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PROTECTION OF ELDERLY PERSONS' LEGAL INTERESTS – REASONS FOR AND REVIEW OF LEGAL SOLUTIONS***

UDK: 364.65-053.9 : 34
364/365-053.9
DOI: 10.31141/zrpf.2024.61.152.263
Review article
Primiteno: 2. 1. 2024.

This article outlines the subject of protective measures applied to safeguard the legitimate interests of elderly persons under the civil law system, as illustrated by regulations selected from European legal systems. With the ageing of societies come all the associated health consequences; therefore, it is necessary to introduce modern legislation to regulate this issue so that the rights of elderly persons, including their human rights, be protected. Decisive efforts should be made to discontinue the institution of incapacitation which is discriminatory against elderly persons involved in civil law transactions, and to replace it with a modern protective system.

Key words: *protection of elderly persons, elderly persons, vulnerable adults.*

1. INTRODUCTION

The number of elderly persons is constantly growing, especially in developed countries. According to Eurostat forecasts, by 2060, persons aged over 65 will constitute nearly 30 per cent of the overall population of the 27 EU member states, while the proportion of the oldest seniors (80+) will reach 12 per cent in that same year.¹ WHO estimates that in 2050 there will be 2 billion people aged 60 and above worldwide.² Legal regulations relating to elderly persons have in many countries failed to catch up with this trend, as the bulk of legislation in that area was passed a long time ago, before the present demographic changes had taken hold, which means

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*** This research was funded in whole by the National Science Centre, Poland “, contract number: UMO-2021/43/B/HS5/00916, project title: Ability to participate in civil law transactions of older people. Support institutions - legal perspective”. For the purpose of Open Access, the author has applied a CC-BY public copyright licence to any Author Accepted Manuscript (AAM) version arising from this submission.

¹ Eurostat data are available on: <https://ec.europa.eu/eurostat/data/database>

² Ageing and life course: [www.who.int/ageing/age_friendly_cities/en/index.html]

that the growing number of seniors in our society either generates new or adds to the existing problems connected with the participation of elderly persons in civil law transactions. These regulations came into being at a time when elderly persons were considerably less active as parties to civil law transactions, while these days they wish to stay active for as long as possible even despite the limitations of old age. The lack of modern legislation gives rise to negative social consequences relating to inadequate protection of elderly persons' property and non-property interests whereby seniors, who are the weaker party to civil law transactions, frequently find themselves at an unfair disadvantage, while also making entry into such transactions riskier for their contracting counterparties. This leads to a complete exclusion of elderly persons from legal affairs to their withdrawal from any legal activity related to property management, including but not limited to property disposal, and – last not least – to defective legal acts (performed in an improper manner, as a result of an error of judgment or under duress).

Although it is rather difficult to define “an elderly person,” a clear age limit must be set down for reasons of safety of civil law transactions. In its definition of the ‘older population’, the United Nations includes persons who have reached the age of 60.³ However, as the primary area of concern of this paper is the older population's involvement in civil law transactions, it seems to make more sense to re-draw the line to coincide with the retirement age of 65. Such a classification of the elderly is applied predominantly in medical science as there is no possibility of using another reliable set of criteria. This is because the physiological changes taking place inside the human body as a result of ageing are of a highly subjective nature.

The aim of this article is to outline the problem of ageing in regard to legal regulations relating to the participation of elderly persons in civil law transactions both in their home countries and across state borders. This paper will provide a justification for intensifying both legal and medical protective measures in respect to seniors. The discussion will also touch upon the theme of legal instruments for supporting elderly persons. This will include an outline of a model solution the application of which will effectively keep elderly persons actively involved in civil law transactions for as long as possible.

This article does not present the full extent of the problem but merely outlines further research which needs to be done in the face of the current demographic situation in Europe and worldwide.

³ United Nations, Department of Economic and Social Affairs, Population Division (2017). World Population Ageing 2017 - Highlights (ST/ESA/SER.A/397).

2. ELDERLY PERSONS' RIGHTS AS HUMAN RIGHTS

These days, we are witnessing what can be termed as “the privatization of human rights,”⁴ whereby recourse to these rights is taken advantage of more and more frequently in matters between individuals.⁵ These rights are said to exercise influence both vertically (between the state, which is a party to the convention, and an individual) and horizontally (between natural persons).⁶ There is also a certain amount of transfer of legal arrangements from international into domestic law, including where combating ageism is concerned.⁷

There is no doubt that a system of protection for the rights of the elderly population, which are indeed their human rights, is the much needed response to ageism common in basically every sphere of life (family, social, employment, access to services, freedom to choose one's place of residence, etc.) in both vertical and horizontal planes. The phenomenon of ageism leads to an increasing exclusion of the elderly, which means that human rights are being violated in many ways⁸.

Discrimination as experienced by elderly persons comes in two forms: direct and indirect. The direct form of discrimination involves refusal to provide a service based on the age criterion, whereas the indirect one produces only fictitious equality where the older person is bound by the same rules as others, meaning that failure to consider such a person's special situation constitutes *de facto* discrimination. Ageing may also escalate discrimination if the pre-existing grounds for discriminatory treatment (disability, race, female gender) are combined with age. This is known as multiple discrimination. Even more hurtful than discrimination is victimization of the elderly in which the victim is physically, mentally or economically abused or exploited.⁹ As a result of these tendencies, elderly persons are categorized as vulnerable adults.¹⁰ The discussed problems show how important it is to articulate the rights of elderly persons as a component of the system of protecting human rights.

⁴ Several international systems recognize and protect human rights: the United Nations system, the Inter-American system, and the African system See D. Rodrigues-Pinzón, C. Martin, The international Human Rights Status of Elderly Persons, American University international Law Review 2003, vol. 18, Issue 4, No. 4, p. 916.

⁵ A. Clapham, Human rights in the private sphere, Oxford 2002, p. 1.

⁶ See A. Barak, Constitutional human rights and Private Law (in:) Human rights in Private Law, D. Friedmann, D. Barak-Erez edit., Hart Publishing 2003, p. 13; A. L. Young, Horizontality and the Constitutionalization of Private Law (in:) Current Problems in the Protection of Human Rights, K. S. Zigler, P. M. Hubner edit., Oxford 2013, p. 73.

⁷ See P. Hubner, A Paradigm Shift in the Protection of Human Rights (in:) Current Problems in the Protection of Human Rights, K. S. Zigler, P. M. Hubner edit., Oxford 2013, p. 117.

⁸ For discrimination in labour law, see N. Adnett, S. Hardy, The peculiar case of age discrimination: Americanising the European social model?, European Journal of Law and Economy (2007), vol. 23, pp. 29–41.

⁹ M. Halicka, J. Halicki, *Przemoc wobec ludzi starszych. Na przykładzie badań środowiskowych w województwie podlaskim*, Białystok, 2010, p. 20.

¹⁰ Vulnerable adults, who are persons lacking the personal capacity to protect their interests, are in particular need of a reliable legal framework – see I. Curry-Sumner, Protection of Vulnerable Adults, European added value of an EU legal instrument on the protection of vulnerable adults, Brussels 2016, p. 6.

All the major international documents regarding human rights set out the principle of respect for equality and non-discrimination, which may well serve as an instrument for protecting the rights of elderly persons.¹¹ For example, Article 2 of the Universal Declaration of Human Rights provides that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The idea of equality as regards legal protection is materialized in Article 7 of the Declaration whereby all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination violating this Declaration and against any incitement to such discrimination. The regulations listing the possible grounds for discrimination do not set down any specific age limit, although the enumeration is open-ended. A similar provision can be found in Article 2 paragraph 1 of the International Covenant on Civil and Political Rights which envisions granting to all individuals the rights recognized in the Covenant, without distinction of any kind. This is followed by an enumeration of grounds for discrimination, just as in Article 2 of the Universal Declaration of Human Rights mentioned above. Legal protection is enshrined in Article 26 of the Covenant. Analogous regulations guaranteeing the rights set out in the Convention are found in Article 2 paragraph 2 of the International Covenant on Social, Economic and Cultural Rights of 16 December 1966 setting forth a catalogue of unlawful discrimination, identical to that mentioned in the legislation discussed above. The same catalogue, although with the items listed in a different order, is to be seen also in Article 14 of the European Convention on Human Rights. The shared trait of these regulations is their form: all of them are known as anti-discrimination clauses that bar discrimination for various reasons, listed as examples but including specifically age. As the catalogue of grounds for discrimination is open-ended, it should be considered that age meets the other status criterion which forbids wrongful discrimination of elderly persons, making these clauses a component of the system for protecting the rights of elderly persons.

As for the premise of age, it is noteworthy that some of the above Conventions set forth separate provisions prohibiting discrimination against children, such as those related to rights exercised by them owing to their status as minors (thus in Article 24 paragraph 1 of the International Covenant on Civil and Political Rights), to their birth in or out of wedlock (Article 25 paragraph 2 of the Universal Declaration of Human Rights) and as a means to ensure protection and assistance to youths (Article 10 paragraph 3 of the International Covenant on Economic, Social and Cultural Rights). Also, a separate legal act – the Convention on the Rights of Children – is dedicated to children's rights. These regulations have regard to the fact that human being at some stages of their lives find themselves as a matter of course in a weaker position relative to other subjects of law and are therefore in need of

¹¹ See D. Rodrigues-Pinzón, C. Martin, The international Human Rights Status of Elderly Persons, *American University international Law Review* 2003, vol. 18, Issue 4, no. 4.

special protection. Although specific regulations relate only to the initial stage of life, it cannot be postulated that its final stage should be left out, as such a conclusion would disturb the balance in the protection of human rights. Rather, it should be recognized that the protection of human rights in so far as it concerns age is, in a sense, symmetrical: because people are especially vulnerable to discrimination in their childhood, teens and old age, they should be covered by special protective legal measures. Therefore, specific regulations relating to children support the conclusion that the rights of elderly persons are also subject to special protection from discrimination under general conventional provisions. The analogy between protective measures for children and for elderly persons is valid only where it refers to the need for accentuating the combat against discrimination. Owing to the different situation of minors as opposed to that of elderly persons (especially the fact that children are perceived from the perspective of their dependence on parents), the sources of discrimination and its symptoms look different for each of these groups and consequently the methods of protection will be to a large degree dissimilar. The failure of the various anti-discrimination clauses to specifically enumerate the premise of age does not prevent them from being used as an instrument for protecting elderly persons, though this is not entirely without effect on the strength of such protection. Protection may be thwarted to some extent by the fact that a certain amount of interpretative manoeuvring would be required for proof of discrimination against an aggrieved party, which would otherwise be unnecessary if age was clearly indicated in the conventions as a cause of unlawful discrimination.¹² It should be underlined that state parties to the conventions are bound to observe the obligations they have contracted and apply appropriate measures to protect human rights.¹³

It should be noted, however, that action orientated directly towards protecting elderly persons has been taken by the United Nations on the international arena since the 1970s, with the result that a series of international instruments relating to elderly persons have been created, among which the most ground-breaking was the UN Principles for Older Persons Resolution No. 46/91 of 1991, which was addressed exclusively and comprehensively to that social group.¹⁴

The problem of an ageing society is also addressed by the European Council the work of which resulted in developing a number of documents relating directly and indirectly to the situation of that social group.¹⁵ Also, to the extent that cooperation within the European Union is concerned, a ground-breaking step forward in combat against discrimination came with the Treaty of Amsterdam which – after the entry into force of Article 13 of the Treaty on the European Union (currently, this is Article 19 of the Treaty on the Functioning of the European Union¹⁶) – bestowed upon the

¹² B. Mikołajczyk, *Międzynarodowa ochrona osób starszych*, Warszawa 2012, pp. 136-138 and 152.

¹³ See inter alia A. Clapham, *Human rights in the private sphere*, Oxford 2002, p. 89.

¹⁴ The earliest legislative act of that kind was the Vienna Plan of Action on Ageing (a resolution adopted by the General Assembly in 1982, No. 37/51).

¹⁵ For example, Committee Recommendation 2009 (6) On ageing and disability in the 21st century: sustainable frameworks to enable greater quality of life in an inclusive society.

¹⁶ As of 1 December 2009. (Official Journal of the EU, C 83 of 30 March 2010, p. 47).

council the powers to take measures necessary to combat all discrimination. The anti-discrimination clause set out in this legislative act mentions age in conjunction with traditionally indicated grounds for unlawful discrimination, such as sex, racial or ethnic origin, religion or belief, disability, and sexual orientation. The emphasis laid upon the necessity to protect elderly persons translated subsequently into specific legislative action, namely to issue an anti-discrimination directive with the aim of exerting influence on member states to materialize the principle of equal treatment and of combat against direct and indirect discrimination.¹⁷ The rights of elderly persons are also mentioned in Article 25 of the Charter of Fundamental Rights of the European Union,¹⁸ whereby the Union recognizes and respects the right of the elderly to lead a life of dignity and independence and to participate in social and cultural life. In line with this, the Court of Justice of the European Union held in a judgment of 22 November 2005 that the principle of non-discrimination on the basis of age should be treated as a general principle of community law.¹⁹

It is possible in Europe to identify clear tendencies towards a further strengthening of the legal situation of this growing social group, as exemplified by the Hague Convention on the International Protection of Adults 13 January 2000, relating to conflict-of-law issues, or the recently adopted Resolution of the European Parliament on the Protection of Adults of 1 July 2017. The recognition of the need for protecting elderly persons is also shown by a number of symbolic acts intended to educate, as exemplified by the European Union's declaration of 2017 as the Year of Elderly Persons' Activity and Intergenerational Solidarity.²⁰ This tendency is consistent with calls raised in legal theory for a universal international treaty to be drafted so as to provide comprehensive coverage for the rights of elderly persons.²¹ Such a convention could be modelled on the Convention of Children's Rights. This is because, as rightly pointed out, this convention focuses on a group that is defined on the basis of age and that is considered to be especially vulnerable.²²

It should be noted that elderly persons who experience multiple discrimination may seek protection from legislative acts which may not directly address this social group, but which – owing to their protective coverage against sources of discrimination – incidentally also become safeguards of the rights of elderly persons. This kind of protection is ensured particularly by the Convention on the

¹⁷ Particularly Directive 2000/78/WE on the general framework of equal treatment for employment and work of 27 November 2000, Official Journal of the European Union L 303 of 2 December 2000, p. 16.

¹⁸ Put into effect by the Lisbon Treaty of 13 December 2007; came into force on 1 December 2009.

¹⁹ Case C -144/04, in the matter of Werner Mangold versus Rüdiger Helm.

²⁰ See: Report from the Commission on the Implementation, results and overall assessment of the 2012 European Year for Active Ageing and Solidarity between Generations, <http://ec.europa.eu/social/main.jsp?langId=pl&catId=89&newsId=2129>

²¹ See more Israel Doron, Itai Apter, The Debate Around the Need for an International Convention on the Rights of Older Persons, *The Gerontologist*, Volume 50, Issue 5, 1 October 2010, pp. 586–593.

²² D. Rodrigues-Pinzón, C. Martin, The international Human Rights Status of Elderly Persons, *American University international Law Review* 2003, vol. 18, Issue 4, No. 4, p. 1008.

Rights of Persons with Disabilities of 13 December 2006,²³ which by providing the disabled with equality in exercising their human freedoms and rights also protects disabled elderly persons, including those whose disability is caused by old age.²⁴ Under its Article 1, disabled persons are classified as those persons whose physical, mental, intellectual or sensory ability is impaired in the long-term, which may – in conjunction with various barriers – prevent them from participating fully and effectively in social life on terms of equality with other people. Especially worthy of emphasis is the principle set out in Article 12 of the Convention, whereby the Member States recognize that disabled persons have legal capacity on terms of equality with other persons in all aspects of life.²⁵ As explained by the commentary to this article prepared by the Committee on Rights of Persons with Disabilities²⁶ – Article 12 of the Convention on the Rights of Persons with Disabilities further defines the substance of this civil right and focuses on the areas in which people with disabilities have traditionally been denied the right. Article 12 does not set out additional rights for people with disabilities; it simply describes the specific elements that state parties are required to take into account to ensure the right to equality before the law for people with disabilities on equal terms with others.

The same perception could also apply to documents intended to prevent discrimination on the basis of gender, with a focus on protecting elderly women,²⁷ or with an orientation towards protecting immigrants,²⁸ among whom elderly persons are naturally present as well.

The combat against violations of the human rights of elderly persons proceeds in the internal legal systems of the individual states mainly by including anti-discrimination clauses in their constitutions even though these rarely contain a reference to age. Exceptions include Finland whose constitution in Article 5 prohibits discriminatory treatment for no acceptable cause, on the basis of age, among other things. However, constitutional protection of elderly persons usually makes provision for such persons to be covered under a general anti-discrimination clause which may enumerate grounds for unlawful discrimination, but always in an open-ended manner. Some constitutions set down standards positively establishing special protection of elderly persons, such as – for example – Article 15 of the

²³ See A.S.Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and its implications for the Rights of Elderly People under international Law*, Georgia State University Law Review Spring 2009, p. 527.

²⁴ See M. Álvarez Torné, *Current issues in the protection of adults from the perspective of private international law*, *Revista Electrónica de Estudios Internacionales* 2016, vol. 32., p. 4.

²⁵ See more A. Ruck Keene (in;) *The international Protection of Adults*, R. Frimston, A. Ruck Keene, C. van Overdijk, A. D Ward edit., Oxford 2015, p. 46-47.

²⁶ Committee on Rights of Persons with Disabilities, *General comment No. 1 (2014)*. Available on: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

²⁷ See, for example, the Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979, Resolution of the European Parliament on the Role of Women in Ageing Societies of 7 September 2010, Official Journal of the EU C 308E

²⁸ For example, the International Convention on the Protection of the Rights of Migrant Workers and their Family Members, approved by the General Assembly of the United Nations in Resolution No. 45/158 of 18 December 1990.

Constitution of Hungary whereby Hungary takes special action to protect children, women, the elderly and disabled. Generally, constitutional provisions receive their specific form in detailed legal arrangements dedicated to elderly persons which will be discussed further on in this paper.

3. THE INSTITUTION OF INCAPACITATION

When reviewing the applicable legal regulations, a critical view should be taken of the institution of incapacitation which – in its severest form – leads to what is known as “civil death” for the person to whom it is applied. This institution strips the incapacitated person of the capacity for legal acts, invalidating any act in law performed by that person, which means that such an act produces no legal effects. Incapacitation in this sense seems to be a discriminatory institution misaligned with the current needs of seniors as people wishing more and more frequently to stay active for as long as possible as subjects of civil law rather than be excluded from or restricted in their freedom to perform legal acts. The institution may sometimes be deemed to be breaching the principle of equality before the law and the ban on discrimination while also being at odds with the need for respect for a person's moral rights, especially freedom and dignity.

For that reason, in countries where incapacitation is still in place, there is an on-going and increasingly heated debate in legal theory as to whether such an arrangement is acceptable in a modern legal system. Controversy mounts as to the axiological and juridical entitlement to such a far-reaching encroachment upon a person's legal rights at a time when the provisions of the Convention on the Rights of Persons with Disabilities accentuate the humanity and equality of all persons with disabilities. Because the Convention directly concerns the situation of persons with mental disorders, it cannot be omitted in a discussion on the legality and purpose of the institution of incapacitation. In that sense, particular attention should be paid to Article 12 paragraph 2 of the UN Convention, which states: “State parties recognize that persons with disabilities have legal capacity on terms of equality with other persons, in all aspects of life.” It is argued that this wording, in the light of the full text of Article 12 of the UN Convention, is not to be understood only statically, as entitlement to certain rights, but also dynamically, for the provision goes on to mention the exercise of legal capacity. The legislative intention underlying the provisions of the UN Convention could be better served by the following wording: “capacity in the sphere of law” which would include both legal capacity as well as capacity for legal acts.²⁹ Article 12 paragraph 4 of the UN Convention lists the

²⁹ See from the Polish perspective: A. Błaszczak, *Zastrzeżenia i oświadczenia interpretacyjne Polski do Konwencji o prawach osób z niepełnosprawnościami* [w:] *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, D. Pudżianowska (red.), Warszawa, 2014 r., s. 35; S. Gurbai, *Ograniczanie czy respektowanie zdolności do czynności prawnych osób dorosłych z niepełnosprawnościami?* [w:] *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, D. Pudżianowska (red.), Warszawa, 2014 r., s. 68-69.

conditions that should be met by the measures related to exercising legal capacity. The measures should respect the rights, wishes and preferences of the person, should be free from conflict of interests and unlawful coercion, should be commensurate with and appropriate to the person's situation, should be applied for the shortest time possible and be subject to regular review by competent, independent and impartial authorities or a judicial body.³⁰ There is no doubt that the institution of incapacitation fails to meet the above requirements if only because it does not match the situation of a given person and – moreover – because it makes no provision for the activation of the incapacitated person.³¹

In foreign legislation, there are visible tendencies to discontinue the institution of incapacitation. This has been brought about by a change in attitudes to this institution, resulting from the case law of the European Court of Human Rights. For example, in matters relating to incapacitated persons, the European Court of Justice held that there is an emerging consensus all across Europe on non-restriction of incapacitated persons' access to the courts³² and also pointed out instances of malpractice, such as the absence of a system of on-going review of grounds for imposing restrictions on an incapacitated person.³³

Incapacitation was abolished in Germany in 1992 with the amendment of laws on custody, in recognition of the human being's natural capacity for legal acts. The same happened in the Austrian and French legal systems. In Austria and France, the courts adjudicate a given person's incapacity for legal acts on an *ad casum* basis whereby legal acts performed by a person with a mental disorder are deemed void.

Some legal systems in the former Eastern Bloc (e.g., in Russia) have retained a division of legal capacity into three types: full capacity for legal acts, limited capacity for legal acts and no capacity.³⁴ The last legal situation, in which a person is deprived of his / her capacity for legal acts, may also be adjudicated by a court.³⁵ However, there is a visible tendency to apply incapacitation sparingly in these countries. For example, incapacitation was abolished in Georgia where the Constitutional Court deemed the provisions on incapacitation, including Article 12 paragraph 5, Article 58, and Article 1290 and 1293 of the Georgian Civil Code as being too invasive of personal autonomy.³⁶

In some countries which have retained the institution of incapacitation, calls have been raised for its elimination and replacement with the so-called supported

³⁰ See M. Schulze, *Understanding on the Human Rights of Persons with Disabilities*, ed. Handicap International, 2009, p. 60-65.

³¹ See M. Balwicka-Szczyrba, A. Sylwestrzak, *Instytucja ubezwłasnowolnienia w perspektywie unormowań Konstytucji RP oraz Konwencji o prawach osób niepełnosprawnych*, GSP 2018, vol. XL, p. 151 and following.

³² Judgment in the matter of *Stanev versus Bulgaria* No. 36760/06 of 17 January 2012

³³ Judgment in the matter of *Kędzior versus Poland* No. 45026/07 of 16 October 2012

³⁴ *Ibidem*, p. 190.

³⁵ *Ibidem*, p. 190.

³⁶ M. Szwed, *Likwidacja konstrukcji ubezwłasnowolnienia w Gruzji po wyroku Sądu konstytucyjnego z 8 października 2014 r.*, PL 2017, No. 1, p. 71.

decision-making model.³⁷ It should be emphasized therefore that today, the loss or limitation of legal capacity is no longer the only available means to protect an adult. Where a limitation of legal capacity is decided, it is generally confined to individual acts or categories of acts, as determined by the court in light of the circumstances of the case and the conditions of the adult in question. The “supported decision-making” should be supported against “substitute decision-making.”³⁸ The experience of foreign countries shows the possibility of introducing effective instruments for protecting the interests of parties to civil law transactions, which have regard to the need for protecting people without stigmatizing them through incapacitation or declaration of disability.

Bearing in mind the discussed situation, it is useful to introduce alternatives to the institution of incapacitation for elderly persons. A discussion of these alternatives will follow below.

4. MEASURES OF PROTECTING LEGAL INTERESTS OF ELDERLY PERSONS

The experience of some states shows the possibility of introducing effective dedicated measures to protect the interests of elderly persons being a party to civil law transactions, taking into the account the need to protect the weaker position of seniors acting as parties to legal transactions and at the same time not stigmatizing them as incapacitated or disabled. Simultaneously, the objective of modern regulations relating to elderly persons in terms of providing support, both in a financial and non-financial sense, is to keep them participating in civil law transactions and social life as well as to ensure that legal acts in which they are involved are performed correctly.

The institutions serving to protect the legitimate interests of elderly persons in selected foreign legislatures can be classified as follows:

As to the time when an institution of support is applied to a senior, we can distinguish:³⁹

- 1) **anticipatory institutions** (providing for the possible inability to independently engage in legal transactions before this actually takes place), e.g., attorney institutions in German and English law. Legal systems can also be pointed out where the grant of a power of attorney is recorded in special registers (e.g., private mandates in England must be registered in Public Guardian; appointing an attorney-in-fact in Austria – in the Austrian Central Register

³⁷ See Jo Watson, Supported decision-making, Intellectual Disability Australasia 2017, Volume 38, Issue 4.

³⁸ P. Franzina and J. Long, The Protection of Vulnerable Adults in EU Member States. The added value of EU action in the light of The Hague Adults Convention, Brussels 2016, p.122.

³⁹ See more R. Frimston, A. Ruck Keene, C. van Overdijk, A. D Ward edit., The International Protection of Adults, R. Frimston, A. Ruck Keene, C. van Overdijk, A. D Ward edit., Oxford 2015.

of Powers of Attorney), as well as countries where the grant of a power of attorney is recorded by civil registries (e.g., in France and Spain).

- 2) **consequential institutions** (when a person is actually incapable of independently engaging in legal affairs, requiring the court to intervene), e.g., appointment of a guardian in Italian law. There are countries as well the institutions of which to that effect are established for a specific time-limit, e.g., *tuttele* and *curatelle* in French law established for a maximum period of 5-years with the option of extension).

Notably, it would be desirable for our domestic law to evolve in the direction of covering both kinds of these institutions. The application of an attorney-in-fact institution might lead to a timely application of a consequential institution, thanks to the involvement of an attorney-in-fact who will keep him or herself informed of his/her principal's health condition. Where the attorney-in-fact has not been granted authority to take action, s/he would act merely as an informant to the authorized entities.

As to the kind of institution of support, it is possible to distinguish:⁴⁰

- 1) legal systems providing for the institution of administrator / manager, e.g. the institution of administrator in Italian law (*Amministratore di Sostegno*),
- 2) legal systems providing for the institution of mentor for non-property matters, e.g. the institution of mentor in Dutch law
- 3) legal systems providing for statutory representation by operation of the law, e.g. in Austrian law, *ex-lege* statutory representative selected from among the closest relatives
- 4) legal systems providing for the institution of a specialized attorney-in-fact (e.g. attorney-in-fact for medical treatment in Portuguese law)

As indicated above, the extent of support depends on the type of institution applied and may be narrowed to specific acts (e.g., ones of non-monetary – or monetary – nature) or widened (representative, attorney) to include a wider variety of legal acts.

As to the source of support, the following types of institutions may be distinguished in foreign countries:⁴¹

- 1) support systems based on legal acts, e.g., lasting power of attorney in England, or power of attorney in Germany,
- 2) support systems based on a court judgment, e.g., a court order appointing a guardian in Germany or court order establishing the institution of Sachwalter in Austria,
- 3) support systems based on a public authority's decision, e.g., the institution of guardian in Norwegian law, appointed by an administrative decision.

⁴⁰ See more R. Frimston, A. Ruck Keene, C. van Overdijk, A. D Ward edit., *The International Protection of Adults*, R. Frimston, A. Ruck Keene, C. van Overdijk, A. D Ward edit., Oxford 2015.

⁴¹ See more *ibid.*

- 4) *ex-lege* support systems, e.g., in Austrian law, the institution of *ex-lege* statutory representative selected from among the closest relatives

The classification shown above presents a variety of ways in which elderly persons can be provided with specific instruments for protecting their legitimate interests, both in line with the wishes of the parties involved (a legal act) or in an authoritative manner (court judgment or administrative decision). In some countries, the legal system allows for legal protection to be established by operation of the law. As the support system for elderly persons, in a broad sense, covers able-bodied and disabled individuals alike, the institutions of support derived from a legal act performed by the interested party would be unfortunately insufficient, meaning that they would have to be supplemented by other institutions applicable at the request of other people or of the public authorities.

5. MODERN LEGAL SOLUTIONS TO PROTECT ELDERLY PERSONS IN DOMESTIC LAW – AN OUTLINE OF A MODEL SOLUTION

Protective institutions under any legal system with the aim of safeguarding the interests of elderly persons could be modernized along the following three lines: The first is to establish an auxiliary-only institution which does not cause the person in respect of whom it is exercised to be barred from civil law transactions. This would be particularly useful for persons who are mentally lucid despite old age. The second is to introduce a partially exclusionary time-limited institution which removes or restricts for a determined period the capacity for a specific category of legal acts. This would be designed only for elderly persons whose mental disorders justify the restrictions. For example, appointing a guardian to manage a disability pension could, depending on the legal remedy chosen, result in the loss or curtailment of the right to access one's pension with the remaining scope of capacity retained. The time-constrained and, if necessary, renewable application of this institution is a possibility to be considered. Thirdly, guardian can be appointed for persons completely incapable of managing their own affairs.

Certain legal effects relating to elderly persons could arise by operation of the law upon the person reaching a specific age. It remains to be considered whether and to what extent administrative authorities should be made competent to apply remedies which do not affect the capacity for legal acts, as was legislated in Norway.

As regards to power-of-attorney institutions, it would be necessary to define the potential group of principals, forms of power of attorney and the manner, which should be disclosed in a relevant register. The security of civil law transactions calls for establishing a special fully public power-of-attorney register. It could be kept by the civil registry office in a separate form in much the same way as the register of acknowledgements. Similar solutions have been adopted by the legislatures of Spain and France. A careful consideration is required as to the introduction of a European

guardian power-of-attorney register to improve Europe-wide legal transaction security.

A system of protection of elderly persons should operate on two levels: that of property and that of personal interests of these people, while the proposed support institutions should incorporate both of these levels. On the property-interest level, it is necessary to consider problems related to the health treatment of elderly persons (medical law). At the same time, it would be beneficial to introduce specialized institutions serving to safeguard a specific category of interests, for example, a mentor for personal matters where this also includes matters related to treatment, or property administrator.

It should also be stressed that the proposed changes are not intended to put elderly persons in a privileged position as parties to civil law transactions at the cost of the others, but to strike a balance between the interests of all parties in such a way as to adequately strengthen the weaker party and to restore equilibrium that has been disturbed due to age-related problems. As a consequence, the proposed solutions would counter discrimination against elderly persons.

The outline of the above model solutions calls for a review and re-assessment of the existing legal regulations in force in the given legal system in terms of their ability to protect the legitimate interests of elderly persons as a growing social group. There is no doubt that the appearance of new measures in civil law to protect elderly persons would improve the reliability of civil law transactions and by extension also elicit positive social and economic effects. Nowadays, in many countries, elderly persons have to fall back mainly on their families and friends. The implementation of an adequate support system would therefore relieve families and friends from the need to take care of seniors.

The emerging law on the elderly in some countries such as the United States and Canada is worthy of note in that context.⁴² Countries where this specialty does not exist (such as Poland) also feature a number of dedicated legal institutions catering for the elderly. The development of these might in the future lead to the emergence a new specialized branch of the law, which would be definitely desirable.

6. CONCLUSIONS

With the ageing of societies come certain important health consequences related to old age. Therefore, it is necessary to carry out in-depth research into the legal situation of elderly persons as parties to transactions under civil law. The legislatures of many countries, however, have failed to catch up with this trend as the bulk of their laws relating to elderly persons were passed under different demographic conditions. Their legal regulations came into being at a time when the elderly were considerably less active as parties to civil law transactions, while these days they wish to stay active even despite the limitations of old age.

⁴² B. Mikołajczyk, *op.cit.*, pp. 90-91 and literature cited there.

The improvement of protections of the rights of elderly persons is justified mainly by international regulations relating to human rights. These require observance of equality on general terms, prohibit discrimination (e.g. the Universal Declaration of Human Rights) and explicitly emphasize the need for protecting this social group (e.g. the Treaty on the Functioning of the European Union).

This article gives an overview of legal solutions intended to protect this social group, including a proposal for a model solution. It is undoubtedly desirable to promote such legal instruments so as to include the elderly in legal intercourse, while also giving them the necessary support. To conclude, we will list the most important characteristics of legal system featuring protective instruments to safeguard the interests of the elderly. First of all, a legal system protecting elderly persons should be transparent, or, in other words, its legislation should be understandable to persons of an advanced age. Secondly, it should educate elderly persons about their rights under the regulations currently in force. Thirdly, it should allow elderly persons to feel more confident as parties to civil law transactions.

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