguyen et al. (2022) highlighted an increased need for specialized forensic services tailored to older prisoners. Other authors pointed to the importance of providing social care and support for older prisoners to ensure their safety, dignity, and effective use of their time in prison (Tucker et al., 2021). Furthermore, there is a need for interventions to reduce the risk of death among released prisoners (Binswanger et al., 2007).

Based on the recommendations provided by Mofina et al. (2022), the assessment of instrumental activities of daily living in the corrections setting or prison environment should be reevaluated. This implies that the current assessment methods may not adequately capture the functional abilities and needs of incarcerated individuals. It also emphasizes the importance of considering the specific activities that are relevant within different prison environments and how transitions between these environments can affect the significance of different activities. This indicates that the prison environment is dynamic and diverse, requiring a tailored approach to understanding and addressing the functional capabilities and challenges of individuals within different contexts of incarceration. Some studies emphasized the importance of targeting depression and assessing functional disability in suicide prevention efforts among older prisoners (Barry et al., 2020). As explained earlier, identifying prisoners with difficulty when performing prison-specific activities of daily living may help identify those at risk for depression and severe suicidal ideation, particularly among older male prisoners (Barry et al., 2017).

Managing the growing geriatric prison population requires creating an effective social environment, as concluded by Aday and Maschi (2019). On the other hand, regarding the care and management of older prisoners, conflicts between custody and healthcare systems are considered inevitable (Hagos, Butler, et al., 2022). When discussing ageing in prison, it also should be recognized that life imprisonment and long-term imprisonment

penalties intensely violate human rights (Paunović & Pavlović, 2021). One of the approaches to reaching best practices includes integrating care plans with safety and security routines and addressing bureaucratic obstacles. Furthermore, adaptations to the physical and social environment, as well as work processes, could lead to optimizing the care of older prisoners, but financial constraints hinder their implementation. Interdisciplinary teams are crucial, and lessons can be learned from hospice care programs regarding teamwork and role recognition. Nurses and healthcare workers in custody require specific competencies, and their well-being and psychological support should be prioritized. The authors also suggested adapting person-centred care to the unique prison environment and focusing on individualized care, prisoner involvement, choice, and self-management (Hagos, Butler, et al., 2022).

5. Conclusion

The growing population of older prisoners worldwide presents significant challenges for prison administrators, particularly in terms of addressing their unique health and social needs. This narrative literature review examined various aspects of the health of older prisoners, including their health status, health-related issues, and factors affecting their quality of life and daily activities. The findings highlighted the prevalence of chronic health conditions among older prisoners, with higher risks of hypertension, cardiovascular diseases, respiratory diseases, and arthritis compared to non-offender older adults. Mental health problems such as depression and anxiety were also observed, emphasizing the need for targeted suicide prevention efforts among older prisoners, focusing on those with depression. Additionally, assessing functional disability may help identify older prisoners who should be screened for mental health issues.

The factors of the prison environment, more precisely barriers, and enablers, could have further implications for policy, research, and practice. The prison system often fails to meet the unique needs of older prisoners, suggesting the need for specialized services or adapted units. The findings underscore the urgency of adapting prison infrastructure to meet the changing health needs of this ageing population and improving their overall well-being and successful reintegration into society. Future research and interventions should continue to address the unique challenges faced by older prisoners and promote their health, social support, and quality of life. Considering the health and quality of life is crucial for the proper prison treatment of older prisoners, given their vulnerable physical and mental health. However, there is still a lack of research on how this population of prisoners perceive their health and quality of life, despite the need to understand their unique challenges and needs. By conducting comprehensive evaluations in this area,

we can gather valuable insights to develop tailored interventions and support systems that address the well-being and rehabilitation of older prisoners.

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Elena Tilovska-Kechedji*

HUMAN RIGHTS BASED APPROACH TO AGING IN THE EUROPEAN UNION

We are all equal and have the right to live a dignified life no matter our age. As we get older our human rights, our political, social, economic rights, do not get weaker, or they do not have an expiration dat. Our human rights are governed and should be respected until the end. But in reality, this is not the case. Young generations feel that old people are a burden to the system, since the concept used in most countries is that young workforce pays for the pensions of the elderly. They are also a burden to the health care system as we saw during the Covid pandemic. Therefore, these and other view points or state of mind should change since we all have the fundamental right to life as well as to the other human rights no matter our age.

Keywords: *Human rights, dignity, life, aging, EU*

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1. Introduction

We are all equal as human beings, despite our age, at least we should be equal. But in reality, due to unclear legislation, influence from culture, history, influence from different future trends, influence from different perceptions and views in societies, people as they get older are viewed or treated as a burden to that society. But these views should start changing, since the older population can offer knowledge, experience and expertise from which younger generations can learn, but also because in couple of years the older population will be the majority in the world.

Demographics impact the changes of social, political, economic and cultural processes. The low natality rate and the better life style, health, social, and economic life have extended the life expectancy. Therefore, the elder population will increase and with that its participation in the world will increase. According to the United Nations, the number of older people above 65 years of age, by the middle of the 21st century, will exceed the number of children.[1] By 2030, the number of older persons will grow from 900 million to 1.400 million, and by 2050, that number will grow to 2.100 million. Therefore, old people will change the present course and bring new challenges for the social and sustainable development of societies.[2]

Despite the above presented facts, we need to strive to respect the fundamental rights of all the people and provide equal treatment for all regardless of the age. Because, all human beings have an essential right to dignity, that must be protected and respected. The fundamental rights, the civil, political, social and economic rights, as presented in the Charter of Fundamental Rights of the European Union do not have an expiration date especially regarding age. The old population should be respected equally, in order for them to have a dignified life. But, in today's modern world, being old, carries negative connotations, and old people are perceived as a burden to society. This is due to the fact, that aging is perceived with the loss or weakening of physical and mental capabilities, rather than having a positive connotation to the fact that old people have knowledge and experience. This stereotypical view of ageing so far was supported by policy makers who were focusing on the physical/ mental deficits and on how older people needs should be

[1] Solarević, M, Pavlović. Z. "Aging and Human Rights: Human Dimension of Statistics and Legislation in Serbia". Yearbook Human Rights Protection "From Unlawfulness to Legality. Provincial protector of citizens -Ombudsman. Number 1, Novi Sad 2018

[2]Martín García-Moritán. "Older persons as rights holders: Strategic areas to address". International Conference Human Rights of older persons & non-discrimination October 3 and 4, 2017. Santiago, Chile. Center of Old Age and Aging Studies, Pontificia Universidad Católica de Chile. The Office of the United Nations High Commissioner for Human Rights (OHCHR) ISBN Nº 978-956-14-2242-1 Retrieved from: ConferenceSantiagoReport.pdf (ohchr.org)

met by the state and society, neglecting the fact that older people can contribute positively to society. In addition to the negative attitudes and connotations towards older people, there is also the presence of discrimination. This discrimination ranges from jobs expectancies, to limits in accessing goods and services, to poverty, violence, abuse and much more. The 2015 Eurobarometer survey shows that discrimination of old age is the most frequently exercised type of discrimination.[3] Furthermore, the same year, a survey conducted in 50 countries by the Global Alliance for the Rights of Older Persons (GAROP) showed that around 2,000 older people were excluded from social or policy priority, ignored, avoided or disrespected, they were subjected to violence or abuse.[4]

In regards to this problem, there have been many soft law instruments adopted, like the Vienna International Plan of Action on Ageing (1982), the United Nations Principles for Older Persons (UN 1991) and the Madrid International Plan of Action on Ageing (MIPAA, UN 2002). All these instruments aim was to eliminate age discrimination and to promote the dignity of the elderly by pointing out their independence, autonomy, participation in society, and access to health and other care.[5] Also, the UN General Assembly points out that MIPAA is the only international instrument devoted to older persons. But this instrument is not legally binding, and it is not a human right instrument although it commits to people freedoms and human rights, and people ability to age with security and dignity, participation as citizens with their rights.[6] Therefore, the instruments do exist but none of them are applicable to protect the rights and dignity of the elderly. In the European Union the abuse of the older people has become a concern, especially due to demographics. In 2010, the number of people that were older than 65 was more than 17% of the total population, but this number will double, and the number of 80 year olds will triple by 2060. From this number, two out of three people are women, they are more exposed to social isolation and poverty, and they do not have quality access to health care and social assistance. [7]

[3] "Shifting perceptions: towards a rights-based approach to ageing". European Union Agency for Fundamental Rights. 2018 Retrieved from: Focus- Shifting perceptions: towards a rights-based approach to ageing (europa.eu)

[4] Eun-Hee CHI. "It is now time to act to promote and protect the human rights of older persons ". Human Rights of Older Persons 20th Informal ASEM Seminar on Human Rights 22-24 FEBRUARY 2021, ONLINE/SEOUL, KOREA. Retrieved from: ASEMHRS20-Human-Rights-of-Older-Persons.pdf (asef.org)

[5] Kalliopi, Chainoglou. "Human Rights Convention for Older Persons". Retrieved from: Microsoft Word - draft_ Human Rights for Older Persons_Chainoglou.docx (uom.gr)

[6] Ibid

[7] Nena Georgantzi. "Elder abuse and neglect in the European Union". UN Open-ended Working Group on Ageing 21-24 August 2012 Retrieved from: ElderAbuseNGOEWG2012.pdf (un.org)

2. Defining old age

The terms 'old people' or 'ageism' are linked to the age of a person and the biological process, these terms represent a social framework of realities and perceptions. The terms are usually discussed from four perspectives:

- chronological age, based on the birth;
- biological age, linked to physical changes;
- psychological age, the mental and personality changes in the life cycle;
- social age, the change of an individual's roles and relationships as they age.

These four aspects develop at different paste and affect individual and social reactions differently caused also by the historical and cultural background of the country. This affects the society view on older people, as well as how this group view themselves. Ageism is the stereotyping, prejudice or discrimination against individuals based on their age.[8] Aging of people should be viewed as a natural process of two phases: the first phase where there is growth and development of the person and the second phase results in old age.[9]

3. Cases of poor treatment of the elderly

There are many cases where old persons have been treated poorly due to their age. For example:

1. The first case is about death caused by poor hospital conditions and inappropriate treatment. The case is Volintiru v. Italy (application no. 8530/08). The application was presented to the Italian Government on 19 March 2013. The problem was raised on February 2007, when a women aged 85, the applicant's mother, was taken to the hospital due to hypoglycemia accompanied by neurological damage. The woman was in a coma, with a bloodstream infection of the left lung and a diuretic blockage. After a month in the hospital the doctors sent her home, even though her state was still considered serious but stable with slight improvement. On 10 March 2007, she was taken to the casualty department in a coma, she died nine days later. The applicant argues that her mother did not receive all

[8] "Shifting perceptions: towards a rights-based approach to ageing". European Union Agency for Fundamental Rights. 2018 Retrieved from: Focus- Shifting perceptions: towards a rights-based approach to ageing (europa.eu)

[9] Radaković, S. "Rights of the Elderly to Lead a Life of Dignity". Yearbook Human Rights Protection The Right to Human Dignity. Provincial Protector of citizens Ombudsman. Number 3, 2020 Novi Sad

the necessary treatment to protect her life. She also claims that the poor conditions in the hospital caused the infection leading to her death. But she also argues that there was a lack of an effective investigation by the authorities. The European Court of Human Rights presented the application to the Italian Government and asked questions regarding Article 2 (right to life), Article3 (prohibition of inhuman or degrading treatment), Article 8 (right to respect for private and family life) and Article 35 (admissibility criteria) of the European Convention on Human Rights. 10

2. The second case is about the risk of treatment contrary to Article 3 if a deportation is enforced. The case is Chyzhevska v. Sweden from 25 September 2012. The applicant, is a 91-year-old Ukrainian. The complaint was that if deportation occurred to return her to Ukraine this act would be in violation of Articles 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to respect of private and family life) of the Convention, due to her poor health and she had no family and where to go in Ukraine. The Court decided to strike the application out pursuant to Article 37 (striking out applications) of the Convention. The applicant was granted a permanent residence permit in Sweden and no longer faced a deportation. This decision was carried out due to a medical certificate from February 2012, which stated that the applicant's poor health had deteriorated and that her life would be at great risk if she was put on an airplane to be deported. And so, the Swedish Migration Board had concluded that there were medical obstacles to the enforcement of the deportation order.[11]

These are not the only cases, but they are few that lead to the conclusion that ill treatment of the elderly exists and the jurisdiction should be reinforced, if not the scenario of ill treatment of the elderly will continue on, not just by the society but also by the institutions, states and society as well.

In regards to the EU there is no specific information on elderly maltreatment from the authorities, but the study of ABUEL (Abuse and health among elderly in Europe) examined seven EU countries on this issue. And the results were that there exists 19.4% mental abuse, 2.7% physical abuse, 0.7% sexual abuse, 3.8% financial abuse and 0.7% for injury. In Germany, 53% of family caregivers reported at least one incident of maltreatment towards their care family in one-year period. Also, evidence shows that 30% of older people are dying from homicide due to maltreatment. Statistics also show that 70%

[10] "Elderly people and the European Convention on Human Rights". European Court of Human Rights Press Unit. 2022. Retrieved from: FS_Elderly_ENG (coe.int)

[11] "Elderly people and the European Convention on Human Rights". European Court of Human Rights Press Unit. 2022. Retrieved from: FS_Elderly_ENG (coe.int)

of the abusers are members of the family or are close to the victim. This data shows, how much elder abuse has spread in the EU, and there is also refusal by societies to admit the existence of abuse and neglect of these group of people.[12]

Elder abuse can occur in: nursing homes, social care institutions, hospitals and medical care centers, home care services, domestic settings. It can occur in administrative issues, shopping and travelling. Physical abuse is easier to trace, but other forms of abuse also exist like psychological, sexual and financial. For example, financial exploitation is growing, like taking over the finances or house, misusing the funds, blackmail, etc..[13]

Furthermore, abuse of the elderly can occur in the health care system as well. The right to health is part of several international human rights treaties. Health strategies should address medical dimensions, treatment and should be available to everyone. States have a duty to protect human life. The right to health is inherent to the right to life. The pandemic has tested States' ability to protect this right.[14] And during the pandemic many EU states failed to protect the right to health as well as the right to life.

4. Legal framework

Many countries have adopted a human rights-based approach to their national plans of action or policies, regarding older persons. Many declared that the Madrid Plan of Action had helped raise awareness and helped in the conduct of studies to understand old people situation and needs. Some gaps were found, like the lack of statistics, and the lack of appropriate care of older persons. Some states have passed laws and policies to improve the issue with the elderly. Also, regulations were passed on the provision of quality and the competence of institutions that provide care services. Others have adopted basic measures, like minimum requirements that need to be met by the residential homes, and training programs for caregivers. Also, public policies need to be implemented by providing financial support, fostering social and healthcare services such as day centers, measures to help families to take care of the vulnerable.[15]

[12] Nena GEORGANTZI. "Elder abuse and neglect in the European Union". UN Open-ended Working Group on Ageing 21-24 August 2012 Retrieved from: ElderAbuseNGOEWG2012.pdf (un.org)

[13] ibid

[14] Elena Tilovska-Kechedji. "Human Rights in Times of Pandemic". Yearbook Human Rights Protection The Right to Human Dignity. Provincial Protector of citizens Ombudsman. Number 3, 2020 Novi Sad

[15] Rosa Kornfeld-Matte. "Current vision of Human Rights of Older persons around the world". International Conference Human Rights of older persons & non-discrimination October 3 and 4, 2017. Santiago, Chile. Center of Old Age and Aging Studies, Pontificia Universidad Católica de Chile. The Office of the United Nations High Commissioner for Human Rights (OHCHR) ISBN Nº 978-956-14-2242-1 Retrieved from: ConferenceSantiagoReport.pdf (ohchr.org)

The general principle of the International legal framework related to equality and non-discrimination is included in the majority of constitutions and national laws, but not in all of them. Also it has to be pointed out that none of them have specifics regarding the rights of older persons and discrimination on age. Where those references do exist, the normative is applied with limitations and it is not applied equally. The reality is that there is no universal international normative which could be used as a basis for development of laws, monitoring and mechanisms to protect the elderly. The present framework of International human rights law does not recognize age as a cause of discrimination, which is a deficiency in the current system, and contributes to serious violations of the Human Rights of older persons to be invisible.[16] Aging is a global issue which in future will cause economic and political pressures on the health care systems because older people are more prone to certain health conditions, they rely on their pensions and social protection. Due to the lack of specifically applied international regulation on protection of the elderly, the discrimination against the old is inevitable. The UN in 2012 reported that the discrimination and stigmatization of elderly, is widespread, in the form of stereotypes, isolation, exclusion, violence and abuse.[17] And older persons are faced with four key challenges: discrimination, poverty, violence, lack of concrete policies and support.[18]

We also have to realize that sometimes specific regulations are not needed because to the elderly apply the same human rights as for all human beings. All human beings are born with the same rights and as we grow older these rights should not change.[19]

[16] Martín García-Moritán. "Older persons as rights holders: Strategic areas to address". INTERNATIONAL CONFERENCE Human Rights of older persons & non-discrimination October 3 and 4, 2017. Santiago, Chile. Center of Old Age and Aging Studies, Pontificia Universidad Católica de Chile. The Office of the United Nations High Commissioner for Human Rights (OHCHR) ISBN Nº 978-956-14-2242-1 Retrieved from: ConferenceSantiagoReport.pdf (ohchr.org)

[17] Elena Tilovska-Kechedji. "International Human Rights Law And Older Persons". Yearbook Human Rights Protection from Childhood to the Right to a Dignified Old Age - Human Rights and Institutions. Provincial Prosecutor of Citizens -Ombudsman No. 5, 2022 Novi Sad

[18] Young-ae Choi. "Ageing and older people's rights are among the most pressing human rights issues of out time". Human Rights of Older Persons 20th Informal ASEM Seminar on Human Rights 22-24 FEBRUARY 2021, Online/Seoul, Korea. Retrieved from: ASEMHRS20-Human-Rights-of-Older-Persons.pdf (asef.org)

[19]Ana Batrićević. "The role of informal caregivers in the fulfilment of the right to a dignified old age in Serbia". Yearbook Human Rights Protection from childhood to the right to a dignified old age - human rights and institutions. Provincial Prosecutor of Citizens -Ombudsman No. 5, 2022 Novi Sad.

5. Human Rights of old people in the EU

There is no binding international human rights treaty that specifically protects the rights of older people, although there is scope for better use of the UN Principles for Older people. [20]

The European Convention on Human Rights, and therefore the Human Rights Act, focuses largely on civil and political issues. The European Social Charter, includes economic and social rights such as health, housing and employment. States that have ratified the Charter, submit reports on the implementation of the Charter to the European Committee on Social Rights. While the Charter does not have an associated court, a protocol from 1998 allowed for collective complaints of violations of the Charter to be lodged with the Committee.[21]

Old people are defined as a homogeneous social group within the legal texts of the EU. For example, in the Charter of Fundamental Rights of the European Union, older adults are considered a homogeneous group within Article 25 (Rights of the elderly). Article 25 states: "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."[22]. But, the concept of "the elderly" includes different narrative that covers different groups, and it is not recognized by the Charter of Fundamental Rights. And the notion of adults in the Charter of Fundamental Rights does not consider discriminations. Article 21 (Non-discrimination) of the Charter does not solve the problem of implicit discrimination against adults, it only separates their rights, the rights of the children and women's rights. Another problem is the gender inequality. The higher percent of older persons (55%) are women, and this should be taken into consideration when defining the rights of older people. Article 23 (Equality between men and women) of the Charter of Fundamental Rights is not fully applied. Therefore, this implies a pro forma interpretation of this Article. [23] Furthermore,

[20] Older People and Human Rights A reference guide for professionals working with older people. The first edition of this report was commissioned by Age UK to the British Institute of Human Rights (BIHR) in 2009 and was written by Lucy Matthews (BIHR). 2011. Retrieved from: nhsggc_equalities__older_people_and_human_rights.pdf

[21] Older People and Human Rights A reference guide for professionals working with older people. The first edition of this report was commissioned by Age UK to the British Institute of Human Rights (BIHR) in 2009 and was written by Lucy Matthews (BIHR). 2011. Retrieved from: nhsggc_equalities__older_people_and_human_rights.pdf

[22] Sanja Ivic, Goran Nikolic, Milan Igrutinovic. "Recognition of Older Adults as a Heterogeneous Social Group". Trans/Form/Ação, Marília, v. 44, n. 4, p. 357-374, Out./Dez., 2021 Retrieved from: https://www.scielo.br/j/trans/a/574qbNhHDQf7MYRYS6ZDJFk/?format=pdf&lang=en

[23] Sanja Ivic, Goran Nikolic, Milan Igrutinovic. "Recognition of Older Adults as a Heterogeneous Social Group". Trans/Form/Ação, Marília, v. 44, n. 4, p. 357-374, Out./Dez., 2021 Retrieved from: https://www.scielo.br/j/trans/a/574qbNhHDQf7MYRYS6ZDJFk/?format=pdf&lang=en

during the COVID-19 pandemic, old people were mistreated and degraded. Older people were a burden on society, weak and unimportant. Some politicians said that older people should be willing to sacrifice themselves for the sake of the economy and the young generations. This is a classic example where old people are discriminated and undervalued. Some medical recommendations were to set an age limit for the admission to intensive care during the pandemic. The pandemic revealed many social inequalities and divisions especially in regards to the old population. The question of inequality is not just economic, social or political, it is very much real. It implies to the symbolic oppression on hierarchical thinking: young/old, citizen/alien, self/other and so on, in which the first is perceived as valuable, while the second is rejected.[24]

But the EU was built on the postulate of governing fundamental rights of all. Therefore, the EU must fight discrimination represented in the Treaty on the European Union. But there is no language presenting clearly the need to fight ageism or to address the discrimination of old age. According to international and European law, direct discrimination such as age, can be justified only in the labor market policies, and the pension systems, which is also not acceptable. Article 19 of the Treaty on the Functioning of the European Union (TFEU), helps the EU to make positive action and adopt legislative measures, to avoid discrimination. Furthermore, Article 21 of the Charter of Fundamental Rights, prohibits discrimination on the grounds of age. This is of course a novelty in human rights law, but it lacks the clear protection from age discrimination. Non the less, the primary law gives the possibility for the EU to take anti-discrimination measures, without imposing a duty. And in addition, positive action is possible only with agreement of all the member states. These limitations give right to EU bodies and member states to decide whether and what type of action might be used to tackle discrimination. Legislative instruments like the Community Charter of Fundamental Social Rights of Workers which pointed the right to adequate retirement, and the Revised European Social Charter which introduced the legally binding reference to the right of social protection of the elderly, only attributed social rights in old age. But they all failed to ensure equality in old age. These measures can only reinforce the stereotyping of older people. But a novelty that gives a positive assurance is the EU Charter of Fundamental Rights which includes a confirmation of the rights of the elderly in Article 25 where it states that "the rights of the elderly (are) to lead a life of dignity and independence", unlike previous instruments, and this Article should be used as a guidance on how equality in old age needs to be inter-

[24] Sanja Ivic, Goran Nikolic, Milan Igrutinovic. "Recognition of Older Adults as a Heterogeneous Social Group". Trans/Form/Ação, Marília, v. 44, n. 4, p. 357-374, Out./Dez., 2021 Retrieved from: https://www.scielo.br/j/trans/a/574qbNhHDQf7MYRYS6ZDJFk/?format=pdf&lang=en

preted. Also, this Article confirms that the EU aspires for equality and takes into consideration the special needs of older people. The EU legislation provides us with a benchmark in the pursuit of equality in old age. [25]

But despite the novelty, the EU's present approach to ageing is paradoxical, on one hand it produces stereotypes of older people as useless; and in the labor market it presents the opposite. The age limits in EU are interpreted very differently. There are situations where people aged 65 and above in the same country are considered capable to work but too old to drive, this is very controversial. Older people in travel insurance have barriers in regards to freedom of movement. On one hand it promotes longer working lives and on the other hand it maintains mandatory retirement ages. So, the EU has had a sketchy approach to ageism. But efforts to enshrine anti-ageist objectives are encouraged. Active ageing strategies are useful elements in an effective approach towards non-discrimination and equal opportunities, but for this kind of policies to be taken seriously, they have to be given a chance. Policy action will be inefficient if ageism persists in the beliefs of societies. The EU is conscious of its population ageing, but it is less concerned with the human rights challenges related to ageing. The EU legal and policy framework have given social characteristics to chronological age, consolidating work, retirement, and economic contribution. Therefore, old age has been defined as unproductivity, dependency, and a burden to society. This vision confirms stereotypes and legitimizes age discrimination and marginalization. That is why the EU must present balanced and effective mechanism to stop the inequalities, prejudice and ill treatment of older people. And it should promote a human rights-based approach to promote equality and dignity of old people.[26]

6. Good practices of member states in regard to the elderly

There have been good practices from some member states in regards to old age. Austria in 2012 adopted a Federal Plan for Older Persons. The plan contains: awareness-raising and measures against age discrimination, and discrimination against women. Furthermore, in Belgium, a public social action Centre was created, which organizes training

[25] Nena Georgantzi. "The European Union's Approach towards Ageism". In: Ayalon, L., Tesch-Römer, C. (eds) Contemporary Perspectives on Ageism. International Perspectives on Aging, vol 19. Springer, Cham. https://doi.org/10.1007/978-3-319-73820-8_21 Retrieved from: The European Union's Approach towards Ageism | SpringerLink

[26] Nena Georgantzi. "The European Union's Approach towards Ageism". In: Ayalon, L., Tesch-Römer, C. (eds) Contemporary Perspectives on Ageism. International Perspectives on Aging, vol 19. Springer, Cham. https://doi.org/10.1007/978-3-319-73820-8_21 Retrieved from: The European Union's Approach towards Ageism | SpringerLink

courses with older migrants. The Centre presented a guide of good practices for professionals working with these persons. The Czech Republic adopted a new National Action Plan promoting positive ageing for the period 2013-2017, which underlines the protection of the human rights of older persons. Furthermore, Finland in 2012, presented a Diversity Charter and a Network aiming at developing tools for managing diversity and exchanging good practices. The movement called "Occupy your own age" is a network for social work for the elderly. Germany, in 2006, established the Federal Anti-Discrimination Agency which organizes awareness events such as the 2012 thematic year on age discrimination, during which it awarded a prize to companies for applying innovative strategies for the promotion of workers of all ages. Sweden, in 2013, strengthened protection against age discrimination with the Swedish Discrimination Act, that covers areas of social protection, health care, access to goods and services, qualification and development of resources for older persons.[27] Therefore, we can conclude that even though there is not a sufficient legislation that protects the rights of the elderly in the EU still some member states want to make a difference and take matters in their own hand by promoting acts, plans, strategies and different projects to promote the rights of the elderly as well as prevent discrimination.

7. Conclusion

We can conclude that there is a lot of discrimination and ill treatment of old people in the world. This treatment is present due to the perception and mentality of society and the different influences affected by either cultural, historic or present-day influences that affect how society perceives old people, either as a burden or as people from which young generations can learn from**.**

Furthermore, in the EU there is consciousness that discrimination exists towards old people but in regards to their human rights and dignity there is still no positive action. There is a novelty in the EU with the EU Charter of Fundamental rights that governs the right of the elderly. But still the Charter is not enough to motivate and set an example to the society that this group pf people should be respected and not mistreated.

There have been good practices and changes in some member states to improve and protect the rights and lives of the elderly. But this is not enough, the EU should act and present more obligatory legislation as well as promote good practices to promote the rights and dignity of older people.

[27] "Promotion of human rights of older persons". Recommendation CM/Rec(2014)2 Adopted by the Committee of Ministers of the Council of Europe on 19 February 2014 and explanatory memorandum. Council of Europe. Retrieved from: Prems 39414 GBR 2008 CMRec(2014)2etExposeMotifs TXT A5.indd (coe.int)

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JUSTICIABILITY OF THE RIGHTS OF THE ELDERLY BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Over the last decades, both theory and practice have enthusiastically reiterated the claim that the mechanism of guarantees and human rights protection based on the European Convention on Human Rights is the most successful international human rights protection system. The scope of this undoubtedly successful human rights control mechanism will be tested by the author from the perspective of the rights of the elderly. In this sense, the author begins with the idea that the elderly have specific needs that can only be satisfied by equally specific socio-economic rights tailored to respond to these needs. Several questions arise in this regard that the author attempts to answer in this paper. First and foremost, what is the boundary of justiciability of socio-economic rights? Then, what are these specific socio-economic rights of the elderly, and can any of these rights be encompassed by the field of application of the European Convention ratione materiae? After presenting arguments that the answers to these questions are affirmative, the author examines the boundaries of justiciability of these rights in a narrow sense. The term justiciability in the narrow sense is used by the author in this paper to indicate specific problems that the Court faces when it needs to form the operative part of the judgment after determining the violation of socio-economic rights which, by their nature, are not self-executing and which may require the establishment or modification of the social protection system. In conclusion, the author suggests that the European Court of Human Rights holds all the instruments necessary to achieve full justiciability of the socio-economic rights of the elderly, both in general and in the narrow sense.

Keywords: *Rights of the Elderly, European Court of Human Rights, Justiciability*

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1. Introduction

By examining how the idea of human rights protection has developed in the international community after World War II, we can identify several patterns that help us better understand the trajectory of international human rights protection. Immediately following the end of World War II, the drafting of international documents proclaiming universal human rights began. An example of this is the Universal Declaration of Human Rights by the United Nations in 1948 (Universal Declaration of Human Rights, 1948). Following this pattern, human rights have been developed from a declarative proclamation into substantive rights guaranteed by international acts. These rights were globally expanded by the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights, 1966) and the International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights, 1966).

While working on the drafts of these two Covenants, it was noted that there are certain groups of people who are in such a position that they require additional guarantees to achieve full equality. Recognizing this need, the regulation of human rights at the international level gains another pattern that is reflected in providing special guarantees to certain groups of people through specific conventions. In line with this pattern, we have the Convention on the Elimination of All Forms of Racial Discrimination (Convention on the Elimination of All Forms of Racial Discrimination, 1969) and the Convention on the Elimination of All Forms of Discrimination Against Women (Convention on the Elimination of All Forms of Discrimination Against Women, 1979). Following this pattern, the international community has identified other groups of people who, due to some personal characteristic, warrant special protection. At the same time, it was concluded that the nature of the characteristics that define these groups is such that it is no longer enough to provide this group of people only protection from discrimination, rather it is necessary to also provide them with special substantive rights tailored to their specific needs. Among the various personal characteristics that affect a person's realization of rights, the international community has recognized disability and age. For this reason, today we have the Convention on the Rights of Persons with Disabilities (Convention on the Rights of Persons with Disabilities, 2007), and in terms of age as a factor requiring specially adapted rights, we have the Convention on the Rights of the Child (Convention on the Rights of the Child, 1989) and the Convention on the Rights of the Elderly.[1]

[1] Trust me, keep reading.

A careful reader will undoubtedly notice that the Convention on the Rights of the Elderly does not actually exist. If, resigned to this fake fact, they have not given up reading, the reader will certainly wonder about the purpose of such a false claim. In this regard, the author owes an explanation. This is a psychological trick aimed at momentarily exploiting the reader's intuitive expectation that the Convention on the Rights of the Elderly would naturally follow the list of previously mentioned conventions before the reader's brain manages to kick back the information from the subconscious to the conscious that such a convention does not actually exist. The trick is motivated by an anecdote from an exam where a student listed the "Convention on the Rights of the Elderly" while listing various human rights conventions, which the Professor approved by nodding his head, only to stop questioning the student a few moments later and point out that, as far as he knows, such a convention does not exist. This moment of approval, which the reader might have momentarily shared, actually very effectively shows that among us lawyers, there is indeed an intuitive feeling that this convention should exist.

Out of the many reasons suggesting that a convention on the rights of the elderly should exist, we will point out two here. First, the specific needs of the elderly should be considered. The elderly raise specific issues in terms of human rights and can be said to have distinct human rights experiences; being at the end of the life cycle counts as a very distinctive feature of the human experience (Mégret, 2011: 43) and we must first recognize the specific needs of the elderly in order to provide guarantees of rights that would satisfy those needs.[2] The second reason is that demographic projections show that the elderly will soon make up as much as a third of the world's population (Mikołajczyk, 2013: 511).

These, and many other reasons, have led to the topic of international protection of the rights of the elderly appearing more and more frequently in legal theory and practice. The United Nations formed the Open-Ended Working Group on Ageing in December 2010 for the purpose of strengthening the protection of the human rights of older persons by considering the existing international framework of the human rights of older persons and identifying possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments (UN Resolution, 2010).

In the absence of an international convention on the rights of the elderly and in anticipation of its adoption, the author has decided to examine to what extent certain rights that should be guaranteed to the elderly by the future "Convention on the Rights of the Elderly" can be realized through the system of human rights protection guaranteed by the

[2] For more on some specific needs of the elderly: Solarević, M. and Pavlović, Z. (2018) Aging and Human Rights: Human Dimensions of Statistics and Legislation in Serbia. Yearbook. Human Rights Protection. From Unlawfulness to Legality. Novi Sad: Provincial Protector of Citizens-Ombudsman, pp. 51-68.

European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950).

2. Defining the Research Framework

The control mechanism established by the European Convention for the Protection of Human Rights is considered the most successful international human rights protection mechanism and the mechanism that has contributed the most to the introduction of new high human rights protection standards (Helfer, 2008: 125). This flattering epithet also carries the obligation of this mechanism to continue to recognize specific problems in the realization of human rights in the future and to provide guidelines to member states on how to align their behavior with the requirements of the Convention. Precisely for this reason, the author decided to test the question of the justiciability of the rights of the elderly within the framework of this (rightfully) most successful international human rights protection mechanism.

The European Convention for the Protection of Human Rights guarantees a wide range of rights to individuals under the jurisdiction of the signatory states. These rights apply to all persons equally and without discrimination, which certainly includes the elderly. In this sense, the elderly enjoy the rights stipulated by the Convention that apply to the entire population, as well as the right not to be discriminated against in the exercise of these rights compared to the rest of the population. However, the text of the European Convention does not explicitly recognize any special rights for the elderly in the sense of providing guarantees that certain needs that are specific to the elderly population will be met and guaranteed in a certain way.

Therefore, the first question is what specific needs should the specific rights of the elderly correspond to, because only after answering this question can we consider whether and to what extent these specific rights of the elderly can be subsumed under some of the general rights guaranteed by the Convention.

Although in recent years legal theory has focused extensively on the typical rights of the elderly, for the purposes of this paper, the author has limited himself to a normative approach to defining the typical rights of the elderly by remaining within the system established by the Council of Europe for the typical rights of the elderly that are found in Article 23 of the European Social Charter (European Social Charter, 1996). Indeed, the European Social Charter (revised in 1996) is the first and so far the only inter-

national convention that stipulates certain rights of the elderly in a special article to guarantee legal protection for the specific needs that the elderly have.[3] Thus, Article 23 of the European Social Charter provides that the signatory states[4] are obligated:

- 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;

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.

As we can see, these are social and economic rights tailored to satisfy some of the specific needs of the elderly. In relation to this finding, there are several questions that will be examined in the paper in turn:

First of all, the general question of the justiciability of social and economic rights arises. In legal theory and practice, it is not uncommon to come across the view that social and economic rights are not self-executing by nature and that their realization requires state activity, which involves the adoption of numerous statutory and subordinate acts as well as state funding, so courts cannot decide on the existence of a specific right of a precisely determined person without the state first establishing a system that allows the realization of this right.

Then the question arises as to whether the rights stipulated in Article 23 of the European Social Charter can be subsumed under the field of application of the European Convention for the Protection of Human Rights.

[3] This certainly does not mean that there are no other conventions tha deal with rights that are relevant to the elderly as well. See more about the legal framework of these rights in: Tilovska-Kechedji, E. (2022) International human rights law and older persons. *From childhood to the right to a dignified old age human rights and institutions*, p. 439.

[4] Which accept this Article of Part III of the Charter.

Finally, if the answers to these two questions are affirmative, a third question arises (closely related to the first one), and that is to what extent the European Court of Human Rights can intervene in the legal order of a member state if it finds that some right of the elderly (encompassed by the Convention) is violated (Paunović, Pavlović 2021: 186). Will the Court be satisfied with a declaratory judgment that the right has been violated, or will the Court also order the state to take some individual or even general measures to correct the irregularities?

Only by analyzing the listed questions can we understand to what extent the European Court of Human Rights is capable of protecting certain rights of the elderly.

3. Justiciability of Socio-economic Rights in General and Subsumption of Specific Rights of the Elderly under the Scope of the Convention *Ratione Materiae*

In older legal theory, there were opinions, which have not entirely faded even today, that the task of courts or judicial authority is not to create or articulate a legal norm but to apply it to a specific case.[5] This would mean that in a situation where certain rights are not self-executing, the court could not fill legal or even systemic gaps with its decision to better define a right that has not been sufficiently elaborated by law or regulation. Regarding these views, a thankless division is often created in legal theory according to which civil and political rights are self-executing and therefore justiciable, while social and economic rights, in case further elaboration is omitted through systemic laws, are not self-executing and therefore not justiciable (Gutto, 1998: 79).

Several arguments are put forward in support of claims about the non-justiciability of socio-economic rights: that the implementation of such rights requires significant budgetary funds, while the formation of the budget is explicitly under the authority of other branches of government (Rodríguez-Garavito, 2019: 252); that these rights are not clear enough and are too broadly set, that is, it is more a question of standards to strive for than firmly guaranteed rights (Trispiotis, 2010: 8); and that by deciding on socio-economic rights without adequate legal and regulatory basis, courts would actually overstep the boundaries of their authority and usurp the powers of the legislative and executive authorities (Siegel, 2007: 96).

However, the imperfections that can be attributed to socio-economic rights can equally be attributed to many political and civil rights, regarding which the question of justiciability is not posed, rather it is assumed that these rights are justiciable. Take for

[5] For more on critiques of this approach, see: Siegel, J.R. (2007). A theory of justiciability. *Texas Law Review.*, *86*, p. 73.

example the right to free elections as a *par excellence* political right. This right is not self-executing. On the contrary, it implies the establishment of an entire electoral system by the legislative power, the provision of significant budgetary funds for conducting elections, and numerous activities of state bodies in implementing and controlling elections. Nor is this right clearly defined in the Convention. It does not state who and under what conditions can be nominated nor who and under what conditions can vote, nor does it say what the electoral system should be like.

Representing socio-economic rights as standards to strive for and which are therefore largely or even completely excluded from judicial decision-making means depriving socio-economic rights of their nature and essence. If a constitution or international convention prescribes some socio-economic right, then it means that this legal system has precisely decided to prescribe and guarantee something as a human right, not as a nice wish or utopian standard. Furthermore, if something is guaranteed as a right, it must *per definitionem* have some form of judicial protection. The same applies to socio-economic rights. Therefore, the arguments put forward in support of the claim that socio-economic rights are not justiciable can better serve to discuss how these rights are justiciable, because any other claim starts from denying the very essence of rights as such.[6]

This general and theoretical conclusion about the justiciability of socio-economic rights is not difficult to subsume under the norms and practice of the control mechanism established by the European Convention for the Protection of Human Rights. In the normative sense, it should be emphasized that the European Convention for the Protection of Human Rights already contains guarantees of certain socio-economic rights. Here we will cite as an example the first two rights guaranteed by Protocol 1 to the Convention, which are the right to property and the right to education. In connection with this, Article 19 of the Convention, which establishes the Court precisely to ensure control over the observance of guarantees (including socio-economic ones) from the Convention, should be especially emphasized. Thus, it is the direct intention of the Convention that the socio-economic rights it contains be justiciable. This should be supplemented by the practical approach that the Court has in terms of the goal of the Convention and the role of the Court in the control mechanism. Namely, the Court has emphasized in a large number of cases its firm belief that "the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective" (*Scordino v. Italy*, 2006: § 192). Therefore, the socio-economic rights prescribed by the Convention are not only justiciable in the normative sense but also in the practical sense, because the Court, in

[6] There will be more on the limits on judiciability in a separate part of the paper.

exercising its function, bases its judgment on the idea that the judicial control it exercises should cover the question of the practical realization of guaranteed rights.

The fact that socio-economic rights are justiciable and that the Court recognizes that in performing its role it needs to ensure that guaranteed rights are practical and achievable does not mean that the elderly can turn to the Court for the protection of any human right. The arguments put forward by the elderly before the Court must be capable of convincing the Court that the specific right they are invoking, such as the right to a pension, can be subsumed under one of the rights prescribed by the Convention. This jurisdiction of the Court is called the field of application of *ratione materiae* and it is not easy to trace. Over its history, the Court has often expanded the catalog of specific rights that it believes are covered by the general rights guaranteed by the Convention, using different techniques of interpretation. Using the technique of evolutionary and innovative interpretation, the Court has "incorporated" numerous individual rights into the legal order of European states through judicial creativity, rights that were previously not thought to be covered by the Convention's guarantees.[7]

The situation is no different with the matter of specific rights of the elderly in Article 23 of the European Social Charter. In its practice so far, the European Court of Human Rights has subsumed under some of the rights guaranteed by the Convention various individual rights that are essentially close to those from Article 23 of the European Social Charter.

The Court has also accepted its jurisdiction to decide on social benefits and pensions, which would enable the elderly to have adequate resources to be fully-fledged members of society. The Court did this by subsuming, under certain conditions, these rights under the protection of the right to property. The Court has pointed out in its decision-making that the Convention itself does not guarantee the right to a pension as such, but in member states where a system of compulsory pension and social insurance has been established, people who are beneficiaries of this system have certain legitimate expectations from the state and these expectations can be considered property rights and interests in terms of protection of the right to property (*Andrejeva v. Latvia*, 2009: § 77). In this way, the Court has over the years ruled on various types of social benefits that are closely related to the status of the elderly. In the case of *Kjartan Ásmundsson v. Iceland* (App. No. 60669/00, 2005), the Court ruled on the violation of rights related to disability pensions. In the case of *Stec and others v. United Kingdom* (App. No. 65731/01, 2006), the Court ruled on disability benefits preceding pensions and replacing those benefits with

[7] More on evolutionary and innovative interpretation techniques as well as the judicial creativity of the European Court of Human Rights in: Popović, D. (2013). Postanak evropskog prava ljudskih prava Esej o sudskoj kreativnosti. *Official Gazette, Belgrade*, pp. 137-147.

a pension depending on the age and sex of the beneficiary. While in the case of *Valkov and others v. Bulgaria* (App. No. 2033/04, 2012), the Court accepted to decide on the issue of whether a reduction in pensions affects the violation of the right to property. In an indirect way, the Court also dealt with the issue of the conditions and legality of terminating the insurance status of people who already receive an old-age pension, as in the case of *Grudić v. Serbia* (App. No. 31925/08, 2012).

The Court also dealt with other rights that are marked in this paper as specific rights of the elderly. Above all, the Court dealt with the question of social inclusion of the elderly with health problems. The question has been raised several times whether the state has an obligation to take certain active measures to enable elderly people with health problems a certain level of support in carrying out daily activities that they can no longer do on their own. The Court subsumed this question under Article 8 of the Convention, which guarantees the right to privacy and family life.

In the case of *Jivan v. Romania* (App. No. 62250/19, 2022), the applicant (in his late eighties) became immobile after surgery and requested a personal assistant to help with daily life activities. After his request was rejected by the competent authorities, he turned to the European Court of Human Rights with the argument that the authorities had breached his right to respect for his private life, insofar as they had deprived him of his autonomy and access to the outside world, thus forcing him into isolation. The Court accepted this argument from the applicant and found a violation of the rights under Article 8 of the Convention, stating among other things that there will be a violation of this right in cases where: "the State's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world." (*Ibid.* § 31) The Court followed similar reasoning in the case of *McDonald v. United Kingdom* (App. No. 4241/12, 2014) regarding the applicant's right to be provided with night care by an appropriate assistant in order to achieve a sufficient degree of autonomy in everyday life.

In this section of the paper, we have built on the conclusions from the previous section that the rights that satisfy the specific needs of the elderly as a sensitive and special category are by their nature predominantly socio-economic rights. In connection with this, in this section of the paper, we have shown that socio-economic rights viewed from the aspect of legal theory should be considered justiciable rights. We then confirmed this claim at the normative level by pointing to the provisions of the Convention which on the one hand guarantee certain socio-economic rights and on the other hand explicitly authorize the Court to control the guarantees of these rights. Finally, we gave examples from the Court's case law, which indicates that the Court, by applying an evolutionary and

innovative interpretation of the convention in its work to date, has been willing to subsume some typical rights of the elderly under the general rights guaranteed by the Convention. However, these conclusions do not provide answers to all questions of importance for understanding the justiciability of the rights of the elderly within the control mechanism established by the Convention. It remains to be examined what the limits of justiciability of such rights are. This is exactly what the next segment of the paper is dedicated to.

4. Boundaries of the Justiciability of the Rights of the Elderly

As previously indicated in the paper, the question of the justiciability of elderly rights, as socio-economic rights, entails certain difficulties related to the boundaries between judicial authority and other branches of power. Namely, it is entirely legitimate to question from what point and to what extent a court can intervene in the area of socio-economic rights that undoubtedly require budget allocations, the establishment of a social protection and support system, and the like. Notably, the situation becomes even more complex when considering that the European Court of Human Rights is an international court of limited jurisdiction, which exercises its jurisdiction in a system based on the principle of subsidiarity.

Precisely for these reasons, the exposition that follows in this segment of the paper is divided into two questions. The first is the issue of the boundaries of judicial control, i.e., from what point a court can intervene in socio-economic rights. The second question is about the limits of judicial intervention concerning socio-economic rights once judicial control shows that there is a violation of rights, i.e., how the court can formulate the operative part of its judgment and what it can order the state to do. For instance: can the Court order the enactment of a new law or establish a new method of calculating pensions that would satisfy the right to a dignified old age of the insured?

4.1 Limits of Judicial Control

Within the part of the legal theory that advocates for the justiciability of socio-economic rights, there is a division regarding the question of the limits of control that courts perform in relation to socio-economic rights. Should courts determine what is the minimum core of a socio-economic right that the state cannot further erode with its actions and which will represent the minimum threshold against which comparison is made for the purposes of judicial control of respect for socio-economic rights (Rodríguez-Garavito, 2019: 236)? Or should courts, when controlling socio-economic rights, set

standards that are higher than the minimum core by determining what is the highest possible standard of protection of socio-economic rights that can be achieved in a particular situation given the available resources (Trispiotis, 2010: 6)?

This question is even more relevant from the perspective of the European Court of Human Rights and the specific role it occupies in the control mechanism of the Convention. The European Court of Human Rights regularly emphasizes in its practice that the mechanism for protecting human rights established by the Convention is subsidiary by nature (*Riepl v. Austria*, 2005: § 32). This means that it is primarily the responsibility of member states and national courts to achieve the guarantees of rights established by the Convention at the national level. States have a margin of appreciation between different measures they will use for this purpose. In this sense, the task of the Court in controlling the measures taken by a member state to achieve and protect the socio-economic rights of the elderly is limited. The Court's task is not to determine which would be a better (*Klass and others v. Germany*, 1978: § 49) or the best (*Ireland v. United Kingdom*, 1978: § 214) measure for achieving a certain result but to determine whether the measure applied by the member state is in accordance with the provisions of the Convention.

Therefore, the subsidiary nature of the Convention's control mechanism conditions the Court to limit its control function to the question of whether the member state has satisfied the minimum core of the guaranteed right with its measures.

The fact that member states have a certain freedom in choosing measures to fulfill the guarantees of rights from the Convention entails another limitation of the Court, which is reflected in the doctrine of the margin of appreciation. The margin of appreciation is based on the idea that member states, due to direct communication and a more immediate relationship with their citizens, are in a better position to assess how a certain right should be protected or limited (Todorovic, 2023: 133). In the field of socio-economic rights, this is additionally important because member states are in a much better situation to assess how certain social protection measures will affect the resources available to the state. Due to these circumstances, the Court is willing to show "trust" and leave a certain discretionary area of decision-making to the state in which the Court will not interfere as long as it assesses that the state does not violate the rights guaranteed by the Convention with such powers. In this way, the Court gives national authorities a certain maneuvering space when assessing their behavior before it is ready to claim that there has indeed been a violation of rights (Yourow, 1996: 14). In other words, the Court will be ready to determine that there is a violation of a right from the Convention only if it finds that the state has exceeded the boundaries of the margin of appreciation.

Defined as such, the margin of appreciation transplanted into the discussion about justiciability can also be described as the margin of justiciability.

Using the example of specific rights of the elderly, we can construct a clear picture of the boundaries of justiciability through the application of the margin of appreciation that we have here described as the margin of justiciability. Earlier in the paper, it was asserted that the Court recognized the right to a pension as a property right subsumed under the right to property. However, despite this, the Court took the position that the right to a pension does not automatically imply a right to a pension in a certain amount or in an amount adequate to meet the average needs of pension recipients (*Žegarac v. Serbia*, 2023). The issue of the pension amount was classified by the Court under the margin of appreciation of member states, as they are precisely the ones who have direct knowledge of how much pressure their pension system can endure. In this way, the Court effectively conveyed that the right to a pension is justiciable, but that the right to a pension of a certain amount is essentially not justiciable, as it remains within the domain of the margin of appreciation of the member states, where the Court will not interfere.

4.2 Limits of Judicial Intervention

It has been pointed out several times in the paper that the socio-economic rights of the elderly are not self-executing and typically require the existence of social and health protection systems within which these rights are realized. These systems require funding, which the member states fully or partially provide from the public budget. The establishment and financing of such complex systems undoubtedly fall within the domain of the executive and legislative authorities.

Therefore, the question arises as to how the Court, in a situation where it has established a violation of rights, can tailor the operative part of the judgment considering the redistribution of authority between the judicial, legislative, and executive powers. Can the Court order the adoption of a systemic law to create conditions for the realization of the violated right? Can the Court demand changes to the provisions of existing laws to enable the realization of a right? Can the Court order other general non-legal measures, such as redirecting part of the budget to meet the needs of the elderly? Can it order the construction of a special type of home for the elderly? Moving from the general to the particular, we can ask ourselves whether the Court has the authority to, apart from establishing a violation of rights and possible damages, order another individual measure (for example, to admit a person into a nursing home).

The answers to these questions, at least when it comes to the specific rights of the elderly, cannot be found in the existing case law of the European Court of Human Rights. However, based on the system that the European Court of Human Rights created by an innovative interpretation of the Convention's provisions, we can anticipate what

options of intervention in the national legal order are available to the Court if it decides to use them.

First of all, the Court may be satisfied with the fact that the mere establishment of a violation of rights has achieved just satisfaction for the applicant (European Convention, Article 41). The Court then does not intervene in the national legal system, and the matter is concluded. Furthermore, the Court can, along with establishing a violation of rights, order the payment of a certain amount of money as compensation for damages (*Ibid.*). However, when deciding on just satisfaction (which in case law is most often monetary) nothing in the Convention prevents the Court from ordering another individual measure that it considers will lead to just satisfaction (Todorovic, 2022a: 170). Thus, the Convention authorizes the Court to order any measure necessary to remedy the situation (Colandrea, 2007: 397). In that sense, the Court can order the state to restore a previous situation, for example, by obligating the state to return a person unjustifiably removed from a nursing home. But equally, the Court can establish a new situation, for instance by ordering the state to provide a person who did not previously have special elderly care with such care.

However, the Court has the authority in certain cases to order the state to take general measures to address systemic problems in the realization of human rights, within the procedure of issuing pilot judgments (Todorović, 2022b: 187). These measures can be different and can even obligate the state to amend existing laws or even enact a *lex specialis* that would establish a whole mechanism for realizing and controlling a specific right.[8] Therefore, it is not unthinkable that the Court in certain situations could use these powers to obligate a member state to remove a systemic problem with the realization of the rights of the elderly by enacting a *lex specialis* and establishing an entirely new mechanism for realizing a specific right of the elderly.

The question is whether even a high court in the signatory states (be it constitutional or supreme) can boast that it has the power to order its parliament and government to enact a special law and establish a new mechanism for controlling and realizing a right. In this sense, it indeed seems that the European Court of Human Rights is uniquely positioned to effectively respond to some of the biggest systemic problems in the realization and control of specific rights of the elderly, provided that it finds that they fall within the scope of the Convention.

[8] E.g. *Zorica Jovanović v. Serbia*, (App. No. 21794/08), March 26, 2013. § 92: "In view of the above, as well as the significant number of potential applicants, the respondent State must, within one year … take all appropriate measures, preferably by means of a *lex specialis* to secure the establishment of a mechanism aimed at providing individual redress…This mechanism should be supervised by an independent body, with adequate powers…"

5. Conclusion

Starting from the idea that elderly people have specific needs that can only be addressed by substantive rights tailored to satisfy these needs, and in the absence of a convention on the rights of the elderly, the author relied on guarantees of certain specific rights of the elderly recognized by the European Social Charter. These specific socio-economic rights of the elderly have then been transplanted into the framework of the European Court of Human Rights, posing the question of whether and to what extent such rights are justiciable within the frameworks provided by the European Convention for the Protection of Human Rights and the case law of the European Court of Human Rights.

To better understand the discourse on the analysis of the problem of justiciability, the author built upon contemporary tendencies in legal theory that argue that socio-economic rights, despite their numerous specificities, are necessarily justiciable.

This has only resolved the first obstacle in considering the justiciability of the rights of the elderly in the Convention's control mechanism. It was necessary to further examine whether specific rights of the elderly can be subsumed under the field of application of the Convention *ratione materiae*. The analysis of the case law so far has brought interesting conclusions. Namely, in the last twenty years, the Court has subsumed issues of old-age pensions, disability pensions, work disability allowances, and the right to be part of and realize rights from the pension fund under the scope of the Convention, within the right to property. While regarding the right to privacy and family life, it substantively discussed the rights of the elderly to preserve their autonomy and social lives in their later years through the state's obligation to provide these individuals with night care or an adequate assistant for performing everyday activities (Turanjanin 2022: 524). This certainly does not mark the end of the full catalog of specific rights of the elderly that can fall under the umbrella of the general rights guaranteed by the Convention. Experience with the European Court of Human Rights teaches us that the Court is often ready to expand the catalog of specific rights that fall under the general rights from the Convention through an evolutionary and innovative interpretation of the Convention as a living instrument.

In the end, the author also dealt with the question of the justiciability of specific rights in a narrow sense. Namely, legal theory often emphasizes that the nature of socio-economic rights is such that they are not self-executing, as a result of which the Court's hands are tied in terms of the ways it can provide redress to the party in the process. This is because the realization of socio-economic rights requires the establishment and existence of social and health protection systems within which these rights are realized, which, in turn, requires the adoption of laws and budgets for this purpose, thereby entering the domain of the authority of other branches of government and exiting the domain of the

judgment. In this part, we find maybe the most interesting conclusions because the analysis of the development of case law has shown that the European Court of Human Rights has developed a wide range of powers that enable it to provide just satisfaction at different levels depending on the demands of each individual situation. Thus, in addition to establishing a violation, the Court can award damages or order the state to take another individual measure to achieve just satisfaction for the suffered violation. Going even further, the Court is authorized to order the state to even enact special laws that establish a new system of control and realization of a specific right, according to a pilot judgment. Such an authorization of the Court is a particularly suitable legal remedy for remedying systemic deficiencies in the realization of socio-economic rights, and therefore the specific rights of the elderly.

The conclusion is therefore not only that the specific rights of the elderly as socio-economic rights are justiciable, but that the arrangement in which the European Court of Human Rights operates and the powers that this Court holds suggest the creation of a whole new legal ecosystem in which the specific rights of the elderly will be able to thrive if the Court, through its evolutionary interpretation, continues to expand the catalog of specific rights of the elderly by incorporating them into the existing general rights of the Convention.

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Jasmina Igrački[*]

PREVENTION OF ABUSE-DISCRIMINATION OF ELDERLY PERSONS[*]

Negative stereotypes about older people speak with special reference to their negative effects on mental and physical health. Research on the discrimination of the elderly began in the 60s, and a large number of studies have been conducted to this day. Ageism affects the political, economic and legal aspects of a person's life, and the most questionable consequences that ageism has are on the mental health of old people. Ageism is a big social problem that needs constant attention. Not only because of the fact that we often overlook it, but also because of the fact that the proportion of the elderly in the population is increasing.Adopted negative attitudes about oneself actually lead to faster deterioration of the body in old people. Some studies have shown that some older people, who have adopted negative attitudes about themselves and their abilities, live shorter in their later years. In order for old people to age healthily, we must work together to implement positive discrimination, and politicians, educators, doctors, mental health experts and other health professionals contribute to improving the quality of aging.

Keywords: *prevention, abuse, discrimination, elderly, ageism, society's reaction*

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1. Introduction

At the end of the 1960s, research into the phenomenon of discrimination against the elderly began. Despite the relatively late focus on the problem of discrimination against the elderly, significant research has been carried out in recent decades and a large number of studies have been published related to the problem of discrimination against the elderly. Maintaining negative attitudes and discriminatory behavior towards old people is known as ageism[1].

Ageism affects the political, economic and legal aspects of human life, but the most questionable are the consequences that ageism has on the mental health of older people, as well as their employability. Ageism is a big social problem that needs constant attention. Not only because of the fact that we often overlook it, but also because of the fact that the proportion of the elderly in the population is increasing. Finaly, let's not forget, we will all one day end up in the category of old people. Perhaps the worst consequence of negative discrimination against the elderly is the appearance of a vicious circle that leads to actual physical and mental deterioration of the elderly. Namely, old people often adopt negative attitudes about themselves, conform to the society they belong to, take on the role assigned to them by that same society. And that is the role of inactive, passive and dependent persons. Society does not expect the elderly to be physically active, sexually active, social, creative and productive. By conforming to these expectations, old people avoid activities in which they would be the opposite of what society expects (how many times have you heard "It doesn't suit his age"). By not being active in any way, the ability of the elderly to be active, creative and productive declines. Actually, adopted negative attitudes about oneself lead to faster deterioration of the organism. Some research have even shown that old people who adopted negative attitudes about their abilities in later years have shorter lives. For example, if your grandfather is hearing impaired, it does not mean that he can no longer play chess, and yes, it is possible that the seventy-year-old neighbor goes to yoga. There are centenarians who drive cars, dance, ride bicycles, participate in many social activities, etc.

The aging of the population has consequences in all areas of life. Gradually, but inevitably, it affects the living conditions of the community, because the support of inactive old people increasingly burdens the working-age population. The age policy is only one aspect of a broader policy that strives to ensure the harmonious development of the entire society, with the aim of enabling everyone to occupy a place that ensures the most

[1]The term was coined by the doctor, gerontologist Robert Butler, and came into wider use last decade on our continent precisely as a warning about the emerging negative trend in the attitude towards the elderly throughout Europe.

optimal development of his personality at all times, in his own interest, as well as in the interest of the community itself, taking into account both, age and other elements that determine personality. Ageism permeates many institutions and sectors of society, including those providing health and social care, the workplace, the media and the legal system. Older and younger adults are often disadvantaged in the workplace.

"Problems of the elderly" are, above all, a consequence of the life course in the social organization, which has not changed over time in relation to this phenomenon. In the early eighteenth century, at the beginning of the demographic transition, people began to live longer. Michel Philibert pointed out the question "whether the way we consider the "problem of the elderly" in terms of national policy or the medicalization of life is deeply rooted in the 18th century", having said: "What makes the social, economic and political significance of aging is not the multiplication of the number of old people, but the fact that this multiplication takes place in a society that takes the devaluation of old people for granted, instead of seeing it as a feature of its own culture". In that case, we would have a different paradigm than the biomedical paradigm, the age paradigm which is the result of social construction and the course of life in a certain social organization, and the social response would become quite different. Instead of stigmatizing the elderly, the "more than", as a "bad object" who was considered incapable of adapting to change, as the introduction to Larocque's report does, it would be necessary to completely modify the social organization, its values and priorities in order to enable to everyone: the young or old, capable or incapable, to find their place in it, as they are, i.e. what some call an inclusive society today. It is no longer individuals those who need or have to adapt, but the entire social organization must radically change its way of working.

2. Some of the Possible Factors of Discrimination of the Elderly

In this paper, we will focus on the age discrimination, the category which, by pure convention, is called "elderly" (people aged 65 and over)[2]. Old age is biological, psychological, which should be handled with its cognitive and social components and should not be limited by the calendar. One of the reasons for age discrimination is age within one's own framework. The manifestation of old age today is predominantly reflected in negative social representations of these people, presented as a homogeneous

[2]Every fifth citizen of Serbia (20.2%) or 1,400,000 is over the age of 65, Special Report of the Commissioner on Discrimination of Elderly Citizens,
https://ravnopravnost.gov.rs/wp-content/uploads/2021/09/poseban-izvestaj-o-diskriminaciji-starijih.pdf

social group in terms of lifestyle and as the embodiment of "problematic" old age, inevitably deficient, dependent or even demented. But, the age discrimination is equally the result of a public policy on age that has identified the group of "older people" as a problem for the rest of society, especially from a demographic and financial point of view. The trouble with ageism is that it is not perceived as a form of discrimination, and the explanations offered for this phenomenon are that ageism is much more institutionalized than gender and race. Therefore, people do not notice discriminatory behavior towards the elderly when it happens.

Attitudes towards the elderly date back to the sixties of the 20th century, which are the result, mainly, of the implementation of the old age policy, which was supposed to be a problem for the rest of society. The age policy has created an image of this age group as a burden on society, especially because of its "exponential" demographic growth and costs, which should overburden public spending. This coupling of old age support policies and negative social representations gradually transformed this categorization according to age into a form of social discrimination according to age.

The problem of old age is especially prominent at the beginning of the 20th century, as a "social problem" as stated by Elise Feller, according to whom the first institutionalized figure of old age is a poor old man who needs all kinds of help, in various forms. The image of poor old people, an isolated category, insufficiently capable, dependent on national solidarity, old age as a burden of stigmatization by demographers, a poorly productive category and significantly dependent on other people, is produced.

The change in social structure from the past to the present, also affected the institution of the family, which led to the transformation from the extended family to the nuclear family. The elderly are directly affected by this transformation. The low income of the elderly, even if their income is sufficient, may affect their children look on them as an economic burden, then, management is in the hands of their children, so they cannot have a word in their family, etc., are the reasons leading to an elderly person to be exposed to discrimination in family life, as well. Considering an elderly person as a problem for the family in question, takes away the specificity of the implementation of human rights[3], which must be the obligation of the entire society. This was evident during Covid-19,especially, when old people were denied the use of ventilators or treatment because of their age (Tilovska-Kechedj, 2022:442).

It has been shown, for example, that younger people in China have a rather negative attitude towards the elderly (in contrast to the residents of Korea, Japan and the

[3]Organization of American States.Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Washington, D.C.: OAS; 1988. Available from: https://www.oas.org/juridico/english/treaties/a-52.html.

Philippines), and the elderly internalize such attitudes and are consequently more prone to depression and the perception of themselves as a burden on the family. Research in South America has revealed a link between negative attitudes towards the elderly and fear of aging. Particularly anxious about aging were those who expected an absence of support in the years to come.

One survey conducted on the territory of 28 countries (mostly members of the European Union, but also Israel, Turkey, Russia and Ukraine) states, among other things, that even positive discrimination can have its negative consequences. Europeans perceive older people as warmer, but also as less able to work and a potential burden on the health and economic system. Perceiving older people as warm and harmless can negatively affect older people's self-confidence and work performance.

Today, the aging of the population on a global level is an increasingly prominent problem. This demographic change also prompted the United Nations to adopt a resolution aimed at establishing international standards on the protection of the human rights of the elderly. Unfortunately, there are still no significant adopted Conventions establishing rules-standards on the protection of elderly persons. Age discrimination (ageism) can be found in different areas of life, such as the world of work in the employment of personnel, in the health sector, in the financial sector, in the sector of leisure or representation in the media. The Treaty of Lisbon [4] (Simovic, Simovic, 2020: 380) gives guidelines to the European Union on how to "fight against social exclusion and discrimination, promote social justice and social protection, equally for women and men, solidarity between generations and protect the rights of children". Aging must not lead to a reduction in a person's rights, duties and responsibilities, but it must be emphasized that the person may have permanently or temporarily become incapacitated and unable to protect their rights. Most elderly people are weak. Two thirds of people over 80 in Europe are women. More than a third of them suffer from Alzheimer's or dementia, which makes them more vulnerable to abuse. A dependency and vulnerability situations are complex: both for aging persons and for their families, professional and volunteer staff, and therefore it is necessary to facilitate their circumstances in applying and exercising their rights.

The UN adopted the Report, Decade of Healthy Aging (2021-2030), which aims to provide evidence-based information on the health status and well-being of older adults in the Americas region. This initiative consists of four parts, namely: the demographic situation in the region, aging and health, different areas of action. A feature of the Report is to present the health status of older people in the Americas region, based on a number

[4]Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal C 306, p. 1-271, http://data.europa.eu/eli/treaty/lis/sign, accessed on 10.07.2023

of indicators including life expectancy, healthy life expectancy at birth, and age 60, burden of disease and mortality from 2000 to 2019, as well as excess mortality related to the Corona virus disease (COVID-19) in older people from 2020 to 2021[5]. In the Americas region, life expectancy at birth, for both sexes increased by three years between 2000 and 2019 (77.2 years), while the regional value of the indicator was 3.8 years, and is higher than the global value.

According to research in France[6]: only 30% of people over the age of 65 believe that discrimination occurs "often to very often". The study reveals a form of "hierarchy" in the perception of discrimination according to criteria: older people are more likely to experience discrimination based on origin or skin color (28%) than discrimination related to age or gender, for example (less than 20%). Among people over 65, 17% say they have experienced age discrimination at least once in the past 5 years. For these people, discrimination was most often manifested in the following contexts: public transport (42%), relations with public services (39%) and access to private goods and services (34%). Employment remains an area considered highly discriminatory as more than a third of people who were working at the time of the survey said they had experienced age discrimination in employment. Almost one out of five older people said they have experienced age discrimination. Reported situations of discrimination most often concern public transport, relations with public services or even access to goods and private services (banks, insurance, etc.). Only 12% of them said they have filed a lawsuit. These age discriminations are rarely exclusive, the criteria of health, origin and insecurity are also often cited. In addition, a quarter of people over 65 said they faced difficulties in administrative procedures, which raises the question of access to rights for this population in conditions of increasing dematerialization public services[7]. In 2019, in the European Union, four out of ten respondents (40%) believe that discrimination based on being perceived as too old or too young is widespread. In France, at least half of the respondents (54%) believe that this type of discrimination is widespread.

[5]https://iris.paho.org/bitstream/handle/10665.2/57795/9789275126714_eng.pdf?sequence=1&isAllowed=y

[6]Discrimination in European Union, Special Eurobarometar 493, May, 2019https://europedirect-reims.fr/files/2019/10/ebs_493_sum_fr.pdf , accessed on 06.7.2023

[7]INSEE reports that in 2019, 26,7% people age 60-74 and 67,2% those older than 75 was illiterate (Insee premiere , n°1780, October, 2019).Illiteracy refers to the fact that you do not have basic digital skills (sending e-mail, consulting online accounts, using software, etc.) or not using the Internet (inability or material impossibility).

3. Prevention of Abuse-Discrimination of the Elderly

The aging of the world population is a reality. In the modern world, there is a united opinion that the life and bodily integrity of a person represent a social value, the preservation of which is not only aparticular, individual, but a general common interest of society (Igracki, 2014: 140). A very important place in the system of legal protection is prevention, within which mechanisms of family law and criminal law protection of the elderly are of particular importance. The degree of effectiveness and efficiency of these mechanisms depends on a number of factors, the key being their connection with other institutional protection systems, such as the social protection system, healthcare and other institutions. In addition to the action of social institutions, the action of certain non-institutional factors is also important, among which non-governmental organizations and professional associations, volunteer services, play a particularly important role. Every part of the complex system of protection of the elderly, as well as every institution in it, have its place and carries its share of responsibility for the successful functioning of the legal protection system.

On the international level, numerous instruments have been brought in order to prevent and reduce ageism. In 1990, the General Assembly of the United Nations adopted Resolution 45/106[8], which, among other things, declared October 1 as the International Day of Older Persons. In 1991, the General Assembly of the United Nations adopted the Principles of the Nation for Older Persons[9], listing 18 rights of older persons under the themes of independence, social participation, care, self-fulfillment and dignity; In 1992, the International Conference on Aging met to revise the Plan of Action, and the Proclamation on Aging[10] was adopted; The General Assembly of the United Nations declared 1999 the International Year of the Elderly[11]; In 2002, at the Second World Assembly on

[8] United Nations General Assembly. Implementation of the International Plan of Action on Aging and related activities [resolution A/RES/45/106].45th Session of the General Assembly, 68th plenary meeting; 14 December 1990. New York: United Nations; 1991. Available from: https://documentsdds-ny.un.org/doc/Resolution/Gen/Nr0/564/95/Img/Nr056495. pdf?OpenElement.

[9] United Nations General Assembly. Implementation of the International Plan of Action on Aging and related activities [resolution A/RES/46/91].46th Session of the General Assembly, 74th plenary meeting; 16 December 1991. New York: United Nations; 1992. Available from: https://documentsdds-ny.un.org/doc/Resolution/Gen/Nr0/581/79/Img/Nr058179. pdf?OpenElement.

[10] United Nations General Assembly. Proclamation on Ageing [resolution A/ RES/47/5]. 47th Session of the General Assembly, 42nd plenary meeting; 16 October 1992. New York: United Nations; 1992. Available from: https:// documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/023/73/IMG/ NR002373.Pdf?Openelement.

[11] United Nations General Assembly. International Year of Older Persons, 1999 [resolution A/RES/53/109].53rd Session of the General Assembly, 85th plenary meeting; 9 December 1998. Available from: https://documentsdds-ny.un.org/doc/UNDOC/GEN/N99/763/15/PDF/N9976315.pdf.

Aging held in Madrid, the Political Declaration and the Madrid International Plan of Action on Aging[12] were adopted, which calls for a change in attitudes, policies and practices at all levels in order to use the enormous potential of the elderly in the 21st century (Petrusic, Todorovic, Vracevic, 2015: 37).

According to data of the World Health Organization (WHO)[13], the number of elderly people is expected to double from 962 million to 2.1 billion by 2050 and triple to 3.1 billion by 2100. By 2050, the number of people aged 65 and over, worldwide, will be almost the same as the number of children under 12 years of age. In Latin America, the share of the population aged 65 and over will increase from 9% in 2022 to 19% by 2050[14]. The Commission for Latin America (ECLAC) also reports that around 2040 there will be more elderly than children in the subregion[15]. Given this reality, the United Nations has declared the period 2021-2030 as the Decade of Healthy Aging with the aim of working together to improve the lives of older people, their families and their communities[16]. The Decade includes four key areas of action covering the rights and protection of older persons. The Convention also defines other important concepts for advancing the human rights of older persons, such as abandonment, palliative care, abuse, neglect, old age, aging, home unit or household, older persons receiving long-term care, and integrated social and health services.

Recognition of the specific rights of the elderly is one of the reasons why the Convention is undoubtedly important and relevant. The members of the OAS have recognized 27 specific rights[17] for this group: Equality and non-discrimination on the basis

[12]United Nations General Assembly. Report of the Second World Assembly on Ageing [report A/CONF.197/9]. Second World Assembly on Ageing; 8 to 12 April 2002. New York: United Nations; 2002. Available from: https:// documents-dds-ny.un.org/doc/UNDOC/GEN/N02/397/51/PDF/N0239751. pdf?OpenElement.

[13]United Nations Department of Economic and Social Affairs.World Population Prospects. The 2017 revision: key findings and advance tables [working document ESA/P/WP/248]. New York: United Nations; 2017. Available from: https://population.un.org/wpp/publications/files/ wpp2017_keyfindings.pdf

[14]United Nations Department of Economic and Social Affairs. World Population Prospects 2022: Summary of Results [UN report DESA/ POP/2022/TR/NO. 3]. New York: United Nations; 2022. Available from: https://www.un.org/development/desa/pd/sites/www.un.org. development.desa.pd/files/wpp2022_summary_of_results.pdf.

[15]Economic Commission for Latin America and the Caribbean. América Latina y el Caribe: desafíos y oportunidades de una sociedad que envejece. Santiago, Chile: CELADE; 2006. (Temas de Población y Desarrollo, n.º 5). Available in Spanish from: https://www.cepal.org/es/publicaciones/37307- america-latina-caribe-desafios-oportunidades-sociedad-que-envejece.

[16]World Health Organization. Decade of Healthy Ageing Geneva: WHO; 2020 [accessed 20 June 2022]. Available from: https://www.who.int/initiatives/ decade-of-healthy-ageing.

[17]Organization of American States. Inter-American Convention on Protecting the Human Rights of Older Persons Washington, D.C.: OAS; 2015. Available from: https://www.oas. org/en/sla/dil/docs/inter_american_treaties_A-70_human_rights_older_persons.pdf.

of age, Right to life and dignity in old age, Right to independence and autonomy, Right to participation and integration in the community, Right to security and life without violence of any kind, The right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, The right to give free and informed consent on health matters, The rights of elderly people receiving long-term care, The right to personal liberty, The right to freedom of expression and opinion and access to information and many other rights (Simović, Simović, 2020).

In international law and treaties, this group of people was probably not specifically included in any legislative text, because they did not exist in such a percentage, but today we see that this gap must be repaired in order to prevent the stigma from rising (Tilovska-Kechedji, 2022: 440). The plan is specific, and the recommendations for action give priority to the elderly in order to preserve health and well-being in old age as well as a favorable environment for the elderly. The Inter-American Convention on the Protection of Human Rights for the Elderly is the first regional treaty that fully recognizes the human rights of the elderly. "The purpose of this convention is to promote, protect and ensure the recognition and full enjoyment and realization, on an equal basis, of all human rights and basic freedoms of the elderly, in order to contribute to their full inclusion, integration and participation in society"[18]. By adopting the Convention, the OAS marked a historic milestone in promoting and protecting the human rights of older persons in the Region of the Americas and around the world. The United Nations notes that thousands of older persons in the Region experience discrimination and neglect, particularly women, Afro-descendants, indigenous peoples, refugees, displaced and stateless persons, LGBTI persons and persons with disabilities. These groups are exposed to discrimination on several fronts[19], and the Convention represents an important instrument for improving the protection of the elderly in the Americas region. In addition to the global anti-aging campaign, this represents a global movement that seeks to change the way we think, feel and behave in relation to age and aging.

In this sense, the Republic of Serbia has taken significant steps in terms of harmonizing its legislative framework of family law and criminal law with relevant international and European standards in order to prevent, establish effective protection, and reduce discrimination against the elderly. In the Republic of Serbia, there are several legal acts which provisions are of great importance in the prevention and protection of the

[18]Organization of American States. Inter-American Convention on Protecting the Human Rights of Older PersonsWashington,D.C.:OAS;2015.Availablefrom:

https://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-70_human_rights_older_persons.pdf .

[19]United Nations.World Elder Abuse Awareness Day. New York: United Nations; 2021 2022 [accessed 20 June 2022]. Available from: https://www.un.org/en/observances/ elder-abuse-awareness-day.

rights of the elderly and preventing their discrimination, including: the Constitution of the Republic of Serbia[20], the Law on the Prohibition of Discrimination[21], the Law on the Prevention of Discrimination of Persons with Disabilities[22], the Law on Health Care[23], the Law on Health Insurance[24], the Law on the Protection of Persons with Mental Problems[25], the Law on Social Protection[26], the Law on the Prevention of Domestic Violence[27], the Criminal Code of the Republic of Serbia[28] and many others. In order to prevent and fight against all forms of socially unacceptable behavior, strategic documents were adopted too, which certainlyaffect the issues of the elderly: Strategy for the prevention and protection against discrimination for the period from 2022 to 2030[29], Strategy for the improvement of the position of persons with disabilities 2020-2024[30], Strategy for the prevention and suppression of gender-based violence against women and violence in the family for the period from 2021 to 2025[31] and others.

4. The Phenomenon of Discrimination of the Elderly in Serbia

The phenomenon of the increase in the elderly population, on a global level, also characterizes our country and is becoming a serious social challenge, and above all, it requires taking a range of diverse measures in order to slow down the existing trend. A special problem is the increasingly pronounced discrimination of the elderly population in almost all life segments. A considerable number of elderly people live alone, have health problems, arebecoming increasingly poor, marginalized, exposed to humiliation

[20]Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 98/2006, 115/2021 and 16/2022.

[21]Law on the prohibition of discrimination, Official Gazette of the Republic of Serbia No. 22/2009 and 52/2021.

[22]Law on the prevention of discrimination of persons with disability, Official Gazette of the Republic of Serbia No. 33/2006 and 13/2016.

[23] Law on health protection, Official Gazette of the Republic of Serbia, No. 25/2019

[24] Law on health insurance, Official Gazette of the Republic of Serbia, No. 25/2019.

[25] Law on the protection of persons with mental health issues, Official Gazette of the Republic of Serbia, No. 45/2013

[26]Law on social protection, Official Gazette of the Republic of Serbia, No. 24/2011.

[27] Law on the prevention of family violence, Official Gazette of the Republic of Serbia, No. 94/2016

[28] Criminal Code of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019

[29]Strategy for the prevention of and protection from discrimination for the period from 2022 until 2030, Official Gazette of the Republic of Serbia, No. 12/2022.

[30]Strategy for the improvement of the position of persons with disabilities 2020-2024, Official Gazette of the Republic of Serbia, No.44/2020.

[31] Strategy for the prevention and suppression of gender-based violence against women and family violence for the period between 2021 and 2025, Official Gazette of the Republic of Serbia, No. 47/2021.

and abuse, disrespect, etc. Various forms of discrimination are present in our environment, and ageism could become the most prevalent form of discrimination in the 21st century. According to the Special Report of the Commissioner on Discrimination of Elderly Citizens[32], for the year 2019, the population of the Republic of Serbia aged 65 and over is 20.7%, and those under 15 are 14.3%. Demographic characteristics indicate that the birth rate is declining, that the mortality rate is high, that there is a negative natural increase, low fertility, depopulation and intensive aging of the population, as well as that the number of women over the age of 80 has almost doubled.

The Republic of Serbia follows European and international standards and thus strives to lay the foundations of existing anti-discrimination legislation for the promotion of equality and suppression of discrimination, to improve and harmonize legal acts with the legal acquis of the European Union and international standards.

According to the available data from the Report on progress in the achievement of the Sustainable Development Goals by 2030 in the Republic of Serbia, the poverty risk rate was 24.3% in 2018, i.e.it had a tendency to decrease and indicated slight progress in all age categories except for the oldest of the population (65+) in which a moderate decline is recorded[33]. At the same time, according to relevant data, more than half of users on the records of centers for social work belong to the group of financially disadvantaged users (the percentage of this user group in 2019 increased by 33.5% since 2011), while those over 65 make up a share of 10.9% of the total number of recipients of cash social assistance[34].

A constant problem in Serbia is domestic violence despite the development of various legal and other protective mechanisms, especially when it comes to women and children. The National Strategy on Aging[35], in which one of the objectives of actions against elder abuse, especially domestic violence, expired in 2015, and the new one has not yet been adopted, and studies on the issue of elder abuse at the territory of the Republic of Serbia have not been conducted, so there are no precise data.

However, older men can also become victims of domestic violence, even its severe forms (which most likely lead to criminal prosecution and a judicial epilogue). Namely, a study conducted before the introduction of the criminalization of domestic violence into criminal law suggests that older people are more often victims of severe forms

[32] The Special Report of the Commissioner on Discrimination of Elderly Citizens
https://ravnopravnost.gov.rs/wp-content/uploads/2021/09/poseban-izvestaj-o-diskriminaciji-starijih.pdf

[33]Ibidem.

[34]Ibidem.

[35] Government of the Republic of Serbia, National Strategy on Aging 2006-2015, available at: https://gs.gov.rs/lat/strategije-vs.htm, accessed on: 06.07.2023.

of violence (serious physical injury) in the family context than outside it. It also indicates a higher percentage of men as victims, while on the other hand, sons are most often the perpetrators (Jovanovic, 2022: 494).

In 2019, 2,014 men were victims of murder, suicide and accidents and 819 women, 404 men and 130 women were killed in traffic accidents, and 12,525 men and 7,881 women were injured. In the same year, 472 women and 3,701 men were convicted of crimes against marriage and the family (neglect and abuse of minors, domestic violenceand failure to provide maintenance). Perpetrators of domestic violence are men in 90% of cases - 4,561 men and 462 women were convicted of this crime[36].

In the next 20 years, significant changes will be visible, due to the relative decline of the working-age population and aging. During the period 1995-2015, the 20-29 age group will decrease in number by 11 million (-20 percent), while the 50-64 age group will increase by 16.5 million (more than 25 percent). A strong focus is needed on the age-related aspects of human resource management, a factor that has been neglected until now. It also means rethinking policies that encourage early exit from the labor market, instead of lifelong learning and new opportunities.

There is also pressure on pension systems and the creation of public finances from the increasing number of pensioners and the decline of the working age population. In the next 20 years, the population over the standard retirement age of 65 will increase by 17 million. Within this group, the very old, older than 80 years, will increase by 5.5 million. The pension system should be made less sensitive to demographic and other changes. According to data from the Republic Fund for Pension and Disability Insurance from January 2021, the average amount of pension was 29,378 dinars, while the average amount of agricultural pension was 11,896 dinars. When the available data are compared, more than 75% of pension beneficiaries receive a monthly pension amount less than the amount of the minimum consumer basket (in September 2020 - 37,741.06 dinars)[37]. Such incomes do not provide economic security in old age, but reproduce poverty and dependence on other family members and society as a community.

The large increase in the number of very old people in need of care will lead to an increasing demand on formal care systems. These systems will need to be further developed to cope with the new situation. At the same time, there should be policies to reduce the growth in dependency through the promotion of healthy aging, accident pre-

[36]The Special Report of the Commissioner on Discrimination of Elderly Citizens
https://ravnopravnost.gov.rs/wp-content/uploads/2021/09/poseban-izvestaj-o-diskriminaciji-starijih.pdf
[37]Ibidem.

vention and rehabilitation after death. Differences in family and housing situation, educational and health status and in income and wealth decisively determine the quality of life of older people. Policies are required that better reflect the diversity of the social situations of the elderly, i.e. better mobilize the resources available to large segments of older people and that more effectively fight against the risk of social exclusion in the later years of life.

5. Conclusion

Discrimination is a complex and socially dangerous phenomenon, which can be directed towards different categories of persons, taking into account their personal characteristics, and implies unjustified distinctions, unequal treatment in all areas of life. Untimely suppression of discrimination can seriously affect the development of society as a whole. Realizing the importance of respect for human rights and respect for the principle of equality, the Republic of Serbia adopted a series of legal documents on the prohibition of discrimination on all grounds based on age and the preservation of dignified living conditions without discrimination, with reference to equal access and protection from neglect.

The United Nations has provided a number of sources, which indicate demographic changes worldwide, resulting in a sharp increase in the number of elderly people, who may be directly affected by age discrimination and ageism. Numerous universal conventions and declarations of the United Nations on human rights, as well as documents such as the Political Declaration on the Madrid Plan on Aging and the United Nations Principles for the Elderly, are particularly important for the position of older citizens. With the adoption of the Sustainable Development Goals 2030, the elderly are recognized as a particularly important group when it comes to ending poverty, ensuring a healthy life and promoting well-being for all generations, enabling lifelong learning, gender equality, and creating inclusive and safe environments. The aging of the population affects all spheres of society that need to adapt to the social and economic implications.

In addition to universal documents such as the Charter of Fundamental Rights and the Revision of the European Social Charter of the Council of Europe, the European Union's directive on equal treatment and prohibition of discrimination stands out. The European Commission has paid great attention to demographic changes and the challenges that these changes bring.

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OLDER PEOPLE IN INFORMAL SETTLEMENTS A DIFFERENT KIND OF ELDERNESS[**]

Informal settlements, colloquially referred by many pejorative names and associated with Roma people, represent a peculiar socio-spatial phenomena. While being very noticeable by a majority of population, many aspects of social life inside them remain to be invisible. Lives of their older inhabitants, as well as the very concept of "elderness" is one of the least know among these features. Poverty and everyday-life hardships, together with specific beginnings of individual's life stages and circles (employment from an early age and entering into marriage) cause distinct definitions of "being old" – someone can be perceived to be "an elder-one" as early as in their 40s. This is only the beginning of numerous discrepancies felt by these people in theircommunities and in broader society, especially in legal sphere.

Keywords: *informal settlements, elderly people, marginalized groups, Roma, sociology of generations, discrimination*

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1. Old people on the margin of society

Roma people, unlike other ethnic groups, tend to be stereotypically portrayed by surrounding population in both genders, as well as in all three major phases of life. We have particular stereotypes, ethnic slurs and jokes not only for "Gypsies" in general, but also for "Gypsy child(ren)", "Gypsies (adult males)" and "Gypsy women". Romantic benign depictions may summon images of old Roma grandpa ("stari ciga"), who tries to play his violin with his trembling hands, or an old grandma looking at her cards and giving wise advises and telling fortune to (non-Roma) audience. Social reality and individual experiences of elderly Roma are actually unknown to wider population. While family life and generational-forming process (ageing) of Roma is more visible to non-Roma, since traditional Roma professions were practised in public (petty trading, crafts and services) and by quite often by whole families (women and children acted as apprentices to the head of the family, who would often take role of the master artisan) (Soulis, 1961; Mujić, 1953). Paradoxically, spatial closeness and lack of visible barriers between Roma's family lives and wider society went together with strong symbolic barriers, which formed and intertwined together during the last few centuries (Kubiček, 2017).

Article explores peculiar case in which social factors, namely, family structure, economic activity and ethnic marginalization deeply affected by racism are deeply intertwined with biological process of ageing. As one should bear in mind, ageing is not only chronological and physiological process, but also a mater of individual experience as well, depending from person's genetics, environment, living conditions and lifestyle (Batrićević, 2022: 464). All cited factors, except genetics, actually form experiences which go beyond individual biographies, and can be specific for ethnic groups such as Roma. Reason for this is that belonging to an ethnic group is also generator of shared experiences, which is often compatible with generational common experience.

Our understanding of ageing can be interpreted in Elias' broader theoretical context of the process of civilization. In the Middle ages, live was precarious and threatened by illnesses and sudden, violent death. In his study, *The Loneliness of the Dying* (first time published in 1985), Elias underlines that in the 13th century among feudal elite man of 40 years was considered an old individual, while in industrial societies, especially among higher classes, person of same age is considered almost young (Elias, 201: 7). By postponing death in modern societies, its members become more detached from it, while the sense of one's own control over his fate and life grew stronger. Other persons death, as well as aging, reminds ourselves about our own inevitable fate, which makes very disturbing experience for modern men, unacquainted with these facts (op.cit: 10).

Elias claims that frailty of ageing individual separates them from the rest of society. This seems even trivial, if one considers that older people may more often be limited by physical barriers, but famous sociologist – 88 years old at the time – had more in his mind. He argues that ageing people grow less sociable, and that their mutual feelings with people with whom they were close become less worm than they used to be (Elias, 2001: 2). His theory is very relevant for understanding of Roma elderness for two reasons. Firstly, his concept of different attitudes towards old and dying people in different classes is important, because most Roma tend to occupied lower social strata. Second, his analyses of different modes of social interactions in family and expected length of life and their effect on older people will be vital for the topic of this article.

2. Historical perspective

Historical sources from the past show that demographic structure of Roma and non-Roma (Serb) families were in fact, quite similar. Contrary to stereotypical depictions, both Roma and Serbian nuclear families were similar in number. In 1860. for example, Serbian family had 5.2 members by average, while Roma one had 5.18 (Vuletić, 2002: 52). City-dwelling Roma families were even smaller, In Belgrade in 1856 they had 3.8 members by average, while in Smederevo in 1862 average number of family members for Roma was 4.28 (op.cit.).

On the other hand, striking difference between Roma and Serbian families which is relevant for the theme of this article is that Roma families were, without exception, nuclear. This means that they only included parents and their unmarried (young) children, while in Serbian households, especially in the rural areas families were still extended, although this practice was fading away as the 19th century was ending. This extended family type was called "*zadruga*" and included parents, their children, as well as families of their married sons. For Roma, custom that married son splits from his father as soon as he enters marriage (daughters also left their primary family and formed new ones with their husbands) was strictly observed (Janković, 2018: 56-57). On the other hand, it is also notable that nomadic lifestyle caused some kind of temporary group formation between families who could be related, or not. Main reason for these groupings was better security on the road and entrepreneurial chances.

Socio-economic reasons for practice of nuclear family formation are clear since Roma were mostly engaged in non-agrarian trades, so that accumulation of workforce necessary for cultivation of fields and animal husbandry on larger scale was irrelevant. Furthermore, in the 19th century sizeable number of nomadic Roma lived in improvised housing (tents) during the spring and summer, and in pit-houses (known as *zemunica*, or

bordei in Vlach/Romanian) in autumn and winter. Makeshift nature of households made much more easier for new-formed couples to separate from their parents.

This socio-spatial arrangement saw much change in the following century. Roma families, first in urban areas, and then in rural settlements, started to live in more permanent houses, which become more costly to build and maintain. As Aleksandra Mitrović and Gradimir Zajić noted, most Roma by the end of the 20th century lived in extended families, together with their parents (Mitrović & Zajić, 1998: 58-59). Young age of brides and grooms makes them unable to provide separate housing in most cases, which cemented this (paradoxically quite recent!) patriarchal structure. Same trend was also noted by Tatomir Vukanović, who interpreted this process of expanding of nuclear families as an outcome of material poverty, as well as Milutin Prokić, who shared the same opinion (Vukanović, 1983: 134-135; Prokić, 1991: 102-103).

3. Formational social experiences of contemporary elder Roma

Generation of elderly Roma (those over 65 years old, born approximately between 1920s and 1960s) have witnessed many historical events and process which form common experience with all other ethnic groups all across former Yugoslavia. Generation of their parents had unprecedented chance to be integrated in socialist society, with an opportunity to be employed, educated and socially protected. In practice, most Roma after the II World War occupied lower positions in production, but it still offered then large degree of security and chances to advance further − or, at least better then ever before, and sadly, better then ever after. As Milutin Prokić noted, already in 1948 56.3 percent of economically active Roma was engaged as working force in industry, while 24% worked in agriculture, 9.1% were craftsman and 6.8% had private businesses (*nota bene*, only 0.1% of Roma received pensions in the same period, while percent of pensioners in general Yugoslav society at the time was 1.1%) (Prokić, 1991: 103). In the following decades, number of economically active Roma in Yugoslavia was 28% in 1961 (45% in general population); 26% in 1971 (43% in general population) and 26.85% in 1981 (43.43% in general population) (op.cit: 105). Number of Roma with personal income − at the time mostly pensions − has risen from 1.94% in 1961 to 4.32% in 1971 and to 5.04% in 1981 (in general population percentage of people belonging to this category moved from 3.69%, to 6.05% and was 8.68% and 1981) (op.cit.). Prokić also notes that, although number of economically independent Roma was lower then national average, it was much higher then in some other comparable ethnic groups. For example, Albanians who shared similar demographic and educational structure with Roma had only 24% of economically

independent individuals, while the percentage of Roma with personal income was 32%. Data about concrete occupations of those Roma who were active in production shows unfavourable picture, since 41.57% of Roma worked as miners and industrial workers, 20.62 in agriculture, 13.33% were unqualified workers (compared to 1.93% of workers without qualifications in general population) (op.cit: 106).

Milutin Prokić interpreted these findings in very pessimistic tones in 1991. Yet, social changes which were about to happen brought new, even worse reality. Generation of their children were affected by economic crises of 1980s, Yugoslav wars and sanctions in 1990s and period of social and economic transformation after 2000s, which profoundly lacked ethnically egalitarian bases. Roma born from 1970s couldn't find employment in formal economy, which couldn't offer employment even to privileged ethnic majority. Their would typically ensure living provisions by informal work, as self-employed petty traders, or as wage workers. In addition, those most vulnerable Roma – especially those who were displaced from their place of birth – were forced into begging, collecting communal waste and other dire strategies of survival. This stark contrast between different life experiences of generations of Roma leads to very peculiar picture in present time (Mitrović, 1990; Jakšić & Bašić, 2005; Simpson-Herbert et.al, 2006; Macura-Vuksanović & Macura, 2007).

4. Statistical data

According to results of the latest Census in Serbia (2022), Roma population − or at least respondents who identified themselves as Roma in current moment − is different in many aspects than non-Roma population, even than most of other ethnic minorities. Age structure of this ethnic group show many peculiarities relevant to this paper topic. Nationwide, 131.936 people declared themselves as Roma, among whom 67.459 are male, and 64.477 female. Among men, only 72 are older then 85 years, while 90 Roma women belongs to this category (162 in total). In the age group that also counts as elderly by most standards, 65-84 years, there are 8204 Roma in total, 3843 men and 4361 women.

On global level, as well as in Serbia, number of older people is growing, both in absolute number, and in proportion to younger segments of population (Tilovska-Kechedji, 2022: 440). Demographic projections are predicting that older people will make up one third of population in Serbia, while they are closing to one quarter right now (Ljubičić & Ignjatović, 2022: 446). Roma population in Serbia, on the other hand, although showing the same trend at much slower pace, offers starkly different picture at the present. For example, on Serbia's national average level, oldest category of population (85 years plus) is at around 1.77% (117.651 in total), while citizens who are aged between 65 and

84 years make up 20.32% (135.1204 in total). Among Roma, people over 85 constitute less only 0.12% (162 out of 131.936 in total), while those between 65 and 84 are more are only 6.21% (Serbia 2022 Census, Population by nationality, age and sex)[1]. Last Census still shows that even Roma population is ageing, and that percentage of elderly Roma is slowly growing, although it is still small comparing to national average. Census from 2011 detected only 3.96% of Roma older them 65 years (Jakobi et. al, 2021: 32), and 6.34% in 2022 is considerable increase in number[2].

Still, it is important to bear in mind that statistical data offers only citizens' subjective and manifest answers. In practice, this means that real number of Roma is typically larger than reported in census reports. Some of them tend to present themselves as part of ethnic (Serb) majority, while others identify as members of other, less stigmatized minority groups which are culturally and linguistically close to them (Romanians, Hungarians, Bosniaks...), alter their identity in some new form (Ashkali, Egyptians), or put forward their religious identity (Muslims), or simply don't report their ethnic identity at all (Kubiček, 2018). It is reasonable to assume that number of elderly Roma who don't identify as such is even larger than in middle aged or young segments of this population. Ruža Petrović underlines that statistics and demography treat ethnic identification as *personal affiliation*. In this sense, researcher can only introduce new category, *ethnic origin*, as a objective belonging to one group, which sometimes doesn't match with subjective identification. The relationship between these to concepts is dynamic in social reality, because subjective identification tends to become objective label at some point in time (Petrović, 1991: 116). This temporal nature of one's identity is crucial for the topic of this article, because older Roma had both more time to integrate and to be accepted into ethnic majority and to be acknowledged by its members.

First reason for this is that those older Roma who have been formally employed for whole or most of their carriers, and who have earned pensions and apartments or houses outside Roma neighborhoods doesn't identify whit their ethnic group any more. They may be integrated in their communities and accepted as part of ethnic majority, making the process of assimilation completed.

Second reason for this phenomena is that elder Roma may have severed, or limited their social relations with younger Roma, or with their children and cousins. This process, together with limited chances to form new bonds with Roma belonging to their own generation, could also be realistic reason for this rapid assimilation of elderly Roma.

[1] Population by nationality, age and sex: https://data.stat.gov.rs/Home/Result/3104020303?languageCode=sr-Cyrl&displayMode=table retrived : 12.06.2023.

[2] Total number of Roma between two Censuses was also decresed by 15.668, from 147.604 to 131.936, making this finding even more relevant.

Many relevant institutions: pension funds, medical and social care institutions and so on are not only unable, but also strictly prohibited to have produce or keep any data concerning subjective ethnic identity or objective ethnic provenance concerning their beneficiaries.

This phenomena was already described by Aleksandra Mitrović in her study *The Roma in Serbia* (Mitrović, 1998). In it, she clearly noted that segments of Roma population who are most prone to ethnic mimicry are Roma who are native to local community and *the elderly Roma* (Mitrović, 1990; Mitrović, 1998: 21). Author claims that around 10% of older Roma respondents tend to change their ethnic identification, which is also typical for Roma who are employed in agriculture or who are qualified craftsman.

Aside from assimilation, there is another group of factors that affect smaller numbers of Roma people in Serbia. These factors affect quality of life of poor communities Roma for their whole life. Vladimir Stanković brought forth some striking evidence which proves that Roma had higher mortality rates in Yugoslavia in period between 1971 and 1986 (period in which contemporary elder Roma were still young or middle-aged). Most disturbing finding is mortality rate of newborn children (less then 1 year old), which is the best indicator of quality if health of whole community. While percentage on the national level of newborn children mortality in SFRJ was 6.8%, for Roma it was 26.1%. In other age categories, mortality of Roma was also noticeably higher then Non-Roma: 3.3% for age 1-4 (1% in general population); 1.2% for age 5-9 (0.4% in general population); 1.7% for age 10-19 (1% in general population); 4% for age 20-34 (3% in general population); 10.9% for age 35-49 (7.4% in general population); 6.5% for age 50-54 (4.8% in general population); 7.8% in age 55-59 (5.7% in general population); 8% in age 60-64 (7.4% in general population) and 30.4% among those older then 65 (62.4% in general population) (Stanković, 1991: 173-174).

5. Fieldwork data

Sociological fieldwork offers readers more qualitative insights into life of elderly Roma, generated by previously described socio-historical processes. It is worth noting here that elderly people in general suffered from unfavourable life conditions more often then younger and middle aged men and women up until very recent times. Research from the first and second decade of 21th century shows that older people were among poorest in Serbia, and that they faced exclusion, reduced access to healthcare and many other material and non-material services (Ljubičić & Ignjatović, 2022: 447). For example, one third of elderly people were unable to pay their monthly bills, one quarter needed help to prepare meals, while one in seven people couldn0t maintain hygiene or even to

move without someone's help (one out of ten cases) (Matković, 2012, cited in Ljubičić & Ignjatović, 2022: 447; Jovanović, 2022).

In survey on elderly Roma conducted by Tanja Jakobi, Dragan Stanojević and Dejan Marković in 2020 in Serbian larger cities on 503 respondents (Roma older then 65 years), more then 25% reported that they had experience of migration in their lifetime. These migrations include both internal migrations and external, in countries abroad. Most of these migrations were (at least declarative) voluntary and driven by better life chances in some other places (Jakobi, Stanojević & Marković, 2021: 72). Of course, "voluntary" nature of such changes of locations depends from their previous life conditions. As it was stated before, large proportion of Roma migrated from cities and municipalities located in the south of Serbia, which fell into desperate economic situation since large agricultural and industrial corporations ceased to work in the 1980s, and especially 1990'. Forceful and manifestly involuntary migrations were part of experience of around one third of Roma respondents (op.cit.). Most of them suffered from ethnic cleansing in Kosovo and Metohia by Albanian terrorist groups in 1999, and sought refuge in central Serbia and Vojvodina.

Around 30% of respondents haven't been formally employed for more then 30 years, which practically means that they have never enjoyed any social insurance reserved for regular employees, including pensions (Jakobi, Stanojević & Marković, 2021: 73). This is reflected in the most crucial sense, since 38% of elderly Roma doesn't receive any pension (op.cit: 76). Around one fifth of elderly Roma lives in very bad material living conditions − most of them in informal settlements, without access to an asphalt road. One in ten lives in an improvised house (made of reed, earth, mud, sheet metal or cardboard), but quarter of all houses are in bad conditions, including those made out solid construction material (op.cit: 76-78). Percentage of elderly Roma who can't pay their monthly bills is 46%, which is much higher than in general population (18%) (op.cit: 80).

Finally, this survey sheds much light on the quality of health of older Roma. Most of them has lower access to health infrastructure then general population, and can't afford regular admission of medical therapy, but the data about their health problems is even more telling. Almost 90% of older Roma respondents had high blood pressure; 51% percent has diabetes; 49% rheumatic joint disease; 43% high level of lipids in blood; 31% suffered from myocardial infarction and 28% has asthma. A comparison with the general elderly population indicates that the frequency of more serious chronic diseases among elderly Roma is more pronounced: elderly Roma more often have high blood pressure, high blood lipids, diabetes, heart attack myocardium, stroke, malignant diseases and cataracts then general older population (op.cit: 97-98).

In an older detailed case study in Roma settlement of Mali London in vicinity of city of Pančevo, conducted in 1998 by team of sociologists and psychologists led by Anđelka Milić it was found that half of families in this particular case were nuclear families, which they described as an exception, because typical Roma households at that time were expanded and multi generational (Milić et. al, 1999: 25). Finding that is even more interesting for topic of this article is that around 10% of households were single ones, and that all of Roma living in them were elderly persons. Authors explained this phenomena with two factors. Fist one, family connections between single living elderly people and their families were severed, and as second, they cited that social prestige of elderly person in Roma settlement is degraded. Authors also found that households composed of couples without children counted 7% more, and that they were also mostly older persons as well (op.cit.).

6. Conclusion

Elias notes one crucial difference in his second essay from *The Loneliness of the Dying,* titled *Ageing and Dying: Some Sociological Problems.* In it, he argues that modern, industrial societies have introduced many institutional facilities which take care for elderly, unlike pre-modern societies in which elder people were in custody of their families – which had potential to be beneficial for them, as well as quite brutal at times (op.cit: 72-74). As Elias strongly underlines – dying is a act of violence, whether it is caused by humans, or by the course of nature. For those who are at risk of death, it doesn't change the brutality of this process or event (Elias, 2001: 88-89). This article shows that for Roma, elderly or not, this risk is higher than in general population. If we agree with Norbert Elias that being old means to be aware of one's possibility to die – then large part of Roma community grow old much before that arbitrary taken 65th year.

Max Weber referred to Roma as being peculiar case of an Indian caste which left caste system of their homeland, but remained to be a caste in new social surrounding (Weber, 1958). Keeping in mind that this remark has some exoticizing baggage, it poses as question of their social reincarnation – or, their assimilation caused by social mobility, if we resist to omit this metaphor. Those Roma who have survived premature risks which are typically tied to an old age may "reincarnate" when they reach position of elder person by general standards.

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UNLOCKING WORKPLACE INCLUSIVITY: EXPLORING THE LEGAL IMPERATIVE OF REASONABLE ACCOMMODATION AT WORK FOR PERSONS WITH DISABILITIES IN SERBIA

This paper critically examines the protection of the right to work for disabled persons in Serbia, focusing on employer obligations for reasonable accommodation. It analyses laws, regulations, judicial decisions, and practices of a national human rights institution, revealing gaps and inconsistencies. The study explores reasonable accommodation and reassignment duties for disabled individuals. A comparison is made with the Convention on the Rights of Persons with Disabilities and International Labour Organization standards. The paper highlights weaknesses in Serbian anti-discrimination law concerning protection against discrimination and denial of reasonable accommodation. Inconsistencies between domestic labour laws and anti-discrimination laws are identified. Recommendations, including legal amendments, aim to enhance the protection of the right to work for disabled persons in Serbia, addressing the identified gaps and fostering a more secure work environment.

Keywords: *disability, CRPD, reasonable accommodation, work, discrimination, business*

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Introduction

Business and human rights (BHR) has been an emerging field of human rights law and practice in the past two decades. The first international treaty on BHR is in the process of drafting since 2014, and is currently in its third draft.[1] Apart from the emerging legally-binding document, a number of soft-law instruments and mechanisms emerged in the meantime, as well as domestic laws.

Stein and Bantekas (Stein and Bantekas, 2021) argue that despite the significant prevalence of disability in the world's population (assessed to approximately 1 billion persons, or 15%), a BHR discourse is largely divorced from the human rights of persons with disabilities. Further, the two authors explain that the absence of international obligations on the side of states and multinational corporations (MNCs), coupled with weak domestic institutional protection and high negotiating leverage of MNCs may lead to disregard for the rights of PWDs.[2] The realization of some rights of PWDs consider positive obligations on the side of states and business, of which some are enshrined in the Convention on the Rights of Persons with Disabilities (CRPD).[3] The discrimination in employment, denial of reasonable accommodation at workplace and inaccessible environment are some common violations of the rights of PWDs in a context of BHR. This is not to say that other rights of PWDs are not potentially violated in the same context. Moreover, it is generally understood that socially, economically and politically marginalized individuals and groups suffer more from poor institutional protection of their rights than others.

Serbia has in place a legal framework that should ensure the realization of the right to work and employment for PWDs, however, with considerable deficiencies. Still, legal reforms of the last two decades and more have led to an uneven development of the rule of law and notoriously poor enforcement and implementation (Kambovski, 2022).

The present paper explores the concept of laws and regulations on the duty to provide reasonable accommodation (RA), and the protection from discrimination on the grounds of disability in the context of work and employment in Serbia. It does so by analysing domestic legal acts, as well as the CRPD and the work of the CRPD Committee on RA. Therefore, it employs a comparative international-domestic human rights law method to assess the compliance of domestic law with the ratified international agreement. The paper also uses data on the employment of PWDs, to assess the effect of laws,

[1] UN OHCHR, https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc, Accessed on: 1st June, 2023.

[2] Ibid.

[3] Convention on the Rights of Persons with Disabilities, UNTS, 2515, p. 3, 2006, United Nations.

but with considerable limitations due to characteristics of available data, which is often not disaggregated or simply exclusive of a number of PWDs for different reasons, including the status of their legal capacity. Courts' decisions are analysed in a search for further statutory interpretation of relevant domestic norms.

Issues of legal capacity deprivation and assessment of working capacity are out of the scope of this paper, as those do not consider any involvement on the side of businesses.

Context of the Republic of Serbia

Serbia is a unitary, parliamentary republic. It is an upper middle-income country(The World Bank Group, 2021), a transitional democracy, with a candidate status for EU membership. The political system of Serbia is described as semi-presidential, with fluctuations between a presidential and a parliamentarian phase (Mandić, Nedić, 2021). It is a member of the Council of Europe, and a state party to major international and regional human rights instruments.

The legal system of Serbia is a post-socialist, civil law system. Courts' decisions are not the source of law. With regard to the effect of international law, The Constitution prescribes the direct effect of ratified international agreements and general rules of international law, however in practice, this is highly questionable.[4] The direct enforcement of human rights contained in the Constitution and ratified international agreements is stipulated in art. 18 ¶2. The international agreements are hierarchically under The Constitution, those have to be in line with the supreme law and subject to constitutional review.[5] Laws and other general legal acts must not be in conflict with The Constitution and ratified international agreements.[6]

The Constitution protects the right to work an employment, and prescribes special protection at work and special working conditions for women, children and persons with disabilities.[7] It prohibits discrimination, including on the grounds of "a psychological or a physical disability".[8] The bill of rights of the Serbian Constitution is considered to be extensive and solid, according to the Venice Commission.[9]

[4] Constitution of the Republic of Serbia, 2006. Article 16 ¶2.

[5] Ibid. Articles 167 ¶2, 194 ¶4.

[6] Ibid. Article 194 ¶5

[7] Ibid. Article 60.

[8] Ibid. Article 21 ¶3.

[9] Venice Commission, 2007, Opinion on the Republic of Serbia, CDL-AD(2007)004. para. 21.

The Constitutional Court is an independent body and it is not part of the judicial system.[10] It is mandated with determining the compliance of laws and other general acts with the Constitution, general rules of international law and ratified international agreements.[11] It can also adjudicate on the compliance of a ratified international agreement with the Constitution.[12]

The Supreme Court of Cassation is the highest judicial body in Serbia. All courts are divided in either of two types - courts of general competence and courts of special competence. The courts of general competence, apart from the Supreme Court of Cassation are basic courts, higher courts and appellate courts.[13] Courts of special competence are commercial courts, the Appellate commercial court, misdemeanour courts, the Appellate misdemeanour courts and the Administrative Court.[14] Importantly, the judiciary in Serbia is assessed as lacking independence from the executive, and important reforms were initiated with constitutional amendments in 2021.[15]

Reasonable accommodation: concepts and law in Serbia

The concept of RA attracts a lot of intention from scholars and practitioners worldwide. The somewhat vague wording was clarified in the CRPD, and it means that accommodation needs to be appropriate and necessary for the specific case, and not disproportionately burdensome.[16] The CRPD definition of RA relates to RA in all spheres of life, including work and employment, education, health protection, and reads as follows:

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

International Labour Organisation (ILO) stipulates that RA aims to remove or reduce barriers, such as the physical environment or the way the work is arranged, which

[10] Constitution of the Republic of Serbia, 2006. Article 166.

[11] Ibid. Article 167 ¶1 (1).

[12] Ibid. Article 167 ¶1 (2)

[13] Law on the Organization of Courts, "Official Gazette RS" Nr. 116/2008, 104/2009, 101/2010, 31/2011 - another law, 78/2011 - another law, 101/2011, 101/2013, 106/2015, 40/2015 - another law, 13/2016, 108/2016, 113/2017, 65/2018 - odluka US, 87/2018 and 88/2018 - CC decision. Article 11 ¶3.

[14] Ibid. Article 11 ¶4.

[15] For example: Vuković and Mrakovčić, 2022, Legitimacy, Independence and Impartiality: How do Serbian and Croatian Legal Professionals Assess Their Judiciaries?

[16] Convention on the Rights of Persons with Disabilities, UNTS, 2515, p. 3, 2006. Article 2.

impede the possibility to work for PWDs.[17] Further, ILO argues that the key element of RA is "reasonableness", and explains that it relates to the practicality of adjustments, which cannot be too disruptive for the business.[18] The entire concept of RA includes also the appropriateness of the adjustment to the need of a specific person as another major element.

Slightly differently to the ILO's understanding, the CRPD Committee asserted that the element of "reasonableness" primarily relates to the appropriateness and effectiveness of the adjustment to a disabled person.[19] The issue of costs, and perhaps the disruptiveness of the adjustment to the business, is related to the assessment of the (disproportionate or undue) burden.[20] In this way, the CRPD asserts a more of a person-centred, as opposed to a business-centred approach to RA.

It is important to differentiate the concepts of RA and accessibility. The concept of accessibility from Article 9 CPRD means that access for PWDs must be ensured to places, services, information and communications. The major difference between the two is that the duty to provide RA is activated *ex nunc* and aimed at a specific person, while the duty to provide an accessible environment is an *ex ante* duty and should serve PWDs, and sometimes the general public (especially a universal design) rather than a specific disabled person, explains the CRPD Committee.[21] Another significant difference is that RA is immediately applicable, while accessibility is gradually achieved, and that RA is limited by the proportionality test, while the accessibility is not.[22]

The CRPD Committee communicated its concern with the lack of recognition of denial of RA as a form of discrimination in anti-discrimination laws, as well as the insufficient provision of RA in Serbia.[23] In that light, the treaty body recommended that the state party reviews its legislation and incorporate the denial of RA as a form of disability-based discrimination.[24] Similar concerns and recommendations to Serbian authorities were conveyed by the Committee on Economic, Social and Cultural Rights.[25]

[17]ILO , 2016, Promoting diversity and inclusion through workplace adjustments: a practical guide. p. 16.

[18] Ibid.

[19] General comment no. 6 (2018) on equality and non-discrimination :Committee on the Rights of Persons with Disabilities, CRPD/C/GC/6, 2018. para. 25 (a), (b).

[20] Ibid.

[21] Ibid. para. 24.

[22] Ibid. para 41.

[23] CRPD Committee, 2016, Concluding observations on the initial report of Serbia, CRPD/C/SRB/CO/1. para. 9, 53.

[24] Ibid. para. 10.

[25]CESCR Committee, 2022, Concluding observations on the third periodic report of Serbia, E/C.12/SRB/CO/3. para. 34, 35.

The Constitution protects the right to work for everyone, on an equal footing. Special protection and special working conditions are to be ensured for youth, women and PWDs.[26]

Labour Law, an umbrella law which regulates labour relations in Serbia, in Article 12 ¶4 prescribes the special protection of PWD too.[27] Further, Article 101 prescribes that employers are obligated to ensure the work for a disabled person based on the capacities of those persons, in accordance with the law.[28] The phrase "in accordance with the law" expresses that another law should further elaborate the obligation of employers to ensure adequate working conditions for disabled employees. The wording of this provision is broad enough to accommodate the duty to provide RA, however, it originally aims to address the duty to reassign (redeploy) a disabled employee to another workplace, in line with the person's capabilities.

Another norm of the Labour Law (Article 102) stipulates that a company can terminate a work contract with a disabled employee if the person does not accept the work proposed, or if the employer "cannot ensure the work" in line with Article 101.[29] The person can be dismissed in line with Article 179 ¶5(1) Labour Law, which regulates the dismissal in the case of the so-called "technological excess". The "technological excess" exists where there is no further need for the work of an employee due to deprecation. This norm would not provide sufficient protection from dismissal to a disabled person who cannot continue with their usual role, from a perspective of the duty to provide RA. An employer can simply dismiss a disabled person as a "technological excess", without having to attempt to provide RA, or to explain that RA presents a disproportionate and undue burden in a specific case.

The norm stipulating that the employer dismisses a disabled person for whom another workplace cannot be ensured was introduced in Labour Law in 2014. Before that, such a norm did not exist, while Article 101 had prescribed the duty to reassign only for individuals who acquired disability at work. Thus, Article 101 was extended to encompass all PWDs without prejudice on how the disability was acquired, and clarified the legality of dismissal in cases where another work cannot be provided.

[26] Constitution of the Republic of Serbia, 2006. Article 60.

[27] Labour Law, "Official Gazette RS", Nr. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 - CC decision, 113/2017 and 95/2018 - authentic interpretation.

[28] Ibid. Article 101.

[29] Ibid. Article 102.

Some scholars include the duty to reassign a disabled employee to a position which fits their capacities as part of the concept of RA, while others make a clear distinction.[30] Also, some comparative legal solutions, such as in the USA, explicitly recognize the duty to reassign as part of RA.[31] Ultimately, the aim of the reassignment is to remove barriers that impede the participation of a disabled person in a work process and enable the person to maintain their job. Here, both the duty to reassign and the duty to provide RA are addressed. However, the reassignment should be ideally used only as the last resort measure, while the provision of RA should be prioritized.

Provisions on RA are to be found in Law on Professional Rehabilitation and Employment of Persons with Disabilities (LPRED).[32] In Article 23 LPRED the employment "under special conditions" is the employment where there is a certain accommodation (or adaptation) of either the work or the working environment, or both.[33] The accommodation of the work is the modification of work process and tasks, while the accommodation of working environment can be technical and technological, it includes the accommodation of the means of work, space and equipment, all that based on the abilities and needs of a disabled person.[34]

Additionally, the support to find employment, learn and conduct different tasks, is also considered part of RA under this law.[35] This type of support should not be confused with personal assistance that PWDs may use in other life contexts, and which is regulated with the Law on Social Protection and corresponding regulation.[36]

Law on the Prohibition of Discrimination (LPD) was adopted in 2009, as part of general legal reforms in Serbia with a goal to increase the protection of human rights and support democratisation. The law prohibits discrimination on a number of grounds including disability, which is explicitly mentioned.[37] This anti-discrimination law obligates employers to make appropriate adjustments (accommodations) if it is needed in a specific case to ensure access, RA of the workplace, ensure participation, lifelong learning and

[30] More on this issue: Jamelia N Morgan, One Not Like the Other: An Examination of the Use of the Affirmative Action Analogy in Reasonable Accommodation Cases Under The Americans with Disabilities Act.

[31] Americans with Disabilities Act of 1990, as amended 2008.

[32] Law on the Professional Rehabilitation and Employment of Persons with Disabilities, "Official Gazette RS" Nr. 36/2009, 32/2013 and 14/2022 - another law.

[33] Ibid. Article 23 ¶2.

[34] Ibid.

[35] Ibid. Article 23 ¶5.

[36] Law on Social Protection, "Official Gazette RS", Nr. 24/2011, 117/2-22 - decision of the Constitutional court. Rulebook on closer standards and conditions for the provision of social sprotection services, "Official Gazette RS" Nr. 42/2013, 89/2018 and 73/2019.

[37] Law on the Prohibition of Discrimination, "Official Gazette RS", Nr. 22/2009 and 52/2021.

promotion of PWDs (and other persons in a vulnerable position).[38] The provision specifically mentioning RA was introduced with legal amendments in 2021.

LPD also stipulates that an accommodation cannot be understood as a "disproportionate burden" when it is supported by public measures (e.g. state or local subventions to employers to accommodate the need of an employee).[39] The addition that the accommodation cannot be considered disproportionately burdensome appears as a solid protection of the right to RA in Serbian law. Such an approach is also supported by ILO (2016: 16). The norms on RA are part of Article 14 titled "Special measures".

The obligation to provide RA from LPD is to an extent in line with the CRPD art. 26 on work and employment. The CRPD prescribes that state parties shall ensure RA at the workplace and that denial of that is a form of discrimination.[40] In Serbian law, there is no explicit recognition of the denial of RA as a form of discrimination. Also, the provision containing an obligation of employers to provide RA is part of Article 14 LPD titled "Special Measures", as was already mentioned. This is a curious legal solution by lawmakers, considering that the CRPD Committee specifically asserted that RA should not be understood as a special measure in General Comment No. 6, which was adopted 3 years before the amendment of LPD.[41] Therefore, not only is there no explicit recognition of RA as discrimination, but RA is also classified as a special measure, which can be a problem in itself and is addressed in the following section.

The Law on the Prevention of Discrimination of Persons with Disabilities (LPDPD) prescribes that it is an act of discrimination when an employer denies to "technically adapt" the workplace for a disabled person, but under important conditions.[42] The denial will not be considered discriminatory when the costs for the adaptation are to be borne by the employer or when the costs are disproportionate to the benefits that the employer has from employing that disabled person.[43]

LPDPD thus explicitly recognizes that the denial of technical adjustments of the workplace is discrimination. However, there are at least two major issues with that norm. Firstly, the term "technical adaptation" is too narrow to encompass everything that RA in

[38] Ibid. Article 14 ¶3.

[39] Ibid.

[40] Convention on the Rights of Persons with Disabilities, UNTS, 2515, p. 3, 2006. Articles 27 ¶1(i), 5 ¶3.

[41] General comment no. 6 (2018) on equality and non-discrimination : Committee on the Rights of Persons with Disabilities, CRPD/C/GC/6, 2018. para. 25 (c).

[42] Law on the Prevention of Discrimination Against Persons with Disabilities, "Official Gazette RS" Nr. 33/2006 and 13/2016. Article 22 ¶4.

[43] Ibid.

relation to work and employment could include. RA in this context can mean things beyond technical adaptations, and includes for example assistance of a person in learning the job or changing working hours.[44] An ILO's Guide to RA (2016) provides a non-exhaustive list of possible adjustments and examples of good practice.

Secondly, the conditions under which the denial is to be considered discriminatory are questionable from the perspective of the effectiveness of the norm. Not only that the adaptation must not be burdensome, but any cost incurred to the employer may be seen as the justification for denial. The question of the proportionality of what is gained by employing a specific disabled person and costs is practically too vague and subjective. Any employer could argue that benefits from employing a specific disabled person do not justify any costs, as the employer could employ another disabled or a non-disabled person who do not require any accommodations. For those reasons, the norm of Article 22 ¶4 LPDPD cannot be effective in reality, unless it is coupled with the complete compensation of costs for such adjustment by the state or another entity. In such a case, no costs would fall on the employer, hence the denial of technical adaptation could be discriminatory.

In opposition to that, the CRPD Committee promotes another approach to the proportionality assessment. The treaty body stipulates that the costs of adjustment must be weighed against the aim of RA, which is the realization of the right to work.[45] Again, the CRPD Committee's approach is prominently person- and human-rights-centred.

Courts' practice could be a significant addition to the unclear norm of LPDPD. After all, although courts' decisions are not a source of law in the Serbian legal system, judges should engage in law-making when norms are too vague or obsolete and do not follow the dynamism of life, argues Ivošević (2021).

The distinction between reasonable accommodation and special measures

The CRPD Committee's General Comment No. 6 on non-discrimination asserts that RA should not be confused for a special measure (an affirmative action). The difference between the two is that the former is a "non-discrimination duty" and the latter a measure to address historic injustice in accessing or exercising rights of PWDs, often by

[44] Supra note 35.

[45] General comment no. 6 (2018) on equality and non-discrimination :Committee on the Rights of Persons with Disabilities, CRPD/C/GC/6, 2018. para. 26 (d).

giving preference over other groups.[46] In that sense, RA is immediately applicable, and not a form of preferential treatment over another group.[47]

There is another critical difference concerning the nature of the two concepts, which should be emphasized. Special measures commonly have a temporary character, which means that once the goal is achieved, that is the representation of a group increased, the preferential treatment stops. On the other hand, the duty to provide RA to PWDs at a workplace is aimed at a specific person in a specific situation, and at the realization of the right to work and employment on an equal footing with others. It does not depend on the level of representation of PWDs in a given context. The obligation does not disappear once a certain number of PWDs in a company is reached, or after some period of time. Therefore, classifying RA as a special measure could lead to conflating it to affirmative measures or preferential treatment, and to the dilution of the obligation to provide RA.

And indeed, LPD is not entirely clear either concerning the temporal dimension of RA or its distinction from affirmative measures or preferential treatment. The law stipulates that special measures from paragraph 1 of Article 14 LPD are enforced only as long as it is needed to achieve the goal of the special measure. RA and PWDs are mentioned in paragraph 3 of the article together with other groups such as women, members of minorities, men, persons of a different sexual orientation, gender identity, older persons and others. Therefore, it seems that LPD indeed conflates the concept of RA with the concept of preferential treatment.[48]

There are other provisions that actually prescribe affirmative action measures in the law regulating employment and rehabilitation of PWD.[49] One of those measures is the compensation of costs for the accommodation of workplace.[50] Therefore, while the RA itself is not a form of affirmative action measure, the compensation of costs for the accommodation is.

There are other special measures in LPRED, such as quotas for the employment of PWDs. Employers, public or private, who employ 20 or more persons are obligated to

[46] Ibid. para 25 (c).

[47] Ibid.

[48] For a discussion on the difference between RA and affirmative measure in an American context:,

[49] Law on the Professional Rehabilitation and Employment of Persons with Disabilities, "Official Gazette RS" Nr. 36/2009, 32/2013 and 14/2022 - another law.

[50] Ibid. Article 31. Rulebook on criteria, methods and other issues relevant for the implementation of active employment policy measures, "Official Gazette RS", Nr. 102/2015, 5/2017 и 9/2018. Article 111.

employ one disabled person, and those who have 50 and more employees must employ 2 PWDs.[51] Then an additional disabled person for every 50 employees must be employed.[52]

Employers who do not employ a required number of PWDs pay a contribution to the Fund for Employment and Professional Rehabilitation of Persons with Disabilities (the Employment Fund) for each disabled person they do not employ. The Law stipulates that businesses fulfil their duty to employ PWDs by paying 50% of the average salary in Serbia per unemployed disabled person.[53] The amendments of LPRED from 2013 changed the amount and the character of the compensation for not employing a disabled person. Before 2013, businesses had had to pay "penalties" amounting to 3 minimal salaries per person they do not employ. Therefore, the character of the compensation was more punitive than constructive ("penalty" in opposition to "contribution") and it was considerably higher before 2013.[54]

A business can also fulfil this obligation by buying services or products from "enterprises for professional education and rehabilitation of PWDs", with a value of 20 or more average salaries in Serbia.[55] Therefore, there are two provisions that seriously temper the obligation of business to employ PWD. Those provisions may eventually, coupled with the elimination of sanctions to businesses that do not fulfil their obligation, severely jeopardize the realization of the right to work for PWDs in the open labour market.

LPRED, however, makes a lot clearer differentiation between special measures and RA than LPD. The Law prescribes the obligation to provide RA to a disabled employee, under Section VI, titled "Employment of Persons with Disabilities". Separately from that, under Section VII "Measures of Active Policy of Employment of Persons with Disabilities", the Act stipulates the compensation of costs for RA and other special measures to incentivize the employment of PWDs.[56] The important distinction between the obligation to provide RA and affirmative action measures is thus clear.

Having that in mind, it can be argued that LPD needs to be amended in a way to clearly distinguish RA from special measures, or entirely delete the provision that identifies RA with special measures. LPRED should have primacy over LPD concerning norms

[51] Law on the Professional Rehabilitation and Employment of Persons with Disabilities, "Official Gazette RS" Nr. 36/2009, 32/2013 and 14/2022 - another law. Article 24 ¶1,2.

[52] Ibid. Article 24 ¶3.

[53] Ibid. Article 26.

[54] For example, an average salary in Serbia in March 2023 was 85.845 RSD net and the minimal 42.320 RSD net.

[55] Law on the Professional Rehabilitation and Employment of Persons with Disabilities, "Official Gazette RS" Nr. 36/2009, 32/2013 and 14/2022 - another law. Article 27.

[56] Ibid.

which are related to the work and employment of PWDs, so inconsistencies should be treated in favour of LPRED. The primacy of LPRED lies in the fact that its object and purpose are aimed at regulating the rights and duties of PWDs in the context of work and employment.

In that light, there should be a clear distinction between the concept of RA and special measures (measures of affirmative action) in the employment of PWDs. This distinction is muffled in Serbian law, as LPD, a major anti-discrimination, classifies RA as a form of a special measure.

Furthermore, the norm of LPDPD, which introduces the connection between the denial of "technical adaption" and discrimination on the basis of disability, is clearly inefficient and substandard.[57] The lack of efficiency lies primarily in the conditions under which the denial of adaptation is not considered to be discriminatory are way too broad and subjective, as it was argued. Secondly, the central term - "technical adaptation" is significantly narrower than adaptations employers are obligated to conduct in accordance with LPRED.

Considering the explained lack of harmony between laws regulating issues of RA and the vague and arguably inefficient norms of these laws, primarily LPDPD, it should be useful to look into the courts' practice. Ideally, the courts would have engaged with the interpretation of the concept of RA and relevant norms and helped clarify those.

Still, it should not be forgotten that courts' decisions are not sources of law in Serbia. Hence, the impact of their decisions does not normally spread beyond the specific case. However, decisions of the Supreme Court of Cassation, the highest court in the country, are highly authoritative and can influence the practice of other courts. The Supreme Court of Cassation has also the mandate to harmonize courts' practice through different means.[58] Still, obstacles in the harmonization of judicial practice in Serbia are persistent and profound (Kolaković-Bojović and Tilovska Kechegi, 2018).

Apart from the courts' practice, the following sections examine the role of the Commissioner for the Protection of Equality in ensuring the right to RA in Serbia.

[57] Law on the Prevention of Discrimination Against Persons with Disabilities, "Official Gazette RS" Nr. 33/2006 and 13/2016. Article 22 ¶4.

[58] Law on the Organization of Courts. Article 31.

Courts

Two databases with courts' practice[59] were searched to identify cases where questions related to RA in the context of work and employment for PWDs were adjudicated. Terms used in the search were "reasonable accommodation", "adaptation of work environment", "adaptation of working tasks", "employment under special conditions", "employment of persons with disabilities", "discrimination of persons with disabilities at work", "Law on Professional Rehabilitation and Employment Persons with Disabilities".[60] Also descriptors "discrimination at work", "protection of persons with disabilities" and "termination of the employment contract" were used.

Cases of all courts except basic courts were available in two online databases which were searched. Also, the practice of the Constitutional Court is available in both databases. It should be emphasized that the quality of the search and results also depends on the correctness of the databases and their functioning. In that light, it cannot be claimed beyond a doubt that there were no cases in the practice of Serbian courts apart from those identified in the search.

In a case from 2019, the respondent (a company) filed a revision before the Supreme Court of Cassation against the judgment of the Appellate court in Belgrade.[6162] The case concerned the legality of the dismissal of a disabled employee. The employee was injured at work and on sick leave for 3 years. The company dismissed the employee while they were on sick leave, which a first-instance court found illegal and annulled the decision about the termination of the employment contract. The company was ordered to reintegrate the employee into the work process in accordance with the person's remaining working capacity. The company reassigned the disabled employee to a virtually inexistent role, where they had no work to do. Later, the company adopted a decision declaring the role of the disabled employee a "technological excess" in accordance with Labour Law. The Supreme Court confirmed the judgment of the Appellate court, and asserted that the company "abused the institute of the so-called technological excess", and had failed to "practically and formally" reintegrate the employee into the work process.[63]

[59] 2023, Judicial practice, , 2023, Propisi.net.

[60] Serbian terms were used to conduct the search: razumno prilagođavanje, prilagođavanje radnog mesta, prilagođavanje poslova, zapošljavanje pod posebnim uslovima, zapošljavanje osoba sa invaliditetom, diskriminacija osoba sa invaliditetom na radu.

[61] Judgment of the Supreme Court of Cassation, 2019, Рев2 573/2019.

[62] The revision is a legal remedy against the final judgment of the second-instance court, in accordance with the Law on Non-Contentious Proceedings.

[63] The judgments of the Appellate court in Belgrade and the basic court cannot be found in the two databases.

A case from 2019 concerning the dismissal of a disabled employee due to the lack of appropriate workplaces to reassign them to, in accordance with Article 102 ¶2 Labour Law, was identified.[64] The appellate court rejected an appeal of the plaintiff and found that the company did not break the law by dismissing the disabled person as a "technological excess", as it was prescribed by the law. The company transferred all the operations that the disabled employee had conducted to other employees and terminated that position entirely, while the plaintiff did not indicate there was a vacant position to which she could have been reassigned to. The court held that this was in line with then applicable Labour Law (at the time of dismissal) and confirmed the judgment of the first-instance court.

Another case from 2000 considered the reassignment of a disabled employee to a full-time position, while the employee's working capacity assessment stipulated that they can work only part-time.[65] A first-instance court found that this act of the company was illegal, regardless of the operational needs of that company. The second-instance court confirmed that decision.

Clearly, the concept of reassignment has been well-established in Serbian law before the current provisions on RA. In the first case, the Supreme Court of Cassation dealt with the abuse of the permission of an employer to dismiss a disabled employee under certain conditions, in the sense of Article 102 and 179 ¶5(1) Labour Law. Firstly, the abuse of the "technological excess" institute was found in the fact that the company created such circumstances to be able to declare the employee's role redundant. Secondly, the reassignment of the disabled employee to a role where they had no work to do was found short of meaningful reintegration into the work process.

The second presented case shows that the protection of a disabled employee from dismissal is dependent on the availability of other vacant positions to which an employee could be reassigned. The case also indicates that the court held that the burden of proving there was a vacant position fell on the employee, and not on the company (that there was no vacant position).

It is hard to compare those two cases amidst the lack of all circumstances, especially in relation to the case before the Supreme Court of Cassation. However, the highest court in Serbia, seemingly took a different approach than the court in the second case. It would be interesting to assess the actions of the employer in the second case through the prism of the obligation to meaningfully reintegrate the disabled employee in the work process, which was asserted by the Supreme Court of Cassation.

[64] Judgment of the Appelate Court in Belgrade, 2019, Гж1. 1762/18, Appelate Court in Belgrade.

[65] Judgment of the Regional Court in Belgrade, 2000, Гж. 199/00, Regional Court in Belgrade.

The summary of the third case does not provide sufficient information for further analysis. Also, considering that the case was adjudicated 23 years ago, when a significantly different legal framework was in place, any further conclusions could be hardly relevant today.

The search did not retrieve any results specifically concerned with the provision or denial of RA. A number of cases related to the assessment of the working capacity, which is a prerequisite for an individual with a disability to be recognized as a disabled person in the context of work and employment, in accordance with LPRED, were identified.[66] An analysis of the legal framework, the practice of competent administrative bodies and courts' practice on the assessment of working capacity would be an important addition to the discussion of the employment of PWDs in Serbia. That, however, is out of the scope of this paper.

Commissioner for the Protection of Equality

Amidst the lack of relevant material in courts' practice, it was hoped that the practice of the Commissioner for the Protection of Equality (CE) could shed additional light on the issue, especially in relation to anti-discrimination laws, LPD and LPDPD. The former contains a norm that obligates businesses to ensure RA in a workplace, while the latter obligates businesses to conduct "technical adaptation", as it was explained. Both norms were found to be problematic, the first primarily as it was under the Section "Special Measures", while the RA is not to be considered such a measure, and the second due to the narrow scope of adaptation (only technical) and the conditions which arguably render the norm ineffective.

The CE is a national human rights institution established in 2009, in accordance with LPD.[67] It has since been an important pillar for the protection from discrimination on disability grounds. Despite its significance, the broader impact of CE in Serbia goes rarely beyond the specific case it is concerned with, according to research (Trifković, Ćurčić, Vasiljević, 2019).

Filing a complaint with the CE is costless and the process is quick.[68] The CE must issue an Opinion within a 90-day timeframe from the day of the submission of a complaint.[69] Together with an Opinion it issues recommendations to the violator, urging

[66] Law on the Professional Rehabilitation and Employment of Persons with Disabilities, "Official Gazette RS" Nr. 36/2009, 32/2013 and 14/2022 - another law. Article 4 ¶4-6.

[67] Law on the Prohibition of Discrimination, "Official Gazette RS", Nr. 22/2009 and 52/2021.

[68] Ibid. Article 35.

[69] Ibid. Article 39 ¶1.

them to rectify the violation.[70] The violator is legally obligated to comply with these recommendations within a 30-day timeframe.[71] However, it is important to note that the CE lacks the power to impose sanctions, and entities cannot be penalized solely for non-compliance with the CE's recommendations. Still, the CE can "name and shame" a violator by informing the public of the violation when the violator does not rectify the violation.[72]

The CE can, among other things, initiate the adoption of laws or legal amendments, issue opinions and recommendations on draft laws and initiate the review of constitutionality and legality before the Constitutional Court.[73] The CE's opinions in relation to complaints as well as draft laws and legal initiatives to relevant laws are hereby explored to help clarify the conundrum surrounding the concept of RA in anti-discrimination laws.

The CE engaged three times with the Ministry which led the process of amending LPD. The Law was finally amended in 2021, while the CE submitted an Opinion specifically mentioning RA in 2019. In this Opinion the CE draw the ministry's attention to the communication of the National Organization of Persons with Disabilities (NOOIS) that denial of RA (in various contexts, not only employment) should be recognized as a form of discrimination.[74] The Ombuds recommended the same.[75] The final draft of the law was published in 2021 and the CE submitted another opinion without referring to RA this time. From those submissions of the CE, it can be concluded that the body did not engage thoroughly with the issue, especially not with the conceptual problem of classifying RA as a form of discrimination.

A review of the CE's Opinions on the individual complaints in relation to discrimination against PWDs, in accordance with Article 33 (2) LPD, provides a richer account of the body's approach to the denial of reassignment as a form of discrimination and a concept in general. As it was argued, the duty to reassign may be seen as part of the duty to provide RA. That, however, is not explicitly recognized in the Serbian law, or

[70] Ibid. Article 39 ¶2.

[71] Ibid. Article 39 ¶3.

[72] Ibid. Article 40.

[73] Ibid. Article 33.

[74] Commissioner for the protection of equality, 2019, Mišljenje na Nacrt Zakona o izmenama i dopunama Zakona o zabrani diskriminacije, 011-00-00031/2019-02

[75] Commissioner for the protection of equality, 2021, Mišljenje na Nacrt zakona o izmenama i dopunama Zakona o zabrani diskriminacije, 353-11/21.

explicitly differentiated. In total 114 opinions of the CE reviewed were issued between April 2011 and March 2023, and can be found on the CE's website.[76]

In an opinion from 2022, the CE found that an employer discriminated against a disabled person by assigning them to a workplace "which was not compatible with the disability of the complainant and was conflicted with the decision of the National Employment Service".[77] The complainant had initially been employed at an appropriate work inside the company, but after a sick leave, they were shifted to a workplace which was not adequate for them, and conflicted with the Decision of a commission that had previously determined her disability and working capacity. After another sick leave, during which their work contract expired, the contract was not extended and another non-disabled person was employed at the same workplace. The CE found the acts of this company discriminatory.

The CE did not specifically refer to RA or Article 14 LPD, Article 22 LPDPD, or Article 23 LPRED. It did refer to Article 101 Labour Law and norms of LPD and LPDPD on discrimination in relation to work and employment. The body eventually found discrimination on the grounds of disability, and in accordance with Article 16 LPD and Article 21 LPDPD. The necessity of assignment to an appropriate workplace was proved by the complainant with the document issued by the competent multidisciplinary commission that the individual cannot conduct certain tasks. In the present case, the company did not respond to allegations, and considering that the burden of proof that there was no discrimination falls on them, the CE had no doubts in finding the act discriminatory.

This case is particularly relevant because it considers the failure to provide reassignment, which in a conceptual sense may be regarded as part of RA. More importantly, the law does not explicitly recognize the denial of the duty to reassign as a form of discrimination, yet the CE found the act to be discriminatory. The named provision of LPDPD prohibits discrimination in relation to work and employment against employed PWDs, PWDs seeking employment, assistants of employed PWDs, and employed assistants of PWDs.[78] Therefore, there is no reason why the denial of RA could not be treated as an act of discrimination too, in the sense of Article 21 LPDPD.

[76] Commissioner for the protection of equality Commissioner for the protection of equality, https://ravnopravnost.gov.rs/misljenja-i-preporuke/misljenja-i-preporuke-u-postupku-po-prituzbama/invaliditet/, Accessed on: 9th June, 2023.

[77] The National Employment Service issues a decision, on the basis of findings of a competent multidisciplinary body, about an individual's working capacity and jobs that are compatible or not with the individual's working capacity, in accordance with a regulation on the assessment of working capacity.

[78] Law on the Prevention of Discrimination Against Persons with Disabilities, "Official Gazette RS" Nr. 33/2006 and 13/2016. Article 21 ¶1.

In another case from 2022, the CE did not find an act of a company discriminatory, again on the basis of the complainant's assessed working capacity by a competent body. Namely, the complainant had worked only the morning shift, which was then substituted for the afternoon shift.[79] He claimed that this was discriminatory as he as a disabled person was not fit to work afternoon shifts. The CE stated that the decision of the National Employment Service (NES) on the complainant's working capacity established that this individual can work "normal working hours". Considering that the afternoon shift is considered to be normal working hours, the CE found no incompatibility between the decision of NES and his work arrangement, hence no discrimination.

A case from 2019 also considered the claim that the workplace of a traffic controller was not adequate for a disabled applicant.[80] Prior to submitting a complaint to the CE, the complainant had a court case in order to dispute the decision of the company by which he was assigned to the new workplace allegedly incompatible with his working capacity.[81] The court found that the decision of the company was legal and compatible with the findings of the competent multidisciplinary commission about the plaintiff's capacity to undertake such work. After the court case, the complainant underwent the reassessment of his working capacity, and the competent commission this time explicitly added that the individual cannot work as a traffic controller.[82] Regardless, the CE did not consider the act discriminatory and it reiterated the courts' elaboration that the workplace was actually compatible with the health status and working capacity of the complainant.

The three CE's opinions on the failure to reassign a disabled person to an appropriate workplace show that the CE valued the most the document proving the level of working capacity of the person in question. Those assessments are undertaken by a multidisciplinary commission at the Republic Fund for Pension and Disability Insurance.[83] The decision on a person's working capacity is issued by the NES and it is based on the assessment of the multidisciplinary commission. There is plenty of criticism of the way the assessment is done, including from the CRPD Committee.[84] Anecdotal reports suggest

[79] Commissioner for the protection of equality, 103-22 Pritužba zbog diskriminacije u oblasti zapošljavanja ili na poslu na osnovu ličnog svojstva invaliditet i sindikalna pripadnost, 2022, 07-00-112/2022-02, Commissioner for the Protection of Equality.

[80] Commissioner for the protection of equality, 814-19 Pritužba AA protiv poslodavca BB zbog diskriminacije na osnovu invaliditeta u oblasti rada, 2019, 07-00-354/2019-02 Commission for the Protection of Equality.

[81] Ibid.

[82] Ibid.

[83] Rulebook on the closer methods, expenses and criteria for the assessment of abilities and possibilities of persons with disabilities for employment or to maintain the employment, "Official Gazette RS" Nr. 36/2010 and 97/2013. Article 4.

[84]CRPD Committee, 2016, Concluding observations on the initial report of Serbia, CRPD/C/SRB/CO/1. para. 54-55.

that the assessment of working capacity prevents PWDs, especially those with intellectual disabilities, from accessing the labour market by declaring them unable to work. That issue is particularly worthy of being an object of future research.

The fact that there were no cases specifically focused on the denial of RA speaks of, first and foremost, the low incidence of denial of RA and secondly about a number of potential obstacles that prevent or discourage PWDs from taking their case to the court.[85] The low incidence can be the result of many factors including the overall low employment of PWDs in Serbia, especially those with intellectual disabilities. Considering that the Serbian legal framework on RA is not sufficiently developed as it was argued, it would be too optimistic to assume that the cases on denial of RA before courts and the CE are lacking because companies actually ensure it to their disabled employees.

This suspicion is also supported by the painstakingly low numbers of people and businesses who benefited from state funds for the accommodation of workplaces. Namely, Tatić (2020: 64-65) shows us that in 2016 and 2017 funds were allocated for the adjustment of the workplace for only 21 persons in total. This is not necessarily the number of disabled employees whose workplace was adjusted, but considering the right of the employer to compensate its expenses for the adjustment, there is no reason to not apply for the compensation. Moreover, in 2016 the Employment Fund was allocated 550 million RSD, of which only 3.5 million were used for the reimbursement of reasonable adjustment expenses (Tatić, 2020). Tatić concludes that the funds for the RA are insufficient and should be increased.

Conclusion

The legal framework in Serbia is riddled with strengths and weaknesses in the protection of PWDs' right to work and employment, and businesses' duty to provide RA. Legal reforms in this sphere are constant and the impression is they are done haphazardly, and especially without the real intention to decidedly enforce new norms. The legal landscape is characterized by inconsistencies and gaps that must be addressed to ensure a more robust and comprehensive protection of PWDs' rights. Critical issues include the classification of RA as a form of special measure, which can lead to misunderstandings and limit its broader recognition and implementation. Also, the recognition of denial of only technical adaptations (other, non-technical accommodations are not foreseen) as a form of discrimination in LPDPD is narrow and arguably inefficient.

[85] For more on access to court for marginalized groups in Serbia: Matić Bošković, 2022, Access to Justice and Unequal Treatment.

It was argued that the explicit recognition of the denial of RA in the context of work and employment as a form of discrimination is not necessary, but it is desirable. Despite the lack of it, the anti-discrimination and labour laws as they are, can be comfortably interpreted to prohibit unjustified denial of RA as a form of discrimination on the basis of disability. The reliance on courts for the realisation of the right to RA, however, is disappointingly low. Apart from cases related to the denial of reassignment, cases specifically related to RA were not identified. This may be explained with the deficient legal framework, but also the widespread exclusion of PWDs from job market, and an overall low confidence in Serbia's judicial system.

Despite existing quotas for the employment of PWDs, legal amendments have significantly reduced the pressure on businesses to employ PWDs in last decade. This was achieved by drastically decreasing compensation that a business must pay to the state for not fulfilling the employment quotas.

Also, the state has introduced a number of benefits and subsidies to businesses who employ PWDs, including the compensation for RA, which is a good development, but for now hardly fruitful. Namely, the state Employment Fund for PWDs is allocating negligible funds for the compensation for RA and focuses on the support for sheltered employment of PWDs, out of the open job market. These changes could be understood as part of public policy, which may have shifted from the aim to include all PWDs in the open labour market, and focused on side-tracking them to sheltered employment.

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IV

Social Exclusion, Digital Transformations and Coming to Age

Ana Batrićević[*]

(IN)ACCESSIBILITY OF CULTURAL AND SOCIAL ACTIVITIES TO ELDERLY PERSONS IN URBAN AND RURAL AREAS IN SERBIA[**]

The right to take part in cultural life of the community represents one of fundamental human rights that is guaranteed to all persons, regardless of their characteristics, including age. Unfortunately, elderly persons are frequently facing some sort of discrimination in their attempts to access cultural and social activities in their places of residence, including both - urban as well as rural areas. This is caused by disproportion in the distribution of places where elderly persons can meet and attend cultural events, physical barriers such as distance and inappropriate infrastructure, absence of willingness of relevant stakeholders to adjust cultural venues to the needs of elderly persons, lack of organization of transport of elderly persons to the locations where cultural and social interaction take place, insufficient number of professional or informal caregivers who could assist elderly persons to access cultural centers etc. In this paper, the author highlights key challenges when it comes to the access of elderly persons to places of cultural and social interactions in Serbia, emphasizing that the existence of these obstacles in a modern democratic society represents the discrimination of elderly persons and suggests the most appropriate manners in which the situation in this field could be improved in accordance with international human rights standards.

Keywords: *elderly persons, discrimination, culture, social activities, human rights, caregivers*

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Introduction

The increase in the share of elderly persons in the entire population is a global tendency that is present in the Republic of Serbia as well (Dragišić Labaš, 2016: 39; Batrićević, 2022: 463-465). Unfortunately, this demographic trend is followed by widespread discrimination and stigmatization of elderly persons in the form of: stereotypes, isolation, exclusion, violence and abuse (Tilovska-Kechedji, 2022: 441). This also refers to the cases of various forms of family violence, when the perpetrators are close relatives of elderly persons or even their children, which is known as "parent abuse", "child-to parent-abuse", "child-to parent-violence" or "battered parent syndrome" (Batrićević, Stanković, 2015: 334). These negative and discriminatory practices are also known as ageism (World Health Organisation, 2021). Discrimination of elderly persons affects all aspects of their life, including cultural aspects as well. At the same time, although it is often neglected and not given the priority that it deserves, culture still remains one of the essential preconditions for a dignified life (Dragin, 2019: 32). For elderly population, the right to culture, expressed through the right to participate in cultural life, should also be understood as an aspect of the right to dignified old age (see also: Batrićević, 2022: 463-465).

In the broader sense, culture is defined as the totality of material and spiritual human creations (Batrićević, 2016: 39), whereas, culture in the narrow sense encompasses artistic creations that are the products of cultural activities conducted within the institutional cultural system (Dragin, 2019: 32-33). For the purpose of this paper "cultural activities of institutional cultural system" are defined in accordance with European cultural policies - as activities in the fields such as: painting, music, theatre, publishing, literature, library, museum, archivistic and other similar activities conducted within institutional cultural system (Dragin, 2019: 33).

Despite the fact that the right to culture and participation in cultural life is protected by numerous international and national legal documents (analyzed in a separate section of this paper), the terms such as "participation in cultural life" and "cultural needs" are not clearly defined in current international and national legal frameworks (Dragin, 2019: 35). Therefore, it is important to highlight that the term "participation" implies that citizens (audience) have an active relationship towards cultural life of the community and that cultural life is organized in the way that facilitates cultural reception (Đukić, 2010 as cited in Dragin, 2019: 35). Cultural participation includes "cultural production" (amateur or professional art or creative hobbies) and "cultural consumption" (public cultural reception that encompasses attending cultural events, on the one hand, and private cultural

reception that is provided via media and at recipient's home, on the other) (Morrone, 2006 as cited in Dragin, 2019: 35).

1. The right of elderly persons to participate in cultural life - international legal framework

1.1. The right to participation in cultural life in international legal documents

Cultural rights represent an essential part of human rights and, like other human rights, are universal, undividable and inter-reliant (UN Committee on Economic, Social and Cultural Rights, 2009 according to Mitchell, Webster, Camps, 2023: 1). Their full respect is of key importance for the protection of human dignity and positive social interaction between individual persons and communities in a diverse and multicultural world (UN Committee on Economic, Social and Cultural Rights, 2009 according to Mitchell, Webster, Camps, 2023: 1). Just like economic and social rights, cultural rights have generally been receiving less attention than civil and political rights, but, nowadays, they seem to be given far more serious concern than ever before (Sodani, Sharma, 2022: 480). Accordingly, cultural rights (including the right to participate in cultural life) are declared in numerous international human rights treaties (Mitchell, Webster, Camps, 2023: 4). Some of these sources of international human rights law are universal, whereas others are of regional scope of application.

As the human rights of the second generation, cultural rights were officially proclaimed for the first time at the international level in Universal Declaration of Human Rights, adopted in 1948[1] (hereinafter: UDHR) (Nikolić, 2019: 71). In its Article 27, Paragraph 1, UDHR affirms that: *"Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits"* (UN General Assembly, 1948). However, UDHR is not legally binding - it is a "soft law" instrument and only has interpretative nature (Romainville, 2015: 406).

The key legal foundation of the right to participate in cultural life is the International Covenant on Economic, Social and Cultural Rights of 1966[2] (hereinafter: ICESCR) (Mitchell, Webster, Camps, 2023: 4). The most detailed definition of the right to participate in cultural life is given in Article 15 Paragraph 1 of ICESCR, proclaiming that its States Parties recognize the right of everyone to: a) take part in cultural life; b) enjoy the

[1] UN General Assembly (1948) *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at https://www.refworld.org/docid/3ae6b3712c.html, accessed on 28.06.2023.

[2] UN General Assembly (1966) *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, available at https://www.refworld.org/docid/3ae6b36c0.html, accessed on 29.06.2023.

benefits of scientific progress and its applications; c) benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Actually, this legal provision *"mirrors in binding form Article 27 of the UDHR"* (Romainville, 2015: 406).

The International Covenant on Civil and Political Rights of 1966[3] (hereinafter: ICCPR) also protects some of the dimensions of the right to participate in cultural life, but in the context of the application of the principle of non-discrimination (Romainville, 2015: 406). Namely, the aforementioned Article 27 of ICCPR proclaims that the fact that a person belongs to ethnic, religious or linguistic minorities shall not be the reason for the denial of his/her right to enjoy their own culture in community with the other members of their group. The right to participate in cultural life is also protected by some of the international conventions that protect specific, particularly vulnerable groups, such as, for example Convention of the Rights of the Child[4] or the Convention on the Elimination of All Forms of Discrimination against Women[5] (Romainville, 2015: 406).

At the regional (European) level, the right to participate in cultural life is protected by the Revised European Social Charter of 1996[6] (hereinafter: ESC) and the Charter of Fundamental Rights of the European Union[7] (hereinafter: CFREU). In its Article 15, regulating the right of persons with disabilities to independence, social integration and participation in the life of the community (irrespective of age and the nature and origin of their disabilities), ESC emphasizes that, among other measures the Parties undertake the steps towards the promotion of their full social integration and participation in the life of the community, especially through the measures aimed at overcoming barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure. CFREU is of particular importance for elderly persons, since it explicitly prescribes (in its Article 25) that the European Union recognizes and respects the right of elderly persons to lead a life of dignity and independence and to participate in

[3] UN General Assembly (1966) I*nternational Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, available at https://www.refworld.org/docid/3ae6b3aa0.html, accessed on 29.06.2023.

[4] UN General Assembly (1989) *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, available at https://www.refworld.org/docid/3ae6b38f0.html, accessed on 29.06.2023.

[5] UN General Assembly (1979) *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, available at https://www.refworld.org/docid/3ae6b3970.html, accessed on 29.06.2023.

[6] Council of Europe (1996) *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at https://rm.coe.int/168007cf93, accessed on 29.06.2023.

[7] European Union: Council of the European Union (2007) Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1, available at https://www.refworld.org/docid/50ed4f582.html, accessed on 03.07.2023.

social and cultural life. The aim of both previously cited provisions is to foster the social inclusion of vulnerable and often marginalized groups such as persons with disabilities of any age, and elderly persons (Romainville, 2015: 407). That is the reason why they are of particular significance full understanding of the right of elderly persons to participate in cultural life without any obstacles or discrimination and the devastating effects of its direct or indirect long-term and systematic violation.

The European Convention of Human Rights[8] (hereinafter: ECHR) does not clearly prescribe the right to participate in cultural life (Romainville, 2015: 407). Nevertheless, the European Court of Human Rights indirectly protects some of the aspects of this right, by "recognizing the freedom not to suffer from any interference in the access and participation to cultural life, artistic freedom and the freedom of association in the cultural sector" (Romainville, 2015: 407).

International and regional legal instruments on cultural policies are also significant for the protection of the right to participate in cultural life, including the cases when this right belongs to elderly persons. European Declaration on Cultural Objectives, adopted in 1984[9] invites the member states to jointly promote cultural participation and take actions in a democratic manner within and for the benefit of the community (Dragin, 2019: 34). In this context, it should also be mentioned that the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (also known as the Faro Convention) adopted in 2005[10] affirms that "rights relating to cultural heritage are inherent in the right to participate in cultural life" (See also: Zagato, 2015: 141-168). The right to participate in cultural life has a double-faceted nature, just like numerous other human rights. On the one hand, there is the negative right to participate in cultural life, which consists of the freedom to take part in cultural life without any interference from the state (Romainville, 2015: 408). At the same time, the positive aspect of the right to participate in cultural life includes the positive obligations on the behalf of the state aimed at the development of cultural policies designed to broaden access to and participation in cultural life (Romainville, 2015: 408).

[8] Council of Europe (1950), European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at https://www.refworld.org/docid/3ae6b3b04.html, accessed on 29.06.2023.

[9] Council of Europe (1984) European Declaration on Cultural Objectives, adopted by the 4th Conference of European Ministers Responsible for Cultural Affairs (Berlin, 1984), available at https://rm.coe.int/16806b23f1, accessed on 05.07.2023.

[10] Council of Europe (2005) Council of Europe Framework Convention on the Value of Cultural Heritage for Society, Council of Europe Treaty Series - No. 199, Faro, 27.10.2005. available at https://rm.coe.int/1680083746, accessed on 29.06.2023.

Another document significant for the protection of the right to participate in cultural life is the Fribourg Declaration on Cultural Rights of 2007[11] (Nikolić, 2019: 73). This declaration, was presented in 2007 by the Observatory of Diversity and Cultural Rights (at the Interdisciplinary Institute of Ethnics and Human Rights at the Fribourg University) together with the Organisation Internationale de la Francophonie, UNESCO and supported by more than fifty human rights high profiles, as well as a platform of NGOs[12]. Its list of cultural rights contains, among others, the right of access to and free participation in cultural life as well as in the cultural development of the community (Nikolić, 2019: 73).

1.2. The principle of equality and non-discrimination of elderly persons in international legal documents

When it comes to the right of elderly persons to participate in cultural life, it is important to have in mind the principle of equality and non-discrimination, which is proclaimed in several international legal documents. UDHR proclaims that: "all human beings are born free and equal in dignity and rights". For elderly persons, Article 25 Paragraph 1 of the UDHR is of particular importance since it claims that "everyone has the right to security and a standard of living adequate for the health and well-being of himself and his family".

ICESCR and the ICCPR, provide general protection of cultural, economic, social, civil and political rights. For the elderly, significant rights guaranteed by the ICESCR include: work-related rights (Articles 6 and 7) the right to social security (Article 9), to adequate living standard (Article 11), to education (Article 13) and to the highest attainable standard of physical and mental health (Article 12) (Fredvang, Biggs 2012: 10). Since the ICESCR does not directly refer to elderly persons, the Committee on Economic, Social and Cultural Rights (hereinafter: CESCR) released General Comment No. 6 in 1995 on "the economic, social and cultural rights of elderly persons"[13], providing a legal interpretation of the way in which the ICESCR should be applied to elderly persons

[11] Cultural Rights, Fribourg Declaration (2007) available at https://culturalrights.net/descargas/drets_culturals377.pdf, accessed on 29.06.2023.

[12] For further information see: https://culturalrights.net/en/documentos.php?c=14&p=161, accessed on 29.06.2023.

[13] UN Committee on Economic, Social and Cultural Rights (1995), General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, 8 December 1995, E/1996/22, available at https://www.refworld.org/docid/4538838f11.html, accessed on 30.06.2023.

(Fredvang, Biggs 2012: 10). In the CESCR General Comment No. 20, adopted in 2009[14], it is stated that "age is a prohibited ground of discrimination in several contexts", with the emphasis on the need to address discrimination against elderly persons in the fields such as employment, professional training, as well as against those living in poverty (Fredvang, Biggs 2012: 10).

There are other international treaties of universal scope of application that regulate the rights of vulnerable groups and some of them contain the provisions that are of direct or indirect relevance to the protection of the rights of elderly persons, including their right to participate in cultural life without discrimination. The Convention on the Elimination of All Forms of Discrimination Against Women[15] (hereinafter: CEDAW) mentions age in Article 11, in the context of the equal rights of women and men to social security and paid leave. Furthermore, the Convention on the Protection of the Rights of Migrant Workers and the Members of their Families[16] (hereinafter: ICMW) mentions age in its Article 7, among other prohibited grounds of discrimination. The Convention on the Rights of Persons with Disabilities[17] (hereinafter: CRPD) is of particular relevance for the protection of the rights of elderly persons as well (Fredvang, Biggs 2012: 11). The principles proclaimed by the CRPD include: respect of dignity, non-discrimination, full participation and inclusion in the society, equality of opportunities and accessibility (Fredvang, Biggs 2012: 11). As defined in Article 9 of CRPD, accessibility includes the right of persons with disabilities (regardless of their age) not only to live independently but also to participate fully in all aspects of life. Accordingly, CRPD obliges States Parties to take *"appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas"* (Article 9 CRPD). These measures include the identification and elimination of obstacles and barriers to accessibility and they should be applied in various public spaces

[14] UN Committee on Economic, Social and Cultural Rights (2009), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, available at https://www.refworld.org/docid/4a60961f2.html, accessed on 30.06.2023.

[15] UN General Assembly (1979) Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at https://www.refworld.org/docid/3ae6b3970.html, accessed on 30.06.2023.

[16] UN General Assembly (1990) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158, available at https://www.refworld.org/docid/3ae6b3980.html, accessed on 30.06.2023.

[17] UN General Assembly (2007) Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at https://www.refworld.org/docid/45f973632.html, accessed on 30.06.2023.

including indoor and outdoor facilities, schools, workplaces etc., all of which could be potential locations for cultural events.

At the European Union level, it is important to highlight that the principle of equal treatment, also known as the prohibition of discrimination, has been present since the establishment of the European Union, though its scope has gradually been expanding (Martínez López-Sáez, 2015; see also: Batrićević, 2012: 9-36). The 1997 Amsterdam Treaty[18] was the first to delegate to the European Union the jurisdiction over combatting age discrimination (Martínez López-Sáez, 2015). Council Directive 2000/78/EC of 27 November 2000[19] introduced a general framework for equal treatment in the field of employment, whereas a new draft Directive[20], that was aimed to protect residents in the EU against discrimination on the grounds of age, beyond the workplace was proposed in 2008 (Martínez López-Sáez, 2015). It is especially important to highlight that the Charter of Fundamental Rights of the European Union[21], prohibits discrimination on the grounds of age, by promoting the respect of the right of elderly persons to live a life of dignity and independence as well as to participate in the social and cultural life (Martínez López-Sáez, 2015).

2. The right of elderly persons to participate in cultural life in normative and strategic framework of the Republic of Serbia

The Constitution of the Republic of Serbia (*Official Gazette of the Republic of Serbia*, No. 98/2006 and 115/2021) (hereinafter: CRS) dedicates three articles (71-73, CRS) to cultural rights, which implies that in our country they have not been evolving as successfully as other human rights of the second generation (Nikolić, 2019: 74). These

[18] European Union: Council of the European Union (1997) Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997, available at https://www.refworld.org/docid/51c009ec4.html, accessed 03.07.2023.

[19] European Union: Council of the European Union (2000) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 27 November 2000, OJ L 303, 02/12/2000 P. 0016 - 0022, available at https://www.refworld.org/docid/583d783a7.html, accessed on 03.07.2023.

[20] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181} /* COM/2008/0426 final - CNS 2008/0140 */, available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:HTML, accessed on 03.07.2023.

[21] European Union: Council of the European Union (2007) Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1, available at https://www.refworld.org/docid/50ed4f582.html, accessed on 03.07.2023. and European Union (2012) Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, available at https://www.refworld.org/docid/3ae6b3b70.html, accessed on 29.06.2023.

constitutional provisions proclaim the right to education (Article 71, CRS), the autonomy of university (Article 72 CRS) and the freedom of scientific and artistic creation (Article 73, CRS). However, the Constitution does not explicitly mention the right to participate in cultural life, except when declaring the right of national minorities to express, preserve, conserve, develop and express in public their ethnic, cultural and religious specificities (Article 79, CRS). Nevertheless, CRS proclaims that all citizens are equal before the Constitution and law (Article 21, Paragraph 1, CRS) and prohibits any kind of discrimination, whether direct or indirect, based upon any ground, including age (Article 21, Paragraph 3, CRS). This should be applied on the accessibility of cultural contents to all citizens, including the elderly, without any exception.

The Law on Culture (*Official Gazette of the Republic of Serbia, No. 72/2009, 13/2016, 30/2016, 6/2020, 47/2021 and 78/2021*) (hereinafter: LC) prescribes guiding principles that the Republic of Serbia should follow when fulfilling the general interest in culture and applying its cultural policy as the assembly of aims and measures for the enhancement of cultural development (Article 3, Paragraph 1, LC). One of them is the principle of openness and accessibility of cultural contents (Article 3, Paragraph 1, Point 4, LC). This principle obliges relevant stakeholders to make cultural contents accessible to all citizens, regardless of their characteristics, including their age. Furthermore, the LC enumerates various aspects of the term "general interest in culture" and insists on "providing the conditions for the accessibility of cultural contents" (Article 6, Paragraph 1, Point 14, LC). Cited provision indicates that facilitating the accessibility of cultural contents represents a part of the general, i.e., public interest. This is important since financial resources for the actualization of general interest in the field of culture are provided in the state budget and from the budgets of autonomous province and local self-government units (Article 6, Paragraph 2, LC).

Strategy of the Development of Culture of the Republic of Serbia for the period from 2020 until 2029, adopted at the beginning of 2020 (hereinafter: SDC), also promotes wide accessibility of culture as well as equal and active participation in cultural life.[22] Although SDC does not explicitly mention elderly persons, it seems logical that the principle of non-discrimination, which is obviously present in this provision should be applied to them as well. Another line of SDC promotes the accessibility of cultural contents to elderly persons - the one that addresses the rights of vulnerable groups. Namely, SDC encourages the participation of vulnerable groups in cultural life, without providing a

[22] Strategy of the development of culture of the Republic of Serbia for the period from 2020 until 2029, https://www.kultura.gov.rs/extfile/sr/3993/strategija-razvoja-kulture-od-2020--do-2029-godine.pdf, accessed 03.07.2023.

precise definition of the term "vulnerable groups". This allows us to include a wide variety of vulnerable and/or marginalized groups/communities under one term, including elderly persons, who are, without any doubt, one of the most vulnerable groups in our society. That creates space for the perception of the measures aimed at the enhancement of the participation of elderly persons in cultural life as lawful obligations of relevant state entities - from public policy creators, decision makers, to employees of cultural institutions.

Ageing of population was recognized as a serious issue by the Government of the Republic of Serbia and, consequently, National Ageing Strategy for the period between 2006 and 2015 was adopted in 2005 (*Official Gazette of the Republic of Serbia, No. 55/2005 and 71/2005*) (hereinafter: NAS). Although this strategic document is not in force anymore, some of its provisions are still relevant since they set useful directions and clear goals in this field and a new document dedicated to this issue should be adopted as soon as possible. The main goal of NAS was to create a society that would be suitable for persons of all ages and that would attempt to fulfill the needs and release the potentials of elderly persons (Jovanov, 2017: 5). This goal includes the creation of an integral and coordinated policy grounded on contemporary scientific findings and established obligations, that is expected to harmonize the society with demographic changes (Jovanov, 2017: 5).

Some of the most important goals of NAS comprise lifelong development of an individual, improvement and protection of all human rights and fundamental freedoms, providing the quality of life in the old age, facilitating full integration and participation of elderly persons in the community, elimination of all kinds of social neglect and marginalization of elderly persons, promotion of intergenerational and intragenerational transfer, solidarity and dialogue, establishing cooperation among the government, civil sector and elderly persons and creating equal opportunities for everyone (Jovanov, 2017: 5).

NAS contains the provisions pertinent to the participation of elderly persons in cultural life, creating a strategic framework for the development of the entire society towards the state in which such participation would be possible. NAS prescribes that development programs, including the ones in the field of cultural development, must insist on reaffirming the role of family and family solidarity as well as on defining the needs of elderly persons on the one hand and contemporary family on the other, in order to improve their social, medical and cultural welfare. It is highlighted that this strategic goal is of particular significance for various aspects of life, including culture.

NAS contains a general goal entitled as "Improvement of social, economic, political and cultural position and role of elderly persons". Within this goal, NAS prescribes

several measures, including: organizing media campaigns, making special publications with the purpose to raise the awareness of elderly persons about their human rights and prevent their discrimination (NAS). NAS also recommends the education of younger generations about the characteristics of ageing, the resources and specific needs of elderly persons, as well as the participation of elderly persons in the decision-making processes and self-organization (NAS).

Another important goal of NAS includes facilitating and enhancing lifelong learning and, within this goal, NAS prescribes that the measures should be applied to fulfill cultural, leisure and recreative needs of elderly persons, with full consideration of their personal affinities. Furthermore, NAS suggests that current contents in this field should be improved and that new forms of activities, adjusted to the needs of elderly persons, should be introduced and encourages the establishment and expansion of amateur cultural and artistic associations of elderly persons (NAS). Within its goal to promote and support intergenerational solidarity, NAS also prescribes some measures related to cultural life, such as organizing various activities within the system of education and culture directed towards the promotion of mutual respect, understanding and tolerance for different needs of different generations and positive evaluation of elderly persons' contribution to community development. This implies that participation in cultural life is not only one of essential human rights of elderly persons, but also a channel through which the message about the need to respect elderly persons and prevent any kind of discrimination against them can be transmitted.

The evaluation of the implementation of NAS confirmed that, despite some improvements, the entire implementation process was not conducted as fast as it was expected and that there is steel need to work on the development of the society so that it could respond adequately to the ageing of the population (Kozarčanin, Milojević, 2016: 10-26; Jovanov: 2017: 5). Some of the fields that are identified as particularly important for further development and improvement include, among others, the implementation of measures aimed at the protection from discrimination and violence against elderly persons and the creation of appropriate conditions for the education of elderly persons (Kozarčanin, Milojević, 2016: 10-26; Jovanov: 2017: 5). These areas, that are mapped as the fields in which more effort should be made, are of particular relevance for the improvement of participation of elderly persons in cultural life.

3. Key obstacles for the participation of elderly persons in cultural life in Serbia

Despite the fact that the Republic of Serbia has ratified relevant international legal sources and adopted a comprehensive national legislative and strategic framework for the improvement of accessibility of cultural contents, there seem to be some obstacles that elderly persons are facing in their attempts to fully participate in cultural life. Before highlighting key challenges in this area, it should be mentioned that participation in cultural life is not among the highest rated leisure activities of elderly persons in Serbia. Namely, research has confirmed that preferred leisure activity of elderly persons is watching television, whereas spending time with friends and family, walking, resting and reading newspapers come after it, leaving very little room for reading books or going to the theatre or cinema (Babović *et al.*, 2018: 55). However, the question could be raised whether this list of preferred activities is their genuine choice or the result of current circumstances.

In some cases, the challenges regarding the participation of elderly persons in cultural life are not related solely to age, whereas in others, they emerge exclusively as the result of discrimination on the grounds of age. Therefore, it should be emphasized that the key obstacle for the realization of cultural rights (regardless of age) is related to economic and financial circumstances in our country that were additionally affected by global recession and financial crisis in 2008 (Nikolić, 2019: 76). Even though the negative consequences of economic crises affected all citizens, elderly persons should be considered as particularly vulnerable to its negative impacts due to their already modest incomes (Mijatović, 2003: 225). This is confirmed by the findings that elderly persons in Serbia are much more exposed to material deprivations than those living in the EU, particularly in the cases of elderly women (Babović *et al.*, 2018: 23). Elderly women often cannot afford to attend cultural events, either because they do not have sufficient financial resources or because they voluntarily neglect their own needs in order to help their children or other family members (Petrušić et al., 2015 as cited in Babović *et al.*, 2018: 21).

Another obstacle for the participation of elderly persons in cultural life is related to its digital or virtual aspect. Digitalization and the possibility of online access to cultural contents has the potential to facilitate and enrich a person's participation in cultural life (Vukićević, 2011: 165; see also: Batrićević, 2017: 23-33). Due to its global reach, interactive character, richness of verbal and non-verbal symbols, adaptability and flexibility, the Internet can contribute to the fulfillment of cultural policy goals, one of which is the increase of participation of all citizens in cultural life (Vukićević, 2011: 166). However, elderly persons in Serbia seem to use information-communication technologies rarely,

particularly in comparison to elderly residents of the EU countries, either because of the lack of interest or the lack of someone who could teach them how to use these technologies (Babović *et al*., 2018: 41-42). The share of elderly persons using information-communication technologies in Belgrade is a bit higher and they use them predominantly for communication with friends and family (Dragišić Labaš, 2016: 142).

The participation in cultural life, especially in the form of attending cultural events (such as concerts, theatre performances, exhibitions etc.) is closely dependent on elderly persons' mobility. In that context, the availability and accessibility of public traffic, in both - urban as well as rural areas, are of key significance (Babović *et al.*, 2018: 43). For elderly persons, one of the most important factors is the distance between their place of residence and public transport station, especially if their mobility is limited (Babović *et al.*, 2018: 43). Another important circumstance is the price of public transport that varies from one city to another and, in some cases, may represent an obstacle for full mobility (Babović *et al.*, 2018: 43). The lack or insufficiency of public transport services in rural areas are especially challenging since the mobility and, hence, the access of elderly rural inhabitants to all services including cultural actually depends on the possession of a car (Babović *et al.*, 2018: 43). It should also be mentioned that not all elderly persons have gerontological and daily care centers close to their place of residence. Mobility of elderly persons also depends on the presence of their caregivers, particularly informal caregivers such as family members or volunteers, and their availability and willingness to help them to access cultural venues and attend cultural events (see also: Batrićević, 2022: 463-486).

No matter how contradictory it may seem, the number of elderly persons and their share in the entire population is increasing worldwide, whereas, at the same time, the trend of their social marginalization and discrimination exclusively on the grounds of their age is also expanding (Baraković, Mahmutović, 2018: 20). That is the reason why the insufficient accessibility of cultural contents for elderly persons should also be observed in the context of ageism, which is apparently emerging in all spheres of life, including cultural life as well. Namely, negative attitude towards elderly persons leads to the escalation of prejudice and negative stereotypes, such as, for example, the belief that elderly persons are always of poor health, frail, incapable, depressive etc. (Zovko, Vukobratović, 2017: 113). Common beliefs about the process of ageing nowadays often result in negative stereotypes, which inevitably shape the attitude of the society towards elderly persons (Zovko, Vukobratović, 2017: 113). This overlapping of socio-cultural and biological characteristics keeps elderly persons away from important social issues and the focus of public sphere (Milosavljević, 2014: 149). What causes even greater concern is

the fact that these negative stereotypes have an impact on the way in which elderly persons see themselves (Zovko, Vukobratović, 2017: 113). It is familiar that old age carries a certain number of losses, causing the feelings such as: sadness, loneliness, dependence, inadequacy and isolation, which may lead to the loss of self-perceived dignity of elderly persons (Radaković, 2020: 558). These negative and destructive feelings, combined with the fact that elderly persons often gradually accept the negative stereotypes as correct descriptions of themselves, lead to the situation in which elderly persons begin to avoid social interaction (Zovko, Vukobratović, 2017: 113). This specific withdrawal of elderly persons as their reaction to constant exposure to negative stereotypes and prejudice could be also referred to as "self-discrimination" and it should be observed as one of the factors that make cultural contents less accessible to elderly persons even if there are no physical obstacles for them to, for example, attend cultural events.

The media have an extremely important socio-cultural impact on the public's perception of elderly persons and ageing (Zovko, Vukobratović, 2017: 116). Apart from representing the source of information about various age groups, the media often have either intentional or unintentional impact on the public perception of ageing, particularly when direct intergenerational contact is missing (Zovko, Vukobratović, 2017: 116). The content that is offered by the media predominantly supports the cult of youth, whereas elderly persons are rarely presented in the public and, when they appear in the media, the attitude expressed towards them does not comply with actual conditions (Zovko, Vukobratović, 2017: 116). Having this in mind, the media should also be considered responsible for insufficient participation of elderly persons in cultural life - both as creators and as recipients.

Conclusion
Recommendation to improve the participation of elderly persons in cultural life

Despite normative framework that protects the right to participate in cultural life without discrimination, there seem to be numerous obstacles for elderly persons who whish to attend cultural events or consume cultural contents in some other way, such as, for example online. Apart from physical obstacles, such as distance (especially the isolation during COVID-19 pandemic, which produced a series of negative consequences (see for example: Batrićević, Stanković, 2021: 118)) and mobility issues, lack of financial resources, insufficient knowledge about information-communication technologies, lack of formal and informal caregivers, marginalization and stigmatization of elderly persons leading to their discrimination and self-discrimination are some of the key obstacles for

their participation in cultural life. That is the reason why comprehensive multisectoral and multidisciplinary measures should be implemented in order to improve the situation in this field. These measures should include, but are not limited to: adopting new strategic documents and action plans dedicated to the improvement of general human rights and wellbeing of elderly persons, further enhancement of accessibility of public institutions, improvement of mobility of elderly persons via public transport and organization of caregivers who could assist them in transport, gradual improvement of elderly persons' information-communication technology skills, further support for efforts at the local level (such as gerontological centers but also non-governmental organizations) aimed at the improvement of participation of the elderly in cultural life, promotion of non-discrimination of elderly persons etc.

The improvement of participation of elderly persons in cultural life cannot be achieved without the improvement of their healthcare. That is the reason why a series of activities that would make positive changes in all sectors relevant to this issue, including: *"health care centres and institutions, bodies in charge of the rights of patients, state institutions in charge of pension and health insurance, as well as other relevant stakeholders such as public health policy makers, the media, non-governmental organisations and, finally the entire community"* (Batrićević, Kubiček, 2021: 649).

When non-discrimination of elderly persons in the context of their right to participate in cultural life is concerned, a distinction should be made between inclusion, on the one hand, and integration, on the other. According to United Nations Educational, Scientific and Cultural Organization (UNESCO)[23], inclusion is defined as a process that encompasses not only addressing but also responding to a variety of needs of all learners through the increase of participation in learning, cultures and communities, and reducing exclusion within and from education (Magdaleno, 2017: 66). A concept similar to the one that is applied to learning should be applied to the participation of elderly persons in cultural activities. Integration, on the other side, refers to the introduction of special services for population groups that are identified as vulnerable (Magdaleno, 2017: 66). Although the definition of inclusion given by UNESCO primarily refers to the process of education, which is commonly (but not solely) related to younger persons, it should be emphasized that the concept of inclusion covers everybody, including elderly persons, as well. The reason why this should be highlighted is the fact that the endeavors for inclusion of elderly persons are relatively new and related to the processes of ageing combined with the increase of life expectancy (Magdaleno, 2017: 66).

[23] See also: Interview with the UNESCO-IBE Director, Clementina Acedo https://www.ibe.unesco.org/fileadmin/user_upload/Policy_Dialogue/48th_ICE/Press_Kit/Interview_Clementina_Eng13Nov.pdf, accessed on 30.06.2023.

However, none of the aforementioned measures can be successfully implemented if discrimination against elderly persons keeps persisting in our society. Therefore, the efforts that are either equal or even greater than the ones in the normative sphere should be made by the media, public policy creators, academic community, educators, decision makers and other relevant stakeholders in order to raise awareness about the value of elderly persons for the society and our duty to respect their dignity and human rights. The attempts to improve cultural life of elderly persons and their active participation in cultural exchange should not be made only occasionally, depending on projects or suitable events, but should become a regular practice, supported by the state and promoted by the media, academic community and general public on a daily basis.

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TREATMENT, RELEASE AND REINTEGRATION OF ELDERLY IN PRISON - PROBLEMS AND CHALLENGES IN PRACTICE**

Older prisoners are the fastest growing incarcerated sub-group. They have more complex health and social care needs than both younger prisoners and their agematched peers living in the community. Convicts who are in prison, and the elderly who will soon be released are at increased risk for their physical and mental health. The treatment in the prison is also not adapted to the population of older convicts. This population, due to their age, disability or inability to work, are often not employed in prison. Opportunities to use sports facilities are also limited for older convicts. In this work, the author tries to answer the question of what are the key health and social needs of elderly convicts and how the treatment and its contents can be adapted to this population. Furthermore, a special challenge is the planning of reintegration into the social environment, after release from prison. Consequently, there is a need for timely and multi-disciplinary release planning.

Keywords: *older prisoners, health of convicts, social needs, treatment, prison system, social reintegration*

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Introduction

With the aging of the population, the number of elderly people in prison is increasing (Hayes et al. 2013). Although the number of elderly convicts is growing, all over the world, it seems that the needs of this population remain invisible.

Researchers, policymakers and corrections administrators have yet to reach a consensus as to what constitutes an 'older offender'[1] and definitions vary substantially, ranging from 45 years and above to 65 years and above (Stojkovic, 2007; Yorston, Taylor, 2006).

The issue of definition is essential for comparative research and a lack of consensus can impede the development of a sound evidence base concerning older prisoners and related issues, such as offence types, recidivism rates, health concerns and prison management issues (Badawai, et al., 2011). Heckenberg (2006) suggests that any functional definition must also avoid bundling 'older prisoners' together as a homogenous group and in doing so, neglecting individual characteristics and needs. Defining old age does not have only academic relevance, since different definitions of old age have different impacts on the way in which the society perceives and treats elderly persons, as well as on creation of public policies in the area of social welfare and health protection of the elderly (Petrušić, Todorović, Vračević, 2015: 27 according to Batrićević, 2022: 464).

Public support for 'tough on crime' or 'law and order' policy approaches remains popular in most countries, while the rehabilitative function of prison has steadily eroded over the last half-century. This trend mirrors the advancement of neoliberal welfare retrenchment outside prisons, and the worsening of conditions inside prisons, from overcrowding and violence to the catastrophe of the COVID-19 pandemic (Danely, 2022: 59). Conditions in prison are so poor that prison health researchers have long considered incarcerated people to reach 'old age' (in biophysical and emotional terms), at around, on average, ten years earlier than non-incarcerated people (Aday, 2003). Because of this accelerated aging, 'time served' is much longer than the length of sentence would seem to indicate (Danely, 2022).

This increase in the number of older prisoners around the world is not merely a reflection of aging populations, nor is it likely that the current generation of older people are somehow more prone to criminal behavior than they were in the past. Yet, if we look for answers to the puzzle of the global increase of older people in prison on an institutional level, it becomes difficult to draw strong conclusions.

[1] Despite the variability of definition, many writers and researchers have adopted a functional definition of 'older prisoners' as being those who are 50 years of age and over (Kerbs, Jolley 2007).

Cross-national comparisons are complicated by differences in laws, police enforcement, sentencing, parole and other elements that make up the criminal justice system. Cultural models of aging and access to social welfare support also vary widely across national contexts (Danely, 2022).

In the USA, the number of older prisoners increased by 181% between 2000 and 2010, in contrast to the overall prison population which increased by only 17% (Bureau of Justice Statistics, 2011 according to Milićević, Ilijić, 2022). It is estimated that by 2030 one-third of all prisoners in the USA will be over 50, equating to a 4,400 per cent increase from 1980 (American Civil Liberties Union, 2012). There has also been a sizeable increase in the number of older prisoners in England and Wales (Forsyth, 2014). At the end of 2012 there were 9,880 prisoners aged 50 and over in England and Wales; this figure incorporates 3,377 prisoners aged 60 and over and equates to 12 per cent of the total prison population. It also includes a small but important group of 413 older women (Ministry of Justice, 2013). In Serbia, official statistics show that convicted persons aged over 50 accounted for 14.7% of the total number of convicts admitted to serving their sentences in 1999, 18.8% in 2006, 19.1% in 2015 and 20.1% in 2020, which represents an empirical increase in their percentage representation (Statistical Office of the Republic of Serbia, 2004, 2011, 2016, 2022 according to Milićević, Ilijić, 2022: 504).

While the reasons for the increase in older prisoners vary considerably across societies, prisoners' experiences of growing older, being abused or neglected, and finding ways to care or be cared for in prison, seem to resonate across cultural contexts (Danely, 2022: 59).

In this article, author trying to answer the question of what are the key health and social needs of elderly convicts, and how treatment and facilities can be adapted to this population, and what are the key obstacles that hinder the social reintegration of this population in society.

2. Issues in the management of older prisoners

The rising number and proportion of older prisoners (Forsyth et al., 2014) has implications for planning, policy and service delivery across the correctional system. Older inmates are characterised by different issues and present unique challenges across a number of domains, including physical and mental health needs, costs associated with incarceration, vulnerability to victimisation, prison environment, service delivery and release planning (Baidawi, et al. 2011).

By reviewing international literature we can see the key observation that the treatment of older adults in prison is predicated on broader social beliefs about not only criminality and justice but also age (Maschi, Morgan, 2020; Humbert, 2021).

Ageism, as a modern (negative) stereotype of the elderly, reflects the attitude that this category cannot take care of itself, due to old age, which is associated with the decline of cognitive functions and weakening of physical and mental health. For them, social care represents an unnecessary social cost, an investment that does not return (Ljubičić, 2021: 526).

As Daneley (2022) notes there is a persistent tension, for example between assumptions about age-related vulnerability and the image of the dangerous criminal, or between the recognition of differences in care needs of frail older people and the routines and uniformity of prison institutions. These contradictions are the main topic of two significant studies on the elderly prison population: *Aging behind prison walls* by Tina Maschi and Keith Morgen (2020) and *The older prisoner* by Dieta Humblet's (2021). While it has been recognized for decades that inequalities based on race, class, and citizenship are reflected in and perpetuated by criminal justice and penal systems (Wacquant, 2009), these books are two of the most significant works to extend the argument to age and disability (Daneley, 2022).

In *Aging behind prison walls*, Tina Maschi and Keith Morgen (2020) offer a data-driven and compassionate analysis of the lives of incarcerated older people. They explore the transferable resiliencies and coping strategies used by incarcerated aging adults to make meaning of their lives before, during, and after imprisonment. The autors argue that older prisoners' lives are marked by cumulative disadvantages and a lifetime of traumatic experiences. Despite the demographic heterogeneity of older adults sampled for their research, nearly three-quarters of those surveyed had three or more incidences of trauma, such as abuse or assault, in their life histories. Based on the data, Maschi and Morgen (2020) present a solution-focused caring-justice framework in order to understand and transform the individual - and community-level structural factors that have led to and perpetuate the aging-in-prison crisis. They offer concrete proposals - at the community and national policy levels - to address the pressing issues of incarcerated elders.

Analyzing *Aging behind prison walls*, Daneley (2022) makes the boldest claim from the aforementioned study - that "it was the aging prisoner who awakened the general public to the possibility of a form of justice that cares" (Maschi, Morgen, 2021: 5). The authors introduce the term "caring justice", which means a response to the neglect of elderly prisoners and arises on an institutional and collective level as a result of individual improvement under the slogan *if I care, my community will care, and judicial institutions will care* (Maschi, Morgen, 2021).

In other words, by gaining a "new place of awareness and inner knowing" regarding both the traumas and the resilience of aging prisoners, society will no longer be able to stand aside and will be compelled to act. Resilience, or "adaptive coping," is an ability to bounce back from negative experiences, and in some cases, to find opportunities for "biopsychosocial spiritual" development. Examples of resilience create hope for change, allowing the reader to see older prisoners as more than just passive victims of oppression, incapable of ever having healthy relationships or controlling their actions and emotions (Daneley, 2022: 61).

The development of geriatric services, specific to older adults is important, because they have a potential for improving the lives of older adults both inside prison and in the community, including developing better policies, community services and greater public awareness.

In *Older prisoner* (Humblet, 2021) author examines the construction of 'the older prisoner' that is accompanied with distinct characteristics and specific knowledge determining the way we think about, scientifically approach, and respond to this category. The starting point is that the older prisoner is conceived as a social problem that must be managed. The idea of managing social problems through segmentation is not a novel one yet is here once more applied to the older prisoner who is placed in separate locations.

In this landmark study, the author critically analyzes the notions of "prison harm" and "accelerated aging" that result from the prison environment, picking apart assumptions about the "older prisoner" as a subject in a way that reveals that their special treatment or marginalization is rooted in ageist assumptions.

Prisons, much more so than other places in society, demand order and conformity, severely restricting prisoners' capacities to have their individual needs recognized, let alone to create a space for personal expression and meaning. This is a technology of control necessary for a small number of staff to keep order in the prison environment, but for frail and disabled older prisoners, this 'management' easily crosses a threshold into punishment (Daneley, 2022: 62). Humblet reveals a predominant ethos of what British Criminologist Elaine Crawley and Richard Sparks (2005) calls "institutional thoughtlessness", that is "rooted and sustained by the prison praxis" (Humblet, 2021: 137). Crawley and Sparks introduced the concept of 'institutional thoughtlessness' whereby prison staff, through attempting to retain consistency in their treatment of all prisoners, do not recognise the additional needs of older prisoners and expect them to behave in the same way and to conduct their activities at the same speed as everybody else. This resulted in everyday 'hidden injuries' which were unnoticed by staff and unacknowledged by prisoners (Hayes et al., 2013: 590).

3. Needs of elderly convicts and treatment in prison

Older inmates are characterised by different issues and present unique challenges across a number of domains, including physical and mental health needs, costs associated with incarceration, vulnerability to victimisation, prison environment, service delivery and release planning (Baidawi et al., 2011: 4).

It is widely reported that prisoners and ex-prisoners experience considerably worse levels of health and wellbeing than the general population in relation to suicide risk, mental illness, substance misuse and physical mobility (Forsyth, et al., 2014). The health of older prisoners is a matter of concern - research indicates that you age 10 years faster in prison (Uzoaba, 1998) which can compound the problems that may be associated with ageing. The provision of health and social care do not match those for older people outside of the prison system (Williams, 2010). Similarly, older prisoners present with the highest rates of many disorders in comparison

to the overall prison population (Fazel, Baillargeon, 2011) and have more complex health needs than their aged-matched counterparts in the community, with approximately 85 per cent of older prisoners having one or more major illnesses (Fazel et al., 2001). Fazel et al. (2001) demonstrated increased physical and mental health problems among prisoners aged 60 and over in particular chronic illness and depressive disorder. The same researchers state that 9% of older convicts need additional help with daily activities, most often due to impaired mobility.

Correctional environments are designed for younger prisoners (Williams, 2010; Baidawi et al., 2011) and they are not adapted for elderly with diverse and specific needs (Milićević, Ilijić, 2022; Jovanić, 2014). Daily activities, programs of treatment, work and leisure activities, are not adapted to the population of older convicts.

Many researchers have argued that older prisoners' health concerns are exacerbated by many prison environments and regimes (Aday, 2006; Carlisle, 2006). Stairs, crowd and architectural barriers create additional problems for residence of elderly in prison (Jovanić, 2014). In general, the older a prisoner, the more barriers there were to active life, the greater their mental and physical health needs, and the less likely it was that they would be able to live and function in dignity (Her Majesty's Inspectorate of Prisons, 2004).

Research findings support this and suggest that prison environments and regimes poorly cater for the needs of older prisoners with physical disabilities, such as limited mobility (eg requiring the use of ramps, wheelchairs, walking frames or sticks), hearing or vision impairments, infirmity or incontinency (Aday, 2003; Carlisle, 2006; Kerbs, Jolley, 2009; LeMesurier et al. 2010). Qualitative studies have found that older prisoners

having limited contact with friends and family found it much more difficult to cope with prison (Hayes, et al., 2013).

The first step in ensuring an adequate approach to the treatment of elderly convicts in prison is the identification of their individual characteristics and needs (medical, physical, psychological).

Certain strategies that were developed in the United States of America and United Kingdom, at the local level, implemented with the aim of providing adequate assistance to older convicts.

Such initiatives have utilised assessment, collaboration with community agencies, case management, mentoring and advocacy to identify and address issues affecting older prisoners; for example, developing more appropriate exercise and day programs and coordinating transitional support (Evans, 2005).

In the United Kingdom, strategies have included developing an elderly register, training and employing prisoners as carers for other prisoners or using older inmates as advisors on aging issues within prisons (HMPS, 2009). In Meryland, the social work department in the Division of Corrections is responsible for keeping a database of elderly prisoners, ensuring regular physical and mental examinations and monitoring the need to apply for medical parole if necessary (Gaseau, 2004).

4. Release from prison and reintegration into community

Release from prison is just the first step in the longer process of prisoner reentry, which is composed both of desistance from crime and community reintegration (Visher, Travis, 2003).

While it has been established that older offenders recidivate at a lower rate than younger offenders (Cooper, Durose, Snyder, 2014), it remains largely unknown how older offenders fare in processes of social reintegration more generally (Williams, Stern, Mellow, Safer, Greifinger, 2012).

This topic is significant both because of the scope of the problem, and because social integration has important implications for individuals' long-term health and well-being (Carson, Golinelli, 2013).

Building on the multidimensional concept of reintegration put forth by Visher and Travis (2003), successful social (re)integration is defined as encompassing (a) resource factors, such as the attainment of stable housing, benefits and employment, (b) network factors, such as the (re) establishment of social relationships and roles and (c) psychosocial factors, such as feelings of "mattering" or being valued within these relationships and roles.

In other words, successful reintegration following prison entails securing the material resources, social connections and psychological grounding necessary for positive social functioning (Wyse, 2018).

The researchers point to the existence of numerous difficulties, both in terms of planning the release of older convicts from prison, and in terms of their reintegration into the social community.

The causes underlying this shortcoming include a lack of coordination (eg. funding, resources and service provision) between prisons, community correctional services and community agencies (Ahmed, 2008), priority being provided to younger inmates (either due to higher perceived risk of reoffending or higher perceived chances of successful rehabilitation and re-integration) and a lack of strategies to address the needs of older prisoners, combined with restrictive criteria for the early medical release of terminally or chronically ill prisoners (Rikard, Rosenberg, 2007 according to Baidawi et al., 2011).

Prior studies of prisoner reentry into community (which generally focus on "average" - i.e., younger former prisoners) have documented the challenges they face in securing or maintaining necessary resources and valued social roles, including employment, housing, public benefits, and relationships with family (Travis, 2015).

There is also evidence that incarceration significantly harms familial bonds, by breaking up intact families and diminishing post-incarceration marital prospects and relationships with children (Lopoo, Western, 2005).

Older former prisoners' reentry into community is likely distinct from reentry into community of younger ex prisoners - in many important ways.

Previous researchers state the data the older offenders' ties to family may be frayed following years of criminal involvement and drug abuse, or simply weakened following a lengthy prison sentence. Jobs may be even more challenging to obtain as older men face both the barriers posed by a criminal record as well as those of advanced age (Wyse, 2018).

Researchers state the data that older prisoners due for release often have intense anxieties about, and an inadequate understanding of, the resettlement process (Crawley, 2004). What seems to give older prisoners the most concern is the lack of clarity / or assist from prison staff as to where they are going to live, how they are going to get there (with limited money and poor mobility) and whom they will be living with. In the main, only prisoners with a supportive wife and / or family were hopeful and enthusiastic about resettlement. For these men, release means being with family again and regaining the freedom to structure their own days and choose their own activities and company. Importantly, for those whose wives were infirm, release also provides the opportunity to resume the protector role which they had been forced to leave behind. Most of the older

men who do not have marital or familial ties, however, are unsure how they will fare when released (Crawley, 2004: 34).

Researchers sugested that family relationships with parents and siblings were a key social role and source of emotional support for men exiting prison (Wyse, 2018).

Men also return to particular neighborhood contexts that may have important implications for their reintegration processes. Prior research has found that former offenders are more likely to recidivate when they return to their pre-prison neighborhood, or to a neighborhood populated by higher concentrations of ex-offenders (Stahler et al., 2013). In these cases, recidivism may be facilitated by interaction with criminally-engaged friends and neighbors, and / or exposure to environmental "triggers" for substance use that encourage relapse (Kirk, 2012).

According to the report of Prison reform trust (2003) in elderly convicts who have cronic diseases, the fear of not being able to access health care is often one of central concerns. This category of convicts, while in prison, relied on formal health care as well as informal assistance. They often received a certain type of help in terms of performing daily activities and meeting hygiene needs from other convicts (such as dressing, bringing food or maintaining hygiene in the cell) (Jamieson, Crawley, Noble, Grounds, 2002).

Understanding the social integration processes of older offenders is particularly important given the established relationship between social ties and support and positive physical and mental health outcomes.

The positive implications for health of social connectivity include lower overall mortality, improved immune and cardiovascular functioning and lower rates of depression (Seeman, 1996).

Social integration also protects against feelings of loneliness, promotes life satisfaction, and is an important element in successful aging (Rowe, Kahn, 1997). Given the documented high burden of disease and illness borne by aging former prisoners, social integration may help stave off further mental and physical decline (Aday, 2003; Human Rights Watch, 2012).

Conclusion

Further research should be systematic and focus on characterization of the population of older prisoner cohort in terms of its size and the particular issues and challenges faced by corrections services, including corrections, health and pre-and post-release services, in the management of this prisoner group. Older inmates are characterised by dif-

ferent issues and present unique challenges across a number of domains, including physical and mental health needs, costs associated with incarceration, vulnerability to victimisation, prison environment, service delivery and release planning

Understanding these issues is an essential starting point to formulating strategies for management of older prisoners. One of the recommendations need to include ways to build a more supportive community and to address the specific needs of older individuals in prison and older prisoners living with addiction or mental illness, in order to achieve the most successful social reintegration into the social community.

There is a need to plan effectively for older prisoners' reintegration into the community through the development of appropriate policies and mechanisms. Plannings resetlements into a community begins in prison is crucial, providing an opportunity to enroll in health care, initiate social security benefits and identify available community resources.

An important component of the reentry experience is that of social integration into the roles and relationships of work, family and community. Broadly speaking, social integration can be understood as the extent to which an individual is enmeshed in, and feels a sense of belonging with, others in a social system (Hooyman, Kiyak, 2008). Such connectivity may be fostered by the assumption of key social roles, the receipt of essential social supports and resources, and/or the formation of social ties.

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SENIOR FEMALE SCHOLARS IN SERBIA BETWEEN STRUGGLE FOR RECOGNITION AND EMPOWERMENT STRATEGIES[**]

In this paper, the position of senior female scholars in Serbia is examined. Our goal is to provide an overview of the challenges and differences female scholars are facing on the one hand, while on the other we examine the framework regulating their labour and the possibilities for its improvements in the direction of providing gender neutrality. The analysis is situated in the academic field of studies of higher education (HE) combined with higher education policies and research & development policies analysis. Firstly, the overview of the problem of women's access to the academic sector has been presented from a historical perspective and perspective of existing research approaches to the problem. Afterwards, we examine the challenges women are facing within the ongoing globalisation trends, the strategic acting from a side of international organisations on the global and European levels, and the local reflection of these developments. Finally, we are proposing a novel approach to the research of the problem of the position of senior female researchers based on the combination of autoethnography and life-cycle studies with empowering policy measures.

Keywords: *female senior researchers, approaches, research policies, systemic empowerment, life narrative*

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1. Introduction

The engagement in the research sector has probably been one of the most challenging and demanding professions for women, yet not many detailed insights into their position and struggles to successfully cope with the rising demands coming from the region we have seen published. The academic profession as such is facing numerous transformations in the postcapitalist era of precarity and rising neo-conservatism, therefore a need to better understand and support this group of professionals, particularly in the phase of a life cycle in which the challenge of ageing comes along, thus seems even more significant.

Our focus here is on women scholars in general, coming from all disciplines, even though from time and time the difference between science, technology, engineering, and mathematics - STEM and social sciences and humanities - SSH streams will be pointed to. Instead of placing the focus on excluding mechanisms as previously was the practice of researchers, our focus is on comprehending the system of support and the possibilities for its improvement by learning from historical, comparative and international contexts. We are interested in setting the basis for well-grounded in-depth research based on understanding the life trajectories of concrete important figures in Serbia retrospectively. Since retiring and coming to age is the final phase of life bearing the rising vulnerability, we are curious to find out how this problem is addressed in higher education and related policies on national and international level. Our task in this paper will be to set out the state of the art about the topic, but also to prepare the conceptual and methodological basis which will serve as a framework for later fieldwork surveys.

The switch of focus on well-being rather than on mere survival is one of the directions related to women in later career stages of importance for our approach, especially because a model of a satisfying life course is more often defined by the absence of a problem than it is observed through the shared values of what it does contain. One of the solutions to this is to rely on the newly emerging concept of resilience or to develop an index of what supportive and empowering academic surroundings in late career phases of women in research should entail, and then to counterpose it to the given conditions with the aim to gasp the direction for the future improvements.

2. General overview of the contemporary challenges senior female researchers face

The history of the position of women in HE is an uneasy and delicate topic since women's struggle to get equal rights to access the highest levels of education was not an easy one while for a long time, their intellectual and scientific capacities were neglected.

Today, society did not completely stop reproducing mechanisms of gender inequality within the academic setting according to which women are understood as inferior, less capable and irrelevant, particularly the older ones.

The general improvements of the legislative mechanisms regarding the position of women in the research sector in recent years are the result of the two centuries of struggles of the feminist movement for equality, but also of the massive commitment of international agencies and organisations to empower their position. Numerous initiatives took part in the last two decades which have made a notable impact on HE and research and innovation (R&I) policies on a global level. These targeted initiatives became an integral part of numerous smaller actions targeting women in the field of R&I. Among the main stakeholders which should be here mentioned are the United Nations, UNESCO and the EU, since these international instances might be used as an example and model of how the gender balancing mechanisms operate on the international and cross-cultural level.

The international initiatives are mainly focused on STEM areas and often when the term "scientific" is mentioned and pointed to, it does not include nor relate to SSH (social sciences and humanities) disciplines, which is the fact that should be taken into account.[1] Among the initiatives of the United Nations (UN) most important to mention is that within *the Agenda 2030*, 11th February has been established as the International Day of Women and Girls in Science while gender equality was promoted as a core value for the UN. In the General Assembly, the importance of full access of women and girls to science, technology and innovation has been highlighted and the mechanisms for following the situation in practice have been established. As a specialised agency, The United Nations Educational, Scientific and Cultural Organization (UNESCO) prioritised gender equality and developed mechanisms for improving the representation of women in HE and research. In the case of UNESCO, gender equality has been linked to Sustainable Development Goals and two reports were prepared on how global universities are performing regarding the commitment to gender equality and their compliance with the following policy instruments. Based on these reports, it has been observed how universities are performing and what activities they are undertaking in their teaching, research, engagement and management areas to promote gender equality. The conclusion was that

[1] The practice to look at the two disciplinary blocks as separated became the dominant one and has two negative consequences for the general improvement of women's position in sciences. On the first level, it gives an incomplete and wrong picture of women's engagement in sciences, since for a while SSH area was the one where female researchers were more numerous and dominating. On the other hand, by underestimating the value and importance of SSH in comparison to STEM areas, policy mechanisms degrade and marginalise researchers and academics worked in the SSH area. This in consequence has double bad side effect since female scholars in SSH which are numerous are less valued, while their work in comparison to popular STEM areas becomes degraded and less financially and otherwise supported.

sometimes formal equality masks the actual inequality of opportunities for men and women, but also that regarding gender equality, the institutional culture of HE is slow to change (UNESCO 2020).

Of the highest relevance for the Serbian context is the effort made by the European Union towards improving gender equality within the other supranational HE reforms and policy initiatives, since Serbia is formally an integral part of the European Higher Education Area (EHEA) and European Research Area (ERA). The promotion of women's participation in science on the European level began in 1998 and gender equality also has been included in the legislative documents of the highest level, such as *the Treaty of the European Community* under the Articles 2 and 3. The conclusion was that the problem or underrepresentation of women in sciences is persistent, therefore it should be prioritised in all policy areas (Dewandre, 2002: 278). In 1999, the European Commission established a plan for women in science and recognized two types of actions of gender mainstreaming as particularly important: 1) increasing women's participation in panels and assemblies, and 2) producing statistics which will help the monitoring the gender balance. At this point, gender equality became an integral part of the political agenda surrounding the ERA (id., 279). Many other consequent mechanisms were developed along with the EU's longstanding commitment to gender equality.

For example, the funding and grant application system of the European Commission embedded the requirements related to gender equality in R&I. In the funding schemes, Gender Equality Plans (GEMs) were introduced and integration of gender dimension into research and innovation content became mandatory. The EU terminology related to gender equality recognized two important concepts such as gender balance between women and men in research teams and gender dimension referring to considering the possible differences between men and women in the R&I content of the projects. Furthermore, there is a specific funding pilar for research equality under the Work Programme 2021-2022 "Widening participation and strengthening the ERA" within which two calls were launched in 2021, one of which is related to building a centre of excellence for gender equality, and another one to related to the policy coordination scheme to advance the implementation of gender equality and inclusiveness objectives within the EU Member States and associated countries.

However, despite these and many other initiatives and mechanisms introduced to tackle the problem of gender disparity developed by the international agencies, it does not seem to be adequately noticed that ageing female researchers might face different problems at different life and career stages. The numerous disadvantages the position of women entails related to the complicity of combining private and professional lives tend to accumulate and obstruct professional advancement which therefore tends to flow

slower and women tend to never reach the highest positions and productivity outcomes in amounts men do (Bogdanović 2006: 329; Ignjatović 2006: 140; Dewandre: 278). Therefore, the importance and significance of the collection of data on how the career trajectories of female scientists in the final stage of their careers and after retirement might help make the initial classification of the contemporary forms of career paths and map the challenges this specific group was facing. Retrospective overlooks might additionally be helpful for comparison between the historical periods and different political regimes, which also might help drafting the prospect for support and empowerment measures. It is important to place this research within the existing body of relevant knowledge, therefore in the following section, the conceptual basis for it on both international and national level will be presented.

3. French feminist sociology and philosophy as theoretical and conceptual framework

When the goal of the paper is to provide an insight and overview of a certain segment and population of the higher education and research system employees, the inevitable work to consult is *Homo Academicus* written by French sociologist Pierre Bourdieu (Bourdieu, 1990). In this book, Bourdieu has accomplished an analysis of the composition and backgrounds of the people working in the French academic system. Despite this analysis did not target specific academic strata but rather the academic workforce in total has been examined from a class and social background perspective, there are some aspects which are in a conceptual sense useful for any analysis of the position of a certain group of people with specific characteristics within the system of academic labour and its power relations. The analysis of the university field by Bourdieu is a combination of structuralist and constructivist approaches to the effects of institutionalisation and homogenisation which operate through codification. Among the most important processes within the university field is the struggle to determine the criteria for membership and hierarchy and legitimate them (Bourdieu, 1990: 11). The principles of hierarchical organisation of the academic field are pluralistic and often conflicting, reflecting the characteristics and background of the people holding the positions. Understanding what determines the agency of academic actors is based on considering a set of indicators from the written material about academics that are collected and observed, such as social and geographical origins, religion, educational determinants, capital of academic powers (managerial positions), capital of scientific power, capital of scientific prestige, etc. (Bourdieu, 1990: 39-40).

As a reception which followed the publication of *Homo Academicus*, plenty of papers were written to address a gender perspective and dimension which according to many have not been adequately addressed there (see some of the examples: McCall, 1992; Skeggs, 2004; Pestaña, 2012). Despite the omission to take into consideration also an indicator of gender and eventually other intersectional indicators as well such as race, and age - the overall model used by Bourdieu was a step towards working on the more complex models and also the ones incorporating the dimension of gender into the theory of reproduction of power structures and gender and age-related inequalities within the higher education system which followed. The conceptualisation of the analysis of the academic field as a combination of intersectional analysis of sociocultural differences and hierarchies provided the basic ground for enlarging the list of characteristics and searching for the supporting explanations since the structural information does not tell us much about how the mechanisms of reproduction operate. It however provides a useful framework for placing the life narratives and career paths within.

To build the conceptual framework for approaching how the position of women as academic and intellectual figures has been shaped from a historical perspective, the case of Simone de Beauvoir as a life story including many of the segments of her relevant literary and publicist works also should be considered. The case of de Beauvoir as an intellectual figure is important and relevant for popularising the idea of an educated woman who also acts as a public intellectual (Moi, 2009: 2). She belonged to the first generation of women in Europe to enter the previously male-dominated academic institutions and participate in higher education on an equal level. Moreover, she became one of the leading intellectuals of the 20th century of remarkable productivity "five novels, one play, two collections of short stories, numerous volumes of autobiography, lengthy volumes of correspondence with several men, a war diary, and a wide variety of philosophical and political essays" (de Beauvoir, 2006). In her writings often topics of the position of women in society and ageing were tackled, while in the autobiographical writings, textual constructions of self and narrative representations of historical events in France are interwoven (Bainbrigge, 2005: 115).

The entire case of de Beauvoir entails valuable findings on how a concrete author has used writing to build personal and professional integrity and face the inevitable biological processes. Despite at that time similar terminology was not used and qualitative research has not reached contemporary level, de Beauvoir is the forerunner of modern autoethnographic research and self-administered life narratives. Her insights into the problem of elderliness portrayed in a study *Coming to Age* and in other writings on society's attitude towards it are among the first attempts to open the issue which has been

openly avoided and tabooed (de Beauvoir, 1972). These lines of transhistorical developments demonstrate many of the seminal structural and discursive obstacles the social structures and systems are imposing on women interested in sciences and academic labour which, in general, still operate. On a comparative level, they will help us to draw the horizon of expectations regarding the challenges and problems female researchers are facing now, including the indication of how the system of support might be transformed to better address inherited injustices.

4. Research about women in science in Serbia: Marija Bogdanović and Marina Blagojević-Hjuson

This segment of the paper is placing our analyses into the existing literature about women in research in Serbia. Speaking about the existing literature and research on the topic of the position of senior female researchers in academic labour, we could notice that the life cycle approach has not been included in this type of research in Serbia so far. However, there are several publications about the position of women in science published in Serbia, but none of them includes the dimension of age and/or life cycle in the analysis. One such publication is *Women in Science: From Archimedes to Einstein... Conquest of the Conquered* (original tile: *Žene u nauci od Arhimeda do Ajnštajna… Osvajanje osvojenog*) written by Dragana Popović about the scientific contributions of women from different parts of the world from a historical perspective. At the same time, she noticed that a similar book about Serbian female scientists would be quite a challenge since not much of the evidence has been preserved and is still available (Popović, 2012: 9).

However, no less important are the efforts made by the Institute of Ethnography of the Serbian Academy of Sciences and Art (SASA) in the form of a thematic conference on the topic of women in the sciences. The Proceedings from the Conference Held on 11-13 February 2020 at the Serbian Academy of Sciences and Arts, Belgrade titled *Women Scholars and Scientists in Society* include more than 30 contributions accomplished by female authors on the topic of women and sciences (Stevanović; Prelić, & Lukić-Krstanović, 2020). None of them, however, did include a reference to the problem of ageing, life course approach or higher education policy approaches to the issue, which demonstrates again the need for this type of research to emerge in the local context.

We can detect the two main approaches from the two most prominent sociologists who worked on the topic of gender in higher education in Serbia, and in the following lines, we will shortly represent their main assumptions. The observed terms of gender equality and gender neutrality in academic endeavours in Serbia were mainly identified through the structural presence/absence of women in academic institutions in the case of

Marija Bogdanović, or through revealing the misogyny and patriarchal traditions still present in many academic systems in Serbia, as in the approach to women in science in Serbia developed by Marina Blagojević-Hjuson. The first approach of Marija Bogdanović seems to be mostly to follow the model of Bourdieu, while Blagojević included much of the additional theoretical content from feminist theory and gender studies of the second and third wave of the feminist movement.

The example of the first approach here named structural presence/absence we find in the paper "Women in Education and Science" published in the national academic journal *Sociologija* in 2006 in a form of a structural quantitative analysis of researchers working in the public institutes and at the University of Belgrade in Serbia. The number of institutes included in the analysis was 162 and the simple descriptive quantitative analysis showed that women and men are equally represented in the total number of employed researchers, but also if observed via the categories of research titles. In this simple analysis, the only difference which has been found between male and female researchers is related to the higher managerial positions, where the share of female researchers is much lower. Not much additional information about the differences between genders among the researchers in Serbia was provided besides these basic quantitative proportions, which is always a useful overview but does not help us to better understand the gender difference above the just formal official share in total number of researchers and the mechanisms of power and other types of disbalances which operate (Bogdanović, 2006: 332).

The sociologist Marina Blagojević-Hjuson is another author whose dealing with the problem gender equality in research and higher education is important to mention. While in several relevant publications on the topic she also used dominantly structural and formal comparison of a quantitative type, her engagement with the topic has been much more extensive and included more complex theoretical and methodological efforts than the work of Marija Bogdanović did. In two volumes of a book *Mapping of Misogyny in Serbia* (2000, 2005) she edited, Marina gathered numerous authors who have developed quite an extensive overview of the issues and problems of importance for feminist theory and research which is geopolitically positioned and pro-actively directed towards values of empowerment and emancipation of women as producers of knowledge, not only self-referent knowledge about themselves as women but as a part of universal bodies of knowledge. According to feminist epistemology and the concept of strong objectivity, including the subjective dimension does not undermine the objectivity of knowledge, but rather complements it. In the *Introduction* to the second volume of the collection, Marina identifies two contradictory trends occurring in the peripheries, one of which is rising discrimination and misogyny in everyday life, while on the other hand, she noticed the importance of support on a level of nonprofit and legislative initiatives for gender equality

on a discursive level. In comparison to a strictly structural overview which is more-or-less the basis of every analysis of gender relations in society, the understanding of female marginalisation in science by Marina Blagojević-Hjuson is much more based on cultural and non-material factors among which tradition and historically inherited understanding of the role of women in society stands out.[2] Furthermore, in terms of placing her work within the feminist theory, she stated it belongs to postfeminism which means "creating feminist post-communist discourse" about women in the local context (Blagojević 2005: 10).

What is different about misogyny in comparison to the concept of gender-based discrimination is that it is a more complete concept which explains the gender difference if it is understood and explained scientifically (Blagojević, 2005: 17). In general, according to this concept, the gender gap in society is not only a result of mere inequality but rather of long-lasting hatred and ambivalence men in power produced and preserved concerning women based on negation and devaluation of women's qualities and abilities aside of their traditional role in the family and social reproduction. If we look at the written sources and cultural artefacts, we can always find plenty of evidence of this underestimation of women as equals. This more complex explanation of gender differences in academia goes much deeper into the causes of gender disbalance which is structurally reproduced, in values a society represents, not only in simple class and structural mechanisms which operate in society as it is the case in Bourdieu's work.

Marina Blagojević-Hjuson framed her work from a disciplinary perspective of the sociology of knowledge which included activist and non-profit perspectives particularly important during the period of transition while many of the democratic initiatives came from outside of the university structures. Particularly, positioning gender knowledge in the theory of semi-periphery and applying the world-system theory model to this problem has been quite significant in addition to existing feminist and gender studies, initiatives and movements (Antonijević & Ćopić, 2021). However, in her opus of relevance for the topic of gender and science in the context of coming to age and ageing, we have not found any traces she addressed the enormously important issue of elderly women and their status and position in the academy. For Marina, not only knowledge production according to her feminist approach was important, but also the influence of the feminist movement on public policy creation and its implementation. However, she was mostly focused on anti-discrimination and gender equality policies, not on HE and research & development policies, which is the approach we here undertake.

[2] In her own terms, Marina named her approach as "structural-constructivistic" (Blagojević, 2005: 30).

5. Autoethnography and life narratives of female researchers concerning the existing legislative and policy mechanisms

Aside from the Constitution where elderly people are mentioned under Article 21 *The Prohibition of Discrimination*, it seems that the elderly people are not the main subject of other legislative documents of any level in Serbia except the strategic ones, therefore their position is regulated within other laws such as *Law on Gender Equality* and *Anti-discrimination Laws*.[3] Some of the very basic and universal human rights and their protection such as the right to quality of life and human dignity protection also can be considered as used to protect the rights of the elderly indirectly (Ivanović, 2022: 667; Ćorić, 2022: 32). It is noticeable that numerous other human rights resonate with the rights of elderly people, but their inclusion into the legislative framework seem insufficient.[4]

To better detect the problems related to the challenges coming with the constant efforts women need to invest into balancing private and professional life as researchers, we think it is crucial to provide thick and dense information from them by utilising a combination of autoethnographic and life cycle narrative research methodology. Both these methodological approaches belong to a qualitative type of research and have recently become very popular ways to examine and affect some long-term negative trends via relevant policy mechanisms. The popularity and importance of this type of data collection for various problems and topics increased in the last few decades, and plenty of relevant sources have been published (Chang, 2008: 31). However, the reception of this trend in Serbia is almost non-existent, therefore this paper intended to contribute to change the dominant methodologies for collecting the evidence aimed to impact the policies.

The relationship between life course narratives and public policy analyses is the one which we see as fruitful to be worked upon to, firstly better understand the modifications that occurred with the life-cycle trajectories with the transition and changing conditions of academic labour, and secondly, to project how the system of support and empowerment function and might be improved by the additional legislative and policy measures. This line of research and policy analyses has not been much utilised in Serbia so far, and with this paper and the papers which will follow, the intention is to change this situation and explore the potential of life narratives to inform research policy and empower

[3] *Ustav Republike Srbije*, Službeni glasnik RS,, бр. 98/2006; *Zakon o zabrani diskriminacije*, Službeni glasnik RS, br. 22/2009 i 52/2021; *Zakon o rodnoj ravnopravnosti*, Službeni glasnik RS, br. 52/2021.

[4] For example, the procession of human life and dignity, in general, is one such area (Simović & Simović, 2021:401).

knowledge production among senior female researchers by additional gaps which can be detected by the evidence-based data collected by a survey designed as the combination of life narrative techniques. Here we will sketch our understanding of which type of self-narratives we consider the best in this sense, for the purpose of accomplishing the task of providing a better insight into the policy framework and into the concrete issues senior female scientists are facing in their attempt to pursue successful academic careers. One of the authors meritorious for the popularisation of life narratives in the field of learning and education is British sociologist Iwor Goodson, who understood the popularity of small-scale narratives as a countertrend in comparison to grand narratives of the 20th century (Goodson, 2006: 7). Since life narratives of contemporary times are more fragmentary, there is a need to combine life-histories and life-course research - narratives are to be complemented with the documentary resources and other testimonies.

If based on an autoethnographic approach, the analysis would in any circumstances need to include an autobiographical element, a life-course element, and contextualisation in the given knowledge production and research institutional infrastructure by either conducting a kind of Bourdieu-like analysis or by developing similar apparatus which might help us to portray the academic surroundings in which female researchers develop and work in Serbia, taking into consideration also the geopolitical circumstances and trends in knowledge and development sector. Despite the authors pointing to post-modernist, poststructural and feminist influences as dominant in the contemporary revival of narrative research, there are ways to otherwise design this kind of survey and theoretically frame it within the other traditions of critical social theory, since "narratives in sciences have a long history" (Adams et al., 2015: 18).

Self-narratives are bringing the personal perspective and experience to the ground, and they can be given in a variety of forms, from descriptive storytelling, more autobiographical facts-oriented narrative or life-story which tend to be more analytical and interpretative (Chang, 2008: 31). Narrative might follow the chronology or personal reflections or could be organised around various selected themes, and its ambition is to transcend the mere narration (id., 43).

On the other hand, life-course and life-span methodology has particularly been used in surveys of ageing and the last decades of life, because the retrospective view provides a structural insight into the look of a life trajectory, its phases and turning points. In comparison to autoethnographies and autobiographies, life-course has been much more focused on this model which allows focus on external forces shaping the course of life. From life courses we see the transition from one state to another, since it is composed of sequences of events and social transitions (Bernardi et al., 2019: 2). The individuals are moved by the intention to maintain or improve their situation and this approach does not

underestimate their agency as others do. What is important to notice are three characteristics of life-course analysis which are: 1) the path dependency based on a tendency of advantages and disadvantages emerging during the life cycle to accumulate; 2) the anticipation of the probabilities of occurrences and the related effects in the future, and finally 3) the turning points in the life trajectory signifying the bigger transformation of priorities. All of them could be observed through patterns whose description makes us get a broader picture of the conditions framing and shaping the lives of female scholars, including the prediction of how they might be modified and altered.

The idea that the evidence collected through life narratives could be utilised to inform policies is already elaborated on in the international literature. This methodology and description of life situations might be even more useful than simple quantitative data collected out of context. Brett Davidson is highlighting that it is not enough to advocate the usage of narratives for policy-making. Still, it always must be followed by concrete examples, and there are plenty of public narratives which have been overlooked but can be effectively utilised for this purpose (Davidson, 2017). The other authors point to the narratives as tools for policy transformations are numerous (McBeth et al., 2007; Crow & Jones, 2018). This all give additional relevance to our argument about the need for life narratives data from senior female researchers to be collected in order to get better insights into the difference they are still struggling with at work in comparison to male colleagues and consequently to be able to suggest more supportive solutions and policies.

6. Conclusion - some inputs for the systemic senior female researchers empowerment

In this paper, the main task has been to point to omissions within the HE and research policies in Serbia to recognize the senior female scholars, but also to inspire changes by proposing novel approaches to detect ways in which insights obtained from senior female researchers might be utilised for enabling better empowering and resilience strategies in the future, detected through the observed past experiences.

By examining the policy initiatives on the international level and later the conceptual framework for approaching the problem of female senior researchers on both international and national levels, we have concluded that crucial for designing more supportive mechanisms for women in science is obtaining more detailed and contextualized information about their position through life narratives and autoethnographic supplementary sources in combination with suggesting the novel policy solutions fostering their systemic empowerment.

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Joris Bijvoets*

GDPR IN PRACTICE: NAVIGATING THE CHALLENGES OF DATA PROTECTION IN ELDERLY CARE

This paper delves into the confluence of elderly care, information protection, and Dutch legislation, shedding light on the distinct challenges and intricacies of managing personal and medical data of the elderly. Central to these challenges are privacy concerns, informed consent, and the nuances of data sharing. While risk management forms the crux of information security, both Dutch legal frameworks and the mandated information security standard necessitate a risk-based approach.

An area of particular emphasis in this paper is the Privacy Impact Assessments (PIAs), a key tool for risk management. Drawing from firsthand experiences and existing guidelines, the paper discusses the complexities of conducting PIAs in elderly care. This includes a critique of the ambiguous role definitions in established guidelines and a proposed multi-disciplinary approach to ensure comprehensive and effective assessments. Overall, this paper provides a detailed exploration of risk management within the context of elderly care in the Netherlands.

Keywords: *Elderly care, Data protection, GDPR, Legislation, Risk management, The Netherlands*

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Introduction

Background and importance of the subject

The elderly make up a significant and growing portion of the world's population. With this demographic shift comes the challenge of providing adequate care to an age group with unique and complex needs. In the context of the healthcare sector, information management and protection becomes crucial, both for providing timely and appropriate care and for respecting and protecting the rights of the elderly. This certainly also applies in the Netherlands, where care for the elderly and the management of personal data in healthcare are strictly regulated.

Purpose and scope of the paper

This paper focuses on the interplay between care for the elderly, information protection and legislation, with a special emphasis on the Dutch context. The aim is to highlight the unique challenges and issues arising from handling the personal and medical data of the elderly, including issues of privacy, informed consent and data sharing.

Finally, the most important risks with regard to the security of personal data from practice are mentioned, with possible measures as a recommendation.

Methodology

This paper draws on relevant literature and legislation, including:

- General Data Protection Regulation (GDPR) (European Union, 2022)
- Guidelines on Data Protection Impact Assessment (DPIA) (wp248rev.01)
- Medical Treatment Agreement Act (WGBO)
- Use of Citizen Service Number in Healthcare Act (Wbsn-z)
- Additional Provisions Processing Personal Data in Healthcare Act (Wabvpz)
- Care Quality, Complaints and Disputes Act (Wkkgz)
- NEN 7510
- ISO 31000 - Risk management - Principles and guidelines
- NIS2 Directive[1] (European Union, 2022)

In addition, several cases are handled from practice as a Data Protection Officer.

[1]European Union (2022) 'Directive (EU) 2022/555 of the European Parliament and of the Council of 16 March 2022 on measures for a high common level of cybersecurity in the Union', EUR-Lex. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022L2555&from=EN (Accessed: 4 July 2023).

Implementation of data protection legislation

The importance of information management in elderly care

Information management plays a crucial role in elderly care. The health status of the elderly can change rapidly, and having accurate and up-to-date information is essential to provide appropriate care.

Under Article 465(3) of the Dutch Medical Treatment Contracts Act (WGBO), specific provisions are outlined for situations where a patient is unable to make a reasonable assessment of their interests. When a patient is not under guardianship or mentorship, healthcare providers are obligated to fulfill their duties toward a person appointed in writing by the patient. In the absence of such an appointed person, or if the appointed person does not act, the obligations should be fulfilled towards the patient's spouse, registered partner or other life companion. If these options are not available or if they decline, the obligations extend to a parent, child, brother, or sister of the patient.[2]

Dutch laws regulate how decisions can be made on behalf of an incapacitated elderly person with dementia, with the goal of protecting their best interests and ensuring the appropriate provision of care. These laws aim to balance the autonomy of the individual with the necessary protection and care they require, providing a clear hierarchy of decision-making authority (WGBO, Art. 465(3); Burgerlijk Wetboek, Boek 1).

The legislative framework outlined in the Dutch Civil Code and the Medical Treatment Contracts Act (WGBO) underscores the critical role that legal representatives play in managing the care of elderly individuals with dementia. To effectively fulfil this role, it is imperative that these representatives have secure and reliable access to pertinent medical and personal information regarding the individuals they are entrusted to care for.

However, this access to sensitive information introduces the vital necessity for robust information security measures. Breaches in this data security can lead to a multitude of issues, such as identity theft, fraud, or the unauthorized disclosure of personal health information, leading to potential harm to the individual.

[2] This legal provision works in harmony with the general rules outlined in the Dutch Civil Code. As detailed in the Civil Code, an attorney-in-fact, mentor, or conservator can act as a legal representative, depending on the situation and the needs of the person (Burgerlijk Wetboek, Boek 1).

The WGBO (Art. 465(3)) further specifies the order of preference when no legal representative has been appointed:

1. A person appointed in writing by the patient
2. The patient's spouse, registered partner, or life partner
3. A parent, child, brother, or sister of the patient

Therefore, proper information security in elderly care is not just a technological necessity or legal requirement, but it's also a cornerstone of ethical care. It ensures the dignity, privacy, and safety of vulnerable individuals are upheld, and builds trust in the system that supports them.

The exchange of information amongst care providers, legal representatives, and family members must be regulated carefully and securely. Every actor in this chain has a role to play in ensuring that information is handled with care, respecting the confidentiality, integrity, and availability of data, as per the principles of information security.

In addition, in elderly care, more than in other care sectors, the recording of personal wishes for a later date plays an important role. The Medical Treatment and Research Act (Wgbo) permits a patient to refuse certain treatments, such as resuscitation, even if they result in death. With a Do Not Resuscitate statement, the person concerned can indicate that he or she does not want any further treatment when resuscitation is required. At such a time, the data subject cannot make this wish known himself. It is then very important that the healthcare provider has the correct information to be able to make a choice between resuscitation or not.

A similar situation arises with the subject of euthanasia. In the Netherlands, euthanasia is legally permitted under strict conditions laid down in the Termination of Life on Request and Assisted Suicide Act (WTL).

One of these conditions is that the patient has made a voluntary and well-considered request for euthanasia. As with the Do Not Resuscitate Declaration, this request must be drawn up in advance in the form of an advance directive, which is included in the medical file. It is of great importance for both the person concerned and the family that this advance directive is and remains correct, and is available to the right care providers when needed.

Challenges in managing information in aged care

Extortion and cyberterrorism must be duly taken into account in all sectors of healthcare, so is in elderly care.

Although certain aspects of caring for the elderly can continue for some time without the use of information systems, the provision of medical care, such as the administration of the right medicines, is only possible to a limited extent without good information. In practice, it can happen that someone needs different amounts of medication every day, which may not be taken at the same time as other medicines. Errors in the administration of medicines or the care of wounds can have fatal consequences.

Elderly care in the Netherlands is often provided by larger organizations with multiple locations where care is provided. This entails two additional challenges in the field of information security, which are less common in other healthcare sectors:

- A trend has started in the Netherlands that care workers work as self-employed persons, and no longer as salaried employees [3]. Because these people are regularly deployed at different locations, the continuous allocation of the correct authorization to files is complicated.
- Especially in sparsely populated regions, many people come with the same surname. Many traditional first names are still used, especially among the elderly. In the situation in which two people who have the same first and last name live at one care location, confusion may occur. In the elderly care organizations where the author is working as a data protection officer, in 2022 4 out of 62 officially reported data incidents were due to this situation.

In addition, in elderly care, the role of family members and other loved ones plays an important role in the decision-making process, especially if the elderly person is no longer able to make decisions for himself. Family members may sometimes be empowered to make decisions on behalf of the elder, in accordance with the patient's predefined wishes.

These roles and responsibilities can also affect management and access to information. The dynamics and interaction between different parties involved (e.g. healthcare providers, the patient, and their family members) can influence and complicate information management, which in turn has implications for privacy and data protection (Batrićević, 2020: 128).

The Dutch legal context

The Netherlands has various laws and regulations when it comes to information management and security in healthcare to meet these challenges.

The Medical Treatment and Contracts Act (Wgbo) obliges healthcare providers to keep a file of procedures and the care provided when providing healthcare.

[3]Employers and trade unions agreed that this fact led to the situation regular employees have to work less favorable shifts than temporary workers for a long time. At the end of June 2023, a new collective labor agreement was proposed by trade unions and employers, in which permanent employees must be given priority over self-employed persons when drawing up rosters. The hope is that this will attract more people back into permanent employment.

Elderly care also has to deal with this obligation. To minimize the risk of mistaken identity, both during care and when exchanging files, the personal and unique citizen service number (BSN) is legally obliged to be used in the files by the Additional Provisions Processing Personal Data in Healthcare Act (Wabvpz).

Since 2008, healthcare providers have been legally obliged to comply with the NEN 7510 standard in accordance with the 'Regulation on the use of citizen service number in healthcare', which is part of the Additional Provisions Processing of Personal Data in Healthcare Act (Wabvpz)[4].

This Dutch standard for information security has been drawn up by adding approximately 40 care-specific control measures to ISO/IEC 27001:2017.

From 1 January 2024, it is necessary for healthcare organizations that fall within the scope of NEN 7510 to be able to prove that they comply with this standard. This means that they must obtain certification or be able to demonstrate in some other way that they have applied and comply with the guidelines and recommended procedures of NEN 7510.

The GDPR applies to the processing of these files; this has been incorporated into Dutch law via the GDPR Implementation Act (UGDPR).

The NIS2 directive and elderly care

Since 2020, the EU has been working on the Network and Information Security (NIS2) directive . The NIS2 directive focuses on improving the digital and economic resilience of European member states. Large parts of healthcare are designated by the NIS2 guideline as providers of essential services (AED). Care for the elderly is therefore also part of the vital infrastructure in the Netherlands. The directive is currently being transposed into national law.

To elaborate on the relationship between the NIS2 directive and the resilience of the elderly, it is crucial to highlight the specific role of digital systems and cybersecurity within elderly care.

Elderly care, both in residential care settings and in home care, increasingly relies on digital technology. Patient records are managed digitally, medication planning is automated, and more and more medical devices are connected to networks. Furthermore,

[4]In some situations this obligation does not apply. It is important to determine whether the healthcare institution concerned falls under the term 'care provider' as defined in the Healthcare Quality, Complaints and Disputes Act (Wkkgz). This law defines a healthcare provider simply as 'an institution that provides healthcare on a business basis' or 'an independently operating healthcare provider that provides professional healthcare'. This definition is quite broad. The majority of healthcare institutions fit within this description and are therefore obliged to comply with NEN 7510 when processing patients' BSNs.

telecare, where care is delivered remotely via digital communication technologies, is increasingly used to enable older people to remain independent for longer.

The NIS2 directive, aimed at improving the digital and economic resilience of European member states, plays a vital role in ensuring the safety and reliability of these systems. The fact that large parts of healthcare, including elderly care, are designated by the NIS2 directive as providers of essential services, underscores the importance of this sector to vital infrastructure.

This recognition means that care institutions and services must comply with stringent security requirements to ensure the availability, integrity, and confidentiality of their network and information systems. This not only contributes to the resilience of the healthcare infrastructure as a whole but also to the individual resilience of the elderly. It gives them confidence that their data is secure, that they can rely on the availability of essential care services, and that they can use digital technologies to maintain their independence.

The transposition of the NIS2 directive into national law will, therefore, result in elderly care institutions and services needing to implement more robust security measures. This, in turn, is expected by the law makers to contribute to enhancing the digital resilience of elderly care and the resilience of older people themselves in the digital age.

Risk Management and Data Protection

The relationship between risk management and data protection

The ISO 31000 describes risk management as coordinated activities to direct and control an organization with regard to risks. These risks include technical risks (e.g. data breaches, cyber-attacks), organizational risks (e.g. ill-defined security policies) as well as legal and ethical risks (e.g. patient privacy violations, unlawful access to or use of data).

Article 32(1) of the GDPR states that both the controller and the processor must take appropriate technical and organizational measures to ensure a level of security appropriate to the risk.

Article 32 GDPR paragraph 2 states that when assessing the appropriate level of security, particular account must be taken of the processing risks, in particular resulting from the destruction, loss, alteration or unauthorized disclosure of, or unauthorized access to, transmitted, stored or otherwise processed data, whether accidentally or unlawfully.

In the NEN 7510, the standard in element 6.1 requires the organization to define and apply an information security risk assessment process. Further requirements are set

for this risk assessment process. The process should be applied to identify the risks associated with the loss of confidentiality, integrity and availability of information.

Also, according to the standard, the organization must "choose appropriate options for handling information security risks, taking into account the results of the risk assessment.

The similarities between the GDPR and the NEN 7510 are evident.

Interestingly, both the GDPR and the NEN7510 talk about "appropriate measures" or "appropriate options". In my work as a Data Protection Officer, new clients almost always ask me when "appropriate" is really appropriate. My answer then is that the measures are appropriate when the security risks with regard to the data have been mitigated to an acceptable level.

However, this explanation shifts the question from "appropriate measures" to "acceptable level of risk". Unfortunately, the GDPR is silent on this last point, but the NEN 7510 is very specific about this. The NEN 7510 requires the organization to determine what constitutes an acceptable level of risk. The following section describes how this can be done.

Acceptable Levels of Risk

To determine what an acceptable level of risk is, it is good practice to use a methodology that can quantify a risk. As soon as the risk can be expressed in numbers, a threshold value can also be determined for acceptability and non-acceptability.

The standard states that criteria for the realistic probability of a risk (Probability) and for the potential consequences (Impact) must first be established. This is necessary because the level of a risk is directly proportional to the likelihood and impact of the risk. A risk can be expressed numerically with a simple formula:

Risk = Chance * Impact

These Chance and Impact criteria are defined independently of each other.

Example of Chance criteria

In the risk assessment process it must be possible to answer the question: "how likely is it that a certain risk will actually occur"? The answer to this question must be linked to measurable criteria.

The best method to do this is to set up a table like this:

Table 1: Criteria of Chance

Opportunity	Chance level	Frequency of appearance
1	Very low	Can occur once in 10 years
2	Low	May occur once in 5 years
3	Middle	Can occur once a year
4	High	Can occur 5 times a year
5	Very high	Can occur 10 times per

The height of the Chance is determined by choosing the best description.

Example of Impact criteria

The risk assessment process should also answer the question "what are the potential consequences for a particular risk?".

Similar to the criteria of Chance, one can draw up a table with criteria of Impact. However, there is a difference: for Impact, multiple dimensions are often considered, such as financial impact, image damage and effect on planning. If activities, services or products can influence personal health, a dimension of "personal damage" is also included, for example with a number of deaths and/or injuries.

An example table for Impact criteria is the following:

Table 2: Criteria of Impact

Impact	impact level	Financial	Personal damage
1	Very low	Less than €1,000	Nil
2	Low	€1,000 - €5,000	1 injured
3	Middle	€5,000 - €10,000	max. 10 injured and/or 1 dead
4	High	€10,000 - 50,000	max. 100 injured and/or 10 dead
5	Very high	More than €50,000	More than 100 injured and/or 10 dead

The height of the Impact is the highest applicable impact from the table.

Risk acceptance criteria

In order to determine whether the organization considers a Risk (Probability * Impact) acceptable, the risk acceptance criteria must be established. The easiest way to do this is to represent the possible products of Chance * Impact in a matrix.

An example of such a matrix is as follows:

Table 3: Risk heat map (Probability * Impact)

		Risico = Kans * Impact				
Kans	5	5	10	15	20	25
	4	4	8	12	16	20
	3	3	6	9	12	15
	2	2	4	6	8	10
	1	1	2	3	4	5
		1	2	3	4	5
		Impact				

Table 4: Risk acceptance criteria

Risico	Omschrijving
12 >	**Risk High:** Implementation of measures cannot wait, treat with high priority
7 - 12	**Risk Medium:** Implementation of measures is necessary, but can be planned for the longer term
< 7	**Risk Low:** Implementation of additional measures is not required, maintaining current measures is necessary.

Based on the above, it can easily be determined that a Risk is acceptable with a value of Chance * Impact less than 7. Risks above 6 are unacceptable.

Risk mitigation: taking measures

Risks are mitigated with measures.

There are preventive measures, which reduce Chance, and corrective measures, which reduce Impact. Measures can also be divided into technical and organizational measures.

The GDPR mentions a few measures that seem to have been included arbitrarily throughout the law, such as:

Measure	Article GDPR
Data minimization	Art. 5 paragraph 1 sub c
Mandatory retention periods	Art. 5 paragraph 1 sub e
Prohibition on processing special personal data	Art. 9 paragraph 1
Data protection policy mandatory	Art. 24 paragraph 2
Privacy by design	Art. 25 paragraph 1
Pseudonymization	Art. 25 paragraph 1
Obligation of Processor Agreements	Art. 28
Register of processing operations	Art. 30
Pseudonymization and encryption	Art. 32 paragraph 1 sub a
Data breach procedure	Art. 32 paragraph 1 sub c

The NEN7510 does this in a much more structured way, just like the ISO/IEC 27001, by requiring that when determining the treatment of risks, it must be checked whether measures from “Appendix A” of the standard are applicable for the mitigation of one or more risks. Appendix A of NEN 7510 contains the 114 control measures of ISO 27001, 36 of which have been supplemented with one or more care-specific measures.

To comply with NEN 7510, a risk analysis must be set up that takes into account all 156 measures. The measures are divided into 14 chapters:

1. Information Security Policy5

[5] The chapters with measures start from chapter 5. The chapters before it give direction to the implementation of the measures.

2. Organizing information security
3. Safe personnel
4. Asset Management
5. Access security
6. Cryptography
7. Physical security and security of the environment
8. Business security
9. Communication security
10. Acquisition, development and maintenance of information systems
11. Supplier Relations
12. Management of information security incidents
13. Information security aspects of business continuity management
14. Compliance

It is evident that the NEN 7510 is more extensive in terms of providing practical guidelines with regard to securing the information than the GDPR, for example:

- Where the GDPR says that there must be a policy, the NEN 7510 describes in detail which matters must be arranged in a policy.
- Where the GDPR says that there must be a procedure to minimize the consequences of a personal data breach, the NEN 7510 prescribes in detail which elements such a procedure must contain.

Of course, this does not mean that the NEN 7510 is better in the field of information security, the objectives of the GDPR and the NEN 7510 are different and therefore also different in design. The GDPR is not meant to be used as a practical guideline to secure information, it regulates the right to data protection [6].

An interesting observation in the field of information security is the relationship between technical and organizational measures. When talking about security measures, people often think of the technical measures. However, NEN 7510 contains twice as many organizational as technical measures.

The link with the GDPR can be found in measure 18.4 of the NEN 7510: " Privacy and protection of personal data must, where applicable, be guaranteed in accordance with relevant laws and regulations.". This is the counterpart of Article 32 GDPR. Just as

[6]The GDPR does not regulate the right to privacy, despite the fact that this term is always used in practice. For example, the person who ensures the implementation of the AVG within an organization is always referred to as the Privacy officer, and the person who ensures the implementation of the NEN 7510 is the Security officer. Strictly speaking, this is a mistake, and the Privacy officer should be called, for example, the Information Security officer. For the sake of reader convenience , we also use the term privacy in this paper.

the GDPR says little about how you should protect personal data, the NEN 7510 says little about how you should comply with laws and regulations.

Risk analysis in elderly care

The NEN7510 and the GDPR both require that elderly care organizations in the Netherlands determine on the basis of risk analyzes which measures must be taken to protect the personal data of the elderly (and care employees).

By determining for all measures from NEN 7510, which specific risks with regard to information security apply to the organization, then determining how large these risks are, and which measures must be implemented, a complete picture emerges of how the information security can or must be improved, and where this has already been implemented appropriately.

Measure 18.4 of NEN 7510 also includes specific, more legal risks in the analysis. For example, pursuant to Article 30 GDPR, it is mandatory to have a register of processing operations. If this is not the case, there is a real risk for the organization of being fined by the national supervisor. Non-compliance with article 30 GDPR therefore results in the obligation from measure 18.4 NEN 7510 to address this shortcoming.

In the same way, the challenges from the previous chapter are analyzed as information security risks, and measures are identified to manage these risks as well as possible.

In my role as a data protection officer within elderly care organizations, I have been involved in specific issues related to the application of the GDPR in practice. One such matter concerned obtaining consent for the use of image material during social gatherings.

In this scenario, elderly individuals gather in a communal space to create music and sing together. The organization wished to share an atmosphere impression with the outside world and hoped to publish image material for this purpose. However, it is crucial to remember that in line with the principles of the GDPR, explicit consent from the involved individuals is required for such use of personal data.

To ensure the privacy of the participating elderly individuals was respected, the organization established a process for obtaining consent in advance of these gatherings. This process included clear communication about precisely what the images would be used for and assured the elderly individuals that they had the right to withdraw their consent at any time. For those who are unable to decide for themselves, the consent must be acquired from the correct representative.

Moreover, the organization needed to be able to document this consent as evidence of GDPR compliance, in line with measure 18.4 of NEN 7510. This is done to

make a specific note in the file of the clients. Only images for which is consent obtained by all visible individuals are stored for later publication.

Such processes, although initially they may seem time-consuming or complex, in fact, play a crucial role in safeguarding the rights of the elderly individuals we serve.

Privacy Impact Assessments in Elderly Care

Privacy Impact Assessments (PIAs) represent a distinctive approach to risk management, stipulated in Article 35 of the GDPR, especially when there's a foreseeable high risk concerning the rights and freedoms of natural persons[7].

The Article 29 Data Protection Working Party has issued detailed guidelines (WP 248 Rev.01)[8] for the execution of these assessments. Notably, while these guidelines provide a structure for the PIA process, they don't precisely delineate the roles of the stakeholders involved. This ambiguity poses challenges and opportunities for practical implementation.

Core Elements of a PIA

An effective PIA should address the following pivotal questions:

1. What activities are being undertaken?
2. Are these activities in compliance with the GDPR and other relevant legislation?
3. What are the associated risks, and how are these managed?

Challenges in Elderly Care

In elderly care, PIAs have become integral to regular privacy management with new data processing initiatives regularly introduced. Based on my firsthand experience as a Data Protection Officer, I've noticed that project leaders, who typically lack the specialized training in legal considerations and risk analysis, are often tasked with both initiating and executing the PIA. This conflation of roles, compounded by the absence of clear role differentiation guidance from WP248 Rev.01, leads to apprehension and hesitancy in undertaking PIAs.

Furthermore, expecting a project leader, without the requisite expertise in legal and risk aspects, to take on such a comprehensive responsibility can inadvertently compromise the thoroughness and accuracy of the PIA. It is, therefore, imperative that these

[7] See GDPR article 35

[8] Guidelines on Data Protection Impact Assessment (DPIA) (wp248rev.01

project leaders are supported by professionals well-versed in the intricate domains of privacy and security.

Recommended Approach for an Effective PIA

To navigate the complexities of a PIA within elderly care, a multi-disciplinary approach is crucial. The Privacy Officer, project leader, and Security Officer each play pivotal roles:

- The **project leader** offers a clear outline of the data processing initiative. Given their proximity to the project, they can provide detailed context and objectives.
- The **Security Office**r bridges the gap between the project's objectives and the technical security safeguards, offering insights into the information security framework and potential vulnerabilities.
- The **Privacy Officer**, with expertise in GDPR and related regulations, ensures the PIA's legal robustness, advising on regulatory compliance and data subject rights.

Following this tripartite collaboration, the Data Protection Officer evaluates the PIA's completeness, ensuring that identified risks are effectively mitigated and determining the conditions under which the data processing can proceed.

Adopting this collaborative model, especially in light of the vague role definitions in WP248 Rev.01, leverages the unique strengths of each stakeholder, ensuring a comprehensive and effective PIA process.

Some practical situations

In the realm of elderly care, the application and implications of Privacy Impact Assessments (PIAs) often prove multifaceted. Presented below are a series of practical scenarios in which PIAs have been meticulously conducted by elderly care organizations for which I'm the data protection officer. It's salient to observe the variability in the identified risks across distinct cases.

The onus of devising effective mitigating measures can, at times, pose significant challenges, and there may be instances where complete risk mitigation remains elusive. In such scenarios, the organization is poised with a pivotal decision: deem the inherent risk as acceptable and proceed, or exercise prudence and halt the specific processing activity.

These examples underline the necessity of a collaborative approach in PIAs, weaving in expertise from project leaders, Privacy officers, and Security officers, ensuring a holistic risk assessment and management strategy.

A. Transfer of medical data to wheelchair manufacturer

In the realm of elderly care, preserving mobility for as long as feasible is pivotal, and this often hinges on providing the optimal wheelchair tailored to the individual. Such wheelchairs are customized, factoring in unique constraints and needs. The healthcare organization's occupational therapist curates a detailed application that encapsulates vital medical data pertinent to the client. This dossier, inclusive of the client's name and Citizen Service Number (BSN), is relayed to the manufacturer. This twofold inclusion ensures accurate product delivery and facilitates the manufacturer in invoicing the health insurance provider.

Key risks pinpointed during this PIA, along with their mitigation strategies, encompass:

1. Potential exploitation of the occupational therapist's digital certificate, granting unwarranted access to the manufacturer's portal (security concern). Counteracting this vulnerability necessitates tethering the certificate's utilization to a fingerprint authentication mechanism.
2. Misalignment between the articulated needs in the assistance request and the finalized product, stemming from manual errors at the request stage (a pragmatic risk identified by the project leader). As a safeguard, the BSN is stipulated in the application to thwart identity mishaps. Additionally, a secondary verification by another personnel precedes the dispatch of the application to ensure accuracy.
3. The hazard of medical data processing outside the EU jurisdiction, devoid of adequate protective measures (privacy concern). This is combated by forging stringent agreements with the manufacturer about data residency and necessitating a rigorous scrutiny by the Privacy Officer concerning the manufacturer's subcontracting entities.

B. Monitoring of behavior through automatic camera surveillance

Faced with staffing dilemmas due to increasing absenteeism and regional labor market shortages, the healthcare organization confronts exacerbated challenges in scheduling care during evening and nighttime hours. To ameliorate this situation, the organization contemplates the integration of camera surveillance within clients' rooms, bolstered by artificial intelligence.

This advanced system is poised to detect situations like clients falling to the ground, prolonged durations in bathrooms indicative of possible falls, or extended periods of immobility. Upon identifying potentially adverse situations, the system swiftly dispatches an SMS notification to caregivers, specifying the room number of the concerned client for prompt intervention.

During the PIA, several prominent risks were discerned, along with their mitigation measures:

1. False negatives may inadvertently bypass grave situations, leaving them undetected by caregivers. While complete nullification of this risk is unattainable, the organization counters this with periodic traditional physical check rounds. Moreover, a judicious balance is established, weighing the probability of false negatives against the expenditures of allocating available manpower and resources.
2. The centralized analysis of camera footage via Wi-Fi introduces the jeopardy of unauthorized interception by malicious entities, presenting both privacy and security quandaries. To curtail this risk, several technical precautions are instituted: the camera system is relegated to its dedicated Wi-Fi network, standard camera passwords are promptly customized upon acquisition, and vigilant monitoring is maintained over the devices connected to the Wi-Fi network.

C. Introduction of electronic keys

Aiming to streamline physical access for its 2,500 employees, 1,200 volunteers, and 900 independent contractors, the healthcare organization is transitioning from disparate physical keys to an integrated card system. Every door, encompassing those of individual elderly residences, is retrofitted with a card reader. This advanced system permits the dynamic allocation of access rights to these cards, potentially recalibrating on a daily basis.

While this initiative introduces operational efficiency, it concurrently poses significant security challenges. The PIA identified specific risks associated with this initiative:

1. Each caregiver, volunteer, and independent contractor is issued a distinct card. At the commencement of their shift, a card can be dynamically imbued with updated access rights. If not updated timely, the card either remains devoid of access rights or retains the previous day's configuration. For personnel with a consistent work location, the latter scenario isn't problematic.

However, for volunteers and independent contractors who operate across varied locations, this poses considerable challenges. This oscillation between over-permission and under-permission results in either restricted or excessive access. Currently, this risk is mitigated through rigorous manual oversight by a dedicated staff member who assiduously configures rights daily. An enhanced, more automated solution is under contemplation.

2. Confronted with a system malfunction, possibly precipitated by exigencies like fires, the vendor highlighted two response protocols: unlocking all doors or maintaining their locked status. While the former is advantageous for the safety and potential evacuation of elderly residents, it inadvertently grants unrestricted access to secured zones, including medicine storage housing narcotics like morphine. To judiciously address this quandary, the decision was made to default to a locked state in emergencies. However, to ensure accessibility, provisions were made to manually unlock doors using a master key. To curtail potential misuse, varied authentication tokens are incorporated.

Conclusions

In the Netherlands, information security within elderly care is stringently regulated. While national laws and a dedicated standard for information security, which is even more encompassing than the international benchmark, ISO/IEC 27001, mandate healthcare organizations to thoroughly recognize and counter risks tied to elderly personal data, it's the nuanced execution of Privacy Impact Assessments (PIAs) that remains crucial.

Elderly care presents distinctive risks, some of which are either not found or are less emphasized in other healthcare sectors. PIAs, thus, serve as the lynchpin for gauging these risks and ensuring robust information security measures in elderly care. Their meticulous execution safeguards against vulnerabilities and ensures adherence to stringent legislative demands.

However, the execution of PIAs shouldn't be a solitary endeavor. It demands a collaborative approach, weaving together the expertise of the domain expert or project leader, the Privacy Officer, and the Security Officer. The subsequent evaluation by the Data Protection Officer ensures a holistic, well-rounded assessment that captures the multidimensional facets of risks and their mitigation strategies.

It's paramount that risk management, especially in the context of elderly care, is approached with the gravity and depth it warrants. Recognizing risks is a complex, intricate process. A collaborative, comprehensive approach - harnessing the expertise of all

key stakeholders - is imperative to navigating this complexity and ensuring optimal risk mitigation strategies are in place.

Further research

The intricate dynamics of elderly care, information protection, and Dutch legislation have opened up avenues for rich, multidisciplinary research. Given the evolving nature of both the healthcare landscape and the regulatory environment, continuous exploration is paramount. A few key areas for further investigation include:

1. *Granular Analysis of PIA Implementation in Elderly Care Institutions*: Given the highlighted ambiguities surrounding the roles and responsibilities in Privacy Impact Assessments, there is a clear need for a more in-depth exploration. Future studies should seek to perform a comparative analysis across various elderly care institutions, investigating the actual methodologies employed during PIAs. This research could identify patterns of common challenges, best practices, and potential gaps in the process. Specifically, the participation and interplay between project leaders, Privacy Officers, and Security Officers should be examined in detail to understand how different institutions navigate the complexities of PIAs and how these processes can be optimized.
2. *Adaptive Risk Analysis Frameworks for Elderly Care*: With the core of information security anchored in risk management, and given the unique vulnerabilities associated with the elderly demographic, there's an evident need for specialized risk analysis frameworks tailored for elderly care settings. Further research should aim to develop and validate these frameworks, ensuring they are both robust in safeguarding sensitive data and adaptable to the ever-changing landscape of elderly care. Special attention should be given to the integration of emerging technologies in elderly care and the new risk vectors they introduce, ensuring that these frameworks are future-proofed against upcoming challenges.

Both areas, when thoroughly explored, could significantly enhance the current understanding and implementation of PIAs and risk management in elderly care institutions.

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MILLENNIALS AND ELDERLY PEOPLE: DISCRIMINATION OR FUNDAMENTAL MISUNDERSTANDING?

The fundamental differences between millennials and elderly people stem from the fact that millennials were influenced by the rapid rise of internet culture. As some of the theorists of contemporary media have shown (McLuhan, Baudrillard), new technological mechanisms change not only the world around us but also our subjective perception in a fundamental way. The Universal Declaration of Human Rights (1948) states that "all human beings are born free and equal in dignity and rights" (Article 1) and that "all are entitled to equal protection against any discrimination" (Article 7). Although the State strives to adhere to these provisions, we would like to emphasize that misunderstanding that can lead to further discrimination is a consequence of cultural transformation. It has been shown that the first stage of alienation can be found in education (Hegel) and that the technical culture of the media and the internet plays a key role in this process.

Keywords: *discrimination, elderly people, education, misunderstanding, millennials*

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Foundations of Discrimination

Ageism and Discrimination from a Philosophical Perspective

In order to address the specific relationship between the concept of *ageism* in contemporary society and *discrimination*, we must first try to define the particular ways in which each of these two terms operates. There are different definitions of ageism, but the process itself must be understood in a twofold way: on one hand, there is *the biological concept of aging*, where physical changes occur in individuals:

"We define aging as a physiological process that begins immediately after birth. It is common to all people, we cannot stop it, and it progresses at a similar intensity." (Perišin, Kufrin: 2009, 30)

On the other hand, one must also take into consideration the *social* and *inter-subjective aspects* of ageism, in which society assigns value and an axiological label to the aging process itself and frames its meaning in a broader cultural context.

Some postmodern philosophers have tried to reflect on the social and cultural aspects of aging. From an existential approach, the focus is not only on the factual character of aging but also on its contextual meaning and representational sense in a broader social nexus of values. In this way, Simone de Beauvoir concludes that "old age has become the object of a policy" (Beauvoir, 1970: 221), and she emphasizes the way that the process of aging becomes negatively marked and marginalized in a capitalist society. Other authors also show that in further analysis, we must reconsider the *conventional and historical aspects* of these processes. However, Erdman B. Palmore, in analyzing temporary causes of discrimination, singles out nine negative aspects, as well as eight positive aspects associated with aging: (according to: Zovko, Vukobratović, 2017: 113)

I) negative stereotypes - sickness, old age, ugliness, mental retardation, memory loss, uselessness, isolation, poverty, and depression;

II) positive stereotypes - kindness, wisdom, reliability, wealth, political influence, freedom, eternal youth, and happiness;

These aspects can be referred to as stereotypes, based on which the concept of aging can be approached and perceived in our broader contemporary culture. Nevertheless, if we shift from a philosophical perspective to historical considerations of the concept of aging, we will find that in ancient Greek philosophy - during the so-called *golden age* of civilization that represents *the birth of democracy* - there was a kind of discrimination based on age, but at that time, it was against young people and poets. Plato, in his *Republic*, argues that young people are not qualified to be judges or rulers of the polis because they don't have the capacity to think dialectically, to approach complex social phenomena from different angles in seeking to find the highest truth of Being, nor to find

the highest good of the community in both an ontological and political sense. He emphasizes that "the good judge must not be young but old" because only then can he truly understand what injustice is. (Plato, 1968: 409b) He also posits that only experience that is grounded in appropriate methodology and correct education can lead to fair decision-making, so the true good of the community is possible only when "true philosophers, one or more of them, become rulers in the state". (Plato, 1968: 540d) This is one of the reasons why poets and artists are not welcome in his ideal state and why he criticizes the purpose of these professions. From a modern perspective, can we view Plato as a thinker who consciously discriminated against certain groups of people based on their age and profession?

Plato's intention was to find the "one true" way in which society could be organized, and to demonstrate how a just society is only possible under the auspices of that "one ideal case and structure of the State". Some contemporary authors have criticized this approach to politics and people. Jacques Rancière criticizes the deficiencies of this "origin of democratic thought":

"It was necessary to show that this form of *parapolitics* belongs to the same *suppressive logic* as a Platonic archipolitics that attempts to *abolish a democratic space in order to institute a community of "the One"* or, further, a Marxist metapolitics that assigns to democratic instances the profound reality of relations of production and class exploitation. It was necessary, finally, to pinpoint, at a global level, political philosophy's gesture of distancing the political under the pretext of grounding politics on an ideal of an ordered living in common."[1] (Rancière, 2000: 119)

From a structuralist point of view, discrimination begins when we place "one" ideal Being as the basis of all reality and then reject everything that does not conform to these ideal circumstances. This means that the actual state of affairs is such that there is always a *field of differences* that should be mutually accepted for their unique qualities. The human condition is always grounded in and strives towards *values* that are not merely visible facts. The question of value is always a question of something "invisible"; it is a certain ideal, which *can be flexibly enough defined to assimilate and accept these differences*. More precisely, since the field of practice is a field of possibilities and diversities, if we set an ideal as the aspiration of our actions, that ideal as a certain value must not be discriminatory. When we find those values in the *idea of equality* among people, then the subsequent conditions become only something secondary that needs to be reconciled with these ontological aspects.

[1] Modif. by author

We cannot use modern vocabulary to attribute "discrimination" to Plato, bearing in mind that for him the highest axiological norm was the well-being of the community itself, without which, in his judgment, not even individual justice could be found. We can still argue that the realization of democratic equality, which implies the freedom of *all intelligent and mature beings*, is not possible in the state as imagined by this ancient thinker. From Plato's example, we can see that forms of discrimination depend on the values that we establish as fundamental in society, and without considering the broader social context, we cannot understand specific acts of discrimination either. The concept of a universal right to anti-discrimination will gain significance only when people begin to respect themselves as *free individuals* who do not find their essence in anything heteronomous, or any kind of ideal state which would justify any form of exclusion of a particular social group.[2]

In the history of philosophy, there have been authors who indirectly addressed the issue of discrimination. While Kant and Locke may not have explicitly defined discrimination as we understand it today, their principles of equal treatment, respect for individual dignity, and the protection of natural rights have been foundational in the development of liberal thought. These principles provide a philosophical basis for opposing discrimination and promoting equality within liberal philosophy.

John Locke, who is considered one of the founders of liberal theory showed in his *Treatise on Government* that we must criticize the traditional understanding of freedom. He sought to find the foundation of freedom in the reasonable personality, in people's "natural right" to be treated equally:

"The freedom then of man, and liberty of acting according to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own will. To turn him loose to an unrestrained liberty, before he has reason to guide him, is not the allowing him the privilege of his nature to be free; but to thrust him out amongst brutes, and abandon him to a state as wretched, and as much beneath that of a man, as theirs." (Locke, 2016: 50)

He demonstrates that the assumption of this kind of personal right is founded on the natural right to a life of freedom and emphasizes that all men are "needful for such a life as our nature doth desire, a life fit for the *dignity of man*" (Locke, 2016: 22). According to this theory, every free man has the right to a dignified life, which means that he acts as a respected and equal member of society, regardless of his external characteristics

[2] It is a subject of debate whether Plato's idea of equal distribution of "political opportunities" means distributing them "in proportion to property," because it appears as though he believes that the Athenian treats the possession of property as somehow necessarily linked with virtue. Compare: (Rowe, 2018: 70)

related to age, gender, sex, class, or property. Moreover, the state and the sovereign are obliged to ensure the possibility of realizing that right. Locke was the first to emphasize that only when we establish *equality and freedom for everyone as an ideal* do we reach a point where discrimination cannot be justified philosophically.

Kant's philosophy marked a significant advance in the understanding of liberal freedom, essentially defining it as anti-discriminatory. Nevertheless, he challenged certain principles of natural law, showing that the source and purpose of law should be sought precisely in the transcendental concept of subjectivity, in its *universal source* found in the noumenal idea of freedom and the right to *equal treatment* and *a dignified life* for every person. Within this new methodology, individualism in the legal framework becomes the center of research, according to which a person as such, regardless of any status, has the right to be recognized as a legal entity in the legal system, *to be recognized as a person*. Kant resolves the modern problem of the relationship between *status naturale* and *status civilis* by viewing subjective freedom as the source of both. In this way, he lays the foundation for a universal concept of freedom and equality for each and every person, and he shows that no form of discrimination based on heteronomy and material reasons can be justified.

This new, liberal perspective is also rooted in Kant's work, *Foundation of the Metaphysics of Morals*. In this work, he demonstrates that universal freedom should not only be defined within its ethical framework but also within its legal and social context. This means that even if positive rights do not respect dignity and equality among people, the State must provide conditions to strive towards it, and from an ontological and axiological point of view, no form of discrimination can be justified. This law is not only founded on the **source of the** *will understood as a "universal law of nature" but also finds its grounding in the social and inter-subjective context.* Only based on the second part of his categorical imperative can we establish the universal demand for such equality:

*"Accordingly the practical imperative will be as follows: So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only." (*Kant, 2009: *12)*

In order to completely overcome the naturalistic view on freedom and reduce the possibility of justifying discrimination, Kant distinguishes between *things* (*Sachen*) and persons (*Personen*). He claims that we must treat people radically differently than we treat natural entities and things, in such a way that we fundamentally respect the dignity of their personhood. While we objectify things and use them as tools for their specific purposes, we must approach people purely as free, dignified individuals, by demanding, on the one hand, respect based on universal law, while on the other, extending that same

respect to them in return. For Kant, the concept of dignity (*Würde*) represents an important factor in inter-subjective relationships between people.

Based on what Kant proposes, we are obliged to respect the dignity of others, regardless of external characteristics or heteronomous differences that we do not approve of or that we dislike. According to this standpoint, none of these external "negative" labels (sickness, old age, ugliness, mental retardation, memory loss, uselessness, isolation, poverty, and depression) is sufficient reason to disregard this universal moral right, which should also be a legal requirement. In addition to demanding mutual respect, Kant also shows that the State is obligated to provide everyone with conditions for a dignified life, regardless of material differences. He emphasizes that such a right is not only a moral demand, although it has an ethical and deontological foundation, but also a political statement. Therefore, in addition to moral aspects, (Kant, 1999: 119, 136) he also examines the legal and political conditions necessary to ensure a dignified life for everyone (Kant, 1999: 134,171). Through his teachings, Kant provided an *axiological* and *philosophical foundation* for both articles of *The Universal Declaration of Human Rights* (1948), which state that "all human beings are born free and equal in dignity and rights" *(Article 1)* and that "all are entitled to equal protection against any discrimination" *(Article 7)*, implying that their validity is not merely conventional or normative, but that it must be universally valid.

Contemporary Considerations on Justice and Discrimination

In contemporary discourse, John Rawls is noted for his continuation of Locke's and Kant's liberal demands. According to Rawls, justice requires not just *formal equality* but also the *fair distribution of social goods and opportunities in society*. His theory is based on the concept of the *original position* and the *veil of ignorance*. The original position is a hypothetical state where individuals come together to establish the principles of justice, while the veil of ignorance represents a condition where individuals have no knowledge of their own personal characteristics, such as their age, race, gender, socioeconomic status, or abilities.

Rawls argued that from behind the veil of ignorance, individuals would make rational decisions about justice and fairness. Since they are unaware of their own circumstances, they would strive to create a society that is fair and just for all, as they would not want to risk being in a disadvantaged position. He proposed two principles of justice that would emerge from this hypothetical scenario, both of which are fundamentally anti-discriminatory (Rawls, 2001: 42-50)

1. The Principle of Equal Liberty: This principle states that everyone should have the maximum amount of basic liberties compatible with a similar set of liberties for all. It guarantees fundamental rights and freedoms such as freedom of speech, assembly, and conscience.
2. The Difference Principle: This principle allows for *inequalities in society*, but only if they benefit the *least advantaged members*. Rawls argued that social and economic inequalities should be arranged to bring about the greatest benefit to the least advantaged individuals in society. In other words, *inequality is acceptable only if it improves the situation of the most vulnerable*.

In addition, Rawls addresses discrimination within his theory of justice. He emphasizes the importance of treating individuals fairly and without prejudice. Discrimination is seen as a *violation of the principle of equal liberty* as it denies individuals their basic rights and freedoms based on arbitrary factors such as race, gender, or ethnicity. Within this theory, the veil of ignorance helps address discrimination. Since individuals behind the veil do not know their own characteristics, they are motivated to create a society that is free from discrimination. They would establish principles that ensure equal treatment and opportunities for all members of society.

Rawls' theory encourages the elimination of discrimination through policies and practices that promote equal rights, equal access to opportunities, and fair treatment for all individuals, regardless of their background or characteristics. The difference principle also plays a role by focusing on reducing the inequalities that often result from discriminatory practices and ensuring that the most vulnerable members of society are not further disadvantaged.[3] In essence, discrimination is considered incompatible with these principles, and Rawls' theory encourages the elimination of discrimination through policies and practices that promote equal treatment and opportunity for all individuals.

From a philosophical perspective, discrimination occurs between two groups only when their values are based on common principles, based on which we can compare the conditions of *special groups*, which, although different, can be similar in their essence. Modern philosophy, which partially relies on traditional teachings on discrimination, shows that the ideal framework of rights and the material state of affairs cannot always be compared and that specific vulnerable groups need special rights for their protection. Thus, it should not be a surprise that in Serbia, before the adoption of the *General Law on the Prohibition of Discrimination*, there were several laws regulating specific areas that touched on discrimination. For example, the prohibition of discrimination against

[3] Compare: (Pendo, 2003: 225)

patients is partially resolved by the *Law on Health Care*[4] (2005), and the prohibition of discrimination against children and minors is partially resolved by the *Family Law* (2005)[5], the *Law on the Basics of the Education System* (2003)[6], the *Law on Juvenile Offenders and the Criminal Protection of Minors* (2005)[7], and others. *The Law on the Protection of the Rights and Freedoms of National Minorities* (2002)[8] specifically prohibits every form of discrimination, be it national, ethnic, racial, or linguistic, against individuals belonging to national minorities. There are many other specific laws that prevent discrimination.[9]

In mid-2009, the Republic of Serbia adopted the *Law on the Prohibition of Discrimination*.[10] The adoption of this law was a significant step in the further development of democracy in Serbia. From a legal standpoint, discrimination can be defined in a very specific way:

"Discrimination" and "discriminatory treatment" refer to each unjustified action or unequal treatment, i.e., omission (exclusion, limitation, or preference), relating to persons or groups as well as members of their families or persons close to them, in a direct or indirect way, which is based on race, skin color, ancestry, citizenship, nationality or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, economic status, birth, genetic characteristics, health condition, disability, marital and family status, convictions, age, appearance, membership in political, trade union and other organizations and other real or assumed personal characteristics."[11]

Most countries distinguish between two basic forms of discrimination: direct and indirect, while some also deal with special forms of structural discrimination.[12] We can highlight some basic differences between them:

[4] *Law on Health Care*, Official Gazette RS, No.107/05, Article 26.

[5] *Family Law*, Official Gazette RS, No.15/05,

[6] *Law on the Basics of the Education System*, Official Gazette RS, No. 62/03, Article 46.

[7] *Law on Juvenile Offenders and the Criminal Protection of Minors*, Official Gazette RS, No.. 85/05, Article 88.

[8] *Law on the Protection of the Rights and Freedoms of National Minorities*, Official Gazette RS No. 11/02; 57/02, Articles 3 and 21.

[9] Compare: (Milenković, 2010: 17).

[10] *Law on Prohibition of Discrimination* Official Gazette RS, No.22/3

[11] (Milenković: 2010, 23)

[12] The three commonly recognized types of anti-discrimination laws are (i) prohibitions on what in the United States is known as 'disparate treatment' and in the United Kingdom, as 'direct discrimination'; (ii) prohibitions on what in the United States is known as 'disparate impact' and in the United Kingdom, as 'indirect discrimination'; and (iii) special accommodation requirements for individuals with certain traits, such as disabilities. (Moreau, 2010: 154)

1. Direct Discrimination: Direct discrimination occurs when a person or group is treated less favorably or put at a disadvantage compared to others based on specific characteristics or attributes. This type of discrimination is usually obvious and explicit, as it involves treating someone unfavorably because of protected characteristics such as race, gender, religion, disability, age, or sexual orientation. Direct discrimination can occur in various settings, including employment, housing, education, and public services.

   For example, if an employer refuses to hire a qualified candidate solely because of their age, it would be considered direct age discrimination. Similarly, if a landlord refuses to lease an apartment to someone based on their sexual orientation, it would be direct discrimination based on sexual orientation.
2. Indirect Discrimination: Indirect discrimination, also known as disparate impact, occurs when a seemingly neutral policy, practice, or rule has a disproportionately adverse impact on individuals with a certain protected characteristic. Unlike direct discrimination, indirect discrimination is often unintentional and may not be as apparent. It is recognized that seemingly neutral policies or practices can still result in discriminatory outcomes.

For example, if an employer imposes a requirement that all employees must be a certain height, it may disproportionately affect women as they tend to be shorter on average compared to men. Even though the policy does not explicitly target women, it indirectly discriminates against them.

To establish a case of indirect discrimination, it is necessary to demonstrate that a particular policy or practice puts individuals with a protected characteristic at a disadvantage compared to others and that there is no legitimate justification for the discriminatory impact. Both direct and indirect discrimination are considered unjust and unfair, and many countries have laws and regulations in place to prohibit such practices and protect individuals from discrimination based on various characteristics.

When it comes to ageism in the media, both direct and indirect discrimination can be observed. Older individuals may face direct age discrimination when they are explicitly denied opportunities or subjected to negative treatment due to their age. Additionally, indirect discrimination can occur through media practices that result in the underrepresentation or misrepresentation of older adults, thereby fostering ageist attitudes and stereotypes. In the following analysis, we will examine the factors of alienation between generations, primarily their mutual misunderstanding, and therefore subsequent discrimination.

Millennials and Elderly People - the Process of Alienation

The term "millennials" is used to refer to the generation of people born roughly between the early 1980s and the mid-1990s or early 2000s, depending on the definition.[13] It was first coined by historians Neil Howe and William Strauss in their book "Generations: The History of America's Future, 1584 to 2069," published in 1991. They based this term on the idea of "collective personalities" (Neil, Strauss, 1992: 68) This is only a *terminus technicus*, which describes certain characteristics of generations based on the circumstances and experiences that shaped them but also indicates the ways in which they adopt different experiences.

Howe and Strauss used the term "millennial" to describe the generation coming of age around the turn of the millennium. They identified certain cultural, societal, and behavioral patterns among individuals born during this time, which they believed would have a significant impact on society as this generation grew older. They compared millennials with older generations to show what social factors contribute to generational alienation.

It's important to underline that these are generalizations, and there can be significant variations among individuals within both the millennial and elderly age groups. Additionally, the terms "millennials" and "elderly" (or so-called "boomers") are broad categories that encompass diverse individuals with unique experiences, beliefs, and lifestyles.

Since its first use, the term "millennials" has gained widespread usage and has been adopted by popular culture, media, and social researchers to describe this particular generation. It is often associated with characteristics such as being tech-savvy, socially conscious, and having a desire for work-life balance, among others.

There are several "key differences" between millennials and elderly people emphasized in this book (Neil, Strauss, 1991), which can lead to negative prejudices among them:

1. Age Range: Millennials are generally considered to have been born between the early 1980s and the mid-1990s, so they are currently in their late 20s to late 30s or early 40s. On the other hand, elderly people typically refer to those who are 65 years of age or older.
2. Technological Proficiency: Millennials grew up during the rapid advancement of technology, particularly *the internet and digital devices*. They are

[13] Different sources and researchers may have slightly different date ranges, but the general consensus is that millennials were born between the early 1980s and the mid-1990s.

typically more tech-savvy and comfortable using various technologies and social media platforms. Older adults, on the other hand, may have had less exposure to these technologies and might require more support and assistance to adapt to them.[14]

3. Workforce and Career: Millennials are often associated with entering the workforce in a challenging economic environment and facing issues such as student debt and job market competitiveness. They tend to value work-life balance, career advancement opportunities, and flexibility in their jobs. Elderly people, on the other hand, may have already retired or be nearing retirement. They may have experienced different work conditions and expectations throughout their careers.
4. Social and Cultural Context: Millennials have grown up in an era marked by *globalization*, *multiculturalism*, and *rapid societal changes*. They tend to have more diverse perspectives and embrace progressive values. Elderly people may have different social and cultural norms, having grown up during different historical periods with their own sets of values and experiences.
5. Health and Well-being: While generalizations can't be made for all individuals, younger millennials are often in relatively good health and have lower rates of chronic diseases compared to older adults. However, millennials can face their own health challenges, such as mental health issues and sedentary lifestyles associated with modern technology usage. Older adults may experience age-related health concerns and require specialized healthcare and support.
6. Media Consumption: Millennials have grown up with a variety of media options, including the rise of digital media and streaming services. They are more likely to consume media content through online platforms and have different preferences in terms of entertainment and information sources. Older adults may still rely more on traditional media forms such as television, radio, and print.

When we compare millennials and elderly people, we use age only as a reference point in order to highlight deeper, essential, and structural differences, which can lead to alienation between generations and, subsequently, to intergenerational discrimination (Ljubičić, 2021: 578).

[14] This was noticeable especially during the pandemic caused by the virus COVID-19, when it was much more difficult for the elderly to adapt to the new, extraordinary situation precisely because of insufficient skills in managing new technologies, smartphones, the Internet, and other devices that were the main source of communication in that period. (Compare: Knežić, 2022: 44).

From a philosophical perspective, we can attribute all these differences between generations to two basic causes of alienation: one is rooted in *language and education*, which are distributed differently and uniquely due to the many ways in which the Internet and media culture shape and offer different information and content; the other is based on the specific *division of labor* in the capitalist competitive market, which deepens these inequalities by labeling older generations as "unprofitable". In this sense, Hegel merely emphasized what Plato had already been exploring, that *education*[15] is the *first stage of alienation between people*. (Hegel, 1986: 186) Nevertheless, from a materialistic point of view, it has been demonstrated that the division of labor based on technological advances and discoveries can also lead to misconceptions about certain occupations and specific alienations within the production process.[16]

If we compare modern ideals with the contemporary period, we can see that the *idea of development* and *progress* is what the Enlightenment ideal of education is based on, and which still remains a dominant framework in our culture. If we establish progress, which is measured by the realization of concrete results, as the basis of our own value, and value among people in general, then it should not be a surprise that we label all those who do not meet this ideal as "undesirable". This is one of the reasons why in ancient Greek philosophy, which respected the *ideal of wisdom* that comes only with experience, the elderly were respected, while, on the other hand, based on more recent modern ideals, the elderly are often dismissed and discriminated against. In this sense, Margaret Gullette, one of the most famous researchers on the process of aging in contemporary studies, correctly emphasized that our belief in the modern ideal of progress and development contributes to the process of discrimination and alienation. She explores the "second aspect" of the aging process that we defined at the beginning of our research - not only the physical but also the social and cultural dimension of this phenomenon, showing that many people perceive old age as a process of "declining strength":

"The paradox is that in many ways and for many people, aging-past-youth is increasingly becoming a decline." (Gullette, 2004: 119)

She was not the only one who emphasized the negative aspects of this Enlightenment ideal. Many thinkers from the Frankfurt School pointed out that the Enlightenment movement contributed to alienation not only between the younger and older generations but also to general intergenerational alienation and even to the structural discrimination of certain marginalized groups. Although it seems that we all have received equal rights based on shared, universal reason, it is evident that this equality is only formal,

[15] He also highlights the role of language and the division of labor in this process.

[16] Compare: (Marx, Engels, 2023: 124)

while material goods are distributed differently. This type of unequal distribution leads to increasing alienation. Belief in reason and technology has become an established narrative. (Horkheimer, 1941) This alienation can be abolished only when we change our belief in the ideology underpinning that narrative, which implies that the value of people is based on something external, heteronomous, and measured by their results, representation, and profit. Only when we start to appreciate and respect the elderly, as Kant demanded, as *free persons worthy of a dignified life,* can the gap between generations be abolished.

Media Factors and Alienation

The rapid rise of technology and internet culture, coupled with the development of modern forms of media and their consumption, have created fundamental differences in the way the millennial and elderly generations are shaped. There are various ways in which they can approach content, but also diverse processes and information frameworks that shape their perception contribute to real differences in life values and beliefs between generations. From this perspective, many modern media theorists have shown that the media is not only "something external" that represents different schemas of thinking, but that the laws of simulation change the very way we perceive reality and indirectly impact our actions or abstinence from that reality itself:

"Projecting ourselves into a *fictive, random world* for which there is no other motive than this violent abreaction from ourselves. Building ourselves a perfect virtual world so as to be able to opt out of the real one …We are no longer alienated within a conflictual reality; we are expelled by a definitive, non-contradictory reality." (Baudrillard, 1996: 35-36)

Baudrillard has shown that the media seems to create a sense of harmony and equality among people, while actual differences are not fundamentally represented. This means that even if a certain type of discrimination exists in reality, it is not necessarily visible in the media itself, which presents an "idealized" picture of a one-dimensional society. Individuals care deeply about fitting into ideal templates and filters, and like narcissists, they project a perfect image of themselves to others on social media. His concept of "simulacra" suggests that media representations often create hyperreal versions of reality, detached from their original referents. In this hyperreal realm, he argued that distinctions between true and false, real and imaginary, or authentic and constructed, become

blurred.[17] In such a context, it can be argued that discrimination may manifest in media representations and perpetuate certain biases or stereotypes.

Baudrillard's concept of the "sign-value", which describes discrimination in contemporary media, is particularly significant. He argued that in contemporary consumer societies, objects and signs acquire value through their social meanings rather than their practical utility. When applied to the media, this suggests that the value of certain individuals or groups in media representations may be determined by their social signifiers, such as race, gender, or socio-economic status. (Baudrillard, 2016: 69) This could potentially lead to discriminatory practices or biased portrayals. While Baudrillard's theories do not explicitly address discrimination in contemporary media, they provide a theoretical framework for understanding how the media can contribute to the construction of reality and the perpetuation of certain biases or stereotypes.

The question of the representation and signification of "Others" has also started to become a *question of competencies* for certain professions, as well as for social and cultural relations. Within this alienated void, it seems that the elderly do not always find their purpose, especially because they are not educated in the spirit of the demands of the new internet age and values that seem to be axiologically unacceptable and oriented towards unsustainable values.

However, can the media landscape be a proper domain that will contribute to the reduction of discrimination, when the greatest amplification of differences occurs within it?[18] Is the proclaimed ideal of equal distribution and leveling of differences in the process of globalization in internet culture actually applicable to the elderly, who seem to remain somewhat marginalized in these processes? Or has internet culture simply become an additional space for alienation?

McLuhan confirmed Baudrillard's thesis that alienation occurs to a great degree through the media. His most famous concept is the notion that "the medium is the message". He argued that the medium through which information is transmitted has a profound influence on individuals and society, shaping their perceptions, interactions, and ways of thinking. In this context, different generations may experience the media in distinct ways, influenced by the dominant mediums of their time.

[17] Social networks influence the relativization of the division into private and public spheres of life. Everyday life increasingly takes place through the prism of social networks, with privacy settings establishing this division into private and public sectors on these platforms. On one hand, social networks enable the promotion of oneself and one's opinions, but they also serve as an extension of the private space, encompassing private lives. (Compare: Marković, 2021: 128)

[18] Some studies argue that the media, among young people, can act as agents to increase the permeability of boundaries between conflicting groups and identity constructions, not just fields of alienation. (Compare: Karić, 2019: 128)

For instance, McLuhan's observations about the shift from print culture to electronic media, such as television, seem to highlight potential generational differences in media experiences. He suggested that the visual and instantaneous nature of television could lead to a more fragmented and sensory-oriented mode of perception, contrasting with the linear and reflective engagement associated with print media:

"Today, having exploded the 19th century schlock with the emergence of electricity, we have brought to surface inner life. And we currently live an eternal journey toward inner life …Today's youngsters are all religious without, however, having faith." (McLuhan, 2011: 6)

This implies that in the contemporary technical world, through the special "language" of the new media, alienation has occurred not only in the real world but also in the virtual one, which instead of overcoming the differences between generations, only creates an even deeper gap between them. This alienation makes anti-discrimination more difficult because there are diverse ways of addressing it, so even though anti-discrimination practices are formally pursued, the void of the media makes them more challenging in reality and ultimately leads to a more radical misunderstanding between generations. In this context, Baudrillard correctly defines the political role of the new media:

"The "medium is the message" is therefore a paradox that can extend quite far, to the reduction of content ideologies. Generally speaking, that would be the very *formula of alienation* in a technical society."[19] (Baudrillard, 1964: 229)

In sum, research on the media shows that alienation between generations takes place in the virtual intermediate space. It seems that, in the process of globalization, there is a leveling of cultures and an overcoming of differences, but reality shows that misunderstanding is only increasing in real, embodied space. The ideal requirements that are set through internet templates send messages to not just the older generation but the younger one as well, suggesting their "reality" is not good enough and that it is necessary to submit to the process of idealization, filtering, and refinement in order to achieve the perfect self-image that an anarchistic culture demands. All this contributes to the fact that, although there is a clear anti-discrimination framework in the legal sense, actual practices are such that we still need to work on making them a reality.

[19] Transl. and modif. by author

Instead of a Conclusion: Contemporary Criticism

In contemporary political theory, there are important authors who demand an integrative critique of society. Most of them emphasize that it is not enough to address only the economic and material aspects of discrimination, nor its representation model through the media, but that we must research both in parallel. In that spirit, Nancy Fraser argues that traditional understandings of social justice have often prioritized economic redistribution, neglecting the recognition and representation of marginalized groups. Fraser introduces the concept of "recognition" as a key component of justice alongside redistribution. According to Fraser, capitalism is characterized by both economic exploitation and cultural recognition dynamics. (Fraser, 2008: 73) She emphasizes that capitalism not only generates economic inequalities but also exacerbates social hierarchies by producing cultural injustices and forms of misrecognition. These cultural injustices manifest in various ways, such as stereotypes, stigmatization, erasure, and exclusion of certain groups based on their identities. Fraser argues that struggles for social justice must address both economic redistribution and cultural recognition simultaneously. She proposes a framework of "redistribution" and "recognition" to challenge the structural injustices of capitalism. Redistribution aims to address economic inequalities and class disparities, while recognition seeks to address cultural injustices and challenges the hierarchies associated with gender, race, ethnicity, sexuality, and other identity categories. Other authors have also dealt with these aspects of the anti-discrimination problem.[20]

On the other hand, Michael Wayne critically examines the relationship between the media, capitalism, and cultural production, emphasizing how the concentration of media ownership and the profit-driven nature of the media industry can lead to the commodification of culture. Wayne argues that the dominance of capitalist interests in the media can limit diverse voices and perspectives, potentially undermining democratic participation and the ability to challenge dominant ideologies. He relies on Kant's philosophy, showing that for Kant, the world of the phenomenological and the noumenal are already separated and that there is a philosophical origin of the contemporary, both idealistic and Marxian criticism of discrimination. [21]

Robert McChesney, a prominent media scholar, focuses more on the political economy of communication. He critically analyzes the effects of media ownership and the commercialization of communication systems. McChesney argues that the concentration of media ownership in the hands of a few powerful corporations leads to a decline in

[20] Honneth deals with the problem of the relationship between the struggle for recognition and the right to a dignified life, which are an integral part of anti-discrimination practices. (Honneth, 2004: 352)

[21] (Compare: Wayne: 2014)

diverse viewpoints and public discourse. He advocates for media reform and supports policies that promote media democracy and the free flow of information.[22] Both Wayne and McChesney share concerns about the influence of capitalism on media systems and their implications for democratic processes. They argue that corporate ownership, profit motives, and market forces can undermine the public interest, limit media pluralism, and hinder democratic participation. Their work encourages critical engagement with the structures and dynamics of media systems, seeking alternatives that prioritize democratic values and diverse representation.

In conclusion, we should emphasize that comprehensive research on discrimination shows that the legal aspect of anti-discrimination represents only one aspect in the fight against all forms of discrimination, including the one against the elderly. It is necessary to investigate other economic factors, as well as factors related to the representation space of the internet media and the problem of recognition, in order to expose the root of this problem in its many aspects. This is the only way we can effectively prevent the deepening of this process in real-world practices.

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Olivera Pavićević*

DIGITAL EXCLUSION OF OLDER ADULTS**

Ageism is a particular form of discrimination, in which individuals are judged according to age-based stereotypes, or views on what people should be doing, experiencing, or feeling depending on their age. One of the important dimensions of age discrimination, which is the subject of this paper, is the lag in using digital technology - characteristic of the older population. Older adults as a group are on the negative side of the digital divide. As the use of digital technology becomes more widespread across the globe, older people remain among the group with the lowest access and usage. Lower use rates of computers and the Internet among older adults have important social consequences. As the Internet becomes more integrated into everyday life, people who do not use the Internet are more likely to become more disenfranchised and disadvantaged. Recent reports from the International Telecommunication Union indicate that older people are at the highest risk of digital exclusion due to disabled or difficult access to the Internet, economic difficulties, lack of skills, lack of self-confidence, fear of Internet safety (cybercrime and misinformation) and lack of motivation (some people do not see why would be useful for them to use the Internet). In addition to the mentioned difficulties, there are other barriers, such as inadequate design of digital services - not all digital services are adapted to this group of users. Existing research documents the characteristics of older people that affect their participation in digital practice, and they are made up of both objective characteristics related to older age and stereotypes that close the circle of digital exclusion of the older population. The digital divide arises as a consequence of a lower level of computer literacy, technophobia, lack of perceived usefulness, and physical and cognitive deficits that must be overcome by applying a multidisciplinary approach.

Keywords: *Ageism, older, adults, digital, internet, exclusion*

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Introduction

Discrimination against the older adults has historical, cultural and social variations according to diverse forms and meanings of their authority and status in different societies. However, the status of older people and attitudes toward them are not only rooted in historic and economic circumstances. They also are derived from deeply held human concerns and fears about the vulnerability inherent in the later years of life. Such feelings can translate into contempt and neglect (Butler, 2009). Ageing can be defined from chronological, physiological and social aspect (Batrićević, 2022:464). Recognizing discrimination connected with age, Robert Butler coined the term "ageism" (1968) to describe systematic discrimination against older people. Although he equated age discrimination with gender and racial discrimination, ageism remained the most invisible form of discrimination and has received the least amount of attention. Like gender, ethnicity, or class, age is an aspect of social structure that "involves differential (and sometimes discriminatory) treatment" (Brah & Phoenix, 2004:81). Stereotypes which contribute to age discrimination define older people as a homogenous group by ignoring their habits, experiences, values, opinion, aspirations and circumstances. Such stereotypes usually work unconsciously (Ayalon & Tesch-Römer, 2018).

Older adults may have experienced different forms of ageism which would exert various influences on them. It could divide ageism into two forms, namely, benevolent and hostile ageism. Benevolent ageism refers to the overwhelmed empathy and pity concerning older adults. This often leads to unwanted help (for example, providing extra but unnecessary medical treatment to older adults) which can lead to decreased self-esteem, as well as motivation and confidence loss for older adults (Baltes & Wahl, 1996; Hess, 2006; Hehman & Bugental, 2015 according to Chen & Zhang,2022). Unlike the benevolent one, hostile ageism always refers to more aggressive and drastic attitudes.

Ageism is a form of discrimination that demands an intersectional approach in which there are particular consequences when two or more forms of discrimination interact. Conceptualizing discrimination based on a single attribute in insolation hinders our ability to respond effectively (Australian Human Rights Commission, 2018)[1]. Examples of intersectionality include age and disability, age and race, age and gender, age and social economic status, age and ethnicity. Age discrimination as well as other forms of discrimination are closely related to social exclusion. Social exclusion has multiple harmful effects on the well-being of individuals and society. People are deprived of not only living

[1] Human rights are based on the idea that all human beings have universal natural, inalienable rights (Mršević, 2022:110).

well in the present, but also unpredictable long term effects can be seen due to age discrimination.

Technology as a concept can be generally defined as any electronic or digital product or service. To be able to predict technology usage is important to understand the factors influencing older adults acceptance and adoption of technology (Mitzner et al., 2010). The impact of technology can have differentiating results for the older generations. In regards to age discrimination, digital technology can increase the exclusion of older people, but also it can significantly improve different and very important aspects of their lives. At the same time, technology may be considered as having the potential to affect ageism—both by fostering the perpetuation of ageism and by acting as a force contributing to the weakening of ageist views (Cutler, 2005:67). The aim of the analysis is to enhance the need and right for older people to be included in the development of digital technologies. This will then lead to a more informed older generation that is educated, and able to overcome the stereotypes of digital usage habits.

Advantages of technology and older adults benefits

Digital literacy is a basic element in the development of each individual, because it enables the inclusion of these individuals in a more participatory way. For this reason, some countries are interested in increasing the digital competencies of older adults because it provides them a series of advantages and benefits on a personal, social and societal level (Todorović et al., 2019:2). There are numerous ways in which technology can be beneficial to older adults and much has been written on this topic. Technology applications can improve access to care and support, information, safety, and social connectivity, as well as provide venues for productive engagement (Czaja, 2019). An AARP report showed that older adults are willing to use a wide range of technologies to maintain social connections, "gather information, be safe at home, and promote their personal health and wellness" (AARP, 2008:1) if these technologies allow them to remain independent. Technology can support many home-based tasks such as cooking, cleaning, and yard maintenance. In addition, technology items such as cell phones and medical alert systems can be lifesaving when in need of immediate help. Older adults do recognize the potential of technology to facilitate independence (Mitzner et al., 2010). Several investigators note that the use of assistive devices has increased while the prevalence of chronic disability has declined (e.g., Russell et al., 1997). By fostering effective functioning, images of older adults as frail, housebound, and bedridden are challenged and potentially replaced by far more favorable views (Cutler, 2003:60).

Growing trends of technology usage in computer-related professions are relevant for older adults because workers are remaining in the workforce longer by either delaying retirement, starting a second career, or working on a volunteer basis. The US Department of Labor Statistics (2008) demonstrates that older adults participation in the workforce is increasing dramatically (Mitzner et al., 2010). Numerous studies have demonstrated that older workers are both willing to learn how to use new technology and capable of acquiring the needed skills (Czaja, 2001). The multidisciplinary interplay between technology and successful aging can be classified into two categories of technology use among older adults: technology that targets the overall population and assistive technology, for older adults with special needs (Wu et al., 2015 according to McDonough, 2016). "Positive technology" (Botella et al., 2012; Riva et al., 2012) and human computer integration promote active life and may have a benefit for health and wellbeing (Calvo, 2006). To remain active, competitive, and useful in the workforce, older adults must use and learn to use technology. Human being is influenced by the idea of certain purpose or have to be seen as a purposive being (Stevanović,2022:30). Except impact for safety, security and decreasing risk of hospitalization, technology have aspects that support people to live well and experience the things that make life worth living, providing older adults with meaningful and engaging activities that are stimulating (Astell,2013). Playing computer games has a range of benefits for older people, including the recreational pleasures of satisfaction and accomplishment which positively influenced people's view of themselves and their abilities. Physical and cognitive benefits of computer games enhanced motor skills, such as hand-eye coordination and manual dexterity, increased speed on the games played plus anecdotal evidence of these skills transferring to other aspects of people's daily lives, such as driving (Whitcomb, 1990 according to Astell, 2013).

Technological necessity

On average, people around the world are living longer. In 2020, 727 million persons were aged 65 years or older, and the population aged 65 years or over is projected to double to reach over 1.5 billion by 2050, a 16.3 per cent increase. Unfortunately, half of the global population still lack access to the Internet (World Economic Forum, 2021). Technology can improve the quality of life for an older adult in a way that improves work to alleviate the circumstances related to illness, disability or physical and mental weakness. However, the process of implementing technology in the lives of older adults makes technological literacy necessary. Older adults desire the addition of new technology into their lives, and look forward to using the new technology to make their lives easier. Many

services are moving towards digital platforms including banking, pension, old-age benefits, TV services, transportation booking etc. Older adults face challenges to use many basic services just because they are unfamiliar with the use of digital technologies (Mubarak & Suomi, 2022).

Digital inclusion, among other things, implies acceptance of the information society (knowledge of the advantages of using computers and other digital devices to access the Internet). With this acceptance there will be easy and free access to the Internet which will enhance digital literacy (understanding the use of information and communication technologies and their active use in order to perform daily activities, education, information, entertainment and general communication) (Todorović, et al., 2019:9). In Serbia, adoption of the Law on Electronic Administration regulates the use of information and technologies in the performance of numerous administrations and other tasks. This includes issuing a person's health card, biometric identity card, biometric passport, vehicle registration, supplementary data in the registers born, married and died, and etc. E-banking provides clients an easier, quick and secure way to make banking transactions. The technology itself must be inclusively designed for everyone, while considering the unique needs of older adults. Ensuring digital inclusion for older adults means access, installation, and the possibility of accessing the Internet. Research conducted in Serbia, has shown that slightly more than half of the older adults over 65 years (53%) use a computer, while slightly less than half use a smartphone (48%). There is a direct correlation between mobile phone and computer use (Phi= 0.423). As much as 68% of those who have a computer also have a mobile phone, while 32% of older people who have a computer, don't have a mobile phone. Also, 75% of those who don't have a computer don't even have mobile phone (Todorović et al., 2019:34). The use of e-services is extremely low among older respondents (below 9%). The reasoning by the older respondents for the low usage is as follows: I didn't know how (15.7%), insufficient skills (22.6%), lack of equipment (10%), no Internet access (3.5 %), tried but failed (0.4%), not interested (19.6 %), prefer at counters (24.8%), other (3,4%) (Todorović, et al., 2019:43).

A variety of factors contributes to these technological "divides". Product design and marketing are certainly among the factors leading to differences in access among age groups, but so are costs. Technology can be expensive and beyond the financial reach of many older adults (Cutler, 2005:70). Studies conducted in Serbia confirmed that the use of digital technology is significantly connected with social and demographic factors (Petrović, 2013; Todorović,et al.,2019). In relation to gender, women use the Internet to a greater extent (53.5%) than men (46.4%). According to age, people younger than 30 use the Internet the most (54.9%), and as the age of the respondents increased, the use of the Internet decreased. Moreover, the majority of Internet users are highly educated people.

Also, internet use was more prevalent in urban areas with greater populations (cities of millions); People with higher material wealth use the Internet to the greatest extent (Petrović, 2013:101). Factors that influence digital inclusion among older adults are low material standard, low level of education and place of residence (it's somewhat less closely related to computer equipment but the older people living in rural settlements are the least likely to have computer 11%) (Todorović, et al., 2019:37). The lag in the technological inclusion of older adults in Serbia refers to existing disadvantages, such as economic, educational disadvantages, and the place of residence (different level of development).

Ageism and digital divide

Ageism is a particular form of discrimination, in which individuals are judged according to age- based stereotypes, or views on what people should be doing, experiencing, or feeling depending on their age (Rosales & Fernández-Ardèvol, 2020). Ageism may be directed at people of any age (Bodner et al., 2012). A particular form of ageism is discrimination against older adults based on a view that focuses on disabilities and implies "inferiorization" and "patronage" (Neves & Amaro, 2012: 3). The older population has been portrayed in a variety of unflattering ways as a result of ageism (Cutler, 2005:67). Ageism is reflected in many areas of life, implying deprioritization, disregard, disempowering and exclusion. Ageism shapes both the image(s) that individuals have of themselves and the image(s) that society has of the different life stages (Rosales & Fernández- Ardèvol, 2020). At a societal level, ageism refers to "the way in which society and its institutions sustain ageist attitudes, actions or language in laws, policies, practices or culture" (AGE Platform Europe, 2016). The issue of ageism in the digital space create new form of exclusion - digital exclusion. Digital exclusion prevents individuals or groups from using resources that are sometimes vital to them, thereby causing "multiple deprivation" (Castells, 2002 according to Manor & Hersovici, 2021:1085). Older adults (65+) fall into one of the categories at greatest risk of digital exclusion. If the development of digital technologies will not be taken into account, and the right of older adults to be digitally informed, digitally educated and digitally included, then this group will remain without many rights that belong to them (Todorović, et al., 2019).

Lower use rates of computers and the Internet among older adults have important social and cost ramifications. As the Internet becomes more integrated into everyday life, people who do not use the Internet are more likely to become more disenfranchised and disadvantaged (McDonough, 2016). The digital exclusion of the older adults is part of a closed circle of ageism, which is based on the idea of insufficient interest, inability and reluctance of said population to accept changes. The inability to become technologically

literate, as well as the insufficient importance of overcoming such a conjuncture will not improve the situation. The undeniable relevance of digital literacy, which is a condition for full participation in social life, is faced both with ageist stereotypes and with material, health, family and other aspects of the life of older adults, especially in social disadvantage groups. Too little attention has been paid to tracing a systematic solution to the socioeconomic problem of digital divide (Mubarak & Suomi, 2022). Despite mass diffusion of ICT, marginalized communities continue to suffer from digital division with only rich being insulated from this divide. Additionally, even within individual countries with high levels of computer access there is evidence of a "digital divide" between different regions, areas, and neighborhoods (Harris,Straker & Pollock,2017). Digital divide affects older people among others excluded collectives disempowering them as a group in digital media and perpetuating the exclusionary stigmatization of older people (Rosales & Fernández-Ardèvol, 2020). There is a consensus among social scientists that the grey digital divide is getting serious with the passage of time (Friemel, 2016). Even in developed countries remarkable grey digital divide affects older adults (Carney & Kandt, 2022). Despite the fact that the digital divide is blurring in terms of access and use, the second digital divide, or the divide in skills, purpose of use and motivation, is persistent or widening. This means that people have access to and make use of digital technologies but have less interest, do it for a narrower range of purposes and with more difficulty (Rosales & Fernández-Ardèvol, 2020). Ageism is a key barrier that affects the design, adoption and use of digital technology occurs on the macro (design and policy), mezzo (social and organizational environment) and micro (individual) level. These three levels also interact and influence each other (Euroageism policy brief, 2020).

A digital divide affected older adults in Serbia in a similar way which resulted in a divide of skills, purpose of use, and motivation in regards to technology. In the recent study, respondents named the following explanations for their hesitation about digital usage: insufficient knowledge about such services, insufficient knowledge how to use them, fear that they will not be able to use and follow all the instructions when using different applications and portals, especially when it comes to "obligations towards the state" - they prefer to give up their obligations and rights directly at the counters of competent authorities, deficiency of digital skills and knowledge, poor financial conditions, the desire to fulfill their obligations directly at the counters because on that way they have the opportunity to make social contact, talk with each other or with the officials, and thus fill their free time, lack of interest (Todorović, et al., 2019).

Ageism and digital approaches

Ageism is not only contained in the perception of the relationship between the older adults and technology. Technology is created with a reduced appreciation of the needs, affinities and abilities of older people. Ageist mechanisms have been analyzed on the design of corporate digital platforms (Rosales & Fernández-Ardèvol, 2020). The analysis takes into account three factors that foster discrimination on digital platforms: First, algorithms are influenced by the biases of developers, mainly young men earning above-average salaries (Beyer, 2014; Cohoon & Aspray, 2004). Thus, design decisions are strongly influenced by common points of view, falling into homophilic or self-centered ideas. Some of these biases work by making design decisions that are influenced by their common interests and practices, and ignoring the practices of other groups (Rosales & Fernández-Ardèvol, 2020). Second, the research methods commonly used on digital platforms face limitations when considering the interests of diverse groups of users. The failure of big data approaches illustrated the vulnerability of minority or disempowered groups when they are not properly considered in the overall tool design process. Moreover, the likely ageist responses were not studied in this case. By ignoring 28% of the population for whom the predictions are not accurate, the system deprioritizes both less motivated and less skilled users, two aspects that appear to create a bias against older people (Rosales & Fernández-Ardèvol, 2020). Third, digital platforms are supported by corporations, for whom corporate interests take precedence over the general interest. Thus, their algorithms are aligned with their objectives (Cheney-Lippold, 2011) and keeping them hidden helps to ensure that the corporate ideology remains invisible (Cheney-Lippold, 2011). Ageism could be recognized in that hidden objectives. Thus, for the sake of security and/or altruism, CAPTCHAs (Automated Public Turing test to tell Computers and Humans Apart) fall into ageism by deprioritizing the limitations of older people on digital platforms in their corporate decision-making, and by ignoring the ways in which their comparatively limited skills reduce their chances of completing the CAPTCHA challenges (Rosales & Fernández-Ardèvol, 2020). Another example is a fingerprint system which is meant to simplify the user's life by having a more accessible and secure system than passwords thus creates new strands of discrimination. While digital platforms should provide tools for an inclusive networked society (Buolamwini & Gebru, 2018), fingerprint systems reinforce ageism by ignoring the reality of older people (Rosales & Fernández-Ardèvol, 2020). Tracking systems thus reinforce ageism by deprioritizing the habits of older people in the development of passive metering tools, particularly with regard to the use of basic and older models of mobile phones. They also use voluntary

sampling methods that disregard their comparative limited purposes of use. All these factors limit the chances of older individuals participating in studies that make use of smartphone logs (Rosales & Fernández-Ardèvol, 2020).

Digital inclusion for older adults

Despite the digital divide narrowing, it still exists predominantly in terms of age, education levels and income (Euractive, 2005; Zickuhr & Smith 2012, according to Rasi & O'Neil, 2014:55). The digital divide is a multifaceted phenomenon and needs multifaceted efforts to control it, in the same sense, the grey digital divide has to be tackled from multiple perspectives (Mubarak & Suomi, 2022). The grey digital divide is influenced not only by access but a myriad of factors including ICT skills, ability and social support. Findings indicate that older persons tend not to use computers and the Internet since they fail to see the advantage of using online services, are not motivated to learn, and most of them are not familiar with the digital jargon. They perceive computers and the Internet as useless and sometimes even as dangerous and as a threat to their freedom and lifestyle (Hakkarainen, 2012). Furthermore, smart phone usage also declines with age for a variety of reasons, ranging from a lack of interest or a lack of awareness to the advantages such devices offer, to a lack of skills and economic constraints (Hakkarainen, 2012). The economic status as a barrier to adopting and using new technologies does not require a deeper analysis in terms of organizing support in overcoming the technological divide among different social groups. However motivation, attitudes, and social identification of older adults regarding refusal to adopt new technologies demands a more complex understanding of their social position. Aging stereotypes can encourage the self-perception of older adults as a socio-demographic group who are technophobic and unable to learn to use technology. With such attitudes one can see aversion, anxiety and an avoidance to adopt and participate in digital praxis. Older adults have lower self-efficacy regarding computer use and more computer anxiety than younger adults. Moreover, computer self-efficacy has an indirect effect on technology adoption through anxiety, since people with lower self-efficacy have higher anxiety (Czaja, et al., 2006).

From the perspective of social representations theory, social groups are different in terms of their social representations (Moscovici, 2000; Wagner et al., 1999; Bauer & Gaskell, 1999, according to Rasi & O'Neil, 2014:57). The differences can be socio-structural, historical, cultural/subcultural or intergenerational, or they could depend on the education level (Wagner et al., 1999:100). Social representation of certain groups emerge as a result of their experiential world. Study dedicated to social representations of computers and the Internet by elderly Finnish and American non-users (Rasi & O'Neil,2014)

shoed results that calls for awareness-raising activities (e.g. media literacy campaigns, guidance materials, training, support) from industry, governments, educators and non-government organizations. The activities should aim at providing more balanced Internet-related information and altering elderly non-users overtly negative perceptions of the Internet as Tool and Thing, Depriver of Freedom, Danger and Marker of Differences (Rasi & O'Neil, 2014:68).

Significant implications for the understanding of how solving the grey digital divide is essentially a multi-level challenge. Cross-collaboration research efforts among academic-healthcare-industrial discourses are required to design and innovate state-of-the-art digital inclusion initiatives for senior citizens (Mubarak & Suomi, 2022). From an intergenerational perspective, it is of practical importance to develop positive attitudes toward older adults. We must change a culture that fails to take characteristics and needs of the older population into account while creating technology designed and employed so that differences in use related to age are minimized. This further implies that tutors cannot use the same principles and techniques to deliver content to older generation as they do for young generation. Older adults take their own time to learn digital technologies, often need excessive patience, repeated reminders, slower learning, and sympathy of their tutors. The practical implication here is that tutors need to undergo specialized training to deliver digital education to older adults (Mubarak & Suomi, 2022). Potential benefits of technology for older populations can be realized by acknowledging that older people are willing to use technology, and are willing to learn to interact with new technology systems.

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OPPORTUNITIES TO PREVENT SOCIAL EXCLUSION OF OLDER PEOPLE BY ENHANCING THEIR DIGITAL LITERACY

Globalisation and digital transformation strategies change the pattern of communication making more services digitised. One of the objectives of the EU Digital Decade policy program set for 2030 is to digitise all key public services and make medical records fully available online. The realisation of this objective would benefit the local communities; however, it requires an adequate level of digital literacy and access to digital services for all citizens. This research explores which factors contribute to media literacy among older people to prevent their social exclusion. To identify what needs to change, data analysis relies on a COM-B model that distinguishes capability, opportunity, and motivation as important factors that delineate behaviour. The data were collected through semi-structured interviews with professionals, older people, and their families from Osijek County. Two independent reviewers analysed the transcripts through thematic analysis that was guided by the COM-B model of behaviour.

Keywords: *COM-B model of behaviour, older people, digital literacy, prevention of social exclusion*

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1. Introduction

Digitally connected society and easy information exchange helps us to be more active citizens, facilitate and cope with the difficulties of modern daily life as well as contribute to our quality of life (Crnković et al., 2022; Nekić et al., 2016; Stojšić Dabetić, 2020). Digital technologies are rapidly evolving, with on-going updates and new features, requiring all users to be digitally literate and adaptable to new and rapid changes which can be measured by digital literacy index (Krish et al., 2018 according to Stepanović, 2019). Digital literacy refers to people's ability to read and understand information available on Internet or multimedia images, to express opinion on online sources, communicate through digital networks and navigate through websites (Ciler, 2020). Digital literacy among older people becomes increasingly important while information and communications technology (ICT) can help them maintain a healthy lifestyle as well as prevent and treat medical conditions by accessing relevant information and services. Easy use of ICT supports older people to more frequently communicate with their family and friends and to live more independently within their preferred community. Such digital activities that foster social interactions contribute to older people's happiness and life satisfaction (Havighurst, 1959 according to Mišović et al., 2022), widen and obtain their social networks, decrease their sense of loneliness, and help older people to live more active and connected lives (Krawczyk, Abdelmonem, 2013 according to Stojanović et al., 2020). Digital literacy also supports the silver economy as it increases their productivity, knowledge, and skills (Ciler, 2020). All these opportunities are in line with the concept of smart ageing that encourages and supports older people to use their own potential. Within the area of smart ageing, ICT brings solutions that increase individual health, quality of life and increases physical and mental health (Cotten et al., 2012, Salovaara et al., 2010). For example, cognitive activity that is required to play interactive computer games prevents cognitive decline associated with ageing (de Bruin et al., 2010; Almeida et al., 2012 according to Bleakley et al., 2015). Research by Cotten et al. (2014) shows that the use of ICT decreases symptoms of depression with the largest effect size among older people living alone in households. Other studies confirm the beneficial effect of ICT for addressing loneliness and depression, strengthening mental health of older people and preventing social exclusion (Cotten et al., 2014, Fang et al., 2017; Szabo et al. 2019).

Global and EU papers (e.g., Ageing in a Digital World - from vulnerable to valuable, The Silver Economy: Final Report) guide national policies and professionals to further work on digital inclusivity of older people. These international guidelines see that healthy ageing, equal and active participation of older people in (digital) society can be achieved through increasing availability of ICT in rural and deprived areas, increasing

motivation and competencies of older people to utilise ICT, implementing guidelines for more accessible web content (e.g., easy to understand texts, zooming options, chat and emails as an alternative to voice messages, larger frames for clicking, available and sensitive user support). The Digital Decade policy programme (European Commission, 2021) sets targets for 2030: at least 80% of the EU population will have basic digital skills and all key public services will be accessible online (such as medical records through e-Health).

Although benefits are diverse, one of the contemporary challenges that older individuals face is the digital divide. In the context of this paper, the concept of the digital divide refers to age-related unequal access to digital technology and the Internet. When using ICT, older people predominantly focus on connecting with families, managing health, accessing information, connecting with peers and personal activities such as online shopping, and making reservations (Vorman et al., 2015). Lack of access and use of ICTs among older people is well-documented. In 2017, around 44% of people aged 65-74 years in the EU-27 never used a computer (Eurostat, 2020). Last available data for 2022 show that 34.8% of people aged 65 to 74 in the EU-27 did not use the Internet in the last three months (Eurostat 2022). Between countries differences are large and range from 67% of older people from Serbia and Turkey that did not use the Internet in the last three months to 2% of older people in Ireland and Iceland. One of reasons for using ICT more frequently is COVID-19 pandemic as it accelerated the pace of digitization and pressed older people to use digital technology to be connected with their families and health services (Begović, Labaš, 2021).

Older people do not use ICT as often as people in working age due to a variety of challenges. In addition to limited network coverage, the digital divide can stem from various factors such as socio-economic, geographical, educational, and generational factors (Cullen, 2001 according to Stepanović, 2022). Also, lack of trust towards the use of ICT decreases the motivation for learning digital skills (Krawczyk, Abdelmonem, 2013 according to Stojanović et al., 2020). Such negative perception is further supported by the privacy challenges related to availability of older people personal data, thefts, stealing identities as well as their perception that ICT fosters addiction (Lukačević et al., 2018). Another reason why they prefer direct, non-digital communication are cognitive changes associated with ageing that decreases integration of new knowledge and skills. Due to cognitive decline, older people cannot quickly integrate new unknown content, have lower self-confidence, and rely more on others in gaining digital information (Ciler, 2020). Those more disadvantaged for digital exclusion are older people with poor socio-economic status and health (Matthews et al., 2018). and A smaller income puts older people at risk of poverty. Motivation to gain digital skill depends on how older people

see benefits of using it and their ability to integrate new knowledge and skills (Ciler, 2020). Regarding interpersonal level, support from family members, motivation and knowledge exchange among peers and others within their community encourages older people to use ICT (Gatto, Tak, 2008; Ciler, 2020). On a community level, an important role in strengthening digital literacy and mastering new knowledge and skills have been training organised by community organisations and libraries (Sloan, Vincent, 2009 according to Ciler, 2002). Training content should be relevant, useful, and organised at an easily accessible location. Community and local governments can be facilitators by making older people's digital struggles more visible in strategic plans and annual financial plans. Such guidelines help community members better understand the disadvantaged position of older people and nurtures a sense of connectedness and inclusiveness of older people as normative behaviour within the community. As seen, diverse personal, interpersonal, social, and economic factors contribute to the level of using ICT.

Some groups of citizens are struggling to grasp and use digital technology equally which leads to digital, and potentially social exclusion (Helsper & Galácz, 2009). One such group at risk for digital deprivation and digital exclusion are older people whose disadvantaged position is further aggravated due to decrease in contacts after retirement, death of spouse, lower income, and physical limitations. We took the COM-B model as a theoretical framework to explore components that can increase ICT use among older people. The COM-B model is an essential part of the Behaviour change wheel that is often used to design and implement behavioural change interventions. COM-B conceptualises that there are three components important for any behaviour to happen. According to the COM-B model, behaviour will occur when the person has the capability and opportunity to engage in the behaviour and is more motivated to enact that behaviour than any other behaviours (Michie et al., 2011). All three components are mutually interdependent and further divided on two levels which delineate COM-B as a model with six subcomponents: psychological capability, physical capability, social opportunity, physical opportunity, automatic motivation, and reflective motivation. *Capability* refers to an individual's psychological and physical capacity to engage in the behaviour. In relation to ICT skills among older people, physical capability relates to whether older people are equipped with knowledge and skills required to use ICT (e.g., do they know how to write on digital devices and navigate Internet browsers). Psychological capability relates to whether older people have process, reason and comprehend information needed to use ICT and can they remember how to do it when the time comes. *Opportunity* refers to factors available in our environment that encourage or discourage behaviour change. Physical opportunity would mean that older people need to have time and access to computer/smartphone and Internet connection that are affordable while social opportunity that

is socially acceptable for older people to engage with ICT. Regarding *motivation*, Michie et al. (2011) distinguish reflective motivation that refers to conscious reasons and plans to use ICT and automatic motivational processes that refer to emotional reactions of older people associated with using ICT. With the aim to better understand and suggest what needs to change for older people to increase their digital literacy, we used the COM-B model to answer what factors support and challenge older people to use information and communications technologies more frequently.

2. Methods

2.1. Research Design

In order to get a deep contextual understanding of older people's experiences on using ICT and factors that facilitate it, we chose a qualitative interpretative approach and utilised interviewers to collect data and draw conclusions. To answer research questions, we collected data by using semi-structured interviews face-to-face. Semi-structured interviews enable the dialogical generation of new knowledge because the participants have more free space to reflect on. We collected socio-demographic characteristics of the participants through four questions and data on research question through eight open-ended questions specifically designed for this study. The initial questions were focused on experiences of older people using ICT while the latter question referred to the components that enable and challenge older people to use ICT. The interview guide was piloted to ensure the questions were clear and understandable for older people. All words or concepts that were unclear to participants were clarified in the interview to increase the interpretative validity (Chioncel et al., 2003). At the end, the participants were given the opportunity to independently share additional perspectives. We used the COM-B model to systematically guide the analysis of the interview data and as a framework for understanding what needs to change for older people to use ICT more regularly.

2.2. Participants and settings

Through a purposeful sampling approach, we collected data from 12 participants: six professionals that previously or currently work with older people related to ICT topics, six older people (four with and two without experience of using ICT), and one family member of an older person that does not use ICT. We expected these groups of participants would contribute to the richness of the responses. Inclusion criteria for participants was physical availability to conduct live semi-structured interviews. These criteria were delineated due to the nature of the research theme and the importance of non-verbal communication, which is difficult to follow in a virtual environment.

Participants were between 35 and 86 years old, five of them were male. Professionals were from two large Croatia cities, four of them worked within local community organisations and two professionals worked within public education. Older people (professionals by experience) were living in one small and two large Croatian continental cities. Participants' demographic information is summarised in Table 1. Heterogeneity of the sample is seen through participants' age, gender, and digital literacy. The homogeneity of the professional's subsample is reflected by their experience of working with older people on utilising ICT. Heterogeneity among pensioners is reflected by their diverse experience with using ICT.

Croatia is seen as a less prospective EU country that lags to provide a socio-economically supportive area for older people to live in. In 2022, 33.5% Croatians older than 65 were at risk of poverty or social exclusion which is an adverse rate compared to EU-27 average where 20.2% older people are at risk of poverty or social exclusion).

Table 1. Summary of participants' demographic characteristics (N = 12)

Variable	Frequency	Percentage
Sex		
Male	5	42%
Female	7	58%
Age		
25-45	4	33%
65+	8	67%
Employment status		
Employed	4	33%
Pensioned	8	67%
Digital literacy (self-assessment)		
Yes	8	67%
No	4	33%

Data for Croatia show that Croatian older people are at the adverse side on the digital divide because 61.5% of Croatians aged 65 to 74 in 2021 did not use the Internet in the last three months and in 2017 a total of 73% of Croatians aged 65-74 years had never used a computer (Eurostat 2020, 2022). These data illustrate that Croatian older people have poor digital skills which makes them at risk for lagging on (daily) information, services and contributes to their sense of social exclusion and disconnection from families and communities.

2.3. Data Collection

The interviews were collected by first-year graduate social work students that previously were trained in qualitative research techniques and had experience in conducting interviews. The interviews were conducted individually, while the data analysis was done at the group level. The eligible participants were telephonically invited to participate in the interview. Participants selected a suitable day and place for the interview.

Participation in this research study was voluntary. Participants were not reimbursed for their participation. At the start of each interview, the participants were informed about the research and its aim, audio recording of the interview, participant rights, data protection, and possible risks. All participants gave signed written informed consent to confirm they are willing to participate in the study. Interviews were conducted in April 2023 and lasted between 20 and 35 minutes. All interviews were audio-recorded for transcribed verbatim and analysis. The written transcripts are digitally stored with a password to secure restricted access.

2.4. Data analysis

The data were analysed and interpreted using deductive-directed content analysis approach (Mayring, 2014). Two reviewers independently coded all transcripts and delineated COM-B subcategories to each code. To ensure consistency in coding, at the beginning of coding, two transcripts were reviewed together. The researchers concluded that data saturation was reached when three consecutive participants did not provide additional ideas (Francis et al., 2010). Data saturation was achieved after the tenth interview.

Both authors mapped each code into associated domain-specific COM-B category. Any disagreement that emerged while mapping codes to COM-B categories were discussed and resolved.

3. Results and discussion

Factors that contribute to digital literacy among older people were identified and are discussed in relation to the COM-B model. Participants' answers were mostly mapped to psychological capability, physical opportunities, and reflective motivation.

3.1. Capability

Participants see that rapidly evolving ICT and older people's lower cognitive abilities make their knowledge and skills lag behind. Specifically, they express that memory- and attention-declining makes their learning how to use ICT slower.

> "I encounter challenges because I lack knowledge and because something is constantly being upgraded. The children show me what to do and I am able to do it a couple of times but if I don't use digital devices for two days, I forget how to do it." (Participant 11, male pensioner without DL)

These results guide experts to design ICT with more nuanced learning experiences (Tyler et al., 2020) to deliver ICT training with participants' individual physical and cognitive challenges in mind. Complementary to recognizing the lack of knowledge, the majority of participants strongly expressed that older people need to enhance their digital literacy to be able to use and navigate ICT. This participant's suggestion needs to be taken with the understanding that, although important, increasing knowledge does not mean older people will use ICT more regularly. Tyler et al. (2020) showed that increased engagement with ICT among older people depends more on motivational processes (than having digital literacy). As a prerequisite to use ICT more frequently, older participants praised for more training on personal data protection and learning English. These results illustrate that older people see literacy and the learning process as passive and narrow. However, current learning processes and navigation among the wealth of information are characterised by the opposite qualities - activity, creativity, and having skills to interact with information (Jerčić, 2022). Organisations that continue and offer such prevailing mechanical approach to learning, older people will stay dependent on others to navigate novel and constantly ICT changes in the future.

Generally, participants expressed that older people understand why it is important to increase digital literacy but also that it is important to continue with vivid promotion of these benefits among older people. They see Internet shopping, access to public and health services and communication with their (grand)children as most common examples of ICT benefits.

> "ICT should be presented and promoted among people of the third age in a faster, simpler, more effective and better way. It should be explained to people that this is something they will not be able to do without in the future. You should clearly explain what they can get by learning, what are the benefits." (Participant 5, male expert)

Participants also report how older people need to know what locally available resources for learning ICT and places are where they can use digital devices. The participants provided several examples of positive practice on informing older people: through public institutions and community institutions where older people regularly visit as well as local mainstream media. Another advantage of more frequent exposure to wealth of locally available resources is to promote and normalise the importance of using ICT among older people.

The use of ICT by the older people is often accompanied by physical obstacles. This study found that decreased finger dexterity, eye fatigue and deterioration of vision are the most often physical challenges among older people who use digital devices.

> "The biggest challenge is the transition from older mobile phones to smartphones while I cannot use buttons to type. My fingers and eyes cannot accommodate such small letters and type on the limited screen surface." (Participant 3, female pensioner without DL)

These limitations suggest that IT developers should secure that programs are easy to use and have options to adapt touch-screen options. The Accessibility Guidelines highlight fundamental factors that help program developers to overcome these difficulties. Some of the solutions would be to increase text visibility for individuals with reduced visual abilities, provide alternative communication options for those with hearing abilities, adapt interaction for individuals with reduced motor abilities, create understandable and accessible content for those with cognitive limitations, offer adequate user support to overcome obstacles and finally, develop an e-health application that promotes wellness and fitness. Guidelines see that the responsibility lies with developers who should focus on creating simple applications that will help older people to utilise ICT (Ageing in a Digital World - from vulnerable to valuable, 2021).

Given the small rate of older people using ICT, to improve the psychological capability of older people and help them use ICT more frequently, community services must prioritise reaching out to them, especially those that are living alone, in rural areas and in risk of social inclusion. The European Economic and Social Committee (2021)

argues that it is important to establish suitable conditions and mechanisms to minimise digital exclusion in rural areas and to secure financial resources from EU funds. To achieve this goal, adequate transport and telecommunications infrastructure needs to be provided so older people living in these areas can meet digital standards. These intentions are in line with the central pledge of the 2030 Agenda for Sustainable Development (*Leave No One Behind*).

3.2. Opportunity

The majority of participants assess that older people do not use ICT because they do not have appropriate smartphones, laptops or computers at home to use on a regular daily basis. There was a general agreement among participants that older people cannot afford smart devices due to their financial deprivation. Decrease in income upon retirement increases financial responsibility for older people to allocate their income more practically and purposefully and digital access is not among perceived priorities. Our results are consistent with those previously indicating how income is an important social determinant of inequality (Gu et al., 2019; Žganec et al., 2008). Participants suggested that the subsidies or more affordable prices for devices or monthly Internet subscriptions for pensioners could help them to utilise ICT more frequently.

> "Today, it's all about prestige, and we pensioners have such a small income that we certainly would not decide to buy smartphones, let alone computers or laptops. It would be good for us to get some kind of discounts and benefits when using ICT …such as more affordable Internet subscriptions, subsidies, or even free devices." (Participant 12, female pensioner without DL)

More than half of participants also see neighbourhood availability as important to secure digital equity for older people. Participants suggest that local stakeholders can effectively increase digital literacy among older people by providing them easier access to education and equipment. This can be done through securing places within a community where older people can get support when experiencing challenges. As older people struggle with constant digital novelties and forgiveness, several participants suggested that always available services within community organisations or libraries would be needed to help them solve a specific-problem or provide tuition on how to navigate ICT novelties.

> "It would be good if some places with free computers and Internet access were provided because, you know, not everyone can

> afford it. We are pensioners after all." (Participant 2, female pensioner with DL)
>
> "Every Wednesday we have a digital corner for older people, where our two volunteers are available to those who have some problems or desire to learn something on mobile phones and laptops." (Participant 5, male expert)

These findings suggest that participants see their abilities are externally controlled by the availability of local resources. As such, digital equity for older people can be guaranteed by securing public places within the community where older people can use ICT (computers, smartphones, printers and Internet) for free. Similarly, Tsai et al. (2016) advocate that the government should secure ICT devices in independent living communities, hospitals, and local community centres.

In this research, participants that were not involved with local community organisations did not know about services or training available for them. This information suggests that digital divide can also be decreased by consistently informing older people about locally available resources. Most participants saw ICT training as an important facilitator to increase digital literacy among older people. As previously mentioned, while experts say that ICT training is available within the community, only a couple of participants attended them. Majority of participants agree ICT training needs to reach more older people and that they need to be easily available, tailored to older people's capabilities and needs, and paired with other activities that older people eagerly or regularly attend (e.g., dance or hang-out after the ICT training session, ensure their friends are also coming to the ICT training). Previous research also problematized that during ICT training professionals do not pay attention to older adults' individual needs and interests, especially among rural population (Cheng et al., 2021). All pensioner participants that participated in this study reported how it is important that educators are attentive and sensitive to their interest as well as cognitive and physical challenges. More interactive and practical format of ICT training can help older people to gain self-efficacy and confidence while utilising ICT. Here, they see that younger people have more patience for their limitations. Blažič and Blažič (2020) also report that facilitators must be educated and prepared to work with the older people as they need more support during ICT training. Several participants also reported it is important to have an educator they trust and that is attentive to group dynamics.

Regarding targeting and recruiting participants for ICT training, it is important to nudge the ICT training towards those older than 75 years, older people with disability or chronic health problems, those living alone, single or widowed, older people with poor

educational background and those living alone in households or in distal places (Vroman et al., 2015). This study supports this as several participants reflected that the digital divide is greater for older people that live in distal, rural places because it is more difficult for them to attend ICT training and access Internet. Recurring suggestions were to secure older people free or affordable transportation to ICT training and build infrastructure to make ICT an available opportunity in rural communities and secure equal ICT access for all.

COM-B model reflect that capability, opportunity and motivation are interchangeably paving our behaviour. This means that provision of such devices and support checkpoints alone would be insufficient for a long term behaviour change. Such interdependency is also seen in our results. Participants report that younger family members are those that provide them incentives to use ICT and support while experiencing challenges. Only two participants reported that they would like to get even more support from family members to learn how to use ICT. These results reflect the location of this study since in Croatia family values and connections are still strongly nurtured. It is expected to see that family and grandchildren have an important role in building the capacity of older people to utilise ICT (e.g., to navigate smartphone applications and social networks to connect with friends and family). The results of this study are in line with those of Rosales and Blanche (2022) and Tsai et al. (2016) who show that perceived family support contributes to better learning and gives older people the confidence to experiment and learn new ICT functions. To broaden the response to digital divide, new ICT educational models are being implemented that rely on family members. For example, Cheng et al. (2021) showed promising gains for those older people involved in a family intergenerational learning project in which grandchildren within their rural households teach grandparents how to use ICT.

Several older participants also shared that ICT is not a common topic among their peer conversations. Three participants shared that it would be important for older people to see that their peers use social networks and to support each other virtually.

> "I would have more interest in it [ICT] if we all started doing it together. Maybe we would motivate each other or if it became a daily routine. Right now, everyone here (in their NGO) just wants to socialise, and we use digital technology minimally." (Participant 11, male pensioner without DL)

The absence of a strong ICT culture among peers does not encourage older people to use ICT more frequently (Vorman et al., 2015). Targeted introduction of ICT benefits on events that are organised for older people would make this topic more visible.

Also, it would be important that this topic is advocated among those that older people see as trustworthy (e.g., doctors, local governmental stakeholders, within local public media channels, church). Inception of these important topics could make older people more motivated and supported to gain and sustain digital literacy.

Several participants reflected that necessity (e.g., COVID-19 pandemic) as well as a system that fosters and offers online services is a strong incentive for older people to learn ICT. As more public services are available online, educating on available resources and nudging those older people that have access to smart devices is an important opportunity to grasp upon.

> "The force taught me to use them [ICT]; at one stage I had to use Internet banking, which I always tried to avoid, but I learned when I have to." (Participant 1, female pensioner with DL)

Half of pensioner participants also reflected that public service experts do not support their ICT use because they are not fully prepared to non-direct, digital communication with them. This implies that there is still need for structural changes so public service employees could support global efforts to bridge age-related digital divides.

> "It should be ensured that the doctors and others that we are trying to contact have time to answer at all, but we wait for their answer for days. Then you lose trust and willingness for such communication" (Participant 8, female pensioner with DL)

Experts also shared that intersectoral cooperation at the national and local level is an important facilitator that can enhance digital literacy of older people. Intersectoral cooperation is also advocated through global and European strategic plans that address older people's challenges. It is also mentioned within the national strategic documents and legal regulations but as our results from local communities hinders, this is not implemented. National challenges with implementation were confirmed in the Croatian National plan to combat poverty and social exclusion (2021 - 2027). This document detected several implementational difficulties such as lack of tools for monitoring the implementation of adopted measures, lack of cooperation among stakeholders while planning and implementing interventions, and unwillingness of stakeholders for coordinated and systematic interventions. These identified challenges provide understanding of contextual challenges that should be addressed in order to bridge age-related digital gaps.

3.3. Motivation

All older participants mentioned that ICT is not in line with older people's values, identity, and goals. Participants that do not have digital skills mostly reflected how they value more in-person communication and using services without a digital mediator. Non-digital communication and service delivery makes them feel more comfortable and they prefer not to change their well-known way of functioning. Vroman et al. (2015) confirms this as being a more frequent user is associated with seeing ICT activities as important and of value. All older participants in this study without digital skills said they are satisfied with communication in-person and that they do not have intention to learn how to navigate ICT.

> "I tell you, it's not for us old people... I like to be left alone to knit and do the things that we old people love... if I could do this much until now without knowing those devices, I can do without them a little more. It's nice for you young people, you're born with technology in your hands, but for us it's unnecessary, and nothing can replace communication in-person. Neither do I trust them [ICTs] nor can I learn to navigate them." (Participant 3, female without DL)

National study confirms this as only 17% of members of a local community organisation from a larger Croatian city are interested in ICT (Jakopec et al., 2022). This finding implies that, in order to foster and sustain interest of older people for ICT, it is important to connect ICT with older peoples interests. Zhang et al. (2022) suggest that enhancing their optimism and showing need to utilise ICT is a potentially a solution to decrease age-related digital divide.

An expert pertailed the contextual explanations for poor ICT training attendance. He explained how the struggle to reach older people is not specific for ICT training but due to general lack of interest among some older peoples for any community activities.

> "Generally, the same group of pensioners is ready to participate in activities that we prepare for them. The most difficult thing is to "pull" pensioners out of the house, out of their comfort zone, out of their habit of "cooking lunch at 11". (Participant 9, male expert)

General lack of interest for community activities implies that more systematic regulation activities are needed to include older people in ICT training.

Although not all participants have digital skills, they all gave reasons why learning to navigate ICT is important and they all expressed negative affect while sharing their digital experiences and thoughts during interviews (e.g., What a pain, no thank you; It's hard and confusing; I don't have the will or the nerves; I am burdened by these constant changes; I cringe immediately when I think about how unsafe it is). Unpacking the deeper meaning behind these negative affects, we found that older people do not trust ICT and worry about possible consequences (e.g., theft and data misuse). Such results show that older people generally lack self-efficacy and believe they are at an age where it's hard (or impossible) for them to learn about navigating ICT. While in this research both older people with and without digital skills reported unpleasant feelings regarding ICT, Vroman et al. (2015) found differently - unpleasant emotions were present only among those older people that do not use ICT. This difference can be explained by different research perspectives since in interview questions we specifically dug deeper into challenges that older people were having while using ICT. Participants in this study that utilise ICT expressed difficulties in tracking and navigating changes in ICT. These findings are important since feelings of frustrations can lead to future disconnection from ICT (Tyler et al., 2015). This means that support and education with navigating ongoing ICT changes need to be continuously available also for those that already use ICT. To address this challenge, it is also important that experts during ICT training for older people acknowledge and address their needs, emotions, and interests. Evaluation of a local ICT training that was created specifically for older people showed that education makes older people feel more confident, independent, and satisfied due to feelings of closeness with family members and communities (Lukačević et al., 2018).

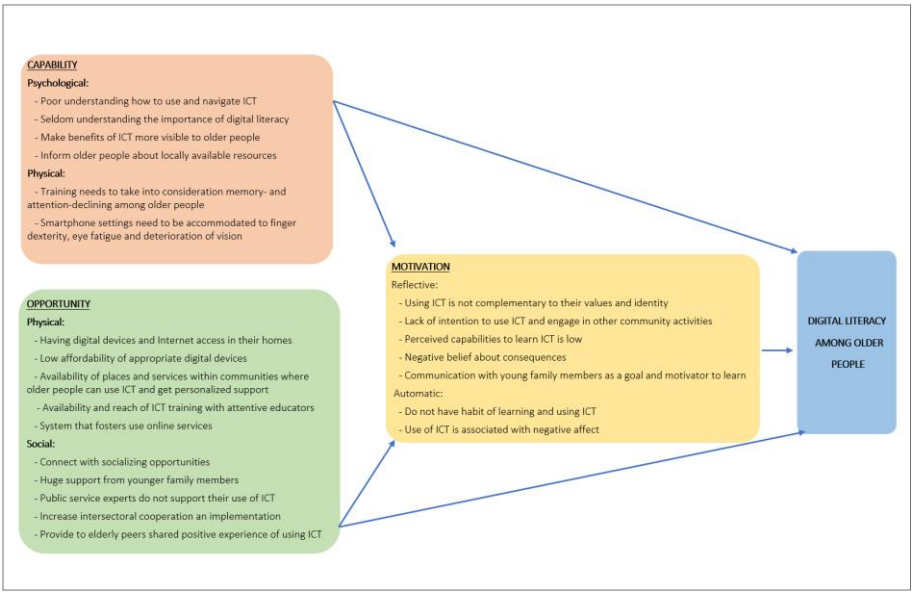
Motivation can come from different sources but in this study we found that the main motivator for older people to grasp ICT is the ability of digital technology that helps them communicate and spend time with children and grandchildren. Participants were more motivated to learn when they saw ICT as a mechanism to connect more with children, spouses, grandchildren, and friends (Ciler, 2020). Grandchildren were often those that empowered older people to use emails and video calls.

> "Well, only the grandchildren, because I would like to hear more from them, see them through the camera and see the pictures they send me from the trip. They are everything in this world to me and I love to watch how smart they are and how they go their own way and that really motivates me, and I love that they always call me...I'll have to wince a little for them." (Participant 11, male pensioner without DL)

Findings from Vroman et al. (2015) support this as they show that top preferred ICT activity is email communication with family. As older adult's decision to use ICT is an intentional one, addressing the affective and psycho-social elements of their decision-making helps to leverage dilemmas and beliefs regarding ICT (Vroman et al., 2015). Since motivation and interest are key facilitators for digital literacy in previous research, it is important to make the benefits of ICT and continuous learning more vivid to older people (Jakopec et al., 2022; Tyler et al., 2020). Social interaction is an important motivator through which ICT activities can be promoted as useful and satisfying and intentionally make them see ICT engagement as a joyful experience. Highlighting social interactions with families and peers can help older people without ICT literacy to build and sustain new habits of learning.

COM-B model provided a sound theoretical framework that enabled us to explore and better understand the components that facilitate use of ICT among older people. Summary of factors that contribute to digital literacy among older people were visually mapped to the COM-B model (Figure 1) in order to make the results more easily accessible.

Figure 1. Summary of the participants answer what needs to change for older people to increase their digital literacy



Findings of this study show what components are important for professionals to plan and implement appropriate and feasible behaviour change intervention to increase

use of ICT among older people. Results of this study showed that psychological capability, physical opportunities, and reflective motivation are the most important facilitators through which digital literacy among older people can be increased. Participants see that rapidly evolving ICT and older people's lower cognitive abilities make their knowledge and skills lag behind. Results suggest that local stakeholders can effectively increase digital literacy among older people by providing them easier access to education and digital devices as well as securing places within a community where older people can get support when experiencing challenges. It is important to provide support services that would address older people's concerns about the consequences of using ICT, show how ICT can be used to reflect their values, and make the benefits of using ICT more visible. Vorman et al. (2015) advocate that a person-focused approach is critical when considering more frequent use of ICT among older people. Tailoring would be feasible through identifying and using existing strengths and skills that older people have and focusing on their positive experiences and achievements. Vorman et al. (2015) delineates guidelines to achieve this: addressing concerns and lack of confidence with ICT, presenting ICT as personally relevant, user friendly, building knowledge and skills that equip older people to successfully navigate ICT and its on-going developments.

3.4. Limitations

This research has several limitations. One aspect is related to the interview as a data collection method. The subjective role of the interviewer has a great role in collecting and analysing data. To address credibility of the results, we used transcription logs, provided detailed descriptions, and included two researchers in coding and generating results that utilised an iterative-collaborative review process. Also, atmosphere and interaction between the interviewees and the interviewers can also affect what data is collected. For this reason, data were collected by students that had previous experience conducting interviews and that were working directly with older people during their studying. Also, each participant was encouraged to to express their own opinions and experiences.

Generalisability of the results is limited while participants were only living in the urban area. However, the intent of the research was not generalizability of findings but to explore components that contribute to using ICT. Future research on understanding factors that contribute to ICT among older people would benefit from including more family members as well as older people and community members from the rural areas. Also, it is possible that participants could not recall some of their experiences or provide favourable answers. We sought to address this constraint by taking students with experi-

ence in conducting interviews and creating a pleasant atmosphere during interviews. Despite these limitations, the findings are consistent with previous literature and may be applicable in other urban areas.

4. Conclusion

Based on a qualitative research approach and COM-B model, this research generated important insights into components that enhance use of ICT among older people. Valuable factors that influence behaviour change were found on all COM-B subcomponents. Among a wide range of factors, most of them were related to psychological capability, physical opportunities, and reflective motivation.

The research confirmed that the COM-B model of behaviour helps to expand the forms of professional work to strengthen digital literacy and engagement among older people. The findings of this study help tailor policies, guide local organisations, professionals, and families on how to support older people to gain digital literacy and sustain digital engagement. Taking these factors into consideration, we see the need to expand the current content and delivery of ICT training as well to include peers and family members in motivating for change. The findings of this study can help to tailor targeted and personalised age-specific delivery of services that aim to increase digital literacy among older people.

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Mengxuan Chen*

EXPLORING THE POTENTIAL OF ROBOCARE IN ANTI-AGESIM AND PROTECTING HUMAN RIGHTS FOR ELDERLY PEOPLE IN LONG-TERM CARE SETTINGS

The World Health Organization (hereinafter: WHO) estimates that the number and proportion of people aged 60 years and older in the population will increase to 1.4 billion by 2030 and 2.1 billion by 2050. As the number of older people increases, the need for long-term care is also increasing. According to the WHO report (WHO, 2021), half of the world's population is ageist towards elderly people, including stereotypes, prejudice and discrimination.

Article 12 of the Universal Declaration of Human Rights (UN General Assembly, 1948) states that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." In addition, Article 23 of the revised European Social Charter (ESC, 1996) guarantees elderly persons the right to social protection, enabling them to remain active members of society. Therefore, it is crucial to combat discrimination in long-term care.

The emergence of AI technology in healthcare is revolutionizing long-term care, and this article discusses the potential of robocare in preserving dignity and upholding the human rights of the elderly. Additionally, it examines whether robots can help mitigate discrimination experienced by elderly individuals in long-term care settings.

The aim of this article is to explore the potential of robocare in reducing ageism in long-term care settings. The following research questions will be examined: 1. how elderly people are discriminated against in long-term care settings? 2. What are the pros and cons of robocare in reducing ageism in long-term care settings?

Keywords: *Robocare, Long-term care, Human Rights, Ageism, Anti-discrimination*

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1. Introduction

The World Health Organization (WHO)[1] estimates that the global population aged ≥ 60 years will increase significantly by 2050. This increase is a matter of numbers and population vulnerability (Pirzada, P, et al.2022). Although life expectancy and longevity will increase, ageing can lead to a lack of autonomy, cognitive impairment, isolation due to increased loneliness, and illness of varying severity. Health is an important area in the context of age discrimination, as older people are more likely to suffer from multiple comorbidities and age-related health conditions. (Saif-Ur-Rahman, K M et al.2021). Notably, the population of individuals aged over 80 is on the rise, coinciding with the increasing average life expectancy. Consequently, there is a corresponding growth in the number of elderly individuals requiring assistance and care (Ana Batrićević,2022 according to Rocha, Pacheco, 2013: 51). The Council and the Commission proclaimed the European Pillar of Social Rights, principle 18 states, 'Everyone has the right to affordable long-term care services of good quality, in particular home-care and community-based services.' (European Commission, 2017) The need for long-term care increases with age, especially among the elderly.

AI has shown significant promise in two key areas: remote monitoring to enhance community care and long-term care, as well as drug development related to ageing. However, this narrowed emphasis might inadvertently reinforce age-based stereotypes about older individuals and the specific AI technologies that can be beneficial for them. (Mannheim I, et al. 2019). However, elderly people in long-term care settings perform many of their daily activities in isolation, and the use of assistive or service robots reduces the use of human labour and to some extent the incidence of discrimination.

The aim of this article is to explore the pros and cons of robocare in reducing ageism in long-term care settings. This article has two main questions: 1. how elderly people are discriminated against in long-term care settings? 2. What are the pros and cons of robocare in reducing ageism in long-term care settings?

Following the introduction, the article analyses the concept of ageism in the first part, the second part examines the importance of developing robocare in long-term care settings, the third part examines the pros and cons of robocare in reducing ageism in long-term care settings, as well as the conclusions of the article in the fourth part.

[1] World Health Organization. Health Topics, Ageing. Available online: https://www.who.int/health-topics/ageing#tab=tab_1 accessed 8 July 2023

2. Ageism in Long-term Care Settings

2.1 The concept of Long-term care

The World Health Organization (WHO) defined LTC as "the activities undertaken by others to ensure that people with significant loss of intrinsic capacity can maintain a level of functional ability consistent with their basic rights, fundamental freedoms and human dignity" (WHO,2015). At the EU level, the following definition was provided by the Social Protection Committee (SPC): "Long-Term Care encompasses a range of services and support for people who are dependent over a long period of time on help with their daily living. This need is usually the result of disability caused by frailty and various health problems and therefore may affect people of all ages. But the great majority of the recipients of long-term care are older people." (SPC/ECS, 2014: 9).

Although there is no standard international definition of long-term care, the definitions above indicate that long-term care is a service and assistance for people who need it to ensure their independence and that anyone can need long-term care, not just older people.

2.2. The Concept of Ageism

Ageism, introduced by Butler in the 1960s, refers to discrimination against people purely because they are "old" (Butler, Robert N.1963:243). Butler's definition and subsequent research and advocacy primarily focused on the challenges faced by older people. Data from the World Values Survey (Inglehart R, et al. 2014), covering 57 countries, show that 60% of respondents say older people do not receive the respect they deserve. Across regions, the increasing proportion of older people significantly predicts negative attitudes towards older people. Current global trends in population ageing, coupled with the lack of targeted policies to effectively address the issue, are likely to drive a general increase in ageism in the coming decades. (Marques, S, et al. 2020). Ageism encompasses a diverse array of societal elements, as the World Health Organization (WHO) describes it as the propagation of stereotypes, prejudiced attitudes, and discriminatory actions targeting individuals or oneself solely due to their age. (Officer A, de la Fuente-Núñez V,2018:295).

However, some have expanded the concept to encompass both older adults and young individuals (Gutterman, Alan,2022). This viewpoint suggests that discrimination based on age can affect younger individuals in the same manner as older individuals, and it encourages collaboration between groups at different ends of the age spectrum to address common concerns. Ageism permeates individuals of all age groups, including chil-

dren. Although no one is inherently ageist, this prejudice emerges early on in life., Research indicates children develop negative stereotypes about old age during early childhood, around the same period when attitudes about race and gender start to form. (Jill Vitale-Aussem, 2019), From these formative years, we begin to categorize and stereotype individuals who are not our peers, encompassing “old people” as well as individuals of our parents' age. Furthermore, people even learn to stereotype younger, often labelling crying or scared children as “babies.” These stereotypes are reinforced through various mediums such as television shows, birthday cards, and jokes. Gradually, these everyday stereotypes take hold within society and subtly influence people's unconscious perceptions of individuals from different age groups (Paige Hector, LMSW, 2022). Ageism presents itself in distinct ways within the context of long-term care. A notable contrast arises when comparing the care provided to younger and older individuals with similar types and levels of disabilities. What would be deemed completely unacceptable for younger people is often considered commonplace for older individuals. Younger people would never willingly accept living in nursing homes and often reject homecare due to its perceived confinement, advocating instead for personal attendant services that allow them to maintain their independence. (Kane, Robert L., and Rosalie A. Kane, 2005)

And according to Palmore (1999), ageism can be categorized into two types: negative ageism and positive ageism, which are associated with negative and positive ageist behaviours respectively. Generally, ageism refers to the negative attitudes and behaviours exhibited towards older adults. However, there are instances of “ageism for the aged,” such as offering public service and medical care discounts exclusively for older adults, which can also be considered as ageist. Ageism is similar to other forms of prejudice, stemming from both positive and negative stereotypes. The danger of age-related stereotypes, even if they appear to be “positive”, is that they can create a false perception of older people and limit people’s understanding of them by limiting their true perceptions when interacting with them in everyday life. Positive stereotypes commonly associated with elderly people include attributes such as “smart”, “kind”, “reliable” and “happy or calm”. On the other hand, negative stereotypes often include descriptors such as “sick/disabled”, suffering from a neurocognitive disorder such as dementia, living in a long-term care facility, resistant to change or stubborn, perceived as useless, unproductive or a burden. social, experiencing isolation and depression, facing financial difficulties, being sexually indifferent or frigid, being short-tempered or short-tempered, and struggling to use technology or learn new things. (Gutterman, Alan, 2022 according to J. Chonody and B. Teater.). Professionals who are meant to support and assist older individuals, like health professionals, can also hold ageist prejudices (Todd D. Nelson,2005). Chonody and Teater (2016) put forth the argument that one positive stereotype of older individuals is

their tendency to be empathetic, although this stereotype can also be accompanied by paternalistic attitudes. Acknowledging the different dimensions of ageism, the discussion and solutions in this article address "negative, old age-centred ageism", particularly in long-term care settings.

The Global Strategy and Action Plan on Ageing and Health (2016-2030) (WHO, 2017) and the corresponding World Health Assembly resolution WHA69.3 (WHO, 2016) have recognized the significance of addressing ageism as a fundamental requirement for formulating effective public policies on healthy ageing and enhancing the daily experiences of older individuals. Consequently, the WHO was entrusted with the task of collaborating with various partners to develop a global campaign aimed at combating ageism. During the formulation of the vision and principles of the Global campaign to combat ageism, it became apparent that in order to prevent harm, mitigate injustice, and foster intergenerational solidarity, it is essential to combat ageism directed at individuals of all age groups. According to the above analysis of ageism, this article is based on the World Health Organization's definition of ageism and focuses on negative ageism in long-term care settings from the effects of elderly people and caregivers

2.3. Ageism in long-term care: Effects on elderly people

In 1995, the UN Committee on Economic, Social and Cultural Rights emphasized the importance of challenging and overcoming "negative stereotyped images of older persons." They called upon States, non-governmental organizations, media, educational institutions, and older individuals themselves to actively combat perceptions that depict older individuals as solely suffering from physical and psychological disabilities, incapable of functioning independently, and lacking social roles and status. The goal was to promote the complete integration of older persons into society (CESCR,1995).

While the demand for long-term care, is increasing due to population ageing, the existing studies highlight clear instances of ageism in long-term care. For instance, a study conducted in Canada revealed that many older residents in long-term care facilities felt that communication with caregivers was ageist. Caregivers used controlling language and employed patronizing communication patterns, treating them in an infantilizing manner (Lagacé M, et al. 2012). Similarly, in long-term care institutions in Israel, ageism was observed through inaccurate medical diagnoses, objectification of older residents, neglect of their needs, and cost-cutting measures at their expense (Band-Winterstein T, 2015). A comprehensive systematic review conducted in 2020 found that in 85% (127 out of 149) of the studies analyzed, age was a determining factor in the allocation of specific medical procedures or treatments (Chang ES, et al. 2020). Another evident expression of ageism has been the unbalanced and higher number of fatalities occurring in long-term care

homes (LTC), where residents have been left neglected or exposed to COVID-19. This situation can be attributed to various factors, including insufficient staffing levels (Curryer & Cook, 2021).

Healthcare practitioners sometimes engage in ageist practices when it comes to the treatment of older individuals, often intervening quickly to protect them at the expense of their freedom and rights. For example, the common approach of directing older individuals leaving hospitals to nursing homes as a supposed safe haven, while persuading them and their families that it is the only sensible solution, demonstrates ageism unless similar suggestions would be made for a younger person in a similar situation. Moreover, efforts to transition people out of nursing homes tend to focus more on those under the age of 65, neglecting older individuals who acquire disabilities such as blindness, deafness, or spinal cord injuries. Unlike their younger counterparts, these older individuals are less likely to receive targeted rehabilitation, training, and equipment to manage their daily lives. These discriminatory practices highlight the inherent ageism within healthcare systems, emphasizing the need for equal and unbiased care for individuals of all ages, regardless of their disabilities or medical conditions (Kane, Robert L., and Rosalie A. Kane,2005)

Apart from that, sexuality is often disregarded as a suitable topic for discussion with older individuals. Physicians also exhibit age bias in diagnosing and treating sexual performance issues, attributing dysfunction in older adults to physical factors rather than psychological factors. Older individuals are more likely to receive medical interventions such as testosterone replacement therapy and PDE5 inhibitors, while younger adults are referred to sexologists and receive a more comprehensive approach aligned with the biopsychosocial model. These findings highlight the differential treatment and interventions for sexual issues based on age. (Gewirtz-Meydan, Ateret, and Liat Ayalon,2017). Staff attitudes towards sexuality in later life within long-term care facilities significantly influence the level of sexual expression among residents (Gewirtz-Meydan, 2018 according to Elias and Ryan, 2011 and McAuliffe et al., 2007). While most studies indicate positive attitudes among LTC staff (Mahieu et al., 2011), there are still notable shortcomings. Staff knowledge about sexuality in later life is limited (Gewirtz-Meydan, 2018 according to Mahieu et al., 2011, 2016), personal comfort discussing sexual topics is low, and essential conditions for sexual expressions, such as privacy, are often not adequately facilitated (Gilmer et al., 2010).

Ageism has been observed in long-term care facilities, with instances of ageist communication patterns, inaccurate diagnoses, neglect of needs, and allocation of medical procedures based on age. Additionally, sexuality in later life is often disregarded, and

healthcare practitioners exhibit age bias in diagnosing and treating sexual performance issues.

2.4. Ageism in Long-term Care: Effects on Caregivers

Several studies have examined ageism in long-term care, involving healthcare professionals, care workers, and administrators of long-term institutions. For instance, (Band-Winterstein,2015) found neglect as a form of ageism in everyday care routines, including themes of transparency, invisibility, being forgotten, dehumanization, objectification, lack of accurate medical diagnosis, ageist language, and cost-cutting measures. (Billings,2006) reported evidence of ageism in healthcare and social care professionals, such as insensitive treatment, exclusion from conversations, patronizing behaviour, lack of privacy, limited choices, over-medication, and assumptions about older individuals' sexual activity. These studies shed light on the various manifestations of ageism in the attitudes and practices of those involved in long-term care.

Negative stereotypes and ageist behaviours can lead to a reluctance among care workers to work with older adults. (Chi et al., 2016; Liu, C., Liu, F., & Chuang, S.,2020). Ageism prevalent in society can lead to a lack of popularity among healthcare workers when it comes to providing care for older individuals (Ben-Harush et al., 2017). According to (Mejia et al., 2018), ageism and anxiety related to ageing are the primary barriers that impede employment opportunities for older people. The study also found that a decrease in negative ageist behaviours and an increase in positive ageist behaviours towards older individuals were significantly associated with a greater willingness to work with them (Mejia et al., 2018). Additionally, (Shinan-Altman, Soskolne, and Ayalon, 2019) highlighted that ageism and a lack of interest in caring for older people have contributed to a shortage of manpower in the long-term care sector. (Gendron et al., 2016) discovered that workers' attitudes towards ageing and older individuals partially explain the relationship between job satisfaction and career commitment.

Unpaid family members, friends or neighbours who provide assistance to older people form an important part of the long-health care system for older people and help with many of the everyday tasks that are essential to their health. (Condelius and Andersson, 2015) observed ageism among the next of kin, as they tend to view certain conditions and complaints as inevitable aspects of ageing, considering further examinations or treatments as “pointless” or even “wasted”. (Sutter et al., 2017) found that people who held negative attitudes towards older adults were less willing to provide emotional, instrumental, or nursing care to a family member with a chronic health condition.

Ageism in long-term care has been extensively studied, revealing neglect, ageist language, and cost-cutting measures. These behaviours contribute to a reluctance among

care workers to work with older adults, leading to a shortage of manpower in the sector. Additionally, ageism among family members is observed, as they often view certain conditions and complaints in older adults as inevitable and may be hesitant to pursue further examinations or treatments.

2.5. Ageism and Anti-Ageism in the International Human Right Law

Irrespective of the particular scientific field or discipline, scientific knowledge has the potential to advance and support the development and implementation of human rights in diverse ways.(Kubiček, Andrej,2022) Within the international human rights system, there is currently no comprehensive legal instrument specifically targeting ageism and prejudices against older people. When considering ageism from a positive standpoint within the framework of international human rights law, an important reference point is the Universal Declaration of Human Rights (UDHR) adopted by the United Nations (UN) General Assembly in 1948, holds significance as it is considered customary international law and serves as the foundation for all currently binding international human rights treaties. Its preamble emphasizes the importance of recognizing the inherent dignity and equal rights of all individuals, stating that such recognition forms the basis for freedom, justice, and global peace. Article 1 of the UDHR further emphasizes the entitlement of every person to enjoy all the rights and freedoms outlined in the Declaration, without any form of discrimination based on factors such as race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth, or any other status. Article 12 states that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." (UN General Assembly, 1948). However, the term "age" does not explicitly appear in this particular article. Since the 1990s, there has been a growing recognition among human rights law actors of the potential for human rights to combat ageism. In 1996, the Committee overseeing the Covenant on Economic, Social, and Cultural Rights (CESCR) clarified that age should be interpreted as a prohibited ground for discrimination in core human rights treaties (CESCR,1996). In 2009, the same committee acknowledged age as a prohibited ground of discrimination in various contexts, such as employment, access to training, and discriminatory practices related to access to old-age pensions (CESCR, 2009). Further efforts to address ageism were seen in 2011 when the UN highlighted the stigma and discrimination faced by older people in accessing healthcare (UN Human Rights Council, 2011). In 2014, the UN appointed an Independent Expert on the Enjoyment of All Human Rights by Older Persons, who emphasized the persistence of ageist attitudes worldwide, resulting in discriminatory practices and undermining the autonomy and self-esteem of older individuals (Kornfeld-Matte, 2015).

Unfortunately, there is currently no universal, sectoral convention on the protection of the human rights of older persons that would serve to educate the international community and raise awareness among policymakers about the rights of older persons and the harmful effects of age discrimination. To combat ageism globally, it is crucial to incorporate ageism as a keyword in international law and establish a comprehensive treaty on the rights of older people. Additionally, addressing ageism in conjunction with other intersecting inequalities is important. Non-legal initiatives like the UN Decade of Healthy Ageing and the Sustainable Development Goals are valuable in the fight against ageism and in promoting inclusivity for people of all ages.

3. Robocare in anti-Agesim in Long-term care settings

The term "gerontechnology" refers to technological software and devices that cater to the specific needs of older individuals. While numerous digital applications fall under the category of gerontechnology without incorporating AI, AI has shown great potential in remote monitoring to support community care and long-term care (Mannheim I et al., 2019). It is worth noting that this narrow emphasis may unintentionally reinforce age-related stereotypes, influencing the perception of AI technologies that could truly benefit older adults (WHO, 2022 according to Mannheim I et al., 2019).

3.1. The Concept of Robocare in Long-term Care

Artificial intelligence technology has become increasingly prevalent in the daily care of elderly individuals. Robots are now employed to fulfil the needs of older people with disabilities, providing essential items and assisting them with fundamental activities of daily living. These tasks include aiding in eating, facilitating handwashing, helping with dressing, and facilitating bathing, among others (Goher KM, Mansouri N, Fadlallah SO,2017)

(Martinez-Martin, 2018) noted that robotics can serve as a solution for providing healthcare support, aiding in daily tasks, and enhancing autonomy and self-management for the elderly. The demand for effective elderly care solutions, including therapy, rehabilitation, companionship, activity planning, and healthcare robots capable of collaborating or independently assisting with daily tasks, has been steadily increasing. These robots are particularly valuable in offering healthcare support and promoting independent living, especially when age-related challenges arise. According to (Shannon Vallor, 2011), a robot ethicist, caring robots are utilized in homes, hospitals, and various settings to assist, support, or care for vulnerable individuals, such as the sick, disabled, young, old, or others

in need. Care robots can be classified based on their actual or potential functions, including providing assistance with care tasks, monitoring the health or behaviour of the care recipient or caregiver, and offering companionship to those in need of care.

Considering these descriptions, this article defines Robocare in long-term care settings for elderly people as artificial intelligence technology that can help elderly people to live independently in long-term care settings and provide companionship and monitoring functions.

3.2. Pros and Cons of Anti-Agesim in Robocare.

As mentioned earlier, this article defines robocare as helping elderly people to live independently in long-term care settings and providing companionship and monitoring functions. We can classify robocare as assisted living, monitoring and companionship.

Numerous studies have highlighted the potential benefits of Artificial intelligence for the older population, including improved well-being, enhanced quality of life, support for independent ageing in their preferred environment, and better care and healthcare outcomes (Mannheim et al., 2021). However, it is crucial to acknowledge that these technologies can also contribute to social inequalities and the exclusion of older adults (Neves and Vetere, 2019). This exclusion can arise from sociodemographic disparities, such as lower income, limited education, and residing in rural areas, as well as a lack of social support (Reiners et al., 2019). Moreover, the limited involvement of older people in the development of Artificial intelligence can further exacerbate these inequalities (Mannheim et al., 2019).

3.2.1. Pros of Anti-Agesim in Robocare.

AI technologies in remote monitoring systems mimic and replace human monitoring by collecting data from health monitoring technologies and additional sensors in a person's home. This data is used to monitor and measure various activities, detect unusual movements, and identify potential cognitive or physical decline (WHO, 2022 according to Ho, A.,2020). Continuous data collection enables predictive analysis of disease progression, personalized care management, and prevention of health risks through behavioural analysis (WHO, 2022 according to Rubeis G.,2020). By continuously collecting data on individuals at risk, algorithms based on AI can predict and prevent common challenges faced by older people, such as falls or sudden emergencies (Rubeis G.,2020).

Moreover, Automation and digitalization have the potential to enhance labour productivity in the sector, therefore requiring support for training in digital skills. Technology can take over certain tasks of long-term care workers and thus relieve them in their daily work, including helping with case management, lifting patients, managing

electronic documentation, and remote monitoring of people receiving care at home (Zigante, V., 2021)

Assistive robots have the potential to tackle the increasing shortage of healthcare and social care workers. By being appropriately programmed, these robots can support professional caregivers, increasing their efficiency and enabling them to dedicate more attention to the interpersonal aspects of their work (Hajdú, 2020: 582). Additionally, they can alleviate the physical demands of caregiving, such as lifting and carrying, thereby reducing the risk of injuries (Prescott T J, Caleb-Solly P.,2017). Robotic technologies have been employed to aid in clinical procedures and maintain residents' hygiene within care settings. Additionally, smart voice assistants have been implemented to enhance residents' interactions with various services such as accessing weather updates, and news, and connecting with their families (Hsu, 2021).

Companion robots have been designed to address the psychological well-being of elderly individuals living alone. They come in various forms, such as animal companion robots (e.g., Paro, AIBO) and humanoid social robots (e.g., Kabochan) (Abbott, Rebecca, et al., 2019). These robots are primarily used in nursing homes and households with cognitively impaired seniors, providing entertainment and companionship. Studies have shown that developed countries have been utilizing Paro robots in hospitals and care facilities, confirming their ability to improve the quality of life, enhance social interaction, facilitate emotional expression, and reduce the use of psychotropic medications among the elderly. Kabochan, a humanoid robot capable of mimicking human interaction, effectively improves cognitive functions in elderly women living alone and alleviates anxiety in Alzheimer's disease patients. The application of companion robots has expanded beyond Alzheimer's patients to include elderly individuals affected by strokes, and depression, and those in good health, effectively reducing anxiety, and loneliness, and enhancing social engagement (Kang, Hee Sun, et al.,2020; Tanaka, Masaaki, et al.,2012).

Based on the above analysis, we can see that robocare in long-term care settings can improve the quality of life of older people to some extent, reduce social isolation and their sense of loneliness, and accurately detect their physical condition, but in terms of ageism, robocare can eliminate some ageism because the development of AI technology can reduce the workload of caregivers or directly replace them, allowing older people to avoid ageism from caregivers.

3.2.2. Cons of Anti-Agesim in Robocare.

Although there is limited research on the intersection of ageism and AI in the context of long-term care (LTC), studies exploring innovative technologies designed for LTC settings demonstrate a prevalent portrayal of older individuals as passive or lacking digital skills. This depiction reinforces age-based stereotypes, prejudices, and discriminatory attitudes, perpetuating negative perceptions of older adults (Mannheim et al., 2021).

Non-users of technology are often perceived by technologists and society as uninterested or incompetent, disregarding the complex practices and meanings associated with technology use and non-use (Neves et al., 2018). For instance, many older users consider themselves non-users because they feel they cannot fully utilize a device independently (Neves et al., 2012). It appears that the elderly themselves also have a lack of self-confidence or ageism caused by the influence of their surroundings.

On the other hand, stereotypes about older users also prevail, leading to their exclusion or lower priority on digital platforms (Rosales & Fernandez-Ardèvol, 2020). The research of (Neves, B et al., 2023) findings reveals that perceptions of AI and later life are deeply ingrained in promissory discourses, which involve expectations and envisioned roles of technology, as well as in ageing anxieties, encompassing concerns and uncertainties. These discourses and anxieties primarily stem from ageist stereotypes that generalize the ageing process and portray older individuals receiving care as passive, dependent, and lacking competence. Importantly, these biased views are not only held by technology developers but can also be present among gerontology professionals who may harbour pre-existing assumptions, particularly regarding older people's technological capabilities (Mannheim et al., 2021). The design of AI technologies plays a crucial role in determining whether ageism is encoded within them. Design teams often lack representation from older people, which can result in the oversight of ageist practices and biases present in AI technology. Biases can stem from the funding and design processes, where older individuals are excluded from market research, design, and user testing due to ageist stereotypes (Anne-Britt Gran, Peter Booth & Taina Bucher,2021). Even with the intention to cater to older people, designers may still rely on misconceptions about their lifestyles, engagement with technology, and preferences for AI technologies in healthcare. Rather than designing with older people, the tendency is often to design on their behalf, leading to inflexible use of AI technology and potentially requiring older individuals to adapt to predetermined approaches and philosophies. Overall, involving older individuals in the design process and addressing misconceptions is vital to ensure that AI technologies are inclusive, adaptable, and respectful of their needs and preferences (WHO, 2022).

Additionally, machine learning in healthcare relies on "big data," including biomedical information, to improve diagnosis and decision-making through AI technologies. However, older people are often excluded from the data sets used to train these models, despite their significant utilization of healthcare services in many countries (WHO, 2021). This exclusion can introduce biases, particularly in AI technologies designed for multiple age groups but not explicitly classified as gerontechnology. And even when sufficient data on older people exist, they may not be appropriately disaggregated for use, partly due to the perception of later life as a homogeneous life stage, disregarding the diverse skills and interests of older individuals (WHO, 2021).

Studies on innovative technologies in long-term care reveal a prevalent portrayal of older individuals as passive or lacking digital skills, reinforcing age-based stereotypes. This bias is perpetuated by the exclusion of older people in the design and testing processes of AI technologies, leading to inflexible designs and predetermined approaches that may not meet their needs. And not only is there a general bias against elderly people's ability to operate robots or use digital technology for developers and gerontology professionals, but even elderly people themselves are not confident in their ability to use them.

4. Conclusion

Ageism in long-term care settings is a multifaceted issue that affects both older people and caregivers. Research has highlighted ageist patterns of communication, neglect of needs, inaccurate diagnoses, and discriminatory allocation of medical procedures as indicative of ageism in the care provided to older people. Age discrimination is not limited to caregivers, as family members and society at large may also hold ageist attitudes and engage in discriminatory practices.

The introduction of artificial intelligence (AI) and robocare in long-term care settings presents both opportunities and challenges for addressing age discrimination. This article was initially intended to explore the possibility of addressing ageism in relation to the development of AI, but after research, it was found that the development of AI and the application of robocare could lead to new forms of ageism. On the one hand, through the design and implementation of AI technology, robocare could reduce ageism due to caregiver bias, inherent impressions, and so on, by reducing caregiver work hours and replacing the caregiver. On the other hand, it may also create new forms of ageism, as many innovations designed for long-term care settings portray older people as passive or lacking digital skills, reinforcing negative perceptions of ageing and contributing to ageism. The exclusion of older persons from the development and testing process of AI technologies further exacerbates these prejudices.

Furthermore, addressing age discrimination in the long-term care sector requires a comprehensive approach within the framework of international human rights law. While there is currently no universal convention specifically addressing age discrimination, efforts have been made to recognize age as a prohibited ground for discrimination and to promote the rights of older persons. Including age discrimination as a keyword in international law and creating a comprehensive treaty on the rights of older persons would help combat age discrimination globally.

In summary, ageism in long-term care settings is a complex issue that requires attention and action. There are challenges and risks associated with the integration of AI and robocare, and even though the development of AI and robocare can mitigate ageism to some extent by reducing the involvement of caregivers, AI and robocare are accompanied by new, digitally dependent ageism, while the lack of international human rights laws that resist ageism reinforces the age discrimination suffered by older people who are receiving robocare in long-term care settings.

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EXPLORING THE POTENTIAL OF ROBOCARE IN ANTI-AGESIM AND PROTECTING HUMAN RIGHTS FOR ELDERLY PEOPLE IN LONG-TERM CARE SETTINGS

The paper contains an analysis of the attitudes and activities of independent institutions on typical modalities of discrimination against the elderly, which represents the second reason for the frequency of complaints filed for discrimination. The thematic part includes presenting the continuous existence of general violations of the rights of the elderly through first - discriminatory factors - inadequate number, type, and coverage of the necessary social protection services, the impossibility of using the existing health and social protection services, the illegal operation of certain homes for the accommodation of the elderly, but also their inadequate number; second - interventions by independent institutions with opinions and recommendations, pointing out the complexity of intersectionality of age with other discriminatory factors, such as poverty, violence, belonging to ethnic minorities, female sex. The data for this work was collected by desk analysis of regular and special reports of the Protector of Citizens, the Provincial Protector of Citizens, the Commissioner for the Protection of Equality, initiated changes in public policies, as well as media and CSO reports related to discrimination of the elderly.

Keywords: *Discrimination of the elderly, intersectionality, Commissioner for the Protection of Equality, national and provincial Protector of Citizens, social and health care services*

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1. The position of the elderly population in the Republic of Serbia

The demographic image of the Republic of Serbia in recent years has been characterized by aging population, with a constant increase in the share of the elderly (65+)[1] and a decrease in the share of young people (up to 15 years of age). (Janković, 2019: 346) The reason for this is twofold: on the one hand, the extension of life expectancy[2] (due to the improved quality of life and the progress of medical science), and on the other hand, the decrease in the birth rate and negative natural increase.[3] The average age in the Republic of Serbia increased in the previous five-year period from 42.9 (2016) to 43.4 (2020). The share of the population older than 65 years, in 2020, was 21.12% against 14.28% of the population aged up to 15 years. Population projections, made by the Statistical Office of the Republic of Serbia (SORS), indicate that the number of inhabitants in the Republic of Serbia will constantly decrease in all age categories.(SORS, 2020) However, the decrease will be greater in the category of young people than in the category of those over 65 years old, and the share of the elderly will continue to increase (up to 22.2% in 2041), while the share of young people will continue to decrease (up to 12.5% in 2041).[4] Aging is a very current topic in the European Union (EU) in recent years as the number of elderly people is increasing. In the EU, in 2020, there were 91.9 million people over the age of 65, which represents a fifth (20.6%) of the total population. Projections show that in the next 30 years, the number of elderly people in the EU will be constantly increasing, as well as in Serbia, and that by 2050 it will reach 29.5%, and by 2060, 30.3% of the population will be over 65. (Eurostat database, 2020) [5] These demographic changes,

[1] The concept of the elderly is a sociological concept and differs in different cultures and environments. In order to monitor the phenomenon of aging and the situation of the elderly, various international organizations have adopted different age limits for the elderly. Thus, the United Nations (UN) uses an age limit of 60 years, and people over 60 are considered elderly. At the same time, the World Health Organization (WHO) considers people over 65 to be elderly. The International Labor Organization (ILO) considers people aged 15-64 to be the working population, and people over 65 are outside the labor force contingent. With all of the above in mind, within the scope of this analysis, the elderly are considered to be persons over 65 years of age (65+).

[2] Between 2010 and 2019, life expectancy saw a cumulative increase of 1.7 years, from 74.01 to 75.71 years. As a result of the Coronavirus pandemic, the value of this indicator decreased to 74.24.

[3] For more than a quarter of a century, Serbia has recorded negative rates of natural increase. In the period from 2010, the rates of natural increase recorded a continuous decline of this indicator. In the observed period, the rate of natural increase fell from -4.8‰ to -8‰. 2020 due to the Coronavirus pandemic additionally contributed to this negative trend.

[4] Shares calculated according to the projections of the Republic Institute of Statistics. Available at: https://data.stat.gov.rs/Home/Result/180203?languageCode=sr-Cyrl

[5] Eurostat database, available at: ttps://ec.europa.eu/eurostat/web/main/data/database?p_p_id=NavTreeportletprod_

WAR_NavTreeportletprod_INSTANCE_nPqeVbPXRmWQ&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view

associated with aging, require changes in public policies, especially in relation to social and health care systems, and pension systems, but also to adapt the economy to a larger number of elderly people, which also implies employment, adequate housing, development, and lifelong learning, as well as customized services. (Todorović et al., 2019) Also, the above-mentioned trends require work on raising awareness and changing attitudes towards the elderly. Elderly people are often exposed to prejudice, stigmatization, and discrimination because of their age, which is reflected in various ways, and results in the perception of the elderly as inactive and unproductive members of society. (Petrušić et al., 2020)

2. Abuse and violence against the elderly

Five types of elder abuse are most often mentioned:

- Physical abuse - causing physical pain or injury to an elderly person;
- Mental abuse - actions (verbal/non-verbal) that can cause mental pain and emotional suffering in an elderly person;
- Financial abuse - illegal or inadequate use of financial resources of an elderly person;
- Sexual abuse - any type of sexual contact without the consent of an older person;
- Neglect - intentionally or unintentionally not providing the basic conditions for the life of the elderly persons. (Janković et al., 2015)

In 2020, 36,656 reports of domestic violence were recorded in Social Work Centers (SWC). (Republican Institute for Social Protection, 2021) Elderly victims reported violence in 12.15% of cases. Women in all age categories are more often victims of violence, which also applies to the group of elders (63% are women). (Mršević, 2020) Mental and physical violence are the dominant types of violence against the elderly. In the process of protecting victims of domestic violence, SWC mainly relies on its own resources, through the provision of material, legal, or professional advisory support and assistance. Groups for coordination and cooperation at the local level[6], in 2020, adopted a total of

[6] In accordance with Article 25 of the Law on Prevention of Domestic Violence (Official Gazette of the RS, No. 94/2016), a group for coordination and cooperation is formed in the area of each basic public prosecutor's office. She reviews every case of domestic violence that has not been concluded by a final court decision in a civil or criminal proceeding, cases where protection and support should be provided to victims of domestic violence and victims of crimes from this law, prepare an individual plan of protection and support for the victim and proposes to the competent to the public prosecutor's office, measures to end court proceedings. The group for

11,404 individual plans for the protection and support of victims of violence, of which 16.3% of individual plans refer to elderly beneficiaries. (RISP, 2021) The consequences of abuse and violence against the elderly are manifold and difficult to determine because there are large differences between the number of reported and unreported (documented) cases of abuse and violence against the elderly. Data from various studies show that elderly people who have been abused are 300 percent more likely to die than those their peers who have not experienced this type of experience. The data also show that elderly victims of abuse showed higher levels of psychological distress and lower efficacy than those who had no such experience. Also, the health of elderly people who are victims of violence is threatened, their chronic diseases are aggravated, chronic pain, high pressure, heart problems, and of course the elderly have more fragile bones, and therefore are at a greater risk of osteoporosis, which can cause frequent fractures that can seriously endanger the health of an elderly person and can eventually be fatal. (Janković et al., 2015)

3. Discrimination of the elderly

Abuse of the elderly is often preceded by discrimination against the elderly, the so-called. ageism. Ageism is a type of discrimination that includes prejudice against people based on their age. Prejudice against the elderly includes the maintenance of negative images and stereotypes towards this age group. (Mršević, 2020a) According to the data of the Commissioner for the Protection of Equality, age as a basis for discrimination has been one of the most common grounds for discrimination in terms of frequency of mention in complaints. Discrimination on the basis of age refers to discrimination of persons over 65 years of age, mainly due to the inaccessibility of facilities and spaces, as well as the impossibility of using various services, primarily social and health care. (Commissioner, 2022) Compared to 2019, the number of complaints submitted on this basis has increased significantly, which is expected considering the pandemic of COVID-19 virus and the consequences it had on the population of different age categories. In 2020, the largest number of complaints was filed due to discrimination against persons over 65 years of age, followed by complaints due to discrimination based on the age of persons between 18 and 65 years of age, and finally complaints filed due to discrimination against children. (Commissioner, 2021) In 2020, the largest number of complaints due to discrimination based on age refers to proceedings before public authorities, while a smaller number of complaints were filed in the field of health care and the field of pension and disability insurance. The measure prohibiting the movement of persons over 65 years of

coordination and cooperation consists of representatives of basic public prosecutor's offices, police administrations, and centers for social work, from the areas for which the group is being trained.

age, which was introduced during the state of emergency, affected the number of complaints submitted on this basis in the area related to the actions of public authorities. During 2020, in addition to complaints related to the curfew and other problems during the state of emergency, the Commissioner was often approached by elderly fellow citizens stating that they need help at home, that they have no one to turn to, that their children are not around, they do not have time for them or they are already burdened enough, that they feel neglected, etc. All of the above indicates that the crisis caused by the COVID-19 pandemic has further emphasized the need to increase the number and variety of services in the community to support the elderly. (Janković, 2023: 451)

4. Independent institutions

Understanding the importance of the principle of non-discrimination, in recent years the Republic of Serbia has built a valid anti-discrimination legal framework. It adopted and made part of its legislation the most important universal and regional agreements in the field of human rights and worked on the adoption and implementation of optional protocols to these agreements. As part of that, institutions were formed to take care of all citizens about their human rights and their protection.

4.1. Protector of Citizens

It was established by the Law on the Protector of Citizens, which was adopted in 2005. The law was amended in 2007 in order to harmonize it with the new Constitution. The constitutional category of the Protector of Citizens became in 2006, after the adoption of the current Constitution of the Republic of Serbia. The Protector of Citizens is an independent and independent state body, tasked with protecting and promoting respect for freedoms and rights. The immunity enjoyed by the Protector of Citizens allows him independence and independence in his work. The role is defined by the Constitution of the Republic of Serbia and the Law on the Protector of Citizens, that is, to constantly influence the respect of human freedoms and rights. The Protector of Citizens, upon a citizen's complaint or on his own initiative, checks in a special procedure whether there have been or are any omissions in the work of the administrative body. If he determines them, the Protector of Citizens asks the administrative authorities to omit the documents and recommends a way to do so. The administrative body must inform the Protector of what it has done according to the recommendation and, if not, explain why. In addition to initiating and leading the procedure, the Protector of Citizens can mediate, give advice and opinions and influence the improvement of the work of the administrative body and the protection of human freedoms and rights. Thus, the Protector of Citizens acts preventively

(prevents future cases of rights violations) and educationally (educates citizens, but also employees in administrative bodies about human rights and their protection).

The Protector of Citizens started its activities related to the elderly citizens of Serbia at the beginning of the establishment of that institution when in 2010 extensive control of the work of homes for the elderly and gerontological centers was carried out. It was established that the existence of private homes for the elderly as a response to the lack of accommodation capacity in state homes often carries with it the risk of violating the human rights of the users, even the lack of basic consent to accommodation. The existence of practices that violate the human dignity of users (way of addressing, failure to inform about prescribed treatment and medicines, disrespect for privacy, etc.) in both state and private homes, pressure on users to give up their real estate property in favor of the home staff, etc. was established. Strengthening of controls in all homes for the elderly was recommended, exemplary examples of good practice were pointed out (Subotica and "Bežanijska kosa" home in Belgrade), as well as strengthening of non-institutional support for the elderly for independent living (Protector of Citizens, 2011). This defined the guidelines of the interests and actions of the institution of the Protector of Citizens in terms of the relationship between administrative authorities and senior citizens of Serbia.

"In Serbia, the population is getting older, and the rate of violence against the elderly population is increasing, so every day we must dedicate ourselves to protecting the rights and dignity of our elderly fellow citizens." (Pašalić, 2022) The Protector of Citizens pointed out that elderly people with their rich experience and knowledge are a valuable part of our society who faces numerous challenges, including the risk of physical, emotional, financial, and sexual violence, the most serious forms of human rights violations. "Older people from villages in underdeveloped municipalities are especially at risk, which often have no one to turn to for help." In Serbia, 16 percent of older women aged 65 to 74 experienced some form of violence after turning 65, but victims rarely decide to report it. Human rights are universal and apply to all citizens; however, respect for the rights of the elderly requires greater protection of their rights. Recognizing and eradicating violence against the elderly requires a comprehensive approach by the state and the entire society and includes raising awareness of the phenomenon, education, effective legislative measures, prevention, and support. Only by working together can we create a safe environment where the elderly are protected and respected." (Pašalić, 2022)

In regard to specific cases, the Protector of Citizens also acts ex officio, based on information other than the complaints of those directly injured. A typical case is the initiation of the procedure on its own initiative on January 11, 2023, to assess the legality and regularity of the work of the Ministry of Labour, Employment, Veterans and Social Affairs, the Center for Social Work in Stara Pazova and that gerontological center, and

after learning from the media that the user of the services of the Gerontological Center center of Belgrade Working Unit Home "Bežanijska kosa" in Zemun killed another user housed in that institution. The Protector of Citizens determined that the "Bežanijska kosa" made a mistake in its work because it admitted a user, who, according to media reports, took the life of another user, to that institution without complete documentation, more precisely without a health certificate. This failure of the social protection authorities failed to be determined by the Social Protection Inspection of the Ministry of Labour, Employment, Veterans and Social Affairs during the extraordinary supervision of the work of the "Bežanijska Kosa" Home. The Protector of Citizens also established that data on the health condition of the user who, according to media reports, took the life of another user, was not known to the Stara Pazova SWC during the initial evaluation of the user, nor to the Gerontological Center Belgrade - Home "Bežanijska kosa" when he was admitted. The doctor's findings and opinion for this user, which his relative subsequently submitted to the "Bežanijska kosa" home only after his admission to the home, would show that his health condition is a contraindication for placement in an institution for adults and the elderly, and based on such a health condition he could not have been placed in the nursing home on Bežanijska kosa if that institution had information about his health at the time of admission. As an omission by the competent Social Protection Inspectorate, the Protector of Citizens also determined that during the supervision of the operation of a private home for the elderly in which a user who, according to media reports, took the life of another user, had previously resided, it was not determined whether this home properly maintained documentation about the user during his stay.

Every year, in his regular annual reports, the Protector of Citizens points out the social situation of particularly vulnerable categories of citizens, is paying special attention to the rights of children and young people, women, mothers-to-be, victims of domestic violence, the elderly, and LGBTI persons, members of national minorities, migrants and asylum seekers in the state borders. When it comes to the elderly, as well as during the establishment of the institution of the Protector of Citizens, private homes for the elderly have remained places of violation of the users' human rights. Namely, the practice of the Protector of Citizens shows that there are homes for the elderly that do not meet the prescribed conditions for work, do not have appropriate work permits, i.e. have lost their work licenses, and were banned from working by the social protection inspection, despite measures taken by the Ministry for Labour, Employment, Veterans and Social Affairs continue to work and receive users. Their illegal work violates the guaranteed rights of elderly people housed in such institutions.

In connection with this problem, the Protector of Citizens initiated procedures to control the work of the relevant Ministry and sent him recommendations[7] to eliminate the above-mentioned irregularities, to conduct a timely inspection of the work of unregistered, more precisely, illegal homes for the accommodation of adults and elderly users, and to take all measures in cooperation with other competent authorities for the elimination of observed irregularities; to closely monitor whether unregistered homes without delay initiate the procedure for obtaining a license and registration, whether they promptly implement the declared emergency measures, i.e. whether they eliminate other illegalities in their work; to monitor whether unregistered homes comply with the ban on carrying out activities or carrying out activities until the prescribed conditions are met and, if it determines that the controlled entity has not carried out the stated measures, initiates the initiation of proceedings before the competent judicial authority in a timely manner, in order to protect the users of these institutions; to carry out inspection supervision in a timely manner, with the aim of controlling the work of social welfare institutions for the accommodation of adults and elderly persons and, when irregularities are found, to take appropriate effective measures; then to timely control the implementation of the pronounced measures and to initiate, if it judges that there is a legal basis for it, the taking of appropriate measures by other competent authorities in order to protect the users of these institutions; to employ the appropriate number of social protection inspectors in the Department for Inspection Supervision, if, based on the assessment of real needs in the field, he finds that the improper undertaking of all measures within the scope of the social protection inspector's competence is the result of an insufficient number of employees in relation to the scope of work. The Ministry of Labour, Employment, Veterans and Social Affairs informed the Protector of Citizens that in the future it will act in accordance with the recommendations of this independent body. (Protector of Citizens, 2023: 58).

4.2. Provincial protector of citizens - ombudsman

The Provincial Protector of Citizens - the ombudsman is an independent and independent body of Autonomous Province Vojvodina (APV) that protects the rights of citizens and supervises the work of provincial administrative bodies, public companies, and institutions that exercise administrative and public powers, and whose founder is APV, in connection with their actions in carrying out decisions and other legal acts of APV. The decision to establish the institution of the Provincial Ombudsman was made in December 2002. The first Vojvodina Ombudsman was elected on September 24, 2003,

[7] Available at: https://ombudsman.rs/index.php/2012-02-07-14-03-33/7435-inis-rs-v-z-r-d-z-p-shlj-v-nj-b-r-c-i-s-ci-ln-pi-nj-d-z-sh-i-i-in-r-s-risni-uslug-s-sh.

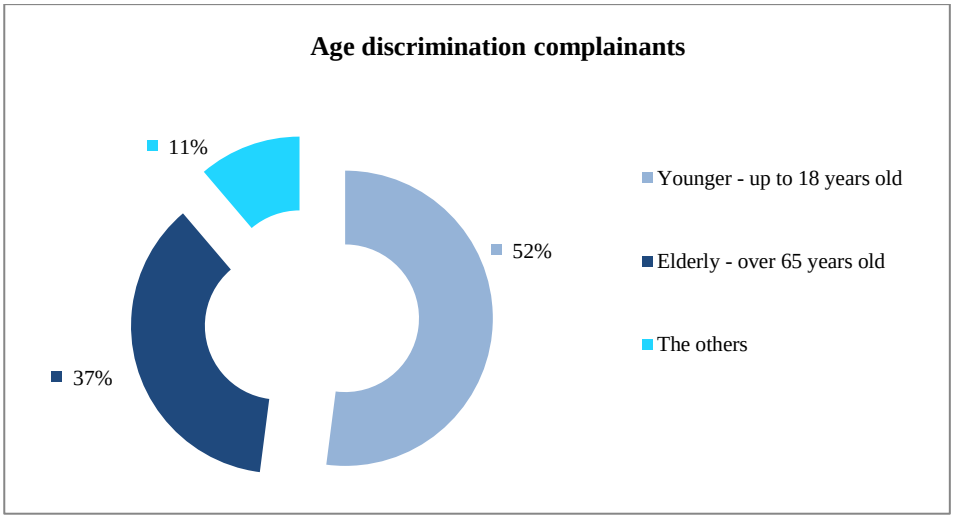
and started working in January 2004. The Institution of the Provincial Protector of Citizens-Ombudsman (PPCO) performs the activity of protecting human rights preventively - by providing legal advice within its competencies and thus teaching citizens how to protect their rights, and reparative - upon learning of a possible threat or violation of certain human rights and freedom, carried out the procedure of supervision and determination of the responsibility of the competent authorities, and by giving recommendations to the provincial authorities and institutions, which are ordered to act differently, better and more efficiently in working with citizens. During its existence, through its supervision or other activities, it carries out a serious activity - raising the awareness of provincial authorities and institutions that wherever people are involved as actors of some events or procedures. (PPCO, 2021) What is, for example, 2022 was characterized by participation in the adoption of provincial regulations, education of state bodies and institutions, visits to rural women's associations, activities with the "Life without Violence" network, visits to institutions for residential care for mentally ill persons, visits to police departments, correctional facilities and gerontological centers and homes for the elderly and the implementation of a pilot study on violence against the elderly in social care institutions founded by APV, as a targeted problem of today. (PPCO, 2022)

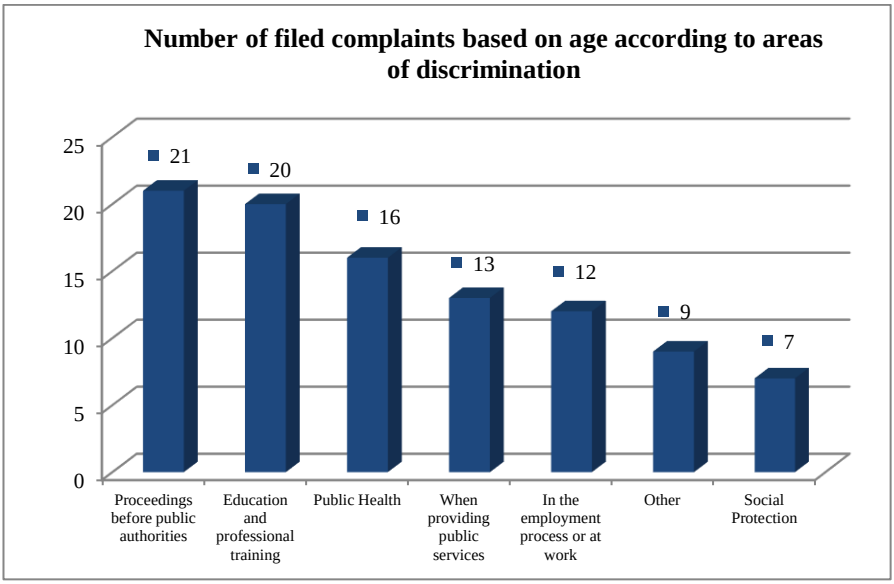
The conclusions from the research confirm that the topic of violence against the elderly is quite unknown and that the users of the services of social welfare institutions are reluctant to talk about it. Elderly people clearly distinguish and recognize psychological and physical violence, but do not recognize economic/financial violence, neglect, and abandonment. The place where the elderly feel the most vulnerable and where, according to the results of the research, they state that it is possible to experience violence is equally the street (public space) and the family. They see the gerontological center or the home where the users are placed as a safe space where it is not possible to experience violence. It is interesting to note that more than half of the surveyed users answered that it is acceptable and almost normal for them to have their income and money managed by a third party and that even 2/3 of users of home accommodation services do not collect their pension. Social workers and close relatives are seen as trustworthy persons for help in a situation of violence. Through this pilot study, it was observed that 2/3 of the surveyed users responded that they had not met a person who experienced violence, and it remains unclear whether the reason for this is that there is generally less violence or that certain behaviors are not recognized as violence, so this encouraged the implementation more extensive and detailed research on violence against the elderly in the coming year.

4.3. Commissioner for the Protection of Equality

The Law on Prohibition of Discrimination established the Commissioner for the Protection of Equality (Commissioner), an independent and specialized state body, formed in 2009. This completed the national anti-discrimination legal framework, which brought Serbia closer to the implementation of international and European anti-discrimination standards. But actually, the fight is just beginning.

The Commissioner's practice shows that age as a basis for discrimination is among the most numerous personal characteristics during the entire period of the institution's work. This ground of discrimination was among the top five grounds in terms of frequency of filed complaints, with the number of complaints increasing year after year or at least remaining stable. Thus, age as a basis for discrimination was the second basis for the number of complaints in 2016, 2017, and 2018. In 2019, this ground of discrimination was the fourth most frequent, but it was cited in approximately 10% of the total number of complaints, of which the largest number related to discrimination against persons over 65 years of age. And in 2020, discrimination based on age is the second most frequent ground with 14.8% of the total number of complaints filed. The trend in the number of complaints based on age continued in 2021 when a total of 98 complaints were received.





In terms of discrimination against people over 65 years of age, the practice of the Commissioner indicates that at this age the needs for different support are distinguished, especially for those senior citizens who live alone, in remote rural areas, with minimal income, are over 80 years old, elderly women or those who suffer some form of violence, abuse or neglect. For years, the commissioner has pointed to the worse position of older women in Serbia and the more difficult, above all, economic situation of women compared to older men, their lesser involvement in decision-making that affects their lives, and the need for support measures, as well as the violence they suffer. Elderly women who live alone, women with disabilities, and those who live in the countryside are in an even more difficult situation. In the field of work and employment, women are often considered as older workers, even though they are far less than 65 years old, are still employed and lack more years to exercise their right to a pension, or are not even employed, i.e. are unemployed, and it is more difficult to find employment precisely because of their age. A special challenge when it comes to senior citizens is the inadequate number, type and coverage of various social protection services. (Commissioner, 2022) These circumstances present challenges primarily for pension and disability insurance systems, as well as social and health care. The need is to adapt society to the aging of the population, longer life expectancy, and the trend of decreasing the total population, as well as the need to provide an adequate response to citizens. In order to find the best ways to

solve these challenges, it is necessary to ensure greater social participation of older citizens and their inclusion in the processes of both decision-making and the implementation of concrete activities. In addition to the emphasis on regular reports, the Commissioner for the Protection of Equality prepared and submitted to the National Assembly in 2021 a Special Report on Discrimination of Senior Citizens. In addition, specific activities were undertaken, for example. in cases of preventing senior citizens from using certain bank services, primarily credit, the Commissioner issued opinions on the violation of 22 provisions of the Law on Prohibition of Discrimination, and the banks to which the recommendations were sent changed their business practices. A recommendation regarding the exercise of the right to a free voucher for a subsidized vacation in Serbia for those over 65 years of age who have not exercised the right to a pension.

5. Conclusion

The trend of life extension and the demographic aging of the population are the reasons that, for example, EU member states focus and dedicate themselves to aging policies, especially in the field of health and social protection, all with the aim of solving the challenges that this demographic trend entails and to avoid increasing the presence of discrimination against the elderly, while providing institutional and any other support. (Commissioner, 2021) The EU does this with joint strategies and initiatives, which in an innovative way encourage active aging, the fight against ageism, and the care of older members of society. Bearing in mind that the Republic of Serbia is also facing similar demographic trends, and that the EU accession process is underway, the Republic of Serbia should, as far as possible, join the mentioned initiatives and monitor their implementation. Improving the social inclusion of the elderly is possible only with complex multisectoral reforms and partnership cooperation of all actors. It is necessary to return to the initiative of the Madrid International Plan of Action on Aging (MIPAA) [8] (UN, 2008) and when planning and passing public policy documents, within the analysis of the effects on society, pay due attention to the impact on the elderly. It is necessary to change the value patterns, and the way of perceiving the elderly, because these patterns are still quite traditionalist, and stereotypical and understand old age as a period of life in which functionality declines, as a result of which a more withdrawn and passive life is expected. (Babović et al., 2018) Specifically, in addition to the adoption of the Social Protection

[8] It is a key document of the global aging policy, which concerns the consequences of population aging, the well-being, and active participation of older persons at all levels. It was adopted in 2002. It covers various topics and contains 239 individual recommendations. Available at: http://www.un.org/esa/socdev/ageing/secondworldo2.html.

Development Strategy, it is necessary to plan the development and adoption of a new Strategy on Aging (the old one expired in 2015), which would comprehensively approach the improvement of various aspects of the lives of the elderly. The new Strategy would establish comprehensive and coordinated measures and activities to improve the social inclusion of older women and men in the Republic of Serbia and, at the same time, improve their economic position and advance their human rights. It is necessary to establish a consistent and effective long-term care system. It is necessary to organize this system into an efficient whole, and the prerequisite for this is to identify an adequate financing model, which is currently based on three separate lines: pension and disability insurance and budgets for social protection and health care. It is necessary to provide systematic insights into the availability, distribution, and content of the palliative care service throughout the Republic of Serbia and to define measures for the further development of the palliative care system based on more precise insights into the state of the service and assessment of unmet needs. Given that services for the elderly are extremely unevenly distributed between Local Self-government Units, it is necessary to encourage the development of services for the elderly in local communities that lack these services through policies and measures from the national level, and especially through dedicated transfers in social protection, either through the development of public services or support to the civil sector. It is necessary to increase the diversity of social services for the elderly so that they cover a wider range of services and enable different levels of elderly inclusion and support, according to needs and preferences. This would encourage more active lifestyles, actually more adequately profiled support. (European Commission, 2021)

And for all of the above to be included in the control function, independent institutions are necessary, which in the previous period diagnosed discrimination against the elderly. Those that already exist should be strengthened, primarily in terms of competence and the possibility of initiating actions ex officio, and those that partially exist (local ombudsmen or bodies at the local level) should be organizationally and functionally introduced into the social being of the Republic of Serbia. This is the only way to continue the fight for human rights, as a path towards a civilized society. (Simović et al., 2020: 381) Human lives are much more endangered today because multiple risks are increasing. That is why the need to adopt and apply the concept of "build better" is highlighted, which implies noticing the deficiencies that led to serious consequences and even human losses. The necessity of work for improvement, with a critical review, should be activities that are undertaken in the present, with the intention of preventing or at least mitigating the causes of the consequences of emergency situations[9] in the future. (Mršević et al., 2021)

[9] Like the emergency caused by COVID-19.

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Una Josipović Kondaš**

ADMINISTRATIVE PROCEDURES IN THE FIELD OF SOCIAL CARE WITH AN EMPHASIS ON THEIMPORTANCE OF HOME ASSISTANCE FOR ELDERLY PERSONS***

Social care and care for the elderly, with the growing awareness of the need for and importance of deinstitutionalization, is receiving the attention it deserves, given that the population of the elderly is a critically vulnerable group in relation to their share in the total population. Special services, which are provided to the elderly as part of social care, have come to life in recent years and have proven to be a successful bridge between the services guaranteed by the state and the realization that has been systematically applied in the last few years. The Constitution of the Republic of Croatia guarantees care for the elderly and the infirm and the right to a healthy life, among other provisions, which are the basis for new legal frameworks, the need for modernization of social legislation and strategic programs on care for the social rights of the elderly. Therefore, the social services that elderly people can receive are primarily based on the Social Welfare Act and enable, among other things, help at home as a special form of social welfare. The paper will also give an overview of "Zaželi - women's employment program" as one of the models for the implementation of the deinstitutionalization policy. By analysing the legislative framework of the Republic of Croatia in the field of social care for the elderly, EU social policy and "Zaželi - women's employment program" as a form of this kind of care, the authors will try to point out the importance and success of the deinstitutionalization policy in the Republic of Croatia.

Keywords: *social care, social services, elderly people, special administrative procedures, Social Care Act, deinstitutionalization*

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1. Introduction

The aging of the population is an issue affecting all the countries around the world, member states of the European Union (hereinafter: the EU) including the Republic of Croatia (hereinafter: RC). The percentage of persons over 65 years of age in 2019 was 20, 3% of the total population of the EU member states while the estimate by 2050 is 29, 4%.[1] Compared with the population of the EU, the RC has a higher percentage of older population. According to the data obtained from the last census in the RC in 2021,[2] persons over 65 years of age constitute a percentage of 22, 45% of the total population. On one hand, the RC has been struggling with the challenges of attending the needs for social services of the older population for a few years now, while on the other, opportunities for improvement of the welfare system keep presenting themselves through the European structural funds. To adequately react to political changes, the RC has released several strategic documents with the aim of deinstitutionalisation and prevention of institutionalisation of services provided to the elderly and infirm. The EU politics promote the rights of beneficiaries to receive care in their own homes and local communities.

The objective of this paper is to demonstrate the relevant regulations of the Social Welfare Act[3] by applying the normative method with regard to the chosen social service - home assistance as a special form of social care granted through a special administrative procedure as well as to highlight the novelties referring to the amendments of the Social Welfare Act from 2023. Moreover, the same Act is then applied in the context of the implementation of the "Zaželi - women`s employment program" as the latest example of the successful implementation of the deinstitutionalisation process and the prevention of institutionalisation of the elderly and infirm by applying the European funds for obtaining home assistance in a different form.

This paper consists of seven parts. After the introductory part, in the second chapter, an overview of the rights to social services of the elderly and infirm is provided by applying the compilation method along with the conclusions from the two scientific research that had been conducted earlier. The third chapter offers an analysis of the legal frameworks of the social legislation regarding the social services - home assistance by

[1] Corselli-Nordblad, L., Strandell, H., Ageing Europe: looking at the lives of older people in the EU: 2020 edition, Corselli-Nordblad, L.(editor), Strandell, H.(editor), Publications Office, European Commission, Eurostat, 2020, https://data.europa.eu/doi/10.2785/628105, accessed 6 June 2023.

[2] State Statistical Office of the Republic of Croatia, Population Census 2021, Zagreb, 2022, https://dzs.gov.hr/UserDocsImages/Popis%202021/PDF/Popis_2021_konacni_rezultati.pdf, accessed 6 June 2023.

[3] Official Gazette RC, No. 18/22, 46/22, 119/22, 71/23.

applying the normative method according to the current Social Welfare Act. The statistical data from the Department of Social Welfare Osijek (former Social Welfare Centre in Osijek) are compared with the information regarding the number of users of home assistance services. The fourth chapter is dedicated to presenting the deinstitutionalisation process, transformation and prevention of institutionalisation of the services for the elderly in the RC. Furthermore, modern politics in both the EU and the RC are shortly highlighted in the fifth chapter by applying the normative method and the method of analysis and synthesis within the context of deinstitutionalisation and prevention of institutionalisation of the care for the elderly and infirm. The sixth chapter describes "Zaželi - women`s employment program" and its implementation in the RC through statistical data presented in a table regarding the number of arranged projects and the number of project beneficiaries (in counties) in 2019 and 2020. The project is presented as an example of successful implementation of the politics of deinstitutionalisation and prevention of institutionalisation of the elderly and infirm. In the final seventh chapter, conclusions and conclusive considerations are presented with regard to the objective and research subject of the paper.

2. Short overview of rights to social services for the elderly and infirm

The international context offers different options when determining the age limit for categorizing the elderly. An older person is defined by the United Nations as a person who is over 60 years of age for instance, whereas for the World Health Organization the elderly population is defined as people aged 65 and over.[4] According to Tilovska-Kechedji older people belong to the category of persons more challenging to define considering the differences between the individual feelings and perceptions of the person itself, depending on whether the persons perceive themselves younger or older. However, if the description that older implies the ending of a life cycle was to be added to the definition of the elderly, the definition itself would become more concise (Tilovska-Kechedji, 2021:440). Within the context of the European social politics and Croatian legislation, the elderly are referred to as persons over 65 years of age, who are in need of some form of care due to their health condition. The significance of the social welfare system as a public service with explicit public interest for the RC is evident, among other things, in providing assistance and support, various social services, prevention and counselling, decision making about social rights guaranteed to the beneficiaries based on the current

[4] Corselli-Nordblad, L. & Strandell, H., Ageing Europe: looking at the lives of older people in the EU: 2020 edition, Corselli-Nordblad, L. & Strandell, H. (eds.), European Commission, Eurostat, Publications Office, 2020, https://data.europa.eu/doi/10.2785/628105, accessed10 June 2023.

legal sources. Moreover, the span of the affected area, sensitivity and vulnerability of different categories of beneficiaries, the complexity and intertwining of knowledge and skills, legislative branches as well as other relevant areas included and labelled by the system (Đanić Čeko, Tomeković, 2021:94).

The constitutional text promotes the obligation of the state in securing care and assistance in addressing the common life needs for the infirm, frail and socially vulnerable.[5] In addition, it should secure social, material and other conditions necessary for dignified life.[6] According to the constitutional regulations, the children are obligated to provide and care for the infirm and old parents.[7] All of the above indicates a direction in which a state is obligated to provide a dignified life to its individuals whereby through fulfilment of social conditions and shaping the social environment one can recognize the role of state as social, directly connected with the social welfare system. The social dimension of the state is also noticed through the obligation of establishing various forms of protection and special care to all its subjects.

In accordance with the current legal framework, and within the context of social services, some of the fundamental principles are highlighted based on which the users of social care in the system of social welfare (in this case the elderly) are granted services according to individual needs, along with the right to be informed, support, respect for privacy and protection of personal data and secrecy as well as participation in decision making (in accordance with the assessment).[8] The elderly, according to the SWA, are described as the persons at 65 years of age and over.[9]

The social service home assistance, which is one of the 15 social services according to the SWA, [10] will be presented as follows. Based on the legally described categories of users, social services are to be used by the persons, who due to their old age or sickness, are not capable of attending to their basic needs on their own.[11] Legal conditions and criteria regarding the granting of a particular service are regulated pursuant to Art. 19 of the SWA. The services can be provided over a longer period or temporarily, depending on the assessment, individual intervention plan and needs. There are four different ways of granting services according to the legislation and the service itself: a) decision (unless

[5] Art. 58 p. 1 of the Constitution of the Republic of Croatia, Official Gazette RC, No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 (hereinafter: Constitution of RC).

[6] Art. 63 of the Constitution of RC.

[7] Art. 64 p. 4 of the Constitution of RC.

[8] See basic principles in the social welfare system according to the Art. 4.-14. of the Social Welfare Act, Official Gazette RC, No. 18/22, 46/22, 119/22, 71/23 (hereinafter: SWA).

[9] Art. 15 p. 9 of SWA.

[10] See Art. 71 of the SWA.

[11] The categories of social welfare beneficiaries are prescribed in the Art. 18 p. 1 of the SWA.

provided by the Department of Social Welfare), b) referral, c) inference and d) contract. Pursuant to amendments from 2023, a special novelty is the approval of social service through a referral. It is issued based on the individual intervention plan and needs of the beneficiary, along with the beneficiary`s consent and for one service only. If several services are provided to a beneficiary, each service requires a separate referral. Moreover, if the circumstances, based on which the referral had been issued, are to change (regarding the type of the service, ways of providing the service, the scope of the service etc.) a new referral is to be issued. The service indicated by the referral becomes invalid by ways proscribed in Art. 78 of the SWA.

Home assistance is one of the 15 social services regulated by the SWA, it encompasses organising food (preparation, procurement and delivery of cooked meals to one`s home), performing household chores, maintaining personal hygiene and fulfilling other daily needs. Home assistance is a non-institutional service. The elderly can submit an application for this service to the competent Department of Social Welfare according to their residence if they require assistance of another person or if their partner or children cannot assist them in performing their everyday activities. Legal conditions for granting this service are proscribed in Art 101 of the SWA. The providers of this service may be a welfare home, home assistance centre, a community services centre, and religious community, other legal or natural person (trade owner).

Generally speaking, beneficiaries of social services should be given the right and possibility to choose the services they need : a) regardless whether the beneficiaries are institutionalised, they should have the right to choose where and who they want to live with, b) beneficiaries who live in a community should also be given the right to access timely and efficient services in accordance with their needs and specific characteristics such as age, gender, culture, religion or nationality (Žganec, 2022:9). In this context, in 2020 a research was conducted in the RC analysing the needs for services involving the persons over 65 years of age who have requested the services from the, at that time current, social welfare centres. The research results show that the development of services should focus on expansion and improvement of community-based non-institutional (delivery of meals, home assistance, organization of daily activities, health care escorts, medication delivery, improvement of digital skills, organization of public discussions and educations), however development and expansion of institutional forms of care (housing options) are not to be neglected and should be available in the proximity of the persons surroundings (Štambuk, Skokandić and Penava Šimac, 2022:208). On the other hand, according to the research conducted by Ljubičić and Ignjatović involving the beneficiaries of a nursing home, the results showed that the research participants had not made the decision of moving to a nursing home by themselves. Such decisions had been made for

them by their relatives due to their health condition or the fact that there was no more room for them in their homes. Based on the research results, two conclusions were drawn: most of the older persons do not voluntarily decide to move to an institution but are forced to do so by their relatives who cannot provide for them any longer. The COVID-19 pandemics has additionally emphasized the drawbacks of the social welfare system since the elderly have been deprived of their freedom of movement, rights to make their own decisions which particularly affected the institutionalised elderly (Ljubičić, Ignjatović, 2021:459).

3. Analysis of the administrative procedure for obtaining home assistance as one of the social services based on the Social Welfare Act

In regard to the competent body for deciding and approving the selected social service - home assistance, the change of its name should be the thing to point out first, in accordance with the amendments of the SWA from 2023; in the Institute for Social Welfare (hereinafter: ISW).[12] ISW according to Art. 1 of the General Administrative Procedure Act (hereinafter: GAPA),[13] represents one of the four categories of the body comprised of public law bodies (the group of legal persons with public authority; public institutions).

Based on the normative analysis of the procedural provisions of the SWA (the third part of the Act, Competence and Procedure)[14] for all types of administrative procedures, the following can be concluded:

1. regarding the competent body: public law body and competence (local and actual): - locally competent ISW as public institution, administrative departments of the city or county competent for social welfare services, competent ministry;[15]
2. parties in the procedure: on one hand of the administrative-legal procedure there are natural persons (different terminology in the Act depending on the status, type of rights demanded for granting through the procedure to the user: parent, caretaker, foster parent, child, service receiver, homeless person, user of rights and others) and on the other hand, the competent public law body;

[12] See. Art. 176 p. 2 of the SWA.

[13] Official Gazette RC, No. 47/09, 110/21.

[14] Art. 126- 161 of the SWA.

[15] Art. 15. of the Law on the Organization and Scope of State Administration Bodies, Official Gazette RC, No. 85/20, 21/23.

3. the procedure for granting the rights: the procedure becomes active based on the submitted application or on official duty (Art. 131 of the SWA);
4. rights to services are granted from the day the beneficiary starts using the service, while other rights are granted from the day the application had been submitted or by starting the *ex offo* proceedings or from the day of the decision effectiveness or from the day the use of service of organised housing starts (Art. 136 of the SWA);
5. name and type of the act reached through special administrative procedure: decision;
6. the form in which the decision is made: oral decision and written decision;
7. deadlines: 8, 15 (immediate action) and 30 days (investigatory procedure);
8. principles of social care: the SWA proscribes 14 principles typical for this administrative area, adjusted to the system of social welfare and implementing social activities;
9. mechanisms of legal protection (legal remedies): regular legal remedy appeal[16] upon which decides competent Ministry or units of local (regional) self-administration (proscribes that the appeal does not postpone the execution of the decision - exception);
10. explicitly proscribed urgency of the procedure (Art. 132 of the SWA), (Đanić Čeko, Šego, 2020:304)

From the analysis of legal provisions referring to the approval of home assistance, there are certain specific details that have been noticed regarding the procedure and decision making of the ISW. Pursuant to the amendments of the ISW from 2023, the decision making is handled through a referral rather than through a decision. The procedure for providing of the service is motioned on party`s request or for assessment of the standard and criteria for obtaining social service by authorised persons proscribed in Art. 131 p. 3 of the SWA. In addition, the procedure for approval of social service is urgent. In the period of maximum 15 days upon submitting the application for approval of the service home assistance, the ISW is obligated to issue a referral for granting the requested services under the condition all the legal demands had been fulfilled. Otherwise, the ISW is required to notify the party explaining the reasons for declining the referral. The provisions in Art. 135 of the SWA are applied, which proscribe an additional expertise process. The referral can be complained about. In addition to an appeal in this special administrative procedure, when either granting or declining the service, the parties also have another

[16] See Art. 143. of the SWA.

regular legal remedy at their disposal - an objection. Both regular legal remedies are proscribed by the GAPA. Further legal protection is ensured through lawsuits submitted to the competent first instance administrative court.

Lastly, the overview of the information regarding the number of users of home assistance services provided by the Department of Social Welfare Osijek (former Social Welfare Centre in Osijek):

1. in 2021 one home assistance service was approved based on a decision,
2. in 2022 one home assistance service was approved based on a decision (according to the SWA, Official Gazette RC, No. 157/13, 152/14, 99/15, 52/16, 16/17, 130/17, 98/19, 64/20, 138/20) and 64 applications were approved based on a referral (according to the amended SWA, Official Gazette RC, No. 18/22, 46/22, 119/22, 71/23).

Many users from the Department of social Welfare in Osijek, including those who do not exercise any rights in this particular Department, are nevertheless users of home assistance service through projects organised by various associations, since the lead project partners do not possess an income census limiting the use of home assistance service. The project lead partner of the "Zaželi" program may have users who are at the same time users of the care and assistance allowance, which is a legal limitation when granting the home assistance service based on a referral (previous decisions). The ISW is a project partner to many associations that provide home assistance services.

From the Osijek-Baranja County 2020 Report regarding social services, it is evident that there is still a huge interest for expansion and development of social services, primarily for institutionalised and residential accommodation and home assistance services. The project "Zaželi - home assistance" holds great importance and, among numerous positive influences, reflects on the quality of life of its beneficiaries - the elderly and persons in unfavourable circumstances.[17]

The data about home assistance service from 2020 and 2021 for the RC is as follows:

[17] From December 14, 2018 to June 14, 2021, Osijek-Baranja County implemented the project "Wish - help at home" - Empowerment and activation of women on the labour market. Report on the State of Social Welfare and Business of Social Welfare Institutions Founded in Osijek-Baranja County in 2020, p. 12,

https://www.obz.hr/images/-Zupanijska_skupstina/2021/2_sjednica/16_informacija_o_stanju_socijalne_skrbi_u_2020_godini.pdf, accessed 20 July 2023. Report on the State of Social Welfare and Business of Social Welfare Institutions Founded in Osijek-Baranja County in 2021, p. 7-9,

10_izvjesce_o_stanju_socijalne_skrbi_i_poslovanju_ustanova_socijalne_skrbi_ciji_je_osnivac_obz_u_2021.pdf, accessed 20 July 2023.

1. in 2021 - number of beneficiaries: 5.416, number of services: 16.461, service provider: mostly home assistance centres: 7.007;[18]
2. in 2020 - number of beneficiaries: 4.904 (2019: 4.990; 2018: 4.759), number of services: 9.482, service providers: mostly other legal persons performing the social welfare activities: 5.492.[19]

Digitalisation of the social welfare system needs to be in accordance with the principle of availability according to which social welfare is ensured in a way that guarantees availability of service to its users, with the principle of providing information about rights and services in the social welfare system and with the right to support in overcoming communicational issues. Modernising of the social welfare system and the digital approach have numerous benefits. First and foremost, they make the services more accessible to users and the institutions of social services become more efficient thus enabling a prompter response to users` demands. Digitalisation of this area also contributes to the possibility of more extensive gathering of information about the social services users whereby allowing the public law bodies to react and operate more hastily (Đanić Čeko, Guštin, 2022:807). In the context of availability of services within the system of social welfare, the e-Citizens system, more precisely e-Social welfare system services, should also be mentioned.[20] The service enables issuing documents, verifications or even submitting requests for granting certain rights or assigning a particular status.[21] The mentioned digitalisation of the social welfare system directly influences the digitalisation of administrative procedures, especially when issuing documents and verifications and keeping official records. In addition, it should be emphasized that the providers of social

[18] For more dana see Annual Statistical Report on Applied Rights social Welfare, Legal Protection of Children, Young People, Marriage, Families and Persons Deprived of Business Capacity, and to Protect Physically or Mentally Harmed Persons in the Republic of Croatia in 2021, Republic of Croatia, Ministry of Labour, Pension System, Family and Social Policy, Zagreb, August 2022, p. 5, 20, 61, Godisnje statističko izvješće za 2021. godinu.pdf (gov.hr), accessed 20 July 2023.

[19] Annual Statistical Report on Applied Rights social Welfare, Legal Protection of Children, Young People, Marriage, Families and Persons Deprived of Business Capacity, and to Protect Physically or Mentally Harmed Persons in the Republic of Croatia in 2020, Republic of Croatia, Ministry of Labour, Pension System, Family and Social Policy, Zagreb, August 20221, p. 1, 3, Godisnje statisticko izvjesce u RH za 2020. godinu.PDF (gov.hr), accessed 20 July 2023.

[20] Katalog usluga - gov.hr, Ministarstvo rada, mirovinskog sustava, obitelji i socijalne politike - E-usluge socijalne skrbi (gov.hr), accessed 15 July 2023.

[21] About statistical data related to the use of Social Care e-Services from 2017 to 2021 see more Đanić Čeko, A. & Guštin, M. (2022). Digitalizacija hrvatske javne uprave s posebnim osvrtom na sustav socijalne skrbi. *Zbornik radova Pravnog fakulteta u Splitu*, 59 (4), p. 812-813, https://doi.org/10.31141/zrpfs.2022.59.146.793

services are enabled to use one stop shop (for social welfare and social services),[22] in the process of determining minimum conditions for granting social services.[23]

4. The process of deinstitutionalisation, transformation and prevention of institutionalisation of services for the elderly in the Republic of Croatia

The Social Welfare Act, which was passed in 1997[24] in the RC, allowed the possibility of involvement of private and nongovernmental organizations in the social sector that were presumed to contribute to deinstitutionalisation of social care (Šućur, 2003.). In 2001 the RC was facing the challenges of transition aimed at minimising the state role in the social system and at the same time increasing the role of the market, family and civil society which resulted in the idea of deinstitutionalisation with emphasis on the fact that socially sensitive persons should maintain living in their current surroundings, with their families or within their current local areas (Šućur, 2003.)

However, the process of deinstitutionalisation in the RC is believed to have started developing more intensely before the Croatian pre-accession period for the EU had finished, during that period Croatia agreed to hasten the deinstitutionalisation process thus lowering the number of institutionalised elderly (Žganec, 2022:16). Several strategic documents have been released recently in the RC focusing on the elderly through the process of deinstitutionalisation and prevention of institutionalisation. The Action Plan for Deinstitutionalisation, Transformation and Prevention of Institutionalisation in the period from 2018 to 2020[25] set: a) the general aim - ensuring the quality of life of the elderly within their family and community and b) specific aim - ensuring availability and quality of non-institutional services for the elderly with special emphasis on development of community-based services along with the integrated social service (such as consultation and assistance, psychosocial support, home assistance, social day care for seniors etc.). Social Welfare Strategy for the Elderly in the Republic of Croatia for the period from 2017 to 202026[26] defined the aim to increase the availability of services for the elderly, Measure

[22] See more at https://psc.hr/pruzanje-socijalnih-usluga-u-djelatnosti-socijalne-skrbi/, accessed 15 July 2023.

[23] See Art. 6 of the Services Act, Official Gazette RC, No. 80/11.

[24] Official Gazette RC, No. 73/97.

[25] Plan of transformation and deinstitutionalization and prevention of institutionalization for the period 2018 to 2020, Ministry of Demography, Family, Youth and Social Policy, Zagreb, 2018, https://mrosp.gov.hr/UserDocsImages/dokumenti/MDOMSP%20dokumenti/Plan%202018-2020.pdf, accessed 10 June 2023.

[26] Social care strategy for the elderly in the Republic of Croatia for the period from 2017 to 2020, Ministry of Demography, Family, Youth and Social Policy, Zagreb, 2017,

1.2. Development of services for the elderly directed at senior persons living in their own homes, accompanied by the following activities: encouraging the development of social day care for seniors and home assistance on local level. Financial means for implementing this measure were obtained from the EU funds. On the following pages of this paper, in the context of the aforementioned strategy and the implementation of the EU funds, the authors will provide an overview of the "Zaželi - women`s employment program" that was actively implemented in the Republic of Croatia from 2017 till the moment this paper was written.

The current strategic document released by the competent ministry, the 2021-2027 National plan for the development of social services,[27] foresees the construction of centres for senior citizens which would enable accessibility to use various non-institutional services thus improving the quality of life in their own homes, ensuring integrated social and health care on primary level and housing services for the beneficiaries, who due to functional incapability and deteriorated health condition, need assistance and supervision in order to completely fulfil all their needs.

5. Social politics of the EU - the right of the elderly and infirm to welfare

It can be said that various combinations of different factors influence the increase of risk of poverty and social exclusion of the elderly such as low income, poor health condition, age or gender-based discrimination, deterioration of physical and mental capacity, unemployment, isolation, abuse and limited access to services (Kucharczyk according to Walsh et al, 2017). In the context of modern social politics of the EU related to welfare of the elderly and infirm, it is necessary to mention the European Pillar of Social Rights presented on 17th November 2017 by the European Parliament, Council and European Commission.[28] The list of legal foundations supporting its validity can be found in the preamble of the European Pillar of Social Rights along with the following: *"The European Pillar of Social Rights expresses principles and rights essential for fair and*

https://mrosp.gov.hr/UserDocsImages/dokumenti/MDOMSP%20dokumenti/Strategija%20socijalne%20skrbi%20za%20starije%20osobe%20u%20RH%20za%20razdoblje%20od%202017.-2020.%20g.pdf, accessed 10 June 2023.

[27] National plan for the development of social services for the period from 2021 to 2027, Ministry of Labour, Pension System, Family and Social Policy, Government of the Republic of Croatia, Zagreb, 2021, https://mrosp.gov.hr/UserDocsImages/dokumenti/Glavno%20tajni%C5%A1tvo/Godi%C5%A1nji%20planovi%20i%20strate%C5%A1ka%20izvje%C5%A1%C4%87a/Nacionalni%20plan%20razvoja%20socijalnih%20usluga%20za%20razdoblje%20od%20%202021.%20do%202027.%20godine.pdf, accessed 10 June 2023.

[28] Inter-institutional declaration on the European Pillar of Social Rights, Official Journal of the European Union (2017/C 428/9).

well-functioning labour markets and welfare systems in 21st century Europe. It reaffirms some of the rights already present in the Union acquis. It adds new principles which address the challenges arising from societal, technological and economic developments."[29] The European Pillar of Social Rights is considered to be the document which consolidates the span of social rights and principles contained in various instruments addressed differently, assembled in one document politically confirmed as a unit by the EU institutions and member states in the Council of the European Union (Garben, 2019:104). Legally, the European Pillar of Social Rights does not have a direct influence, but rather indicates how currently existing political institutions understand and interpret these rights and principles and how these can be executed in the context of their current politics. (Garben, 2019:104-105).

In the context of assessing the services through Principle 18 of the European Pillar for Social Rights it is stated that everyone has the right to accessible and quality services of long-term care, especially to services of care in their own home and community. This document is considered to be the first such document on the EU level that acknowledges the challenges of adequate support and assistance for the elderly (Kucharczyk, 2021:426). This regulation is also in accordance with the regulations of the Charter of Fundamental Rights of the European Union by which the Union acknowledges and respects the rights of the elderly to lead a dignified and independent life and to participate in social and culture life.[30] In addition, it also acknowledges and respects the rights of the persons with disabilities to measures which aim to secure their independence, social and professional inclusion and their participation in the life of the community[31] (Kucharczyk, 2021:426).

Other European documents like "The European Charter of Rights and Responsibilities of Older People in Need of Long-term Care and Assistance"[32] from 2010, "The Common European Guidelines on the Transition from Institutional to Community-Based Care"[33] from 2012, the study by the European Commission from 2018 "Challenges in

[29] https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/hr/index.html,
https://ec.europa.eu/social/main.jsp?catId=1606&langId=en, pristupljeno: 10.7.2023.

[30] Art. 25 of the European Union Charter on Fundamental Rights, Official Journal of the European Union (2016/C 202/389).

[31] Art. 26 of the European Union Charter on Fundamental Rights, Official Journal of the European Union (2016/C 202/389).

[32] https://www.age-platform.eu/sites/default/files/European%20Charter_EN.pdf, accessed10 July 2023.

[33] https://deinstitutionalisationdotcom.files.wordpress.com/2017/07/guidelines-final-english.pdf, accessed10 July 2023.

Long-term Care in Europe - A Study of National Policies"[34] also emphasize the importance of prioritizing the possibility of long-term care in a person`s own home environment especially if the persons have spent their entire lives living there (Spasova et al., 2018:11, Štambuk et al., 2021:26). Back in 2015 the recommendation was given to all the member states based on the Opinion of the European Economic and Social Committee on long-term social care and deinstitutionalisation to use European structural and investment funds for promoting transition from institutionalised care to community-based care, for development of social and health services and for training personnel in the sector of assistance service.[35]

Encouraged by the COVID-19 pandemics, which highlighted the drawbacks of the long-term care system, the European Commission published the European Care Strategy[36] on 7th September 2022. When the system is under-capacitated and receiving lower financial support, it cannot follow the constantly growing needs thus resulting in lack of care for those who need it thereby increasing the risk of poverty in older age while at same time family members, women mostly, resign from their workplaces in order to take care of the elderly (Caracciolo di Torella, 2023:10-11). Through the European Care Strategy, the European Commission encourages the member states to ensure adequate and sustainable financing and investment in high-quality care systems by using the existing EU financial means, among other sources, for improving equal approach to high-quality long-term care, especially community-based care and care in persons own homes. Along with this Strategy the Commission suggests delivering a set of recommendations to the Council of EU. The Recommendations[37] were released on 8th December 2022 with the aim to enable access to affordable, high-quality, long-term care for all the persons in need of such form of care from all the care-providers both formal and informal. The member states are advised to report about the series of measures to the Commission that have been or are planned to be taken for the purposes of the implementation of the Recommendation within the period of 18 months from the date of its effectiveness.[38]

[34] https://ec.europa.eu/social/main.jsp?langId=hr&catId=89&newsId=9185, accessed10 July 2023.

[35] Point 1.4. Opinions of the European Economic and Social Committee on long-term social care and deinstitutionalisation, Official Journal of the European Union (2015/C 332/01).

[36] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Care Strategy (SWD(2022) 440 final), (SWD(2022) 440 final),

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0440&from=EN , accessed 10 June 2023.

[37] Recommendations of the Council of the European Union on access to affordable and high-quality care, Official Journal of the European Union (2022/C 476/01).

[38] Art. 11. of the Recommendations of the Council of the European Union on access to affordable and high-quality care, Official Journal of the European Union (2022/C 476/01).

6. Implementation of the "Zaželi - women`s employment program" in the Republic of Croatia

One positive example of successful implementation of politics of deinstitutionalisation and prevention of institutionalisation through providing home assistance to the elderly and infirm in accordance with the objectives of Europe 2020: Strategy for Smart, Sustainable and Inclusive Growth[39] and the principles of the European Pillar for Social Rights is without doubt the implementation of "Zaželi - women`s employment program". In 2017 the first (permanent) open call for project proposals for "Zaželi - women`s employment program" by, at that time current, Ministry of Labour and Pension System[40] was published, that was financed from the European Social Fund.[41] Specific objective of the Call for Proposals was to empower and improve the work potential of not so easily employable women and women with lower level of education by employing them in their local communities which would result in decreasing the consequences of their unemployment and the risk of poverty while at the same time encourage social inclusion and increase the life quality of the beneficiaries by performing activities such as helping with the delivery of groceries, helping with food and meal preparation in homes of beneficiaries, helping with cleaning of beneficiaries` living space/home, helping with getting dressed and undressed, care about hygiene, helping with social integration, helping with granting different rights (medication delivery, paying the bills, delivery of assistive devices etc.), supporting beneficiaries through conversation and socialisation, inclusion in society, escort and help in various social activities. The program was intended for persons over 65 years of age or infirm and especially for the disabled persons.[42] The financing and implementation of the program was actively continued through the following years

[39] Communication from the European Commission, Europe 2020: a strategy for smart, sustainable and inclusive growth, COM (2010) 2020.

[40] See Art. 12 of the See Art. 12 of the Law on the Organization and Scope of Ministries and Other Central Bodies of State Administration, Official Gazette RC, No. 93/16, 104/16, 116/18.

[41] Operational program effective human resources 2014-2020, priority axis 2, specific objective 9. I 1. Fight against poverty and social exclusion through the promotion of integration into the labour market and social integration of vulnerable groups, and the fight against all forms of discrimination. See more Call for submission of project proposals Zaželi-women's employment program available at:

https://www.esf.hr/natjecaji/socijalno-ukljucivanje/poziv-na-dostavu-projektnih-prijedloga-zazeli-program-zaposljavanja-zena/, accessed 1 June 2023.

[42] Instructions for applicants Zaželi-women's employment program, UP.02.1.1.05 available under Tender documentation, p. 11 and 19, https://www.esf.hr/natjecaji/socijalno-ukljucivanje/poziv-na-dostavu-projektnih-prijedloga-zazeli-program-zaposljavanja-zena/, accessed 1 June 2023.

conclusive with phase II and III in 2023.[43] The project "Zaželi - women`s employment program" was implemented throughout the entire RC, which is visible form Table 1.

Table No. 1 *Overview of the number of contracted projects and their beneficiaries distributed in 20 counties of the RC and the City of Zagreb in 2019 and 2020*

County	Number of contracted projects in 2019	Number of beneficiar-ies in 2019	Number of contracted projects in 2020	Number of benefi-ciaries in 2020	Total - contracted projects	Total - benefi-ciaries
Zagreb	9	704	9	486	18	1190
Krapina-Zagorje	3	683	5	336	8	1019
Sisak-Moslavina	26	2582	18	2621	44	5203
Karlovac	10	718	5	376	15	1094
Varaždin	6	544	6	564	12	1108
Koprivnica-Križevci	7	764	2	150	9	914
Bjelovar-Bi-logora	15	1448	11	1446	26	2894
Primorje-Gor-ski Kotar	11	478	2	102	13	580
Lika-Senj	8	490	2	318	10	808
Virovitica-Po-dravina	16	1092	4	460	20	1552
Požega-Slavo-nia	6	940	8	1720	14	2660
Brod-Posavina	21	2522	24	3332	45	5854
Zadar	4	386	10	337	14	723
Osijek-Baranja	54	5614	40	4945	94	10559
Šibenik-Knin	20	1438	32	1777	52	3215
Vukovar-Sri-jem	32	3592	38	6069	70	9661

[43] More about this program Zaželi-women's employment program and invitations from phase I, II and III see on https://strukturnifondovi.hr/, accessed10 July 2023.

Split-Dalmatia	29	2718	11	1243	40	3961
Istra	-	-	-	-	0	0
Dubrovnik-Neretva	5	523	4	268	9	791
Međimurje	6	305	7	504	13	809
The City of Zagreb	6	790	26	1401	32	2191
Total	294	28331	264	28455	558	56786

Source: Data collected from the Implementation Report "Strategies of social care for the elderly in the Republic of Croatia for the period from 2017 to 2020" for 2019 and 2020.

In 2019 and 2020 the service was provided to 56.786 elderly and infirm users in the RC as is visible from the table. The largest number of users of the services provided by the "Zaželi - women`s employment program" was registered in Osijek-Baranja County. According to the data provided by the Croatian Bureau of Statistics regarding the assessment of the population in the RC in 2020,[44] Osijek-Baranja County was, compared to other counties in the RC by the number of persons older than 65, placed fifth while when compared by the number of disabled persons, it was placed third on the list.[45] Osijek-Baranja County is one of the Croatian counties with a high rate of risk of poverty and persons in the risk of poverty and social exclusion.[46] It can therefore be concluded that this particular county is an excellent example of successful implementation of "Zaželi - women`s employment program" benefiting on one hand the women who had earlier had difficulty finding employment and on the other providing services to the elderly and infirm.

[44] Press release of the State Statistical Office, 2021, Estimate of the population of the Republic of Croatia in 2020,, accessed 5 June 2023.

[45] Report on persons with disabilities in the Republic of Croatia, Croatian Institute for Public Health, September 2021, https://www.hzjz.hr/wp-content/uploads/2021/10/Invalid_2021.pdf, accessed 5 june 2023.

[46] National classification of statistical regions 2021, Official Gazette No. 125/19. HR NUTS 2021 forms the statistical basis for effective management of regional development policy, for socioeconomic analysis and for achieving the goals of social and economic cohesion. According to the HR_NUTS 2021 classification, the Republic of Croatia is divided into four NUTS 2 statistical regions, while the Osijek-Baranja County falls under the Pannonian Croatia region. According to data from the State Statistical Office, Pannonian Croatia has the highest rate of poverty at 27.0 and the rate of persons at risk of poverty or social exclusion at 28.6. Press release of the State Bureau of Statistics, 2022, Indicators of poverty and social exclusion in 2021,

https://podaci.dzs.hr/media/njedpovs/zudp-2022-1-1-pokazatelji-siroma%C5%A1tva-i-socijalne-isklju%C4%8Denosti-u-2021.pdf, accessed 5 June 2023.

On 24th August 2022 the European Commission adopted the Partnership Agreement with the Republic of Croatia for the financial period 2021-2027,[47] which, among other things, approves the Efficient Human Resources program 2021-2027.[48] According to this Program, the "Zaželi" program is not only planned to be continued with but also redesigned. The primary objective of the program is oriented on social inclusion and providing help to the elderly in the context of long-term care and prevention of institutionalisation. Support for the elderly and/or infirm will also include partnership with local social services in order to secure the adequate quality of services while the standards and criteria for the aimed groups will be clearly proscribed.[49]

Conclusion

The system of social welfare observed from the administrative-procedural perspective is significant for the requirements of the normative analysis of special laws regulating procedural issues in social welfare that determine numerous rights and granting of services for the users of that system. Several minor deviations and specificities in implementation of the special administrative procedure under the competence of the ISW have been highlighted through normative analysis of procedural provisions of the SWA in relation to the GAPA. Certain deviations and specificities are justified due to the urgency and protection of welfare and interest of the users within the system, which are frequently demanded by this special administrative area. The overview of statistical data for the ISW in Osijek during the observed period of two years have been presented regarding approval of home assistance service and certain changes in decision making pursuant to legal amendments in 2023. This also includes statistical data for the entire RC in accordance with the annual reports of the competent ministry. In addition, e-service social welfare through the e-Citizens system for providing services in the context of digitalisation of the system of public administration has been shortly analysed along with the increase in number of e-services.

Even though the process of deinstitutionalisation, transformation and prevention of institutionalisation is a long-lasting process, it can be claimed that the RC has successfully implemented EU politics and principles in its modern social politics when it comes to social welfare for the elderly in the form of providing care in persons own homes and their local community. The process of deinstitutionalisation in the Republic of Croatia is

[47] Partnership Agreement with the Republic of Croatia, 1.2, 2021.-2027, C (2022)5960.

[48] Effective Human Resources Program 2021-2027, p. 19-20, available at: https://strukturnifondovi.hr/wp-content/uploads/2022/11/Program-Ucinkoviti-ljudski-potencijali-2021.-2027_.pdf accessed 3 June 2023.

[49] Ibidem, p. 91.

believed to have started developing more intensely before the Croatian pre-accession period for the EU had ended. The Action Plan for Deinstitutionalisation, Transformation and Prevention of Institutionalisation in the period from 2018 to 2020 and the Social Welfare Strategy for the Elderly in the Republic of Croatia for the period from 2018 to 2020 have influenced the deinstitutionalisation process by focusing on the development of social care services for the elderly. National strategic documents are completely harmonised with the European social politics and the principle of securing the providing of services in users` homes and their local communities. "Zaželi - women`s employment program" is presented as a positive example of implementation of deinstitutionalisation politics and prevention of institutionalisation in the RC. It is to be concluded that the implementation of the program is also a positive example of use the EU funds for the projects directed at development of providing non-institutional services for the elderly, since the only condition of eligibility for participation in the activities was that the users were persons older than 65 or the infirm, with special priority for the disabled persons. The users were able to receive a service which occurred in their own homes and communities regardless their property census according to the SWA. After having implemented the program for several years in continuation, its upgrade is expected shortly with special emphasis on expansion of non-institutional social services for the elderly and insurance of adequate quality of the services.

Although the RC has successfully accomplished the program and project implementation vital for influencing the expansion of social services for the elderly within the community, there is nevertheless the issue of ensuring the rights to long-term care which would include health care as well, as is stated in the Recommendation of the Council of Europe 2022. Adjustments of the long-term care politics are expected in the upcoming period in the RC.

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Teodora Gojković*

STIGMATIZATION AND SUICIDAL BEHAVIOR AMONG THE ELDERLY POPULATION IN SERBIA**

Stigma is a negative process of labeling, discrimination and social disqualification, a disgrace which especially affects old people and worsens their psychological state. The upcoming negative trend towards the elderly around the world is so present that we could expect that ageism will become the most prevalent form of discrimination in 21st century. Serbian society has been affected by the process of demographic aging for decades. The impact of aging on mental health is closely related to the social life factors of the elderly, which directly affects their quality of life - the more or less simultaneous biopsychosocial losses, experienced by the elderly, significantly influence the increase in self-isolation or distance from the family, which is less and less ready to take care of old and sick members, which can cause suicidal ideas and suicidal behavior of the elderly. (Self-)isolation of the elderly can also be more broadly socially conditioned, where the quality of institutional and non-institutional care for the elderly plays a dominant role. This increases the pressure on societies, especially affected by "ageistic" challenges, to adequately respond to them - contemporary approach to aging foresees significant forms of sustenance for active, dignified aging through institutional and non-institutional forms of support, which is why it is important to improve them in the direction of destigmatizing members of the elderly population. In this paper, conclusions will be presented based on the analysis of secondary sources on the mentioned issue.

Keywords: *demographic aging, stigmatization of the elderly, ageism, suicidal behavior, active aging, aging with dignity*

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Introduction

The most significant contribution to the study of stigmatization from the perspective of symbolic interactionism and labeling theory was made by the American sociologist of Canadian origin, Erving Goffman. In his book of the same name, he defined stigma as a negative process of labeling, discrimination and social disqualification, as an unwanted and deeply discrediting difference from average normality, which conditions the non-acceptance of a given person in social interactions within various spheres of life (Goffman, 2009: 15). This paper will discuss the social and psychological aspect of discrimination against old people in our social environment and on a global level, due to the fact that the increasing participation of people over 65 in the total population has become an important feature of the modern world (Knežić, 2006: 286). Their considerable social exclusion from various domains of life, such as the domain of work and employment, education and professional training, the domain of social and health protection, freedom, security, access to justice, active participation in the community, the domain of culture, media and information, participation in political and public life and, finally, infrastructure, was established[1]. Considering that, the starting assumption of the paper is that old people in Serbia are a distinctly marginalized and stigmatized social group.

The World Health Organization classifies old people into groups that include the age of 65 and over, respectively 60 and over - the group of *early old age* from 65 to 74 years, *middle old age* from 75 to 84 years and *deep old age* from 85 and several years, whereby the age of 60 to 65 is marked as the beginning of aging[2]. However, it could be said that old age occurs in that period of life when objective signs of stagnation and regression appear on the biological, social and psychological level (Jakič-Kozarčanin, 2003, according to: Dragišić-Labaš, 2001). This means that old age has its own biological aspect, which implies biological, chemical and functional changes in the organism; the psychological aspect, which refers to changes in the individual's psychological functions, and the social aspect, which refers to the individual's social environment, more precisely to society's attitude towards the elderly and their social interaction (Baraković, Mahmutović, 2018: 20). Negative beliefs and attitudes towards older people are increasingly present, especially in the sphere of work, where the prevailing view is that older people can only be passive recipients of social assistance and, therefore, are often accused of being a burden to younger generations (Skirbekk, 2004). The belief that older adults are less valuable and not the object of society's interest contributes to fueling ageism,

[1] https://www.politika.rs/scc/clanak/394877/Drustvo/Diskriminacija-na-osnovu-starosti (date of access: June 20th, 2023)

[2] https://population.un.org/wpp/publications/files/wpp2017_keyfindings.pdf (date of access: June 22th, 2023)

which threatens to become the dominant form of discrimination in the 21st century (Kang, Kim, 2022: 1). Ageism refers to stereotypes, prejudices, and discriminatory actions or attitudes based on chronological age and, accordingly, age stereotypes are fixed beliefs that overgeneralize characteristics, attributes, and behaviors considered common to the elderly as a group (Iversen et al., 2009). It can manifest implicitly, through unconscious thoughts, feelings, and behaviors, and explicitly, through intentional actions or verbal expressions, which can ultimately result in the internalization of ageistic attitudes and stereotypes (Iversen et al., 2009).

Our society fosters different ageisms in its discourse, the most prevalent of which are ageisms against the elderly - older people are often labeled as extremely disobedient and inconsiderate of others; they are criticized because they go to shops, use public transport, hang out, wait in line at the post office or shop, which is why they were especially attacked during the period of application of social and health measures during the COVID-19 virus pandemic (Milojević, 2021: 139). According to some estimates, around 1.4 million citizens of Serbia over the age of 65 are exposed to various forms of discrimination, violence, neglect, marginalization and "reduction"[3]. The elderly make up a quarter of our population, which, on the one hand, indicates the awakening of awareness regarding this social problem in the scientific community and its increased social visibility, and on the other, to the fact that Serbian society has been affected by the process of demographic aging for decades, which basically means an increase in the number and share of the old population in the total population due to the decline in the birth rate (Mihajlović, 2013: 73).

It is known that late life carries special risks for the onset of somatic diseases and comorbidity with mental disorders, of which dementia and depression are the most prevalent (Stanimirović, 2017: 7). Internalized age stereotypes can lead to low levels of self-confidence and self-esteem and, therefore, can have a particularly negative impact on the mental health of older people - age is increasingly recognized as a risk factor for increased stress, anxiety, depression and reduced life satisfaction (Iversen et al., 2009; Bryant et al., 2012). In old age, in addition to biological and physical endurance, spiritual strength also weakens, bringing old people to a state of despair, hopelessness, pessimism, depression, which qualifies them as the most vulnerable category of the population with self-destructive activities (Knežić, 2006: 286). Dominant life events are retirement, death of a spouse, departure of children from the family, i.e. "symptom of an empty family nest" or some serious organic disease and, consequently, an intense feeling of loneliness, which

[3] Ibid.

is why these factors are recognized as suicidogenic (Dragišić-Labaš, 2001: 366). According to the report of the World Health Organization, people over 60 most often commit suicide, with the largest number of suicides of that age group being from Southeastern Europe[4]. Therefore, the second part of the paper will be devoted to the social problem of suicidal behavior of the elderly.

I believe that it is important to empirically examine the connection between the process of aging, stigmatization and suicide of the elderly, and this paper should serve as a guideline for that endeavor. For now, it remains at the level of supposition, which is why the goal of the paper is not to make generalizations, but to theoretically expose the phenomenon based on secondary material. I became interested in this topic during my undergraduate studies, when, dealing with the sociological aspects of mental disorders, we devoted an entire class to the topic of "suicide of the elderly" and found that the topic was biased, which could also be a reflection of the stigma faced by the elderly people in general. For this reason, I would like to arouse the interest of the wider academic public in Serbia with this paper and to possibly raise some important questions that could be asked in future researches.

1. Stigmatization - conceptual framework

1.1. Theoretical definition of marginalization and stigmatization in sociology

Since stigmatization stems from marginalization, it is necessary to first define marginalization as a broader concept. Marginalization is one of the indicators of the development and democracy of a society - the greater the number of people in a society who are marginalized, the more underdeveloped or less developed the society is, in a humane and social sense. At the same time, it is also a social process, causally connected with social inequality, social exclusion, distribution of social power, discrimination, stigmatization, social frustration or deprivation and so on (Milosavljević, Jugović, 2009: 9-11). Excluding certain groups of people from social processes and relations, which is essentially marginalization, means depriving them of the opportunity to participate in various spheres of social life - thus, perpetrating "social violence" against them (Ibid).

In domestic literature, we come across many definitions of marginalization, where each of these definitions emphasizes one of the aspects of marginalization as the main one. Considering the topic of this paper, it is appropriate to operationalize marginalization by reducing it to some important and interconnected characteristics of marginalized groups, due to which this group, metaphorically speaking, finds itself in the gap

[4] http://www.danas.co.yu/20021016/terazije.htm (date of access: June 20th, 2023)

between "two worlds" - *social isolation*; *social subordination*; *social immobility*; *social inhibition* and *social instability* (Milosavljević, Jugović, 2009: 19-20). Based on that, as typical marginalized groups in our society, it is possible to single out Roma, AIDS patients, convicts in prisons, people with developmental disabilities, people with mental health disorders, refugees, homosexuals, juvenile delinquents, prostitutes, drug addicts, homeless people and old persons (Šagrić et al., 2007: 49).

The share of people over 65 in Serbia is among the highest in the world - according to the estimates of the Republic Institute of Statistics from 2012, it is 17.4%, and projections based on vital statistics testify to its further increase (Solarević, Pavlović, 2018: 52). In Serbia, according to the results of the 2011 census, the participation of people over the age of 60 in the total population amounted to 23%, which means that, expressed in absolute numbers, in Serbia (without Kosovo and Metohija), about 1,684,289 people were registered over 60 years old, which is an increase of about 40% compared to 1991 (Zdravković, 2016: 293). We are even talking about the phenomenon of the aging of the elderly, the intensification of which is noted especially in the inter-census period (2002-2011), which means that in the age composition of the elderly, the number and share of "elderly" old persons is increasing, primarily those aged 80 and over, as a result of which the average age of the contingent of the elderly population is also increasing (Mihajlović, 2013; Zdravković, 2016). According to the latest estimates of the United Nations, in the next forty years, the most pronounced depopulation zone will be located in Serbia and the eastern edge of the European Union (Solarević, Pavlović, 2018: 52). Demographic aging can become a threat to social stability through generational tensions, which could happen due to the decreasing number of working-age population, which will be forced to support an increasing number of elderly people (Solarević, Pavlović: 54)[5].

The elderly in Serbia are marginalized in multiple ways - they are the poorest social group, without systemic support and subject to ageist prejudices (Ljubičić, Dragišić Labaš, 2018: 105). If old age causes a certain social reaction from the environment, on the basis of which pressure is exerted on members of certain demographic cohorts to always behave in accordance with the socially established model of behavior, then we apostrophize stigmatization as an aspect of their marginalization[6]. In a causal sense, stigmatization is related to the socio-psychological phenomenon of stereotyping, by which the typification of certain groups of people is based on a distorted image and, thanks to this,

[5] With historically low fertility rates, the number of people over 80 years old in Europe is expected to increase from 22 million in 2008 to 61 million by 2060 (Solarević, Pavlović, 2018: 52).

[6] The word "stigma" is of Greek origin and is translated as "to stand out" or "to mark" - it refers to the marks that in ancient Greece were applied with a red-hot iron and marked someone as a slave, criminal or traitor - therefore, as a person who should avoid, especially in public places (Milosavljević, Jugović, 2009: 43).

people are able to identify and target "critical" social groups. The end result of such wrong and mostly unjustified generalizations is stigmatization, rooted in the socially structured model of normality - everything that is different and unpredictable in relation to what is pre-defined as normal and predictable, is understood as deviant (unreal, unexpected and unacceptable). When it comes to old people, the discourse of society often insists on the difference between *them* (the undisciplined and privileged) and *us* (the disciplined, able-bodied population), which is why the discourse that infantilizes old people becomes dominant, i.e. treated as completely helpless and, on the basis of that, the state has the legitimacy to control them, punish them and, if necessary, make decisions on their behalf (Milojević, 2021: 140). The results of a research show that one of the important problems of the elderly is related to their social exclusion, which can relate to various aspects of life - social relations, participation in cultural activities and access to various services in the local community, bad neighborly relations and inadequate access to material goods (Walker et al. 2006, according to: Knežić, 2011: 57).

1.1.1. Discrimination based on age as a form of stigmatization

Ageism, in addition to sexism and racism, is considered one of the most widespread prejudices of modern society, the intensity of which ranges from prejudice to discrimination and can be deemed as a direct product of socialization and the value system adopted by it[7]. The term "ageism" means systemic stereotyping and discrimination based on age (Solarević, Pavlović, 2018: 54). Two basic components of ageism are *prejudice* and *discrimination*. As the first aim is to devalue a certain group of people and subject them to certain stereotypes, i.e. negative generalizations (in the case of old people, these would be stereotypes about their physical incapacity, unsociability, dissatisfaction with life, etc.), in extreme cases they can turn into gerontophobia - strong, unreasonable fear of old age and old people, that is, hatred towards them. Discrimination implies the active implementation of prejudices in certain ways and, accordingly, on the institutional and social level, and in the case of the elderly, it can be manifested in several ways - as the denial of certain services to the elderly (social or health care, housing or employment issues); the unavailability of certain services (for example, the right to vouchers for vacations in spas in Serbia is currently denied to persons over 80 years old); the impossibility of exercising certain rights and the absence of special rights and services that would enable the elderly to meet their specific needs and achieve a satisfactory quality of life (Simić,

[7] The term "ageism" was first used by gerontologist Robert N. Butler in 1969. It is composed of two words - *age*, translated as year, and *-ism*, which denotes a system or theory in a derogatory, negative sense. He compared the phenomenon of discriminatory attitude towards the elderly to racism and sexism (Baraković, Mahmutović, 2018: 23).

Simić, 2008: 55). As such, ageism has at least a two-fold negative effect on the elderly - firstly, negative stereotypes about the elderly and the aging process, which are rooted in society and the current value system, lead to the elderly being belittled and portrayed as less valuable members of society; secondly, such attitudes are accepted and transmitted to new generations, first of all, through mass media, literature, seemingly harmless jokes at the expense of old people and caricature of old people and old age, using certain terminology that carries with it a negative connotation (Ibid). An indirect way of spreading prejudices is striking - by continuously promoting and glorifying youth, beauty, strength and power. Such a trend makes the population group of the elderly vulnerable, the elderly are marginalized and discriminated against, and many old people are rejected by society - due to low income, poverty, lack of family support, incapacity or illness (Simić, Simić, 2008: 56).

The processes of the origin and development of ageism can be traced through four forms of this social phenomenon - the most important are *institutional ageism*, which refers to the types of processing missions, rules and practices that discriminate against individuals and/or groups because of their age, and *intentional ageism*, in which they use discriminatory ideas, attitudes, rules or practices towards the elderly despite being aware that they are based on prejudice against this population (Milner, Norman & Milner, 2012: 20). The World Health Organization (WHO) demystified myths about aging, publishing a publication of the same name in 2008, which highlighted the most common, widely accepted myths common to most cultures, namely - myths about how people should expect their mental and physical health to improve worsen over time; that creativity and contribution are hallmarks of a younger age; that most adults want to be in peace and solitude; that spending on the aging population is a pure waste of resources; that the experience of ancient people is less relevant for modern society; that old people are not suitable for jobs, that old people are expected to "step aside" etc. (WHO, 2018, according to: Baraković, Mahmutović, 2018: 24).

The consequence of stigmatization that Goffman wrote about is the acceptance of a negative, socially constructed image of oneself and its becoming part of one's identity. In this sense, old people and people who are aging often adopt these attitudes and attitudes towards their own and other people's aging - they accept passivity, and physical and psychological deterioration as inevitable (Goffman, 2009; Rodin, 1985: 1272). As a result, they withdraw from social life, accepting the prevailing opinion that they have nothing to offer and are no longer needed or useful. This vicious circle - adapting old people to stereotypes again and again, pushes old people more and more into isolation and intensifies their psychophysical deterioration, and at the social level contributes to

strengthening the misunderstanding of the process of aging, old age and old people (Rodin, 1985: 1275).

That ageism is rooted in all spheres of society is also shown by the results of certain researches, according to which people who are professionally engaged in providing help and support to old people, knowingly or unknowingly, tend to discriminate against older patients and users of services. One study from 1968 revealed that social workers have less empathy and are more dismissive of elderly clients (Mittens & Wood, 1986, according to: Rodin, 1985); then, research from 1989 and 1997 shows that employees who work with the elderly perceive their users as physically disabled and dependent on professional help (Riverson, 1989; Reynolds, 1997, according to: Rodin, 1985). Research conducted at the beginning of this millennium did not show any significant progress - the elderly are most often excluded from medical research, their operations are most often cancelled, and they are less often admitted to hospitals for examination and treatment when they have heart problems; furthermore, women after the age of 65 are not scheduled for regular check-ups for the prevention of breast cancer; among future nurses, working with elderly patients is perceived as the most undesirable, regardless of the level of income and the possibility of advancement in the service (Williams, 2000; Castle et al., 2007, according to: Rodin, 1985).

Certain authors identify the media as the main "culprits" for society's attitudes towards age and aging, in two ways - by imposing the cult of youth through media content, which has led to a repulsive attitude of young people towards old age, but also among old people themselves, as and by media promotion of the idea of the undesirability of visible physical and mental changes related to the aging process, compared to the physical and mental characteristics of young people, which resulted in a strong presence of ageism, discrimination and bigotry directed at old people, as well as a negative self-perception of members of this population. Namely, numerous studies, carried out from the 1980s onwards, have confirmed the undoubted influence of the media on the perception of old people and age, with the general conclusion that old people are marginalized by the media and that media representation is largely based on stereotypes that lead to prejudice and stigmatization, i.e. ageism (Baraković, Mahmutović, 2018: 23).

Along with multidimensional marginalization comes self-stigmatization, which can have two outcomes - refusal to accept help and support, because the elderly believe that they do not deserve it, or the old person's strong dependence on other people's help, because there is a belief that they do not have the personal capacity for self-care (Ljubičić, Dragišić Labaš, 2018: 91). Perception based on negative stereotypes affects the self-perception and overall social interaction of old people, as well as their need to hide their age and their effort to substitute physical appearance for the insecurity and discomfort caused

by their unfavorable age status in society (Polić, 2005, according to: Baraković, Mahmutović, 2018: 25). Socially acceptable criteria of adequate adaptation to aging include - conformity between internal mental state and external circumstances; then, the continuity between the past experience and the current way of adaptation; acceptance of the inevitability of old age, as well as the existence of a certain degree of satisfaction resulting from security and relaxation due to the lack of responsibility (Simić et al., 2007: 84).

2. Socio-psychological changes in the period of involution - an example of suicidal behaviour of the elderly in Serbia

Instead of being seen as a natural course of life, old age is increasingly seen as a problem, which is why prejudices and negative attitudes towards the elderly, inhumane thinking about their needs and the lack of intergenerational solidarity are increasingly present (Solarević, Pavlović, 2018: 53). However, in old age there can be a change in cognition, memory, the personality itself and its mood and behavior, which is why it is sometimes difficult to distinguish whether the slowing down of mental processes is a consequence of old age, some psychophysiological disease (depression, hyperthyroidism, etc.) or simply, socially conditioned. The findings of numerous researches in the field of gerontology and geriatric psychiatry indicated that the impact of aging on mental health is closely related to the social life factors of the elderly (Ibid). Thus, an American gerontological study, focused on living conditions and care of the elderly, showed that the prevalence of mental disorders in people over 65 years old, who live in the community, is 15 to 25%, while, for people who are placed in the hospital, the same prevalence is 27 to 55% (Simić et al., 2007: 78).

Although modern research destroys some myths about age, such as the prejudice about senility, according to which every old person sooner or later becomes senile; then, the myth about the inefficiency of the elderly; the belief that the elderly do not have the capacity to change and accept changes - such beliefs continue to exist and thus feed ageism. Despite the fact that in the period of involution, a decrease in mental and physical functions is expected, as well as a person's ability to fully master new and complicated situations[8], a person can be completely mentally preserved and capable of creating even in late life, while a person's ability to change, in this case, depends more and more on

[8] In the broadest sense, aging can be seen as part of a natural process that consists of two phases - the first phase (*evolution*) includes growth and development, while the second phase (*involution*) begins with the weakening of physical functions and results in the final period of life, i.e. old age (Radaković, 2020: 558).

previous life experience, primary structure of personality and social factors, and less and less on age (Simić et al., 2007: 79-80).

However, family sociologists have pointed out that the key characteristics of aging as a life cycle are numerous biopsychosocial losses - death of a spouse, decline in physical health, retirement, departure of children from the "family nest", loss of social position and/or social security, which is why old people spend a lot of emotional and physical energy in the grieving process, in adapting to the changes that have occurred as a result of the losses, and in recovering from the stress after the loss. Loss at this age, more than at others, is accompanied by the appearance of self-isolation or distance from the family, which, on the other hand, is less and less ready to take care of its old and sick members, shifting the responsibility for that to social and health institutions. Finally, the isolation of the elderly can be more broadly socially conditioned, where the quality of (out)institutional care for the elderly plays a dominant role (Erikson, 1982; Sholevar, 1995). The generational gap and conflict bring with them revaluations of the generations themselves in the family. While traditional societies *a priori* valued the elderly, and where respect for parents, grandparents was even ritually expressed, the period of modernity, and especially late modernity, changes this relationship. According to the theory of modernization, the development of technology and medicine led to an increased life expectancy, a decrease in the number of younger cohorts, which led to the revaluation of old people. From a relatively small number of people who lived to old age in the past, and had the status of those with superior predispositions, today the demographic pyramid is increasingly moving towards the elderly, and children and younger people are seen as valuable (Ayalon, Tesch-Römer, 2018).

It has been empirically confirmed that aging can be a significant threat to the psychological well-being of older adults, by identifying a significant correlation between age and stress, anxiety, depression and reduced life satisfaction - old people who have experienced discrimination based on chronological age are more exposed to stressors and depression, and an individual who believes he is too old is more susceptible to the negative consequences of aging, such as decreased self-efficacy and increased negative emotions (Snape & Redman, 2003; Tougas et al., 2004; Eibach et al., 2010, according to: Kang, Kim, 2022: 2). A recent analysis of studies, conducted on this topic, showed that depression is an outcome of aging in 54% of cases, with negative age stereotypes being associated with higher levels of depression, loneliness and lower morale, while perceived ageism negatively affects active aging (life satisfaction, subjective health and self-perception of health) and on general mental health and well-being (Zhang et al., 2019; Fernandez-Ballesteros et al., 2017, Sabik, 2013, according to: Kang, Kim, 2022: 9). A special problem is that, as already mentioned, the elderly are prone to self-stigmatization, which

is why they often deny the existence or seriousness of emotional problems, so as not to be a burden to their family members and society (Hajdú, 2020: 577).

2.1. Socio-demographic characteristics as predictors of suicidal behavior of elderly people in Serbia

The French sociologist Émile Durkheim offered a sociological typology of suicides, dividing them into egoistic, altruistic and anomic, whereby the first occurs as a consequence of the loss of social interest or insufficient social integration, that is, increased individualization, the second as a consequence of insufficient individualization or excessive social integration, and thirdly as the result of social crises, which arose as a consequence of the violation of social norms, as a result of which society is unable to direct the individual and exercise control over him (Dirkem, 1997). Another way to approach the problem of suicide of the elderly is by looking at it as an inability to cope with current developmental problems imposed by a certain age (Knežić, 2011: 61). Although there are few countries that have criminalized suicide, moral and social stigma is what most often accompanies this act, shifting the focus from the condemnation of suicide as a sin or crime to suicide as a mental disorder (Jovanović, 2020: 535). Suicide and attempted suicide are not criminalized in Serbia, but inciting and assisting suicide is (Jovanović, 2020: 536)[9].

Based on these understandings, we come to the conclusion that suicide among members of the elderly population represents a significant public health problem, because suicide rates in this population are significantly higher compared to the rest of the population (middle-aged, young adults and adolescents) and that, as a phenomenon, it has social background. That old age represents a statistically significant risk factor for suicide, and that suicide rates are higher in countries where a large number of old people live and where the birth rate is lower, is confirmed by international statistical data - in most countries of the world, the highest suicide rates are among the population aged over 65 years

[9] Article 119 of the *Criminal Code* of the Republic of Serbia incriminates suicide as follows - (1) Whoever incites another to commit suicide or assists in committing suicide, will be punished by imprisonment for a term of six months to five years; (2) Whoever assists another in committing suicide, according to the provisions of Article 117 of this Law, and if suicide is committed or attempted, will be punished by imprisonment in secret from three months to three years; (3) Whoever commits the offense referred to in paragraph 1 of this article against a minor or a person in a state of reduced sanity, will be punished by imprisonment for a period of two to ten years; (4) If the act referred to in paragraph 1 of this Article is committed against a child or a mentally incompetent person, the perpetrator will be punished in accordance with Article 114 of this Law; (5) Whoever acts cruelly or inhumanely towards another person, who is in a position of subordination or dependence, and because of such behavior commits or attempts suicide which can be attributed to the negligence of the perpetrator, will be punished by imprisonment for a period of six months to five years (according to: Jovanović, 2020: 536).

(Bauer et al., 1997; Conwell et al., 1990; Kirsling, 1986; Leenaars, 1995; McIntosh, 1992, according to: Knežić, 2011: 60)[10].

The results of the longitudinal research on suicide in Serbia showed that, in the observed period (1990-2014), every third person who committed suicide was 60 years old or older (Dragišić Labaš, 2019: 103). According to domestic research, the etiology of suicide of old people is found in combined factors - their loneliness, neglect, death of a spouse, poverty, alcoholism, somatic illness, susceptibility to social anomie, depression or dementia, but also sociodemographic characteristics (gender, age, marital status etc.) (Dragišić-Labaš, 2001: 367). The absence of social support and social isolation can be singled out as relevant suicide factors for the elderly group - it has been shown that the elderly who live alone are more prone to suicide and that loneliness and reduced social interaction are important predictors of suicide. Among widows, divorcees and people who live alone, there is a higher risk of suicide, and this risk is particularly high among men. The analysis of farewell letters of old people showed that there are often contents that indicate depression, isolation, loneliness and exhaustion from life - control studies showed that the effects of physical illness are very often mediated by mental health factors, primarily depression and social isolation (Knežić, 2006; 2011: 287; 61-63). Thus, for example, hearing handicap represents both a medical and a social problem, because hearing loss in the elderly (*presbiascusis*) leads to their isolation, disrupts their social activities and increases the feeling of disability, creating disturbances in mood (depression) and emotions (anxiety) (Dragutinović et al., 2011: 37)[11].

These factors add up to a general change in socialization patterns. Namely, the educational pattern, characteristic of the period up to the 1970s, implied the absence of emotions, attention and tenderness towards children, and from then until today, there was a so-called boomerang effect, since now children do not listen to parental needs in old age, looking at the old as *those who only need to die* (Bobić, 2013). There is also a well-established view of old age according to which depression is a normal part of aging and

[10] Suicide, as a cause of death in the elderly population (even in developed countries such as the USA and Canada), is in thirteenth place, while suicide rates increase with age in both sexes, especially in the age group of 75 years and over. In the US, the highest suicide rates are among men over the age of 85; in Canada the overall suicide rate is 11.9, while among elderly men it is 22.7 and among women 5.5; standardized suicide rates in the countries of the European Union (1980-2006) for men range from 39.13 to 54.52, and for women from 13.9 to 17.27 (Amore et al., 2012: 268).

[11] A frequent, accompanying unpleasant symptom of sensorineural hearing damage is *tinnitus* - an abnormal noise (buzzing) in the ears and head that impairs the quality of communication and the entire social life of old people, which is manifested by the manifestation of symptoms of depression in those who have been hard of hearing for more than a year (Dragutinović et al., 2011: 37-38). Hearing loss is the most common chronic disease in the US - more than 9 million Americans over the age of 65, three out of five of whom do not use hearing amplifiers, have been found to have been sad and depressed for more than two weeks in the previous year (Lutman, Spencer, 1990, according to: Dragutinović et al., 2011: 30).

a natural reaction to mostly negative life changes, and, according to some authors, even ¾ of the suicides of the elderly could be avoided by adequate treatment of depression (Beautrais, 2002, according to: Knežić, 2011: 61). The feeling of loneliness, combined with old age, illness and helplessness, can intensify various (ir)rational fears, where these same fears can lead to arbitrary abandonment of life and where the fear of life overrides the fear of death. This is how we come to the fact that the elderly face problems concerning human dignity and the meaning of further living (Knežić, 2011: 55-56). Consequently, social networks, and, above all, good relationships with partners, children, grandchildren, relatives and friends, are recognized as an important factor for achieving the well-being and life satisfaction of the elderly (Dragišić Labaš, 2016: 81). The elderly often, after retirement, socialize more intensively with their peers, and gerontologists consider this type of contact very important for a faster and better adaptation to the aging process (Stoller & Earl, 1983; Ward, 1978; Fisher, Reid, Melendez, 1989, according to: Dragišić Labaš, 2016: 84).

Self-destructive behaviors of the elderly often lead to premature death and are common in institutional settings (psychiatric hospitals, nursing homes, etc.), especially in the physically ill and dependent on the help of others. In the case of old people staying in psychiatric hospitals, suicidal factors can be grouped, so it is possible to single out - *health* (loss of physical and/or mental health - severe organic disease or alcohol addiction); *economic* (financial difficulties); *family* (related to family dysfunction - bad relations with children, abuse by a family member, children leaving the family, etc.) and *socio-psychological factors* (feeling of loneliness, due to lack of friends, up to social isolation) (Dragišić Labaš, 2019 : 67-68). Gender differences were found when it comes to certain factors - for example, loneliness and alcohol use are more common in old men than in women; women cite the death of a child as the cause of suicide attempts, and in a much larger number of cases they are mentally and physically abused by members of the immediate family (mainly sons and sons-in-law). Gender equality is present when it comes to financial difficulties and bad relationships with children as risk factors (Dragišić Labaš, 2019: 103-104).

Suicidal behavior of old people ranges from feelings of hopelessness, through indirect self-destructive behavior, self-injury, to suicide (Dragišić Labaš, 2019: 104). The act of suicide among the elderly is more planned and less impulsive, and the use of more violent methods is present compared to the young. Also, elderly people do not communicate directly about their intention, that is, their warning signs have a lower chance of being visible, because they often live alone (Amore et al., 2012: 267-269). However, there are some subtle signs, associated with the conscious or unconscious intention to die - refusal to take food and water in order to starve, not taking prescribed medicines, up to extreme

personal neglect, for which, in the professional literature, the term is used term "*sub-intentional suicide*" (Farberow, 1980, according to: Amore et al., 2012: 267)[12]. Refusal of medical intervention and artificial prolongation of life is the right of every person, a morally and legally accepted type of passive euthanasia. The prevalence of passive euthanasia, and especially social euthanasia[13], in the opinion of many, justifies the legalization of active euthanasia, i.e. the intentional deprivation of life of an incurable (and/or elderly) patient, at his or her valid request, as the right to a dignified death (Jovanović, 2020: 543-546).

When there is a direct way of committing suicide, the most common among the elderly is suicide by hanging (in over 50% of cases), followed by strangulation or drowning, poisoning, and the least common is the use of firearms (Penev, 2016: 198-201)[14]. Finally, a significantly higher number of suicide attempts was recorded among old people than among young people - the suicide rate for the population aged 75 and over in Serbia is three times higher than for the age group from 15 to 24 years old, and there is also a general trend, according to in which suicide is three to four times more common among men than among women, and these differences by gender, in favor of men, increase with age (Dragišić-Labaš, 2001; Knežić, 2011)[15].

Conclusion

Analysis of the problem of stigmatization of old people in our society using secondary sources, showed that positive perceptions and attitudes about aging could have a positive effect on the psychological well-being of old people, which should be systematically worked on (Briant et al., 2012). (Self-)isolation of the elderly can be, and most often is, socially conditioned. Therefore, on the one hand, it is necessary to reject ageism based

[12] The term refers to indirect self-destructive behavior, which means the decision not to accept recommended medical therapy and other therapies. Such behaviors, although not directly suicidal, significantly increase the chance of death (Farberow, 1980, according to: Amore et al., 2012: 267-268). According to *The Law on Patients Rights*, the patient, except in exceptional cases, has the right to decide on everything concerning his life and health, which means confirming the principle of autonomy, i.e. abandoning the paternalistic approach regarding the application of medical measures (Jovanović, 2020: 546).

[13] It implies the discharge of incurable and elderly patients from the hospital, so that the family can take care of them (Jovanović, 2020: 545).

[14] Hanging is characterized by easy availability and high mortality. Regarding suicide by poisoning, an interesting fact is that it was the second most common way of committing suicide among old men and women in Serbia until 1990. After that, it remains second in order among women, and third among men, primarily due to the increased use of firearms, which became significantly more available after 1990 (Penev, 2016: 202).

[15] For more informations see: Dragišić-Labaš, S. (2019). Egzogeni faktori u etiologiji suicidalnog ponašanja starih osoba. *Engrami*, 21(3-4), str. 88-89.

on prejudices, negative attitudes and generalizations, because the normalization of discrimination in the discourse leads to the normalization of discriminatory social practices (Milojević, 2022: 141). On the other hand, there is increasing pressure on societies, especially affected by ageist challenges, to adequately respond to them - the modern approach to aging foresees significant forms of dignified aging through institutional and non-institutional forms of support, which is why it is important to improve them in the direction of destigmatizing members of the elderly population (Knežić , 2011; Stanimirović, 2017; Radaković, 2020).

As a proposal to improve the social position of people in the third age in Serbia, the model of active aging is often promoted, which, despite efforts for its implementation, still exists only nominally. *Active* (*successful*, *positive* or *healthy*) *aging* represents continuous adaptation to old age, during which the individual learns to live with deterioration in cognitive and physical functioning, i.e., it is a process by which chances for physical, social and mental well-being are used in the most favorable way, in order to have a better quality of life in old age (Dragišić Labaš, 2016: 24; Bobić, 2013: 142)[16]. However, old age in Serbia is still lived according to the principle of reliance on one's own resources (social networks and professional status, material resources, etc.) and personal initiative in designing everyday life (Ljubičić, Dragišić Labaš, 2018: 105-106). In the conditions of a favorable mental and social climate, where it is not under the impact of poverty, discrimination and segregation, the elderly population can be well integrated, satisfied with their social place and role and constructive in their own way (Simić et al., 2007: 84). Demographic changes create a need to strengthen cohesion between generations, with the family playing the most important role in providing social support and care for the elderly in Serbia. A more present intergenerational solidarity in society would enable adaptation of the environment to all ages, a more active role of the elderly, their social and cultural participation, as well as an understanding of the needs and respect for the rights and specificities of the elderly (Solarević, Pavlović, 2018: 52-53). However, the aging of the world's population and the slowing of the birth rate will continue in the future, which will cause a deficit of young people who could care for the growing number of elderly people.

Suicidal ideas are not an inevitable consequence of aging, involution and related disability and depression, but mainly of weak social support (Dragišić Labaš, 2019: 104). Good mental health and quality of life are correlated with the level of social activity among members of the elderly population and, therefore, our society should ensure that the elderly have adequate opportunities to socialize with their peers, to attend cultural

[16] Active aging includes the following components - paid work/work engagement after retirement (not necessarily of the market type); lifelong learning and education; voluntary activities and active leisure and health care (Bobić, 2013: 143).

events and participate in workshops that will teach them various skills, such as computer programming, painting, dancing or language learning (Radaković, 2020: 565). Therefore, in connection with the prevention of suicide of the elderly, it is very important to point out the reasons for living, which include beliefs and expectations that can reduce the risk of suicide - these can be *responsibility towards family and relatives*; *fear of suicide* and *fear of social condemnation* (Amore et al., 2012: 268-269). In addition, it should be borne in mind that extensive social networks can satisfy the emotional and instrumental needs of the elderly, and help them face hopelessness, which has been identified as one of the main suicidal factors. Consequently, in aging societies, the relationship between elderly parents and adult children becomes a topic of extreme importance - establishing a harmonious relationship between parents and children in all stages of the life cycle contributes to the quality of life of both (Dragišić Labaš, 2018: 156)[17]. Intergenerational bonding and solidarity would, both qualitatively and quantitatively, lead to a better state in the field of active aging, and thus to a greater degree of respect for the rights of the elderly and preservation of their dignity (Solarević, Pavlović, 2018: 54; Radaković, 2020).

Respecting Durkheim's position that suicide is deeply determined by the social environment (Durkhem, 1997), the prevention of suicide of elderly people in Serbia should be devoted to the form of a more systematic and organized care of the whole society for this part of the population at risk of suicide, and implement actions to preserve their dignity - in the "open community" (material assistance from centers for social work, local communities and the Red Cross; then, the organization of various social activities within pensioners clubs; services of the health field service and tele-appeal service; psychotherapeutic and sociotherapeutic treatment in psychiatric institutions etc.), or within marriage and family counseling centers for the elderly, since the post-parental stage is considered the longest period in the married life cycle (Dragišić Labaš, 2001: 373-374; Radaković, 2020: 565-566). We should not lose sight of the fact that all of us, including the people dear to us, will one day belong to the population of the elderly. Let this knowledge motivate us, at the social level, to (choose to) fight for active and dignified aging as the norm.

[17] According to the results of a research (Dragišić Labaš, 2016), "intimacy based on distance" proved to be the desired model of the relationship between children and elderly parents - respondents prefer or look for this kind of relationship, but only a fifth of them managed to establish it (according to: Dragišić Labaš, 2018: 157).

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HUMAN (SOCIAL) RIGHTS BASED PROTECTION FOR ELDERLY PERSONS WITH SPECIAL REGARD TO THE REVISED EUROPEAN SOCIAL CHARTER

Article 23 of the European Social Charter (hereinafter: ESC)[1] *is the first international treaty provision to specifically protect the social rights of the elderly persons in Europe. Its measures reflect a new progressive notion of elderly life, requiring state parties to take coherent actions in various areas. One of its primary objectives is to enable elderly persons to remain full members of society. Article 23 overlaps with other provisions of the ESC which protect elderly persons as members of the general population, such as the right to protection of health, social security, social and medical assistance, and protection against poverty and social exclusion. The focus of Article 23 is on the social protection of elderly persons outside the employment field, requiring states to combat age discrimination in a range of areas beyond employment, namely in access to goods, facilities, and services. An adequate legal framework is essential in order to combat the age discrimination that prevails in Europe in various areas such as healthcare, education and resource allocation. It is necessary to provide elderly people with a legal framework that supports decision-making to ensure that they have the right to make their own decisions unless proven otherwise, which means that elderly people suffering from illness, disability or lack of legal capacity should not be presumed to be incapable of making decisions. The article aims to introduce the complex protection system of elderly persons under the ESC (1996), with special regard to social protection and its implication to ESC's Article E on non-discrimination.*

Keywords: *ageism, elderly person, European Social Charter, human (social) rights, non-discrimination, social protection.*

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[1] Adopted in 1961 by the Council of Europe, the ESC is an international treaty to protect human social rights in the state parties (46 in 2023) of the Council of Europe. The Convention established the European Court of Human Rights, intended to protect individuals from human rights violations.

Introduction

In the meantime the problems of the protection of elderly persons[2] are manifold: 1. demography:[3] the steadily - and in some societies (e.g. Japan) rapidly - aging societies;[4] 2. inclusive aging or active aging: achive an active and ingenuous aging with dignity, 3. human rights-based protection: lack of universal UN Convention on aging, unlike women,[5] child,[6] disabled,[7] migrants[8] and 4. ageism: multiple (old) age discrimination, and lack of equal treatment with dignity:[9] in one hand discrimination based on old age and on the other hand elderly persons must face with various types of discriminations, like gender, ethnicity, colour, origin, disability, etc., 5. Income inadequacy: poverty and social exclusion (income replacement by old-age pension). This is a multiple discrmination which based primarily on (old) age.

Due to the restricted space of this article only some of the above mentioned points (No. 3 and 4) will be discussed profoundly, since this paper's fundamental aim is to explain the desirable paradigmical change to move away from *ageism* towards a *human rights-based* (the ESC's "effective excercise of the human (social) right") approach.[10] It is not a solely matter of granting old people particular human rights, but of guaranteeing them the full enjoyment of all human rights and participation in all areas of the society. This shift has been taking place over the past 20 years or so, and directly counteracts ageism and its pernicious effects. The ESC, as a regional human rights instrument, has always been ahead of these developments.[11] However, there is an enevitable need to enact

[2] UN defines older persons as those aged 60 year or over. On many occasions it is defined as 65+.

[3] Population aging - the process by which older individuals become a proportionally larger share of the total population" (Source: UN report on World Population Aging: 1950-2050); Furthermore, "…the aging of population is often measured by increases in the percentage of elderly people of retirement ages" Source: The Encyclopedia of Population.

[4] Aging of population is a summary term for shifts in the age distribution (i.e., age structure) of a population toward older ages. The Encyclopedia of Population, Paul Demeny and Geoffrey McNicoll (Eds.), New York, Macmillan Reference USA, 2003

[5] UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW (1979)

[6] UN Convention on the Rights of the Child (OHCHR) (1989)

[7] UN Convention on the Rights of Persons with Disabilities (CRPD) (2006-2007)

[8] UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

[9] Eradicate the multiple forms of discrimination that affect older persons, including all forms of violence against older women and men, taking into account the obligations of States with respect to ageing with dignity and rights. Beside the state other national and international actors, like courts, NGO, employers, and individuals shall take part to combat for the equal rights for elderly persons.

[10] See in ESC Art 23.

[11] UN Mainstreaming ageing in the human rights-based approach, https://media.un.org/en/asset/k1j/k1j2tx6uvb (accessed on 17.07.2023)

the firts UN Convention on aging, augmenting the group of the new approached universal human rights conventions. (See detailes later.)

The topic is perspectively relevant and important, since world-wide ageing will be a major determinant of long run socio-economic development in the industrialised parts of the world. There is no question that global ageing will be a major determinant of long-run social and economic development in the world.[12] The dimension of the demographic change is irreversible and will fundamentally influence the future of labour market and social security systems.[13]

Furthermore, Europe is not only ageing: in fact, the fastest growing segment of the population are not "older persons"[14] but what are known as "the oldest old" or very old.[15] Between 2018 and 2050, the number of very old people in the EU is estimated to more than double, up by 130.3 %. The number of persons aged 85 years or over is projected to increase from 13.8 million in 2018 to 31.8 million by 2050, while the number of centenarians (people aged 100 years or more) is projected to grow from close to 106 000 in 2018 to more than half a million by 2050.[16]

From legal point of view older persons might face challenges since their human rights are not protected in existing international human rights norm, except the Article 23 of the ESC.[17]

The methodology used in this paper is evolutionary method which introduce and anylises the existing international norms with specialregads to ESC.

[12] See for example: KINSELLA, K. and VELKOFF, V.A. (2001) An Aging World 2001. Series P95/01-1, US Census Bureau, Washington DC.; Ronald LEE and Andrew MASON, Cost of Aging, Finance & Development, March 2017, Vol. 54, No. 1, https://www.imf.org/external/pubs/ft/fandd/2017/03/lee.htm; (accessed on 17.07.2023) K. Mc MORROW & W. ROEGER The Economic Consequences of Ageing Populations (A Comparison of the EU, US And Japan) https://ec.europa.eu/economy_finance/publications/pages/publication11151_en.pdf (accessed on 17.07.2023)

[13] Gerard QUINN - Israel (Issi) DORON (2021) p.17

[14] Historically, the United Nations has defined an "older" person as anyone 60 years or older, regardless of that person's individual history or where in the world they live. However, it changes according to the development of the societies. For example, someone who is 60 today, may be in some respect equivalent to a person who was 43 years in 1850). In some countries the retirement age is a demarcation line between active (not old) and anactive (old) age.

[15] There is no consensus definition for who constitutes oldest-old adults, or the oldest-old. Most commonly, the oldest-old in developed countries refers to people ages 85 or older; whereas it often refers to people ages 80 or older in developing countries. In United Nations publications, and from definitions by the American Geriatric Society and the World Health Organization, it generally refers to people ages 80 or older. The oldest-old ages are also referred to as the "fourth age."

[16] Ageing Europe Looking at the Lives of Older People in the EU (2019), https://ec.europa.eu/eurostat/documents/3217494/10166544/KS-02-19%E2%80%91681-EN-N.pdf/c701972f-6b4e-b432-57d2-91898ca94893 (accessed on 17.07.2023)

[17] Craig MOKHIBER (2023) Ageism in human rights law; https://www.ageinternational.org.uk/policy-research/expert-voices/ageism-in-human-rights-law/ (accessed on 17.07.2023)

One of the fundamental research questions is the following: the Article 23[18] of the European Social Charter - as a first and sole regional international norm based on the inclusive human rights based approach - can provide adequate protection for elderly persons.

The main target of this article is that law and human rights as instruments for social change and for social transformation to protect the rights and dignity of elderly persons (we call it inclusive dignity). First the old - mainly discriminatory - concept of ageism and the totally different human-rights based (integrative) approach will be discussed. This paradigmatic change in the old-age related approach might be the core doctrinal basis of a new UN international convention on elderly persons.[19] After the Article 23 of the ESC will be discussed in detailes.

1. Ageing and Ageism versus human rights (integrative) approach for elderly persons

Basically "aged" or "eldely" persons are distinct and in many times discriminated social group, at least, in the highly industrialised societies. Due to, at least, six reasons: 1. the changing family structure (in industrial societies the extended family structure[20] changed to nuclear family form[21]); 2. the role of old family members[22] in the nuclear

[18] The text of the article is as follows:
Article 23 - The right of elderly persons to social protection With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation 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;
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 life-style 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.
[For the purpose of the application of this paragraph, the term "for as long as possible" refers to the elderly person's physical, psychological and intellectual capacities.]

[19] The title might be like the following: Convention on the Rights of Elderly Persons (CREP).

[20] An extended family is a family group which includes relatives such as uncles, aunts, and grandparents, as well as parents, children, and brothers and sisters. Usually three generations lived together in the agricultural cultures.

[21] A family group that consists only of parents and their children is called a nuclear family.

[22] The main roles of elderly persons in the extended family: Help with tasks and provide advice. Seniors can also pitch in to help family members with home maintenance, financial planning or financial assistance, transportation needs, errands, meal preparation, shopping, and other activities.

type family significantly diminished; 3. they are gradually excluded from the labour market, 4. quite number of them (especiall the "very old" ones) reach the second childhood[23], 5. age discrimination and 6. exclusion (no self-esteem and dignity.

These factors might result in very low self-esteem and dignity, and invoke two necessary approaches: A). *aging* and B) *ageism*.

A) *Aging.* People are living longer because of better nutrition, sanitation, health care, education and economic well-being. Although an aging world poses social and economic challenges, the right set of policies can equip individuals, families and societies to address these challenges and to reap its benefits.[24] Aging has, at least, three different usually interrelated dimensions: a) biological (physical) aging, d) mental (psychological or cognitive) aging and c) societal (anti-inclusion capacity) aging.[25] Three of them might be a ground of discrimination and exclusion from the "active-aged" society.

a) The *biological aging* itself is an unavoidable process, which affects every persons in the world: from the cradle to the thumb which is the normal way of life. However, the biological aging is in one hand a bio-physio-chemical advancement and on the other hand its a genuine and natural life-circle development without any physichal and/or mental disability, illness or social exclusion and discrimination. For example, greying hair, crawl, wrinkled face, etc. It is part of the essence of the human existence and part of the natural characteristics of a human being and in the same time possible ground for discrimination and exclusion from certain societal groups.

b) *Mental or cognitive aging*[26] means that as a person gets older, his/her mental functions become less quick and flexible, and memory gradually get a little worse. Mentally slow down and troubled persons become more easily distracted by ordinary situations, and it takes more effort to work through - previously easy - problems and decisions, or it becomes more common to experience a "tip of the tongue"[27] moment.[28]

[23] Second childhood is an informal phrase used to describe adults whose declining mental and/or physichal capabilities mean that they need care similar to that of children. It is an unscientific term, but describe the situation well.

[24] UN Population Fund, Aging (2023), https://www.unfpa.org/ageing (accessed on 17.07.2023)

[25] The 3 Unique Kinds of Aging (2020) Home Care Assistance Des Moines 9 am on June 26. https://www.homecareassistancedesmoines.com/distinct-categories-of-aging/ (accessed on 17.07.2023)

[26] Cognitive aging shows how the brain manages memory, thinking, and other mental processes.

[27] Andrea SEABROOK Tip-of-the-tongue moments — those frustrating mental situation that happen when someone can't quite remember a word or a name, etc.

[28] Tip-of-Tongue Moments Reveal Brain's Organization (2008); https://www.npr.org/templates/story/story.php?storyId=91284151 (accessed on 17.07.2023)

c) *Societal aging*. It is a demographic, structural, and cultural transformations that a society undergoes as the proportion of older adults increases - affects every aspect of social life, from social institutions (such as the family, work, education, and politics) to the experiences of aging individuals.[29] The pace of demographic change poses real challenges for economic growth, labour markets, fiscal balances, inequality, and the well-being of societies and older people themselves. In the literature, there is a sharp societal and many times legal distinction between active and inactive age. Actives are persons who take part in labour market. Inactives have two subgroups: 1. persons before enter into the labour market (usually chidren and students) and 2. persons beyond retirement age who are usually excluded from the labour market (retired persons). Many times these retired persons are considered as an "useless" or at least "less useful" segment of the society and often they are discriminated based on this (old age) phenomenon. Primarely the key point is that somebody is "in" or "out" of the labour market and over the retirement age.

As an important deliniation it must be underlined that *Age discrimination*[30] (see. e.g. CJEU Sabena case[31], search young women (below a certain age) for waitress/stewardes), and *Aging discrimination* (discrimination based on old-age is not the same). The later one is usually considered ageism.

B) *Ageism*[32] is a relatively new concept. It was first described by Robert Butler in the late 1960s. The definition of ageism goes as follows*: "Ageism can be seen as a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender. Old people are categorised as senile, rigid in thought and manner, old fashioned in morality and skills*

[29] MORGAN, Leslie A., KUNKEL, Suzanne R. (2015) Aging and Society in. Aging, Society, and the Life Course, Fifth Edition Springer Publishing; https://connect.springerpub.com/content/book/978-0-8261-2173-8 (accessed on 17.07.2023)

[30] Age discrimination is defined as a situation where 'a person is treated less favourably than another is, has been or would be treated in a comparable situation' on the grounds of age (direct discrimination) or where 'an apparently neutral provision, criterion or practice would put persons having […] a particular age […] at a particular disadvantage compared with other persons' according to the so-called 'employment equality directive' (2000/78/EC). Both direct and indirect discrimination and harassment on the basis of age are outlawed by this directive in the field of employment, unless these practices are 'objectively justified by a legitimate aim' and are appropriate, proportionate and necessary. Discrimination can happen also 'by association', if a person is discriminated not because of her own criteria, but because of her association bearing a criteria for discrimination: for example, if a young person is not promoted because she is living with an older person in need for care. NB: The EU legislation only provides for protection against age discrimination in matters of employment. (Age discrimination (2023) https://www.age-platform.eu/glossary/age-discrimination) (accessed on 17.07.2023)

[31] Defrenne v Sabena (No.3), C-149/77

[32] Ageism in briefí: discrimination against older people because of negative and inaccurate stereotypes. Types of ageism: 1. institutional ageism, which occurs when an institution perpetuates ageism through its actions and policies; 2. interpersonal ageism, which occurs in social interactions; and 3. internalized ageism, which is when a person internalizes ageist beliefs and applies them to themselves.

… Ageism allows the younger generations to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.".[33] This definition compared two principal components of ageism: 1. stereotypes and 2. prejudices against old age.

There is another well known definition[34] made by Iversen, Larsen and Solem (2009): "Ageism is defined as negative or positive stereotypes, prejudice and/or discrimination against (or to the advantage of) elderly people on the basis of their chronological age or on the basis of a perception of them as being "old" or "elderly". Ageism can be implicit or explicit and can be expressed on a micro-[35], meso-[36] or macro-[37] level".[38]

Furthermore, according to the Ontario Human Rights Commission the definition of "ageism" refers to two concepts: 1. a socially constructed way of thinking about older persons based on negative attitudes and stereotypes about aging and 2. a tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older persons.[39]

In sum, old people - on the sole basis of being categorised as being "old" - experience, on a daily basis, mostly negative prejudices, biases, stereotypes and discriminatory behaviours. They are stripped of their individualistic and humanistic nature and are all thrown into one big "bucket" of a group generalisation: of being elderly.[40] It can be stated that ageism is an oppressive prejudice. Persons of all age groups mainly show bias against olders. It might change by many factors, such as society by society, regions by regions, religions by religions, etc.[41]

[33] Robert N. BUTLER (1975) Why Survive? Being Old In America, Harper & Row

[34] This definition, ageism includes all the classic social psychological components: cognitive (stereotypes/how we think); affective (prejudice/how we feel); and behavioural (discrimination/how we behave). It encompasses the understanding that ageism can operate both consciously (explicitly) and unconsciously (implicitly).

[35] The basic level is the micro - personal and interpersonal - which appears in the form of refraining from personal communication, exhibiting a paternalistic attitude, and talking down to older persons.

[36] The intermediate, or meso, evel refers to the family and one's social network.

[37] The highest level is the macro, which includes the social structuring of old people and the subjects of policy and legislation.

[38] IVERSEN, T. N., LARSEN, L., & SOLEM, P. E. (2009). A conceptual analysis of ageism. Nordic Psychology, 61(3), 4-22. https://doi.org/10.1027/1901-2276.61.3.4 (accessed on 17.07.2023)

[39] Ageism and age discrimination (2023) https://www.ohrc.on.ca/en/ageism-and-age-discrimination-fact-sheet (accessed on 17.07.2023)

[40] Ageism is a global challenge: UN (2021) https://www.who.int/news/item/18-03-2021-ageism-is-a-global-challenge-un (accessed on 17.07.2023)

[41] CHOPIK, W. J., & GIASSON, H. L., Age Differences in Explicit and Implicit Age Attitudes Across the Life Span Gerontologist, Vol. 57, Suppl. 2, 2017, Pages S169-S177.

1.1. Mainstream theories of ageism

a) *Terror-Management Theory* (TMT). (Jeff Greenberg, Tom Pyszczynski, and Sheldon Solomon) TMT explains how people's awareness of their mortality causes them to fear old age, because death is associated almost exclusively with old age.[42]

b) *Social identity theory.* Another way by means of which ageism may be explained is that of social identity theory (SIT), which proceeds from the assumption that a person aspires to attain a positive self-identity. Self-identity is constructed to a large extent on an individual's group identity, and therefore a positive feeling towards the group to which the person belongs will also create a positive feeling in regard to self-identity. Attitudes towards the other are less positive than attitudes toward "us", thus causing the individual to feel good with his/her belonging to the group. Thus, self-identity enables a distinction to be made between young and old as belonging to groups, the young distinguishing themselves from the old in attributing positive traits to their young age, and vice versa.[43]

c) *Generational division*. Ageism is founded on a macro-level approach and on the industrial-age-based generational division. For example, until the industrial revolution, people of all ages lived, worked, and were engaged with each other. It was only as part of the functional division between 'three stages of life', which fitted well the needs of the industry-based economy, that human society was split into three distinct and separated groups: 1. the young/the children, whose goal was to grow and gain the skills needed in order to become the future workers; 2. the workers, whose purpose was to be the pillars of the economy, and, finally, 3. "the elderly"/the pensioners, who did not have any significant role, other than enjoying a short period of relative freedom before they died. The result of this division was not only the superfluity of the older population, but also their exclusion from the society.[44]

There are many other different theories in this field, however, they all share a similar understanding, while ageism may resemble other "-isms" (for example, sexism or racism, etc.), its main roots are unique and different: it is founded on the unique human

[42] JUHL, J. (2019). Terror management theory: A theory of psychological well-being. In C. Routledge & M. Vess (Eds.), Handbook of terror management theory (pp. 303-324). Elsevier Academic Press. https://doi.org/10.1016/B978-0-12-811844-3.00013-5 (accessed on 17.07.2023)

[43] Jake HARWOOD (2020) Social Identity Theory; https://onlinelibrary.wiley.com/doi/full/10.1002/9781119011071.iemp0153 (accessed on 17.07.2023)

[44] Unifying Generations: Building the Pathway to Intergenerational Solidarity (2022); http://bettersciencebetterhealth.com/unifying-generations-building-the-pathway-to-intergenerational-solidarity/

social construct of what it means to be old - and nothing else.[45] Moreover, this is an obvious form of age discrimination.

1.2. Typical examples of ageing discrimination

Health care: healthcare professionals hold stereotypical views regarding older persons, and in many instances prefer to work with children or young families and rather than with the older persons. Moreover, numerous studies have also shown how, compared with young patients, the real-life medical/care-related treatment of older patients is lower in quality and out of line with the professional care standards[46] in the field.

Employment: there is a large body of empirical data showing how older workers are discriminated against. This starts with the recruitment process (older workers are less frequently invited to interviews); it goes on to promotion (in their later years, older workers are less often sent on courses or to training sessions), and ends with exiting the work force (there are various countries where mandatory age-based retirement is still the norm). On a daily basis, the treatment experienced by workers in older age groups is based on "group-based" stereotypes rather than on their individual abilities.[47]

1.3. WHO approach

According to the World Health Organization (WHO) report,[48] "ageism has serious and far-reaching consequences for people's health, well-being and human rights. For older people, ageism is associated with a shorter lifespan, poorer physical and mental health, slower recovery from disability and cognitive decline.

Ageism reduces older people's quality of life, increases their social isolation and loneliness (both of which are associated with serious health problems), restricts their ability to express their sexuality and may increase the risk of violence and abuse against older people. Ageism can also reduce younger people's commitment to the organisation they work for. For individuals, ageism contributes to poverty and financial insecurity in older age, and one recent estimate shows that ageism costs society billions of dollars".[49]

[45] Gerard QUINN - Israel (Issi) DORON (2021) Against Ageism and Towards Active Social Citizenship for Older Persons The Current Use and Future p.21. (accessed on 17.07.2023)

[46] BATRIĆEVIĆ, Ana. "The Role of Informal Caregivers in the Fulfilment of the Right to a Dignified Old Age in Serbia." From Childhood To The Right To A Dignified Old Age Human Rights And Institutions (2022): 463.

[47] Gerard QUINN - Israel (Issi) DORON (2021) p.22.

[48] Ageism is a global challenge: UN (2021) https://www.who.int/news/item/18-03-2021-ageism-is-a-global-challenge-un (accessed on 17.07.2023)

[49] WHO Global report on ageism (2021) https://www.who.int/teams/social-determinants-of-health/demographic-change-and-healthy-ageing/combatting-ageism/global-report-on-ageism (accessed on 17.07.2023)

In sum, ageism as a legal approach is a pure and prohibited age discrimination against older peoples based on negative and inapropriate stereotypes. Ageism from psychological point of view is one of the last socially acceptable prejudices and age bias. Inevitably ageism has a host of negative effects, for people's physical and mental well-being and society as a whole. It is a very old-fashioned and unwelcomed behaviour without an expressis verbis, universal and full-scaled legal prohibition. However, slowly a new approach of protection of elderly persons (inclusive - effective excercise of the right of elderly) is emerging. (See under next point.)

2. Ageism versus a human rights issue: ESC as a regional sample instrument

The main guiding principle of this article is that law (precisely rule of law) and human rights are an instruments for social change and for social transformation. Hence, older persons, being viewed as a new "social challenge" needed a solution in the form of new legal approach (inclusive dignity) and social policies: policies to keep them healthy, active, and engaged as economically contributing actors and new international and national human rights norms and provisions.[50]

Therefore, as part of this paper's analysis of the social human rights approach for old persons, it is not only necessary to understand what age, ageing and old age mean. It is also not enough to understand the social phenomena of ageism, its roots, and impact. It is also necessary to understand that there is a need for a paradigm shift from a social and societal discrimation-based ageism model to a human rights approach model.[51],[52] Before start to introduce Article 23 of the ESC, the Madrid Plan of Action and the Global Alliance for the Rights of Older People will be displayed briefly. These two instruments are contain the human rights based, inclusive model.

2.1. Madrid Plan of Action and its Implementation

The Madrid International Plan of Action on Ageing and the Political Declaration adopted at the Second World Assembly on Ageing in April 2002 mark a turning point in how the world addresses the key challenge of "building a society for all ages".

[50] Gerard QUINN - Israel (Issi) DORON (2021) p.23.

[51] DORON, I., BROWN, B., & SOMERS, S. (2013). International protection for the human rights of older people: History and future prospects. In P. BROWNELL and J. KELLY (Eds.) Ageism and Mistreatment of Older Workers: Current Reality, Future Solutions (pp. 165-180). NY, New York: Springer.

[52] Alexandre SIDORENKO & Asghar ZAIDI, International Policy Frameworks on Ageing: Assessing Progress in Reference to the Madrid International Plan of Action on Ageing, 16 J. SOC. POL'Y STUD. 1, 141 (2018).

The Madrid Plan of Action offers a bold new agenda for handling the issue of ageing in the 21st-century. It focuses on three priority areas: 1. older persons and development; 2. advancing health and well-being into old age; and 3. ensuring enabling and supportive environments. It is a resource for policymaking, suggesting ways for Governments, non-governmental organizations, and other actors to reorient the ways in which their societies perceive, interact with and care for their older citizens. And it represents the first time Governments agreed to link questions of ageing to other frameworks for social and economic development and human rights, most notably those agreed at the United Nations conferences and summits of the past decade.[53]

There are a number of central themes running through the International Plan of Action on Ageing, 2002 linked to these goals, objectives and commitments, which include:

(a) The full realization of all human rights and fundamental freedoms of all older persons;

(b) The achievement of secure ageing, which involves reaffirming the goal of eradicating poverty in old age and building on the United Nations Principles for Older Persons;

(c) Empowerment of older persons to fully and effectively participate in the economic, political and social lives of their societies, including through income-generating and voluntary work;

(d) Provision of opportunities for individual development, self-fulfilment and well-being throughout life as well as in late life, through, for example, access to lifelong learning and participation in the community while recognizing that older persons are not one homogenous group;

(e) Ensuring the full enjoyment of economic, social and cultural rights, and civil and political rights of persons and the elimination of all forms of violence and discrimination against older persons;

(f) Commitment to gender equality among older persons through, inter alia, elimination of gender-based discrimination;

(g) Recognition of the crucial importance of families, intergenerational interdependence, solidarity and reciprocity for social development;

(h) Provision of health care, support and social protection for older persons, including preventive and rehabilitative health care;

[53]UN Madrid Plan of Action and its Implementation (2002) https://www.un.org/development/desa/ageing/madrid-plan-of-action-and-its-implementation.html (accessed on 17.07.2023)

(i) Facilitating partnership between all levels of government, civil society, the private sector and older persons themselves in translating the International Plan of Action into practical action;

(j) Harnessing of scientific research and expertise and realizing the potential of technology to focus on, inter alia, the individual, social and health implications of ageing, in particular in developing countries;

(k) Recognition of the situation of ageing indigenous persons, their unique circumstances and the need to seek means to give them an effective voice in decisions directly affecting them.[54]

2.2. Global Alliance for the Rights of Older People

The Global Alliance's mission is to support and enhance civil society's engagement at national, regional and international levels on the need for a new international instrument on the rights of older persons.

Established in 2011, the Global Alliance for the Rights of Older People (hereinafter: GAROP)[55] was born out of the need to strengthen the rights and voice of older people globally. Today, GAROP is a network of over 400 members in around 80 countries worldwide, united in their work to strengthen and promote the rights of older persons. One of its main targets to make a proposals for an international legal instrument (new UN treaty) to promote and protect the rights and dignity of older persons and to present to the UN General Assembly, at the earliest possible date.

The following rights as main elements of a new legal instrument has been articulated: a) the right to life, b) the right to an adequate standard of living, c) to social protection, financial security and social assistance, d) to access to work, e) to care and long term care, f) to health care and mental health including vital drugs and treatment, g) to legal services and judicial protection, h) to education and training, i) to information, j) to accessibility, k) to equal recognition before the law, l) to freedom of association, m) to participation in public and political life, n) to participation in a social and cultural life, o) to a private life, p) to freedom from abuse and violence, r) to physical security, s) to social services, s) to care and long term care, t) to dignity, including a dignified death, and u) to

[54] Political Declaration and Madrid International Plan of Action on Ageing, Second World Assembly on Ageing in April 2002, Madrid); https://www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf pp. 17-18. (accessed on 17.07.2023)

[55] The philosophy of the GAROP: Age with Rights. It based on the civil society's engagement toward a new international instrument on the rights of older people.

access to credit, establishment of business, income generation activities and ownership of property.[56]

In sum, the importance of addressing the intersection of discrimination based on different identities was also formally acknowledged. Both Madrid Plan of Action and the Global Alliance for the Rights of Older People was created to enhance the necessity of a new UN Convention for elderly people, since age discrimination and ageism are tolerated across the world, and older people experience discrimination and the violation of their rights at family, community and institutional levels.[57]

2.3. The European Social Charter and the Revised European Social Charter

The main purpose of this subchapter is to explain the critical role of the European Social Charter[58] in advancing and protecting the social rights (precisely the right to social protection) of old persons in the state parties of the Council of Europe.[59]

The Charter is the second flagship convention of the Council of Europe. As a complement to the European Convention on Human Rights,[60] which establishes civil and political rights, the Charter is concerned with social and economic rights. The Council of Europe can take pride in the fact that it has produced the most comprehensive international instrument on social and economic rights.[61]

Despite the use of the word "Charter", these texts comprise legally binding treaties (all registered on the Council of Europe Treaty Series - CETS) intended to protect

[56] Statement by the Global Alliance for the Rights of Older People, 5th Session, 2014; https://social.un.org/ageing-working-group/documents/fifth/International%20Federation%20on%20Ageing.pdf (accessed on 17.07.2023)

[57] The Global Alliance for the Rights of Older People, https://rightsofolderpeople.org/ (accessed on 17.07.2023)

[58] Just 12 years after the formation of the Council of Europe (1949), the world's first treaty on economic and social rights was adopted in 1961. It would take five more years for the International Covenant on Economic, Social and Cultural Rights (ICESCR) to be adopted in the UN system (1966) and nearly 10 more years before the ICESCR entered into force.

[59] JASPERS & L. BETTEN, 25 Years, the European Social Charter

(Kluwer, 1988); Lenia Samuel, Fundamental Social Rights: Case law of the European Social Charter, (Council of Europe Publishing, 1996); The Social Charter of the 21st Century - colloquy organised by the secretariat of the Council of Europe, (Council of Europe Publishing, 1997); David Harris & John Darcy, The European Social Charter, (2nd Ed., Transnational, 2001). A particularly cogent account is given by Carole Benelhocine, The European Social Charter (Council of Europe Publishing, 2012).

[60] Signed in 1950 by the Council of Europe, the ECHR is an international treaty to protect human rights and fundamental freedoms in Europe. The Convention established the European Court of Human Rights, intended to protect individuals from human rights violations.

[61] Carole BENELHOCINE, The European Social Charter, Council of Europe, 2012, p. 12.

and promote economic and social rights in the Council of Europe system as a counterpoint to the European Convention on Human Rights.[62]

The first ESC (1961) did not contained at all the rights of elderly persons. The intention behind the 1988 Additional Protocol was to essentially add four new rights to those protected under the 1961 Charter.[63] These have to do with the right to equal opportunities and equal treatment in employment on the grounds of sex (Article 1), a right to information and consultation (in the workplace - Article 2), a right to take part in the improvement of working conditions (Article 3) and the *right of elderly persons to social protection* (Article 4).[64]

The revised European Social Charter was the first legally binding international instrument in the world to make explicit provision for the social rights of older persons. The original provisions date back to an Additional Protocol in 1988 (Article 4) and were carried forward by the Revised European Social Charter of 1996 (Article 23).[65] The Charter was significantly ahead of all other international or regional instruments at the time. Some 30 years later, the move toward a human rights-based framing of ageing is now more widely accepted as the most appropriate policy perspective. The deliberations of the UN Open-ended Working Group on Ageing[66] all centre around a human rights-based framing of old age. The landmark Council of Europe Recommendation of 2014 on the promotion of the rights of older persons sits neatly alongside the EU Social Affairs Council Conclusions of 2020 which also point unambiguously in this direction.[67]

[62] This is reinforced by the Appendix to the Social Charter which points out that "the Charter contains legal obligations of an international character…." (Part III).

[63] Rataj PRIMOZ, The European Social Charter and the Employment Relation, 20:1 Europe J.Soc. Sec., (2018).

[64] Gerard QUINN - Israel (Issi) DORON (2021) Against Ageism and Towards Active Social Citizenship for Older Persons The Current Use and Future Potential of the European Social Charter, Council of Europe, https://rm.coe.int/against-ageism-and-towards-active-social-citizenship-for-older-persons/1680a3f5da p. 74. (accessed on 17.07.2023)

[65] The 1988 Amending Protocol contained the world's first legally binding provision on the rights of older persons.

[66] UN Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons; https://social.un.org/ageing-working-group/ (accessed on 17.07.2023)

[67] Gerard QUINN - Israel (Issi) DORON (2021) Against Ageism and Towards Active Social Citizenship for Older Persons The Current Use and Future Potential of the European Social Charter, Council of Europe, https://rm.coe.int/against-ageism-and-towards-active-social-citizenship-for-older-persons/1680a3f5da (accessed on 17.07.2023)

Revised European Social Charter (hereinafter: RESC)[68] - 1996 (CETS No. 163). Despite its title, the 1996 Revised European Social Charter did not, as such, replace the original 1961 Charter.[69]

With regard to Article 23 of the RESC[70] the Charter has adopted an approach which included two distinct novel elements: 1. full and meaningful participation in society;[71] and 2. independence (independent & deinstitutionalised life) and life choices in old age.[72] These two elements were complemented with a specific reference to the rights of older persons living in institutions. Moreover, down through the years, and via its growing body of decisions and casework, the European Committee of Social Rights (hereinafter: ECSR)[73] further expanded the scope and material construction of Article 23 to include new elements. These included the legislative frameworks on ageing (including issues around age discrimination and legal capacity/assisted decision making), and the prevention of elder abuse (including issues of data collection and specific legislation).[74]

The official Digest of the case law of the ECSR (2022) summarizes the significance of Article 23 of the Charter as follows: "Article 23 of the Charter is the first human rights treaty provision to specifically protect the rights of older persons.[75] The measures

[68] The structure of the Revised European Social Charter follows the original 1961 structure. Part 1 contains the pithy interpretive principles - with the difference that they now number 31 instead of the original 19. Part II contains the substantive rights - now running to 31 articles. The expanded list contains several new rights. And Part III deals with undertakings.

[69] Gerard QUINN - Israel (Issi) DORON (2021) p. 81

[70] Article 23 of the Revised European Social Charter repeats the content of Article 4 of the 1988 Additional Protocol, except it now lacks numbered sub-paragraphs.

[71] This subsection includes 1. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life; 2. information about services and facilities available for elderly persons and their opportunities to make use of them.

[72] This subsection means of: 1. provision of housing suited to their needs and their state of health or of adequate support for adapting their housing, and 2. the health care and the services necessitated by their state.

[73] The European Committee of Social Rights has 15 independent, impartial members who are elected by the Council of Europe's Committee of Ministers for a period of six years, renewable once. It monitors compliance with the Charter under two complementary mecanisms: 1. through *collective complaints* lodged by the social partners and other non-governmental organisations (Collective Complaints Procedure), and 2. through *national reports* drawn up by Contracting Parties (Reporting System). States Parties have an obligation to cooperate with the Committee and its jurisprudence (both decisions and conclusions). This obligation arises from the application of the principle of *good faith* to the observance of all treaty obligations. For States Parties to ignore or not take into account the Committee's decisions and conclusions would be to fail to show good faith in implementing their Charter-based obligations.

[74] Gerard QUINN - Israel (Issi) DORON (2021) p.20

[75] Notably, foundational international human rights instruments, be it the UDHR, ICCPR, or the ICESCR, do not explicitly contain age as a prohibited ground for discrimination. However, the omission of "age" occurred because when the ICESCR and ICCPR were adopted, the challenge of demographic ageing was not as evident or as pressing as it is now. Source: UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, 8 December 1995, E/1996/22, para 11.

envisaged by this provision, by their objectives as much as by the means of implementing them, point towards a new and progressive notion of what life should be for older persons, obliging States Parties to devise and carry out coherent actions in the different areas covered."[76] The term "legislative framework" does not appear as such in the text of Article 23. However, it can be understood from the Committee's conclusions that, in this category, the Committee seeks legislation that ensures the foundations for the social rights of older persons in two significant fields: A. age discrimination (see ageism above) and B. legal capacity (inclusive dignity).

A. Age discrimination (ageism) The Article 23 of the Charter requires an adequate legal framework for combating age discrimination in a range of areas beyond employment, namely in access to goods, facilities and services, such as insurance and banking products, allocation of resources and facilities.

When looking at States' reports, the ECSR considers if the legislation is sufficiently wide to protect all spheres outside the employment. In case the legislation is in place, the Committee looks at the institutions in charge of ensuring that the law is respected and looks at the case law concerning age discrimination. In situations where there is a legislative framework, however, discrimination on the ground of age is still very widespread, the Committee asks about practical measures that the State concerned is taking to counter such discrimination outside the employment field.

When a constitution of a State safeguards the principle of equal treatment and implicitly or explicitly includes age as a ground of discrimination, the Committee looks at the possibility of relying on constitutional provisions. It requests information about the case law protecting older persons against discrimination outside the employment.

Even if a State concerned has established an institution mandated to eliminate discrimination against older persons outside the employment, the Committee looks at its legislation, whether it explicitly prohibits age discrimination and checks if the institution has a legal basis to ensure the prohibition of discrimination.

If legislative changes concerning anti-discrimination laws occur during the reference period, the Committee asks whether age would be included as a possible ground for prohibited discrimination.

[76] The full Digest of the Case Law of the European Committee of Social Rights (2022) available online at: https://rm.coe.int/digest-ecsr-prems-106522-web-en/1680a95dbd (accessed on 17.07.2023)

The main reason for non-conformity with the requirements of Article 23 of the Charter is the absence of legislation that prohibits discrimination on the ground of age outside the labour market.[77]

B. The legal capacity (inclusive dignity) approach. The ECSR has developed a much broader theory of equality anchored in autonomy (the legal capacity to make one's own decisions), inclusion, participation, and active social citizenship.

This has had the wholesome effect of refreshing and re-invigorating the mix of social rights in the RESC. This means that ageist assumptions are continually being interrogated by the ECSR as it seeks to re-set social policy away from a deficits-based approach to a rights-based approach to old age.

The measures envisaged by Article 23, by their objectives as much as by the means of implementing them, point towards a new and progressive notion of what life should be for elderly persons, obliging the Parties to devise and carry out coherent actions in the different areas covered.

Article 23 overlaps with other provisions of the Charter which protect elderly persons as members of the general population, such as Article 11 (Right to protection of health), Article 12 (Right to social security), Article 13 (Right to social and medical assistance), and Article 30 (Right to protection against poverty and social exclusion). Article 23 requires States Parties to make focused and planned provision in accordance with the specific needs of elderly persons."

It is quite clear that the original logic of the structure, as described above, meant that:

a. Article 23 did not intend to cover all the relevant rights of older persons to social protection, but only those which were viewed as either specifically relevant to older persons and/or not covered by the other articles in the European Social Charter.

b. Two key conceptual aspects were central:

ba. One - the full/meaningful membership in society: or in the words of the ECSR's Digest: "elderly persons must suffer no ostracism on account of their age"; this concept is "operationalised" via two main aspects: adequate resources and information.

bb. Two - independence and choice in life-style; this concept is "operationalised" via two main aspects: healthcare and housing.

[77] Summary on Article 23 of the Charter and ECSR's conclusions: a comparative view (2023) A document prepared by the ECSR's Secretariat.

c. "For as long as possible" - the notion that, even with normal ageing processes, older persons are at risk of losing their ability to remain full members in society - hence the duty to take pro-active steps to prevent or delay this point in time.

d. The older residents in institutions were viewed as a unique and important sub-population with needs for special protection and attention due to the nature of these total institutions, and the special characteristics of their older residents.

e. It is also clear that, originally, Article 23 did not refer to the key social phenomena of "ageism" as such, and their central impact on the living experiences of older persons - generally; and with regards to discrimination, and socio-legal exclusion - due to their age - specifically.

Down through the years, out of the 47 signatories and 36 ratifications of the Revised Charter, Article 23 has only been adopted by 22 countries (that is, only 50% of the members of the Council of Europe). This compares with the ratification by 40 countries of Article 17 (on children and young persons) or 36 countries ratification of Article 20 (on employment and occupation without discrimination on the grounds of sex) is relatively low. In order to understand the historical and current meaning and impact of Article 23, it is necessary to analyse the monitoring and implementation mechanisms of the European Social Charter. Thre are two key processes and mechanisms which enable the ECSR to monitor, interpret, and materially construct the actual implementation of Article 23: 1. the reporting system and 2. the collective complaints system.[78] We will hereby describe the development of the jurisprudence around Article 23 - based on these two different frameworks.[79] To protect the human (social) right the ECSR applies to both.

As for ESC's achievement, it is important to underline that the evolution of "progressive realisation" in the ESC is different from the ICESCR.[80] Literally there is no equivalent to Article 2 ICESCR in the European Social Charter. Nevertheless, it is plain that while many of the rights create "obligations of conduct" (and are therefore amenable to immediate achievement), some of the more important ones create "obligations of result" that implicitly leave much room for an equivalent notion of "progressive realisation".[81]

[78] Based on the 1995 Additional Protocol.

[79] Gerard QUINN - Israel (Issi) DORON (2021) pp. 130-132

[80] UN International Covenant on Economic, Social and Cultural Rights (1966)

[81] This was formally acknowledged in International Association Autism Europe v. France (Collective Complaint No. 13/2002).

This three-pronged test[82] by the ECSR (1. reasonable time, 2. measurable progress, 3. use of maximum available resources) might be considered the functional equivalent of the "progressive realisation" concept under Article 2 ICESCR.[83]

It is important to understand within this context the kind of questions the ECSR will ask and the kind of data it requires and examines when analysing the countries' reports.

The following list is an examples of the standards and indicators that the Committee uses in regard to each of the different elements of Article 23 - but they are examples and they do not necessarily appear in all the conclusions:

1. 1(1) The standards with regard to legislative framework - age discrimination:

a. Is "age" among the grounds of discrimination expressly prohibited under law or the constitution?

b. Is there any specific legislation against age-discrimination outside the fields of labour market/employment law?

c. Is there any case law protecting elderly persons against this type of discrimination?

1. 1(2) The standards with regard to legislative framework - assisted decision making:

d. What are the existing guardianship frameworks and how do they operate with regard to older persons and restrictions on their autonomy?

e. What are the safeguards to prevent the arbitrary deprivation of autonomous decision-making by elderly persons?

f. Are there any plans to introduce a procedure for helping elderly persons to take decisions or to nominate an assisted decision maker or a substitute decision maker?

g. Are there data with regard to actual compliance with the law?

2. Elder abuse:

a. What are authorities doing to evaluate the extent of the problem - in general, and in specific settings (for example, institutions)?

[82] One clear advantage of the ECSR's formulation above is that it specifically covers third parties like families and carers on whom burdens are likely to fall in the absence of appropriate cover. One might argue this is implicit in the view of the ICESCR Committee. But it is made very explicit in the formula adopted by the European Committee of Social Rights. This is especially important in the context of the widespread phenomenon of informal care in the elder sector across Europe and the separate claims this may give rise to on the part of informal carers.

[83] Gerard QUINN - Israel (Issi) DORON (2021) pp. 119-120

b. What are the authorities doing to raise awareness of the problem?

c. What legislative measures have been taken to eradicate elder abuse?

3. Adequate resources:

a. What are the main features of the national pension programmes (both contributory and non-contributory)?

b. What benefits/assistance programmes exist for the elderly who are not entitled to any pension?

c. What are the cash benefits, subsidies, allowances, or other one-off assistance schemes available to older persons?

d. What are the national indicators of at-risk-of-poverty rates for persons aged 65 and older?

e. What is the minimum guaranteed income compared with the poverty threshold, which is fixed at 50% of the equivalised median income calculated on the basis of the Eurostat at-risk-of-poverty rate?

f. How does the percentage of elderly persons with an income of less than 40% of the equivalised median income compare with the European average?

g. To the extent that countries are engaged in pension reforms - how are these reforms expected to impact older persons, generally, and those with low incomes specifically?

4. Information, services and facilities:

a. What are the mechanisms for providing information to the elderly with regard to services and facilities?

b. What is the range of services offered in general?

c. What is the range of services offered for specific populations?

i. Older persons with a need for rehabilitation,

ii. Persons with dementia,

iii. Family care-givers to older persons.

d. What are the average fees charged for receiving these services?

e. To what extent does the supply of these services meet the demand?

f. How is the quality of the services assessed?

g. Is the option given to older persons to choose the service providers?

h. Is there a complaints mechanism/procedure regarding these services?

i. What impact do these services have on the lives of older persons?

5. Housing

a. Are the needs of older persons taken into account in national or local housing policies?

b. What are the conditions for entitlement to housing assistance?

c. What public policies exist to provide financial assistance for home adaptations?

d. What are the actual costs of public housing for older persons?

e. What is the value of housing benefits/assistance?

f. Does the supply of sheltered or supported housing meet the demand?

6. Health care

a. What health care programmes and services exist that are specifically aimed at the elderly (for example, for chronic illness, palliative care, mental health programmes)?

b. What measures are taken to improve the accessibility and quality of geriatric and long-term care?

c. Are there special training programmes for individuals/professionals caring for older persons?

d. What is the proportion of the cost of medicines borne by older persons?

e. What are the co-ordination mechanisms between the health care services and social services?

7. Institutional care

a. Is the capacity of institutional care sufficient to meet the needs (for example, regarding waiting lists, sufficient beds and institutions)?

b. What are the financial costs and fees payable by users?

c. What is the inspection system and is it independent?

d. Has there been a change in the number of institutions (for example, a decline)? If so, what is the cause and how does it impact older persons?[84]

Basically numerous provisions of the ESC have relevance to the situation of older persons - and not just Article 23. Depending on the provisions which a particular State has opted in to, many issues can turn on the interaction between the substantive provisions of the Charter (for example, Article 13 above) with Article 23 (older persons) with Article 30 (poverty and social exclusion) and E (equality). It should not be too dif-

[84]Gerard QUINN - Israel (Issi) DORON (2021) pp. 141-144

ficult to find in each substantive article echoes (no matter how faint) of recognition (autonomy and voice), accommodation of difference and a philosophy of active citizenship and inclusion.[85]

In sum, the RESC is "an instrument capable of providing a dynamic response to evolving realities." The ageing of Europe is certainly an evolving reality that requires a fundamental re-framing of law and policy. This is why advocates should always try to base their arguments on a multitude of Charter provisions and not only on the most prominent ones.

Summary

The following conclusions - based on mainly the Digest of the case law of the ECSR and Quinn and Doron's paper - can be drawn from the analysis of this study.

1. The ageing of European societies is a fundamental social challenge for both families and states as well. The rise in life expectancy, and the decline of fertility rates will re-shape the demography of Europe. Constantly increasing number of older people requires of re-thinking social policies.

2. Ageism as a negative legacy shall be replaced by a new human rights-based inclusive dignity approach. This transition can be seen in the Article 23 of the ESC by the Council of Europe It also can be discovered in the growing calls for the drafting of a new UN thematic treaty on the rights of older persons. (see Madrid Plan of Action and Global Alliance for the Rights of Older People)

3. The ESC - the very first piece of international law on the rights of older persons - was nearly 20 years ahead of related developments in the Organisation of American States and the African Union and directly informed the drafting of the EU Charter of Fundamental Rights. The Council of Europe has these far-seeing innovations in the Charter. Nevertheless, there is still a lack of direct reference to the concept of ageism, and the growing conceptual and empirical knowledge of it. It is time to adopt and use ageism within the jurisprudence of the Charter.

4. The "living and dynamic nature" of Article 23: through its jurisprudence and case law, the European Committee of Social Rights has also shown how Article 23 can be a living and dynamic text that can adapt to social changes. More specifically, this dynamic nature has allowed the Committee to take account of new dimensions, such as:

a. the importance of anti-discrimination and framework legislation beyond the narrow field of employment law,

[85] Digest of the Case Law of the European Committee of Social Rights (2022), Council of Europe, https://rm.coe.int/digest-ecsr-prems-106522-web-en/1680a95dbd pp. 178-181 (accessed on 17.07.2023)

b. the central role of legal capacity, and the need for supportive decision-making mechanisms to augment legal capacity and the retention of autonomy in old age,

c. the significance of the social phenomenon of elder abuse as a barrier to full participation in society in old age,

d. the support of informal and family-based elder care as an instrument to preserve and promote the social rights of older persons.

5. The ageism paradox of Article 23: paradoxically, despite its anti-ageism approach to social rights, there is no direct reference to "ageism" as such either in the language of Article 23 or in the Committee's conclusions or decisions. This paradox could (and should) be easily resolved by the open and clear inclusion of this concept in the future work of the ECSR.

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