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INTERNATIONAL LAW AND AGEISM

Abstract:

In the 21st century ageism is becoming the most widely spread phenomenon. It has become so extensive that presently many more seniors in Europe are exposed to ageism than other people to sexism or racism. Contrary to other vulnerable groups, the elderly do not enjoy any binding instrument that could protect them and their dignity against ageism in the same way that women and racial groups are protected against sexism and racism. Unfortunately, the UN General Assembly resolution, supposed to be a first step to drawing up such a convention, was adopted with a significant number of abstentions, leaving the fate of a potential treaty on the rights of the elderly uncertain. On the other hand, in 2014 the Committee of Ministers of the Council of Europe adopted a new recommendation, and in June 2015 members of the Organisation of American States adopted a treaty protecting the elder's rights. Taking into account these new circumstances, the idea underlying this article is to investigate the ability of international instruments to limit ageism and protect older persons' dignity, as well as to indicate existing gaps.

Keywords: ageism, dignity, human rights, international law, older persons

INTRODUCTION

The demographic trends in the age structure of the current world population are well known. The world's population is now ageing faster than ever before, especially in the group called the "oldest old" (80+).¹ Individuals in this age group are potentially more vulnerable to poverty, exclusion, violence, neglect, abuse and discrimination. However, younger older persons also suffer from unequal treatment. They are overlooked for promotion and training, and finally, they are forced to retire against their wishes. Ageing challenges a person's position in society and his/her belonging to family, local commu-

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¹ United Nations Department of Economic and Social Affairs, *World Population Prospects 2015. Revised*, July 2015, available at: http://esa.un.org/unpd/wpp/Publications/Files/Key_Findings_WPP_2015.pdf (accessed 20 April 2016).

nity and country.² His/her right to choose a place and style of living becomes increasingly limited. Indeed, it is a widely accepted, or at least tolerated, idea that the elderly are less worthy and their human rights simply *shrink*. Beverly McLachlin asserts that in the contemporary ageing world, the most challenging issue is “society’s ability to remain committed to the idea of dignity at any age, the idea that every human being, regardless of his or her age, possesses inherent and equal fundamental dignity and basic rights.”³

In addition ageing is a global phenomenon with cross-border effects. We can say that epidemic ageism⁴ affects more than 164 million seniors living in Europe.⁵ This means that many more Europeans are exposed to ageism than to sexism or racism.⁶ Therefore, ageism poses a challenge not only for particular societies and authorities, but also for the international community as a whole.

At the present time one can speak about fresh new interest in and impetus in area of ageing at the level of international forums. The establishment of the Open-Ended Working Group on Ageing by the United Nations General Assembly (UNGA) in Resolution 65/182 of 21 December 2010⁷ and the 2014 appointment of an Independent Expert on the enjoyment of all human rights by older persons⁸ should be recognised as significant achievements on the part of the international community. The new bodies should firstly identify the gaps in the contemporary regime for international protection of the rights and freedoms of older persons. This task has been clearly indicated in the UN General Assembly Resolution 67/139 “Towards a comprehensive and integral international legal instrument to promote and protect the rights and dignity of older persons”, adopted 20 December 2012,⁹ and in the Report of the Independent Expert on the enjoyment of all human rights by older persons by Rosa Kornfeld-Matte, which was submitted to the Human Rights Council in July 2014.¹⁰ To some extent the Conven-

² L.C. Nolan, *Dimensions of ageing and belonging for the older person and the effects of ageism*, 25 Birmingham Young University Journal of Public Law 317 (2011).

³ B. McLachlin, *Human dignity at any age: the law’s response to an ageing population*, 6 Journal of International Aging, Law & Policy 111 (2013), p. 112.

⁴ E. Palmore, *The Ageism Survey: First Findings*, 41(5) Gerontologist 572 (2001), p. 574.

⁵ *Grey Matters – A Survey of Ageism across Europe*, EU Briefing and Policy Recommendations. Age UK 2011, p. 11, available at: <http://bit.ly/1pyZkCH> (accessed 20 April 2016).

⁶ A. Grześkowiak, *Analiza wybranych aspektów zjawiska ageizmu w Europie z wykorzystaniem wykresów typu biplot* [Analysis of chosen aspects of the ageism phenomenon in Europe via the application of biplots], 3 Ekonometria 37 (2012), p. 72.

⁷ United Nations General Assembly, *Resolution 65/182: Follow-up World Assembly on Ageing*, 21 December 2010, A/RES/65/182, available at: <http://bit.ly/1MmrllR> (accessed 20 April 2016).

⁸ Human Rights Council, *Resolution 24/20: The human rights of older persons*, 27 September 2013, A/HRC/RES/24/20, available at: <http://bit.ly/1ZtDE7s> (accessed 20 April 2016).

⁹ United Nations General Assembly, *Resolution 67/139: Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons*, 20 December 2012, A/RES/67/139, available at: <http://bit.ly/1UN7tix> (accessed 20 April 2016).

¹⁰ Human Rights Council, *Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte* (2014), A/HCR/27/46, available at: <http://bit.ly/22wrOP9> (accessed 20 April 2016).

tion on the Rights of Persons with Disabilities (CRPD), adopted in December 2006,¹¹ may also be recognised as a significant development in this area.

We can also speak about some new important international acts (with varying legal status) relating to the elderly at regional levels – i.e. the Recommendation of the Committee of Ministers of the Council of Europe to Member States on the promotion of human rights of older persons of 2014¹² and the Inter-American Convention on Protecting the Human Rights of Older Persons adopted on 6 June 2015.¹³

Despite these achievements, it seems that one of the gaps in the international protection of the elderly concerns the insufficient protection of older persons' dignity vis-à-vis ageism. The dignity contained in international documents may well remain an empty declaration so long as international law does not provide any effective measures which can be taken to protect against ageism. Taking into account the above, it seems useful to investigate the measures against ageism currently in existence in the light of international law, and their potential efficacy in terms of protection of the elderly. Therefore international human rights documents of varying legal force, as well as documents dedicated *expressis verbis* to ageing and the rights of the elderly, are analysed herein. These latter are usually (except for a new Inter-American convention) not legally binding, but are the final result of a long working process at the intergovernmental level, covering a complex catalogue of older persons' rights.

First of all, the key documents for analysis include the Vienna International Plan on Ageing of 1982, which was endorsed by the UNGA in its Resolution 37/51,¹⁴ the United Nations Principles for Older Persons,¹⁵ the Political Declaration and Madrid International Plan of Action on Ageing (MIPAA) adopted in 2002 by the United Nations Second World Assembly on Ageing.¹⁶ They play the role of guidelines and recommendations for UN Member States in the area of ageing and older persons' rights, so it may be expected that they will refer emphatically to the dignity of the elderly and to ageism. It is worth mentioning that although the MIPAA is not a legally binding document, it

¹¹ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), 2515 UNTS 3.

¹² Council of Europe, *Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the promotion of human rights of older persons*, 19 February 2014, available at: <https://wcd.coe.int/ViewDoc.jsp?id=2162283&> (accessed 20 April 2016).

¹³ Inter-American Convention on Protecting the Human Rights of Older Persons (adopted 15 June 2015), available at: <http://bit.ly/1XiETXr> (accessed 20 April 2016).

¹⁴ *The Vienna International Plan of Action on Ageing*, adopted by the World Assembly on Aging held in Vienna, Austria from 26 July to 6 August 1982, United Nations, 1983, available at: <http://www.un.org/es/globalissues/ageing/docs/vipaa.pdf> (accessed 20 April 2016).

¹⁵ United Nations General Assembly, *Resolution A/RES/46/91: United Nations Principles for Older Persons*, 16 December 1991, available at: <http://www.un.org/documents/ga/res/46/a46r091.htm> (accessed 20 April 2016).

¹⁶ *United Nations Political Declaration and the Madrid International Plan of Action on Ageing*, Second World Assembly on Ageing, Madrid, Spain 8-12 April 2002, United Nations, New York 2002, available at: <http://social.un.org/ageing-working-group/documents/mipaa-en.pdf> (accessed 20 April 2016).

has been equipped with a follow-up mechanism aimed at monitoring states' endeavours in the area of ageing and older persons' rights.

Finally, some relevant reports, such as the aforementioned Report of the Independent Expert, and general comments issued by the human rights bodies, will be taken into account because they are very helpful not only in the interpretation of legal norms, but also in the identification of recent tendencies.

Many other documents and projects have been drawn up at the international level, including some by non-governmental forums, including the interesting Chicago Declaration for the Rights of Older Persons of 2014,¹⁷ adopted by academics and other stakeholders. However, since they do not express the official states' positions at the international forum and they are not issued by organs of inter-governmental organisations, they remain beyond the scope of this study. Similarly, legal and practical solutions of particular states will not be examined here because the main goal of this article is to investigate international regulations, viewed as a result of compromise achieved within inter-state negotiations. At the same time however, obviously the states creating international law norms transfer their own solutions onto an international forum. The most advanced countries in this regard are the United States, Canada and some EU countries. Israel Doron is of the opinion that globalization may contribute to the shaping of an international elderly law.¹⁸ However, as will be seen in the following analysis, this can be considered a rather distant hope.

1. CONCEPTS OF AGEISM

The phenomenon of ageism has mainly been the subject of interest among sociologists and gerontologists, and rather seldom of international lawyers. In the late 1960s Robert N. Butler coined the term ageism and described it as the "prejudice of one age toward the other age groups".¹⁹ He then developed this definition, identifying "ageism as a process of systematic stereotyping and discrimination against people because they are old, just as racism and sexism ... ageism allows the young to see older people as different from themselves, thus they subtly cease to identify their elders as human beings."²⁰ In his later works he also described it as negligence, ignorance and a negative assumption that old people are old-fashioned, unproductive, incompetent, slow-thinking, inflexible, unattractive, sexless, etc.²¹ Taking into account the contemporary demographic situation

¹⁷ Chicago Declaration for the Rights of Older Persons, International Elder Law and Policy Conference (2014), available at: <http://www.jmls.edu/braun/pdf/chicago-declaration-v11.pdf> (accessed 20 April 2016).

¹⁸ I. Doron, *From National to International Elder Law*, 1 *The Journal of International Ageing and Policy* 43 (2005), p. 58

¹⁹ R.N. Butler, *Age-ism: Another Form of Bigotry*, 9 *Gerontologist* 243 (1969).

²⁰ R.N. Butler, *Why Survive? Being Old in America*, Harper & Rowe, New York: 1975, p. 12.

²¹ R.N. Butler, *Longevity Revolution: The Benefits and Challenges of Living a Long Life*, Public Affairs, New York: 2008, pp. 40-41.

in the world and following Robert Butler's approach, this article refers to ageism in its narrower meaning and does not tackle ageism towards young people.

Many other research projects have been carried out and alternative concepts of ageism have been constructed,²² but generally they can be divided into at least two groups. The first perceives ageism as a unique form of discrimination.²³ The second concept limits ageism to a source of discrimination and other negative behaviours towards the elderly, and usually qualifies it as a feeling, idea or belief, or even an ideology.²⁴ According to this theory, ageism differs from discrimination on grounds of age, which requires a specific behaviour or treatment. Some concepts also indicate a stigmatisation of older persons. For example, the High Commissioner for Human Rights, in her report of 2012, writes on "ageism", or the discrimination against and stigmatization of individuals as they grow older."²⁵ Such an approach suggests two principal components of ageism – discrimination and stigmatisation.

Theoretically, a person may have ageist opinions but not necessarily engage in any discriminatory or hostile action. Such a distinction seems to be particularly important for law-makers,²⁶ because the law is not able to protect people against somebody's views, prejudices or stereotypes, but may ban age discrimination and condemn elder abuse. The latter phenomena is the worst display of ageism and it manifests itself in (at least) three forms: 1) in neglect, meaning isolation, abandonment and social exclusion; 2) in violation of human, legal and medical rights; 3) in deprivation of choices, decisions, status, finances and respect.²⁷

Despite the fact that almost 50 years have passed since ageism was identified, and regardless of how it is understood, ageism is still rampant. Today it is recognised as the

²² I.D. Campos, A.M. Stripling, M. Heesacker, "Estoy Viejo" [I'm Old]: Internalized Ageism as Self-Referential, Negative, Ageist Speech in the Republic of Panama, 27(4) The Journal of Cross-Cultural Gerontology 373 (2012), p. 374; I. Doron, *Ageism: Justice and Social Policy*, Conference Papers, Arnulf M. Pins Memorial Lecture. School of Social Work, Hebrew University, Jerusalem: 2013, p. 18.

²³ H. Jönson, *We Will Be Different! Ageism and the Temporal Construction of Old Age*, 53 Gerontologist 198 (2013); B. Bytheway, *Ageism*, in: M.L. Johnson (ed.), *The Cambridge Handbook of Age and Ageing*, Cambridge University Press, Cambridge: 2005, p. 338; E.B. Palmore, *Ageism in Canada and the United States*, 19 Journal of Cross-Cultural Gerontology 41 (2004).

²⁴ P. Szukalski, *Ageizm – przyczyny, przejawy, konsekwencje* [Ageism – reasons, expressions, consequences], in: J.T. Kowaleski, P. Szukalski (eds.), *Starzenie się ludności Polski – między demografią a gerontologią społeczną*, Wydawnictwo Uniwersytetu Łódzkiego, Łódź: 2008, p. 156; J. Herring, *Older People in Law and Society*, Oxford University Press, Oxford: 2009, pp. 12-13; B. Tokarz (ed.), *Stop dyskryminacji ze względu na wiek* [Stop to age discrimination], Akademia Rozwoju Filantropii w Polsce, Warszawa: 2005, pp. 11-12.

²⁵ United Nations Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights*, 20 April 2012, E/2012/51, available at: <http://bit.ly/1o7kcQ9> (accessed 20 April 2016).

²⁶ N. Ghosh, *Age Discrimination and Older Workers: Theory and legislation in comparative context*, Conditions of Work and Employment Series No 20, International Labour Office, Geneva: 2008, p. 3.

²⁷ World Health Organization, *A Global Response to Elder Abuse and Neglect: Building primary health care capacity*, WHO, Geneva: 2008, available at: http://www.who.int/ageing/publications/elder_abuse2008/en/ (accessed 20 April 2016), p. 1.

main threat to the dignity of the elderly.²⁸ Erdman Palmore even diagnosed an epidemic of ageism.²⁹ Nevertheless, “treatment” is very difficult in the case of this “epidemic”, because ageism has many faces and forms. Various studies, using various criteria, identify, for example: implicit and explicit ageism;³⁰ institutionalised ageism;³¹ positive and negative types of ageism,³² etc.

Ageism reveals itself not only in abuse, negligence, or direct³³ or indirect³⁴ discrimination involving the elderly, but also in patronising language that may be regarded by older people as disrespectful, condescending and humiliating.³⁵ Ageism is present not only in healthcare institutions and workplaces, but quite often ageist behaviours are prevalent in the media and even in the justice system.³⁶ Ageism takes place on both a macro level, for instance in anti-aging beauty campaigns, and at the micro level – in everyday language containing derogatory remarks about older people. Ageism may also take the form of a language-based age discrimination reflecting an implicit bias, and so-called *micro-aggression*, understood as daily verbal, behavioural and environmental, intentional and unintentional indignities.³⁷ Generally, it may be stated that ageism and its symptoms are directed against human dignity.

Finally, there are several “natural” reasons that make a successful action against ageism very difficult. Becca R. Levy and Mahzarin R. Banaji indicate that ageism can operate without conscious awareness, control or an intention to harm. Second, social

²⁸ McLachlin, *supra* note 3, pp. 116-119.

²⁹ Palmore, *supra* note 4, p. 574.

³⁰ B.R. Levy, *Eradication of Ageism Requires Addressing the Enemy Within*, 41(5) *Gerontologist* 578 (2001); B.R. Levy, M. Banaji, *Implicit Ageism*, in: T.D. Nelson (ed.), *Ageism: Stereotyping and Prejudice Against Older Persons*, The MIT Press, Cambridge, MA: 2002, p. 51.

³¹ B. Bytheway, *Ageism and Age Categorization*, 61(2) *Journal of Social Issues* 361 (2005), p. 363; B. Bytheway, *Ageism*, in: Johnson (ed.), *supra* note 23, p. 341.

³² M. Pasupathi, C.E. Loeckenhoff, *Ageist Behavior*, in: Nelson (ed.), *supra* note 30, p. 208; Szukalski, *supra* note 24, p. 158; *see also generally* E.B. Palmore, *Ageism: Negative and Positive* (2nd ed.), Springer, New York: 1999.

³³ For example, with respect to access to goods and services older people are denied loans despite the fact that they possess property which could be used as security for the loan; the creditworthiness of senior citizens is reduced; they cannot register a phone without a younger member of their family; their travel insurance premiums growing even without checking their health condition, car rental companies refuse to rent a car to drivers above a certain age etc. In area of the health care people over certain age are denied free (or partially reimbursed) tests, screening, and drugs despite the fact that the risk of many diseases (including cancer) increases with age (*see* <http://bit.ly/1UHRcBd>, accessed 20 April 2016).

³⁴ *E.g.* information on events for older persons may be available only on web sites, even though a small part of the elderly are users of the internet.

³⁵ T.D. Nelson, *Ageism: Prejudice against Our Feared Future Self*, 61 *Journal of Social Issues* 207 (2005), p. 210.

³⁶ *Ibidem*, p. 216; A. Phelan, *Elder Abuse, Ageism, Human Rights and Citizenship: Implications for Nursing Discourse*, 15 *Nursing Inquiry* 320 (2008), p. 323; Doron, *supra* note 22, p. 23; P. Irving, *Self-Empowerment in Latter Life as a Response to Ageism*, 39 *Generations* 72 (2015), p. 75.

³⁷ T.L. Gendron, E.A. Welleford, J. Inker, T.J. White, *The Language of Ageism: Why We Need to Use Words Carefully*, *Gerontologist* (2015, DOI: 10.1093/geront/gnv066 1-10), p. 4.

sanctions against expressions of negative attitudes and beliefs about older individuals are very rare. In fact, they are socially accepted and rooted in culture and beliefs. Finally, contrary to cases of racism, sexism, and ethnic and religious discrimination, identifying hate groups is very difficult in the case of ageism.³⁸ To some extent each of us contributes to the ubiquitous nature of ageism. It has been proven that the process of age stereotypes begins in childhood and remains throughout our lives.³⁹ It has been aptly underlined in another definition, provided by Todd D. Nelson, which describes ageism as a prejudice against one's future self.⁴⁰

Taking into account all these observations and remarks, it may be concluded that putting this phenomenon into legal frames and combating it on a legal basis constitutes a daunting challenge for law-makers at both the domestic and international levels. It is much more difficult than in the cases of racism and sexism. Csilla Kollonay-Lehoczky notes that Robert Butler was right to coin the expression "ageism", but simultaneously he was over-optimistic and over-ambitious when suggesting that ageism should be placed into the same category as racism and sexism.⁴¹ The problem is that age is of a different nature than sex and race. Age refers to every person and it is variable as well as imprecise. In the 21st century people live longer and they consider themselves much younger than their parents and grandparents did when they were the same age!

However, despite all these ambiguities and the confusion surrounding the issue, there is a real need to confront the necessity for international protection of dignity for the elderly and develop the fight against ageism at an international level.

2. STRENGTHENING THE ELDERS' DIGNITY

If one assumes that ageism is the main enemy of the elders' dignity, it can only be useful to see how dignity is protected at the international level. However, the concept of dignity also causes many interpretive difficulties. It enjoys a common appreciation, but its content is unclear and disputable.⁴² Certainly, dignity is recognised as a value which defines and should guide humanity,⁴³ but simultaneously it has been pointed

³⁸ Levy, *supra* note 30, p. 50.

³⁹ B.R. Levy, A.B. Zonderman, M.D. Slade, L. Ferrucci, *Memory Shaped by Age Stereotypes over Time*, 67 *The Journals of Gerontology Series B: Psychological Sciences and Social Sciences* 432 (2012).

⁴⁰ Nelson, *supra* note 35, p. 207.

⁴¹ C. Kollonay-Lehoczky, *Who, Whom, When, How? Questions and Emerging Answers on Age Discrimination*, 11 *The Equal Rights Review* 69 (2013).

⁴² See generally E. Picker, *Godność człowieka a życie ludzkie* [Human dignity and human life], Oficyna Naukowa, Warszawa: 2007; M. Rosen, *Dignity. Its history and meaning*, Harvard University Press, Cambridge, (MA) and London: 2012.

⁴³ J.Ch. Byk, *Is Human Dignity a Useful Concept? Legal Perspective*, in: M. Düwell, J. Braarvig, R. Brownsword, D. Mieth (eds.), *The Cambridge Handbook of Human Dignity*, Cambridge University Press, Cambridge: 2014, p. 364.

out that “dignity is hopelessly vague and equivocal,”⁴⁴ and the idea that dignity can be the ground for human rights is even contested.⁴⁵ Henk Botha noted that “some constitutional lawyers have given up on this quest, declaring that the meaning of dignity can only be determined on a case-by-case basis, or that dignity can only be defined negatively, with reference to past instances of its violation.”⁴⁶ On the other hand, it is also stressed that human dignity involves, among other things, respect for everyone’s humanity, and the creation and protection of conditions for self-fulfilment, self-realisation and the autonomy of each individual. Torture, slavery, coercion, verbal abuse, discrimination and maltreatment; a denial of the right to associate, to make love, to take part in social life, to express one’s intellectual, artistic or cultural ideas; or to enjoy a decent standard of living and health care are understood as examples of direct and indirect attacks against human dignity.⁴⁷ Undoubtedly, all these examples of attacks are characteristic of ageist behaviours, which stand in contradiction to the sense of dignity – just the right to be treated in a dignified manner.

Despite all these controversies, human dignity is invoked in various international acts, although it is not usually defined therein. References to dignity were introduced in the Preamble to the Charter of the United Nations, to the Universal Declaration of Human Rights and to both International Covenants on Human Rights.⁴⁸ In addition to acts of a general nature relating to the rights of every person, the concept of dignity has been introduced into treaties aimed at protecting particular groups of people, such as children, women, migrant workers, disabled persons, victims of involuntary disappearances, and also into treaties protecting specific human rights and freedoms, like the freedom from torture and racial discrimination. It is also invoked in treaties belonging to international environmental law and humanitarian law, as well as international labour law.⁴⁹

Dignity is present in most regional human rights instruments and is protected by regional human rights bodies. However, it may be observed that dignity is “more popular” in more recently adopted human rights acts. For example, in the older inter-American treaties on human rights it appeared only in context of the bans of torture and slavery, but has been invoked very clearly in the Andean Charter for the Promotion and

⁴⁴ G. Den Hartogh, *Is Human Dignity the Ground of Human Rights?* in: Düwell et al. (eds.), *supra* note 43, p. 200.

⁴⁵ *Ibidem*, p. 206.

⁴⁶ H. Botha, *Human Dignity in Comparative Perspective*, 2 Stellenbosch Law Review 171 (2009), p. 182.

⁴⁷ See generally R. Brownsword, *Human Dignity from a Legal Perspective*, in: Düwell et al. (eds.), *supra* note 43, pp. 1–22.

⁴⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1977), UNTS 999; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1977), UNTS 993.

⁴⁹ Ch. McCrudden, *Human dignity and judicial interpretation of human rights*, 19(4) European Journal of International Law 655 (2008), p. 673; B. Mikołajczyk, *Międzynarodowa ochrona praw osób starszych* [International protection of elderly persons], LEX Wolters Kluwer Business, Warszawa: 2012, pp. 109–118.

Protection of Human Rights of 2002. Art. 1 of this Charter states that “human rights are inherent to the nature and dignity of everyone.”⁵⁰

Dignity is not mentioned *expressis verbis* in the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950.⁵¹ A reference to dignity did appear, albeit only, in the 2002 Preamble of Protocol No. 13 to the ECHR prohibiting the death penalty.⁵² The European Court of Human Rights (ECtHR) does however refer to dignity in its judgments, mainly in cases referring to the prohibition of torture and inhuman and degrading treatment or punishment, contained in Art. 3 ECHR.⁵³ Situations where the human dignity of older persons is violated often happen in hospitals, nursing homes and various other detention facilities and closed institutions. Therefore, the jurisprudence of the ECtHR in cases concerning a violation of the prohibition on inhuman or degrading treatment, as well as the right to privacy, are of particular importance. For example, the ECtHR referred to human dignity in the case of *Toteva v. Bulgaria*,⁵⁴ concerning the beating of an older woman in detention by police officers. The Court stated that taking into account the advanced age of the applicant, her injuries sustained during detention should be assessed as ill-treatment within meaning of Art. 3 ECHR. The process of human ageing and human dignity were clearly intertwined and constituted an integral part of the ECtHR’s decision in *Mouisel v. France*.⁵⁵ The applicant – Jean Mouisel – was a 52-year-old person suffering from cancer, serving a fifteen-year prison sentence. He was put in a prison dormitory with no sanitary facilities, even while he was being treated with chemotherapy. The Court observed that placing an elderly or chronically ill person in prison for many years may fall under Art. 3 ECHR. According to the Court his health condition, age, and serious physical disability were factors that should be taken into account when a state carries out its obligations under Art. 3 ECHR. The Court found that the applicant’s continued detention undermined his dignity and constituted a particularly acute hardship that caused suffering beyond that which was inevitable in connection with a prison sentence or treatment for cancer. Therefore according to the Court the applicant, by virtue of being put in the above described conditions, was a victim of inhumane and degrading treatment.⁵⁶

⁵⁰ Andean Charter for the Promotion and Protection of Human Rights, 26 July 2002, available at: <http://www.refworld.org/docid/3de4f94a4.html> (accessed 20 April 2016).

⁵¹ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 5 November 1950, entered into force 3 September 1953), CETS No. 005

⁵² Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (adopted 3 May 2002, entered into force 1 July 2003), CETS No. 187.

⁵³ B. Mikołajczyk, *Is the ECHR Ready for Global Ageing?*, 17 International Journal of Human Rights 511 (2013), pp. 514-515.

⁵⁴ ECtHR, *Toteva v. Bulgaria* (App. No. 42027/98), 19 May 2004. All ECtHR judgments and decisions are available at: www.hudoc.echr.coe.int

⁵⁵ ECtHR, *Mouisel v. France* (App. No. 67263/01), 14 November 2002.

⁵⁶ Mikołajczyk, *supra* note 53, p. 515.

It is also worth mentioning that in various regional international law acts which have been adopted in last two decades, dignity is invoked not only as a value placed in the Preambles, but also in catalogues of rights as a subjective right or a conglomerate of rights. For example, the first chapter of the Charter of Fundamental Rights of the European Union (CFREU)⁵⁷ is titled “Dignity”. It consists of provisions on dignity, the right to life, the right to the integrity of the person, a prohibition on torture, inhuman and degrading treatment, and a ban on slavery and forced labour. The Presidium of the European Convention, which drafted the Charter, explained that dignity, as indicated in the Charter, may be interpreted in two ways – as a fundamental right in itself and as the real basis of fundamental rights.⁵⁸

An intermediate form of this right/value may be found in Art. 5 of the African Charter on Human and Peoples’ Rights,⁵⁹ which contains “the right to the respect of the dignity inherent in a human being and to the recognition of his legal status”. However, Art. 3 of the Maputo Protocol to this Charter of 2003, relating to the rights of women in Africa,⁶⁰ refers directly to the *right to dignity*. This is understood as the right to be respected as a human being and to self-development, and is closely linked with freedom from exploitation, humiliation and physical, sexual and verbal violence.

The “development of dignity” can also be observed in the case of both European Social Charters. The Charter of 1961⁶¹ fails to mention dignity, but the revised European Social Charter of 1996 sets out “the right to dignity at work”.⁶²

While it is obvious that the key international documents on ageing and older persons’ rights as such have been adopted with the intention of protecting the dignity of the elderly, nonetheless it may be interesting to trace the context in which dignity is indicated *expressis verbis* in these documents. The Vienna International Plan on Ageing of 1982 invokes dignity in its principles, rules and recommendations. It was stated that “the development process must enhance human dignity and ensure equity among age groups in the sharing of society’s resources, rights and responsibilities.” Moreover, respect for dignity was included into the recommendations on healthcare and the life of the elderly in institutions, as well as in the context of security of ageing. The UN Principles for Older Persons, adopted in 1991, also refer to dignity and try to determine

⁵⁷ Charter of Fundamental Rights of the European Union of 7 December 2000 with amendments, adopted on 12 December 2007, OJ C 326/12.

⁵⁸ Presidium of the European Convention - Explanations relating to the Charter of Fundamental Rights of the European Union OJ C 303/-7.

⁵⁹ African Charter on Human and Peoples’ Rights (adopted 1 June 1981, entered into force 21 October 1986), 1520 UNTS 217.

⁶⁰ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005), available at: <http://www.achpr.org/instruments/women-protocol> (accessed 20 April 2016).

⁶¹ European Social Charter (adopted 18 October 1961, entered into force 25 February 1965), CETS No. 035.

⁶² European Social Charter (revised) (adopted 3 May 1996, entered into force 1 July 1999), CETS No. 163.

its scope. The Principles state that “older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.”

In the Political Declaration and Madrid International Plan of Action on Ageing of 2002, the concept of dignity appears several times. In Art. 5 of the Declaration, the international community declares its determination to enhance the recognition of the dignity of older persons and to eliminate all forms of neglect, abuse and violence. Enabling every individual to age with security and dignity, combating discrimination based on age, and promoting the dignity of older persons are all specified aims of the MIPAA. With respect to the social, cultural, economic and political contribution of older persons, the Plan recommends taking various actions aimed at ensuring the fair and dignified treatment of older persons, regardless of their disability (whether mental or physical) or other status, and proclaims that they should be valued independently of their economic contribution. In the Madrid document, dignity also appears in connection with the creation of positive images of ageing and combating false stereotypes of the elderly, as well as in context of enhancing the public recognition of their authority, wisdom, productivity and other important contributions.

The need to protect the dignity of older persons appears in many other documents adopted on both the UN forum and regional forums, as reports, studies, various general comments, resolutions, and recommendations. Two of the most recent cornerstone documents adopted in the framework of the Council of Europe and the Organisation of American States also invoke the idea of dignity.

The first of these, the Recommendation of the Committee of Ministers of the Council of Europe to Member States on the promotion of human rights of older persons, refers to previous treaties and soft law acts with a strong axiological basis, such as the Convention on Human Rights and Biomedicine⁶³ and the Recommendation relating to the dignity of the terminally ill and the dying.⁶⁴ The Committee of Ministers stressed that older persons should be able to live their lives in dignity and security, free from discrimination, isolation, violence, neglect and abuse, and as autonomously as possible. Therefore, the Member States are called on to promote, respect and guarantee the dignity of older persons in every circumstance. The Committee proclaimed the right of older persons to respect for their inherent dignity and respect for their private and family life, including respect for their sexual intimacy. Special attention is placed on the states' obligations to protect the dignity of the elderly in relation to palliative care, as well as to conditions of detention.

It should be added that this Recommendation differs from the previous soft law documents, because it presents examples of states' good practices towards older persons.

⁶³ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (adopted 4 April 1997, entered into force 1 December 1999), CETS No. 164.

⁶⁴ Council of Europe, Parliamentary Assembly, *Recommendation 1418 (1999) Protection of the human rights and dignity of the terminally ill and the dying*, available at: <http://bit.ly/22GvoTu> (accessed 20 April 2016).

The Greek and Czech actions aimed at the identification of those older persons living in conditions that violate their dignity are provided as examples.

The other new document - the Inter-American Convention on Protecting the Human Rights of Older Persons of 2015 – indicates that dignity, independence, activity and the autonomy of older persons are main principles of this treaty. It recognizes dignity as a source of human rights. It states that “older persons have the same human rights and fundamental freedoms as other persons and that those rights, including the right not to be subjected to age-based discrimination nor any form of violence, are rooted in the dignity and equality inherent in all human beings.” At the same time, Art. 6 sets out the right to life and dignity in old age. As a result, states have an obligation to adopt measures necessary to ensure older persons’ effective enjoyment of the right to life and the right to live with dignity. Living with dignity is also repeated in the context of the right to safety and a life free from violence of any kind (Art. 6), the right to privacy and intimacy (Art. 16), and the right to social security (Art. 17).

Having analysed the position of dignity in treaties and documents of a non-legally-binding nature, it may be observed that the more recent a document is, the more often it refers to the dignity of older persons. Recently this even plays a dual role – as a value and as a separate right, which may be interpreted as the right to be treated with dignity in all spheres of human life. Thus, following Ben A. McJunkin it may be concluded that “dignity is on the march”.⁶⁵ This tendency may be estimated positively, but it may also be considered as a symptom of the crisis of human rights. In the contemporary world, a human being’s rights, especially a vulnerable human being’s rights, are exposed to new types of violations due to technological progress and the changing demographical structure. More and more groups, including older persons, are threatened by social exclusion. It is also possible that the increasingly frequent evocation of dignity, also in its dual role, means that human rights need additional support. However, numerous references to dignity included in acts of international law, including those dedicated to the elderly, do not guarantee that this category of persons will be treated with dignity. It thus seems that only precise actions against ageism may turn out to be effective. However, in contrast to dignity, the term ageism very seldom appears in international documents. Thus an examination of the steps taken against the consequences of ageism seems to be appropriate.

3. COMBATING AGEISM AS DISCRIMINATION

Provisions prohibiting ageism cannot be found in the international acts aimed at securing the general protection of human rights. Only if ageism is interpreted as discrimination (or a unique form of discrimination) against older persons do the universal anti-discrimination clauses included into human rights treaties become relevant and

⁶⁵ B.A. McJunkin, *Rank Among Equals*, 113 Michigan Law Review 855 (2015).

useful in the field. Unfortunately, age is usually absent among the catalogue of rights protected from discrimination.⁶⁶ Art. 2 of the Universal Declaration of Human Rights states that “[e]veryone 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.” It is easy to notice that age is not included in this clause. The same premises have been repeated in both International Human Rights Covenants.

Therefore, only the premises underlying another protected status could be taken into account as grounds for a prohibition against age discrimination. However, for years the Human Rights Committee (HRC), when considering individual communications referring to Arts. 2 and 26 of the ICCPR, was reluctant to include age into the catalogue or protected statuses. However, the HCR’s views expressed in the cases *Love et al. v. Australia*,⁶⁷ and *Rubén Santiago Hinojosa Solís v. Peru*⁶⁸ showed that its members were no longer unanimous on this matter. Finally, a significant change in the HCR’s views took place in 2011, in the case *Néstor Julio Canessa Albareda et al. v. Uruguay*. In this case, the Committee took the view that “age may constitute one of the grounds for discrimination prohibited under Article 26, provided that it is the ground for establishing differentiated treatment that is not based on reasonable and objective criteria.”⁶⁹

Contrary to the HCR, the Committee on Economic, Social and Cultural Rights (CESCR), when analysing the scope of Art. 2(2) of the Covenant on Economic, Social and Cultural Rights, in its General Comment No. 20 included age into the category of “other status”.⁷⁰ Moreover, the Committee has classified incitement to discriminate and harassment as a form of discrimination. Such a finding seems to be crucial in context of ageism. It must be stressed that there has been great progress in comparison with General Comment No. 6 of 1995 on the Economic, Social and Cultural Rights of Older Persons, where the Committee hardly considered the possibility of including age in the “other status” category.⁷¹

⁶⁶ P. De Hert, E. Mantovani, *Specific Human Rights for Older Persons? The Inevitable Colouring of Human Rights Law*, 4 European Human Rights Law Review 398 (2011), p. 404

⁶⁷ Human Rights Committee, *Love et al. v. Australia*, communication no. 983/2001, views of 25 March 2003, CCPR/C/77/D/983/2001 (2003).

⁶⁸ Human Rights Committee, *Rubén Santiago Hinojosa Solís v. Peru*, communication no. 1016/2001, views of 27 March 2006, CCPR/C/86/D/1016/2001 (2006).

⁶⁹ Human Rights Committee, *Néstor Julio Canessa Albareda et al. v. Uruguay*, communications nos. 1637/2007, 1757/2008 and 1765/2008, views of 24 October 2011, CCPR/C/103/D/1637/2007, 1757 and 1765/2008 (2011).

⁷⁰ Committee of Economic, Social and Cultural Rights, *General Comment No. 20. Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, UN Doc. E/C.12/GC/20, available at: <http://www.refworld.org/docid/4a60961f2.html> (accessed 20 April 2016).

⁷¹ Committee of Economic, Social and Cultural Rights, *General Comment No. 6.: The Economic, Social and Cultural Rights of Older Persons*, UN Doc. E/C.12/1995/16/Rev. 1 (1995), available at: <http://www.refworld.org/docid/4538838f11.html> (accessed 20 April 2016).

It is also worth noting that the International Labour Organisation (ILO) Convention concerning Discrimination in Respect of Employment and Occupation Discrimination⁷² refers to age, and does not even contain the category of “other status”, which could cover various grounds of discrimination, including age. Therefore, the ILO Older Workers Recommendation No. 162⁷³ seems to be crucial for the non-discrimination of *younger older* persons. It contains a whole chapter dedicated to equality of opportunity and treatment, but has no value as hard international law.

Conversely, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990⁷⁴ is hard law and contains age as a protected premise of non-discrimination, though the Convention is not widely accepted and its parties are usually states producing migrant workers, rather than host countries.

A much more important treaty for older persons is the Convention on the Rights of Persons with Disabilities. This mentions age as one of reasons of multiple or aggravated forms of discrimination.

With respect to the regional level, it may be observed that the American Convention on Human Rights,⁷⁵ the Protocol of San Salvador and the African Charter on Human and Peoples' Rights⁷⁶ all contain an open premise of “other status” or “other condition” that may potentially cover age. Similarly, Art. 14 ECHR refers to “other status”. Unfortunately, its specific wording and non-autonomic character (the ban on discrimination refers only to rights contained in the ECHR) means that it may be called a second class non-discrimination clause, and a person who wants to prove that he/she was discriminated against on the grounds of age will encounter difficulties.⁷⁷ Therefore some expectations are placed on Protocol No. 12 to the Convention,⁷⁸ which prohibits its discrimination in all spheres of life, going beyond the scope of the Convention. It establishes a general principle of non-discriminatory treatment by public authorities,⁷⁹

⁷² Convention concerning Discrimination in Respect of Employment and Occupation Discrimination (No. 111) (adopted 4 June 1958, entered into force 15 June 1960), 362 UNTS 31.

⁷³ ILO, Recommendation concerning Older Workers (no. 162), available at: <http://bit.ly/22GxmDA> (accessed 20 April 2016).

⁷⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 8 December 1990, entered into force 1 July 2003), 2220 UNTS 3.

⁷⁵ American Convention on Human Rights: Pact of San Jose (adopted 22 November 1969, entered into force 18 July 1978).

⁷⁶ African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), 1520 UNTS 217.

⁷⁷ H. Meenan, *Reflecting on Age Discrimination and Rights of the Elderly in the European Union and the Council of Europe*, 14 Maastricht Journal of European and Comparative Law 39 (2007), p. 45; R. Wintemute, *Within the Ambit: How Big is the “Gap” in Article 14 European Convention on Human Rights?*, 4 European Human Rights Law Review 366 (2004); Mikołajczyk, *supra* note 53, pp. 516–517.

⁷⁸ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005), CETS no. 177.

⁷⁹ Mikołajczyk, *supra* note 53, p. 517.

but not all the Council of Europe Member States have adopted this Protocol.⁸⁰ In such a situation, the “last safety net” seems to be the inclusion of age to anti-discrimination clauses, as well as the social sphere in the framework of the evolutive interpretation of the Convention.⁸¹ However, it turns out that the ECtHR is rather cautious in accepting such an interpretation.⁸² When the Court has considered the question of age, it has usually combined this circumstance with an applicant’s state of health and conditions of detention, procedural safeguards or gender discrimination.⁸³ In this context the judgment in *Schwizgebel v. Switzerland* case⁸⁴ must be considered as truly unique. In that case the Strasbourg Court considered exclusively age as a premise contained in Art. 14 in connection with Art. 8 protecting respect for private and family life. In this case the applicant was a 47-year-old single mother who was refused permission to adopt a child. The grounds for the refusal were domestic regulations establishing the permissible age difference between the adoptive parent and the adoptive child. In the judgment the Court held that the applicant was treated in a less favourable way in comparison with younger women applying for adoption, but simultaneously pointed out that the age limit required for adoption remains at the discretion of the state authorities, and setting such limits is not of an arbitrary character if it is justified as done in “the best interest of a child”.

On the other hand, despite a quite significant number of complainants over sixty years old submitting applications to the ECtHR⁸⁵ it cannot be determined whether they have done so because they feel that their human rights were violated exclusively due to their old age. Concepts of ageism and even age discrimination never appeared in the claims submitted to the Court in such obviously “elderly-related” cases as the involuntary transfer of an older person from one care home to another or forced placement in a nursing home (e.g. *Watts v. the United Kingdom*,⁸⁶ *H.M. v. Switzerland*⁸⁷), reduction of night-time care (e.g. *McDonald v. the United Kingdom*⁸⁸), divesting individuals of their legal capacity (e.g. *X and Y v. Croatia*⁸⁹), insufficiency of old-age pensions to maintain

⁸⁰ 19 of 47 Member States have adopted the Protocol as of March 2016.

⁸¹ R. O’Connel, *Cinderella Comes to the Ball: Article 14 and the Rights to Non-discrimination in ECHR*, 29 *Society of the Legal Scholars, Legal Studies* 211 (2009) p. 211; K. Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 *German Law Journal* 1730 (2011), p. 1731; M. De Pauw, *Interpreting the European Convention on Human Rights in Light of Emerging Human Rights Issues: An Older Persons’ Perspective*, 8 *Human Rights and International Legal Discourse* 235 (2014), p. 257.

⁸² Mikołajczyk, *supra* note 53, p. 517; B. Spanier, I. Doron, F. Milman-Sivan, *Older Persons’ Use of the European Court of Human Rights*, 28 *Journal of Cross Cultural Gerontology* 407 (2013), p. 417.

⁸³ See generally De Pauw, *supra* note 81.

⁸⁴ ECtHR, *Schwizgebel v. Switzerland* (App. No. 25762/07), 10 June 2010.

⁸⁵ Spanier et al., *supra* note 82, pp. 410–411.

⁸⁶ ECtHR decision as to the admissibility (inadmissible), *Watts v. the United Kingdom* (App. No. 53586/09), 4 May 2010.

⁸⁷ ECtHR, *H.M. v. Switzerland* (App. No. 39187/98), 26 February 2002.

⁸⁸ ECtHR, *McDonald v. the United Kingdom* (App. No. 4241/12), 20 May 2014.

⁸⁹ ECtHR, *X and Y v. Croatia* (App. No. 5193/09), 3 November 2011.

an adequate standard of living (e.g. *Larioshina v. Russia*,⁹⁰ *Budina v. Russia*⁹¹), and poor hospital conditions and/or inappropriate treatment and negligence of the nursing home staff (e.g. *Volintiru v. Italy*,⁹² *Dodov v. Bulgaria*⁹³). Even in the case of *Carson and Others v. the UK*,⁹⁴ referring to the indexation of old-age pensions, where the “other status” stipulated in Art. 14 was taken into consideration, the claimants did not invoke *age*, but only *place of residence* as a subcategory of this premise.

In contrast to the treaties mentioned above, the contemporary binding fundamental EU acts – the Treaty on the Functioning of the European Union (TFEU) and the CFREU – include age in their anti-discrimination clauses, in Art. 19 TFEU and Art. 21 CFREU. However, it should be mentioned that the age premise was not present in the Treaty of Rome of 1957,⁹⁵ which contained only two grounds of discrimination – nationality and sex. Age has been introduced into the EU law by the Amsterdam Treaty in 1997.⁹⁶ Its Art. 13 (now Art. 19 TFEU) allows the EU institutions to adopt laws to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, both inside and outside employment. This revolutionary change in the EU law was a response to the economic challenges in the times of global capitalism and it reflected the general development of anti-discrimination law in the Member States.⁹⁷

In view of old-age discrimination, Art. 21 of the CFREU should be considered together with Art. 25 referring to the EU’s respect for the “rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life”. However, it is easily observable that, in the case of the elderly, the Charter requires the EU only to “recognise and respect the rights of the elderly”, whereas in the cases of gender equality and children rights, it is much more precise and resolute.⁹⁸

In secondary EU law, a ban on age discrimination was introduced through the Council’s Directive 2000/78/EC.⁹⁹ It establishes a general framework for equal treatment

⁹⁰ ECtHR decision as to the admissibility (inadmissible), *Larioshina v. Russia* (App. No. 56869/00), 23 April 2002.

⁹¹ ECtHR decision as to the admissibility (inadmissible), *Budina v. Russia* (App. No. 45603/05), 18 June 2002.

⁹² ECtHR communicated case, *Volintiru v. Italy* (8530/08), 19 March 2013.

⁹³ ECtHR, *Dodov v. Bulgaria* (App. No. 59548/00), 17 January 2008.

⁹⁴ ECtHR, *Carson and Others v. the UK* (App. No. 42184/05), Grand Chamber, 26 March 2010.

⁹⁵ Treaty establishing the European Economic Community of 25 March 1957.

⁹⁶ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts of 2 October 1997.

⁹⁷ H. Meenan, *Age Discrimination in Europe: Late Bloomer or Wall-Flower?*, 25 Nordic Journal of Human Rights 97 (2007), p. 98; A. Numhauser-Henning, *The EU Ban on Age-Discrimination and Elderly Workers: Potentials and Pitfalls*, Paper to the IJCLLIR Panel on “Non-Discrimination Law and Equal Treatment of Employees – Recent Developments and Future Challenges”, Barcelona, 14 June 2013, available at: <http://bit.ly/1o7rhQT> (accessed 20 April 2016), pp. 3–4.

⁹⁸ M. Bell, *The Rights to Equality and Non-discrimination*, in: T. Hervey, T. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective*, Hart Publishing, Oxford: 2003, pp. 98.

⁹⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

in employment and occupation. Indeed, in the widely commented upon¹⁰⁰ *Mangold* judgment interpreting the age premise contained in Art. 6 of the Directive, the Court of Justice of the European Union (CJEU) formulated the principle of non-discrimination on the grounds of age as a general principle of EU law.¹⁰¹ This judgment, referring to termination of an employment contract of an employee, aged 56, of a law firm,¹⁰² is also important from the international law perspective, i.e. from the perspective of this paper. The Court stated in this case that the source of the actual principle underlying the prohibition of itemized forms of discrimination (including age discrimination) was found “in various international instruments and in the constitutional traditions common to the Member States.”¹⁰³ Unfortunately the Court did not indicate which relevant “international instruments” it was referring to, which creates some interpretative problems as the international treaties usually do not include “age” among their non-discrimination premises.

Despite this ambiguity, the Court’s subsequent jurisprudence relating to the ban on age discrimination contained in Directive 2000/78/EC is significant. It deals mainly with preliminary questions from national courts in cases of early retirement, obligatory retirement (also stipulated in collective bargaining agreements), and possibilities to take up a new job after reaching retirement age.¹⁰⁴ According to the Court, in certain circumstances differences in treatment maybe fully justified by the situation on the labour market, which often requires special provisions allowing for diversification and adaptation of employment to constantly changing conditions. Different treatment of employees (including forced retirement at a certain age) is generally acceptable, but it needs to be distinguished from discriminatory practices. Simultaneously, all the

¹⁰⁰ A. Arnall, *Out with the Old... (Editorial)*, 31 European Law Review 1 (2006), p. 2; D. Schiek, *The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation*, 35 Industrial Law Journal 329 (2006); M. Schmidt, *The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ’s Mangold Judgment*, 7 German Law Journal 506 (2006); H. Meenan, *Age Discrimination in the EU and the Framework Directive*, in: M. Sargeant (ed.), *The Law on Age Discrimination in the EU*, Kluwer Law International, Alphen aan den Rijn: 2008, pp. 19-20; A. Zawadzka-Łojek, *Zakaz dyskryminacji ze względu na wiek w prawie Unii Europejskiej* [Prohibition of age discrimination in EU law], Instytut Wydawniczy EuroPrawo, Warszawa: 2013, p. 235.

¹⁰¹ C-144/04 *Werner Mangold v. Rüdiger Helm* [2006], ECR I-09981.

¹⁰² Werner Mangold was employed on a fixed-term employment contract. He brought proceedings in the German courts against his employer. According to a German law introduced in 2002 the fixed term contracts were permitted for employees younger than 52 in exceptional circumstances. W. Mangold challenged the fixed-term nature of his contract, arguing that such a contract had been concluded in accordance with internal law but was in breach of Directive 2000/78/EC.

¹⁰³ Para. 74 of the judgment.

¹⁰⁴ See e.g. C-11/05 *Felix Palacios de la Villa v. Cortefiel Servicios S.A.* [2007], OJ C 297/9; C-45/09 *Gisela Rosenblatt v. Oellerking Gebäudereinigungs mbH* [2010], OJ C 346/9; C-388/07 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, [2009], OJ C 102/6; C-341/08 *Domnica Petersen v. Berufungsausschuss Zahnärzte für den Bezirk Westfalen-Lippe* [2010], OJ C 179/4; C-159/10 and C-160/10 *Gerhard Fuchs and Peter Köhler v. Hessen* [2011], OJ C 269/14; C-499/08 *Ole Andersen v. Region Syddanmark* [2010], OJ C 346/7; C-447/09 *Reinhard Prigge, Michael Fromm and Volker Lambach v. Deutsche Lufthansa AG* [2011], OJ C 319/4.

measures introduced by the Member States must be proportional, objective, reasonably appropriate, necessary, and reasonable in light of the objective pursued.¹⁰⁵ In issuing judgments in “age discrimination” cases, the CJEU does not directly combine age discrimination with ageism, but usually refers in these cases to age balance and prejudices based on age.¹⁰⁶ For example, in the judgment *Commission v. Hungary* the Court clearly stressed that Directive 2000/78/EC seeks to protect individuals against precisely such a prejudice.¹⁰⁷

The EU seems to be much more advanced than other international forums in the identification and elimination of age discrimination, but this prohibition still seems insufficient. Since 2008, intense negotiations have been ongoing concerning the Proposal for a Council Directive on implementing the principle of equal treatment between persons, irrespective of religion or belief, disability, age or sexual orientation.¹⁰⁸ If adopted, it would apply to everybody in the private and public sectors and its scope would cover social protections (including social security and health care), social advantages, education, as well as access to and supply of goods and services, such as housing and transport. Unfortunately, the longer the negotiations drag out, the more exceptions appear in the draft. Under the Latvian Presidency in 2015, it was suggested to introduce a new exemption from the principle of age equality. This new provision, relating to preferential pricing, would allow commercial actors to apply different rates, fees or charges for specific age groups.¹⁰⁹ In the second half of 2015 the Luxemburg Presidency focused on the provisions related to disability and announced the need for further work before the required unanimity can be reached.¹¹⁰

Reviewing the main human rights instruments and the relevant EU acts, it is easy to come to the conclusion that the prohibition on age (especially old age) discrimination is not yet firmly established in international hard law. It also faces difficulties in the EU forum. Therefore, it seems logical to refer to documents dedicated exclusively to older persons’ rights.

¹⁰⁵ B. Mikołajczyk, *Wiek emerytalny w sprawach przed Trybunałem Sprawiedliwości UE* [Retirement age in the case law of the CJEU], 10 *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 9 (2012), p. 13; I. Doron, *Older Europeans and the European Court of Justice*, 42 *Age and Ageing* 604 (2013), p. 606.

¹⁰⁶ See generally U. Belavusau, *On Age Discrimination and Beating Dead Dogs: Commission v. Hungary*, 50 *Common Market Law Review* 1145 (2013).

¹⁰⁷ C-286/12 *Commission v. Hungary* [2012], OJ C 217/12, para. 30.

¹⁰⁸ Commission of the European Communities, Proposal for a Council Directive of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM (2008) 426 final, available at: <http://bit.ly/1VGyRj0> (accessed 20 April 2016).

¹⁰⁹ See Age Platform 2015, *Equal treatment law should not leave older people behind!* Brussels, 17 June 2015, available at: <http://bit.ly/1pzgL5X> (accessed 20 April 2016).

¹¹⁰ Presidency To: Permanent Representatives Committee/ Council Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Progress Report, (13877/15), Brussels, 16 November 2015, available at: <http://bit.ly/22wNcnm> (accessed 20 April 2016).

It is surprising that the problem of age discrimination was not a key issue in the Vienna Action Plan. Similarly, the UN Principles for Older Persons do not use the term “discrimination” at all. According to the Principles, older persons should have access to adequate goods or facilities and they should be able to obtain *adequate care*. Only in the context of dignity it is stated that “older persons should be treated fairly regardless of age”. However, being “treated fairly” does not mean exactly the same thing as “without discrimination”. The fair treatment principle seems to be a rather unclear expression and to offer a much weaker protection than a ban on discrimination.

Unlike the Principles, the Madrid documents of 2002 refer to combating discrimination relatively often and clearly. In the Political Declaration, the states undertook to eliminate all forms of discrimination, including age discrimination. The Plan of Action calls for ensuring the full enjoyment of all the rights of older persons, and for the elimination of all forms of violence and discrimination against them. It also explains that combating age discrimination and promoting the dignity of older persons is fundamental to ensuring the respect that older persons deserve. The action required in this sphere includes promoting the implementation of human rights conventions and other human rights instruments, particularly in combating all forms of discrimination. In relation to work, the Plan calls for introducing policies extending the employability of older persons and eliminating age discrimination in this area. Special attention is placed on older persons with disabilities, who are at greater risk of poverty. In the area of universal and equal access to healthcare services, the Plan proposes, among other things, to take adequate steps, including the implementation of international obligations on access to primary healthcare without discrimination based on age. Finally, with respect to the participation of older persons with disabilities, the Plan proposes to take action to promote accessibility for all, without discrimination, to affordable pharmaceuticals or medical technologies.

In examining the regional forums, the Council of Europe Parliamentary Assembly (PACE) Resolution of 2013 entitled “Combating discrimination against older persons on the labour market” is worth noting.¹¹¹ The Assembly confirms that age discrimination is one of the most widespread forms of discrimination and that it “goes hand-in-hand with the more general phenomenon of ‘ageism’, driven by a negative view of ageing in society”. The Assembly also notes substantial differences between Council of Europe Member States in terms of awareness of the problem and its scale, and urges all of them to ensure that their national legislation includes age among the criteria of non-discrimination and takes account of the phenomenon of multiple discrimination, as well as to take other relevant steps on the labour market.

The latest international developments indicate some recognition of the need to protect older persons from discrimination. The Recommendation of 2014, following the PACE Resolution of 2013, not only reaffirms that older persons should be able to enjoy

¹¹¹ *Resolution 1958 (2013): Combating discrimination against older persons on the labour market*, available at: <http://bit.ly/1UaqpJw> (accessed 20 April 2016).

their rights and freedoms without discrimination on any grounds, including age, but it calls on the Member States to consider making an explicit reference to age in their national anti-discrimination legislation, and to take effective measures to prevent multiple discrimination. The Recommendation indicates useful good practices of states in this area in order to encourage others to adopt similar solutions.

The Preamble of the newly adopted Inter-American Convention contains similar statements as the above Recommendation, but with respect to combating discrimination of older persons it is even more precise. "Equality and non-discrimination", like dignity, have been announced as a principle of this Convention. It prohibits discrimination based on age, and simultaneously obliges states to develop specific approaches in their policies, plans and legislation for older persons, especially those vulnerable and those suffering from multiple discrimination. The need to take anti-discrimination measures is enhanced by *expressis verbis* provisions relating to: access to comprehensive, including palliative, care; freedom of movement; choice of a place of residence while maintaining nationality; work relations; and the right to health, education and adequate housing (Arts. 6, 15, 18, 19, 20, 24).

Summing up, it may be stated that anti-discrimination clauses contained in treaties protecting the rights of *each* person offer relatively weak protection of older persons against discrimination. At the same time, the international documents (usually non-binding) referring directly to ageing and the elderly indicate that combating discrimination against older persons and preserving their real equality requires states to make many positive actions in all spheres of life. These steps usually require financial resources, hence states are unwilling to take them. Nor is there any effective global international instrument (a *hard law* document) compelling states to take any positive action in this sphere. Obviously, the new Inter-American Convention on the Rights on Protecting the Human Rights of Older Persons, which becomes *hard law* upon entry into force, should be recognised as a great achievement in this area, but it must also be remembered that its territorial scope is limited to a few OAS states. This is especially important as, during the negotiations, the USA and Canada expressed their explicit objections to this treaty, so it is very unlikely that they will ever become parties to it.

4. ACTION AGAINST AGEISM AS STEREOTYPES, PREJUDICES AND STIGMA

It is clear that modern, elderly-friendly and skilful interpretations of the discrimination clauses are required to achieve the fullest protection of older persons' rights and their dignity. As has been described, simply refraining from age discrimination may not be sufficient to combat ageism, especially that which may result in elder abuse.

The fight against these consequences of ageism definitely requires positive action, including in relation to stereotypes (also including self-imposed stereotypes) arising

from all the prejudices and beliefs infiltrating human thinking and behaviours.¹¹² These positive actions should also affect the attitudes of law-makers and executive authorities towards older persons. For this reason it is also relevant to examine how international law copes with this face of ageism, and what measures it proposes in this area.

It is obvious that the general human rights treaties do not refer to any old-age stereotypes. Nor can it be expected from conventions protecting the rights of other particular social groups. In consequence the issue of stereotypes towards older persons is not usually taken up by international tribunals. Therefore the ECtHR's judgment in the case *Heinisch v. Germany* is worth mentioning.¹¹³ This case referred to a violation of freedom of speech and was submitted by a nurse in a geriatric nursing home. She had disseminated information on the low level of care and poor conditions in the institution, and was subsequently dismissed from her job. In the judgment, the Court found a violation of Art. 10 of the ECHR and argued, among other things, that the information provided by the applicant had been disseminated in the public interest. This judgment indirectly has played a significant role in the fight against ageism and has become an element of the campaign raising awareness. It also shows the ECtHR's potential to contribute to the elimination of ageism, just as in case of sexism and racism or religious beliefs.

It should be noted that the CESCR, in the above-mentioned General Comments No. 6, stressed the role of governments, NGOs, the media, educational institutions and older persons themselves in overcoming the negative stereotype images of older persons as suffering from physical and psychological disabilities, incapable of functioning independently, and having neither a role nor status in society. In interpreting the Convention on the Elimination of All Forms of Discrimination against Women of 1979, the Committee on the Elimination of Discrimination against Women (CEDAW), in its General Recommendation No. 27 on rights of older women,¹¹⁴ noted the harmful impact of stereotyping and other traditional and customary practices on all areas of the lives of older women. Hence, according to CEDAW, states:

have an obligation to eliminate negative stereotyping and modify social and cultural patterns of conduct that are prejudicial and harmful to older women and thereby reduce the physical, sexual, psychological, verbal and economic abuse that older women, including older women with disabilities, experience based on negative stereotyping and negative cultural practices.¹¹⁵

Art. 8 of the CRPD, entitled *awareness-raising*, is also worth mentioning. It obliges the Parties to adopt immediate, effective and appropriate measures in order to raise

¹¹² Levy, *supra* note 30, p. 579.

¹¹³ ECtHR, *Heinisch v. Germany* (App. No. 28274/08), ECHR 11 July 2011.

¹¹⁴ Committee on the Elimination of Discrimination against Women, *General recommendation No. 27 on older women and protection of their human rights* CEDAW/C/2010/47/GC, available at: <http://bit.ly/1MmMxgU> (accessed 20 April 2016).

¹¹⁵ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), UNTS 1249.

awareness in society and families about people with disabilities. They should also combat stereotypes, prejudices, and harmful practices relating to persons with disabilities, including those based on age.

The age element also appears in Art. 16 of this Convention. It obliges states to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities from exploitation, violence and abuse. All steps that are taken, should be age-, gender- and disability-sensitive. There is no doubt that the Convention also protects the elderly disabled and elderly people with various disabilities caused by age. There is also no doubt that its aim is to promote, protect and enable older persons with disabilities to enjoy all fundamental rights and freedoms, and to promote respect for their dignity.¹¹⁶ However, it should be borne in mind that not every disabled person is old and not all older people are disabled. The Convention certainly does not cover all the problems faced by the elderly, including ageism. This role belongs to those international instruments exclusively referring to older persons and ageing.

Obviously, the main documents relating directly to older persons take up the fight against ageism, stereotypes, prejudices, etc. However, surprisingly the notion of ageism is rarely present, even in the most recent acts, despite it being used in the preceding reports or explanatory reports and memoranda,¹¹⁷ as well as in studies of various international bodies, such as the aforementioned report of the UN High Commissioner of Human Rights of 2012. However, it is interesting that the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, in her recent report uses the term “collective prejudice against older” as a substitute for ageism, what *sounds* rather enigmatic.¹¹⁸

The Vienna International Plan of Action on Aging did not take up this problem at all. The Principles of 1991 modestly confirmed the existence of many stereotypes connected with old age. Some progress may be observed in case of the Madrid Action Plan, which encourages the media and the private and public sectors to avoid ageism in the workplace and to present positive images of the elderly. It also called for preconceived biases and myths to be counteracted, and consequently for the elderly to be treated with respect and gratitude, dignity and sensitivity. The Plan highlights the special role of the media and education in this area.

¹¹⁶ 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*, 25 Georgia State University Law Review 527 (2009).

¹¹⁷ See Committee on Equality and Non-Discrimination, *Combating discrimination against older persons on the labour market*, rapporteur S. Gafarova, Report Doc. 13292, 23 August 2013, available at: <http://bit.ly/1RmbohG>; *Explanatory Memorandum of Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the promotion of human rights of older persons*, available at: <http://bit.ly/1SikYEJ> (both accessed 20 April 2016).

¹¹⁸ Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, on her mission to Austria A/HRC/30/43/Add.2, available at: <http://bit.ly/1VGCYvz> (accessed 20 April 2016).

Prejudice (which the CJEU referred to in e.g. *Commission v. Hungary*) and the stigmatisation of older persons are quite often connected with harassment. Harassment, as defined in Art. 2(3) of Directive 2000/78/EC, is a form of discrimination on grounds (including age) indicated in the Directive. It is manifested as an unwanted conduct which “takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.” Most importantly, since an employer may, in retaliation for an employee’s complaint, dismiss an employee or apply other adverse treatment which may be deemed harassment and/or breach of the principle of equal treatment, the Directive contains a provision (Art. 11) obliging states to introduce measures protecting employees against victimization. This solution gives some possibilities to limit ageist behaviours at work.

The aforementioned PACE Resolution of 2013 on “Combating discrimination against older persons on the labour market” also points out the main elements of ageism in the workplace – discriminatory language, attitudes and practices based on age. PACE assumes that these conscious or unconscious phenomena are guided by the various stereotypes attached to older workers. Hence there is also a need to change attitudes so as to eliminate stereotypes concerning older people and build a realistic and positive image of older workers.

Contrary to the PACE Resolution, two of the most recent documents do not use the term *ageism*. The Committee of Ministers’ Recommendation of 2014 states that it applies to persons who are not able to enjoy their human rights and fully participate in a society because of older age factors, including perceptions and attitudes. It should be noted that the Committee of Ministers pays special attention to raising awareness about the human rights and fundamental freedoms of older persons, including by translating and widely disseminating this recommendation among competent authorities and all stakeholders, especially among medical staff, care workers, informal care-givers, and others who provide services to older persons. It also indicates states’ good practices in this area.

The new Inter-American Convention not only calls on the states to eradicate the prejudices and stereotypes that prevent the elderly from fully enjoying their rights (Art. 8), but it also contains a whole chapter dedicated to raising awareness. In this field, the states agree to: adopt relevant measures; progressively educate the whole of society about older persons’ rights; foster a positive attitude towards old age and the dignified, respectful, and considerate treatment of older persons and, based on a culture of peace, encourage actions to spread and promote these rights and avoid stereotypical images and language in relation to old age; to develop programmes to sensitise the public about the ageing process and older persons; and to foster understanding and acceptance of ageing in study plans and programmes at various levels of education.

It is easy to note that in the process of eliminating stereotypes, the need to take positive action is even stronger than in the case of combating discrimination against older

persons. Undoubtedly it requires not only relevant legislation, financial support and the involvement of various stakeholders, but it also needs time. This may be a discouraging factor for adopting measures, because the effects are uncertain.

CONCLUSIONS

This short review of the most important international initiatives and instruments of law that directly or indirectly refer to older persons shows that the international community has recognized a real need to strengthen and highlight older persons' rights. This is an answer to global ageing and the growing number of another category of vulnerable individuals. However, introducing the concept of dignity into international treaties and other official documents, as well as drawing up various documents directly referring to older persons, does not mean that this category of human beings is in fact treated with dignity and their human rights are respected in practice, or that this type of the international protection is efficient. There is no doubt that states need to take various positive actions aiming at eliminating ageism and combating age discrimination in order to ensure respect for human dignity and enabling the elderly to enjoy their human rights and to overcome various stereotypes and prejudices. Unfortunately, contemporary international law is really quite imperfect in this regard.

Two main gaps in the international protection of the elderly may be identified. First, it may be said that the international community is simply afraid to use the term "ageism". It turns out that, despite the term having been coined a long time ago, the wording of international documents in this field is very cautious. One may counter that the designation of ageism in international legal acts as really unnecessary since the prohibition against age discrimination and references to the protection of human dignity are becoming "more and more popular" in the international fora. However, contemporary binding international law usually does not take into account the vulnerability of older persons. In addition the ambiguity of the age criterion makes the definition of this category of persons much more subtle than other easily-identified groups, such as those suffering from racism, sexism or homophobia. Therefore the protection of older persons – if limited only to the prohibition of age discrimination – is incomplete. Age discrimination of the elderly should be considered in the context of all ingrained bad practices, traditions and prejudices, including self-prejudices and self-exclusion. At present, claims submitted to international tribunals or committees, as well as their jurisprudence, usually combat only the symptoms, but not the sources, of ill-treatment of the elderly.

If the international community becomes fully aware of the existence of ageism as a source of discrimination and stigmatisation, it will be able to achieve progress in protecting older persons' rights. As long as ageism remains absent in international law, the dignity and rights of older will be at a disadvantage. Certainly, putting the notion of ageism into international treaties and other documents will not solve all the problems of the elderly; however it may improve their situation.

Considerations on the rationality of introducing the notion of ageism into international law lead to the second conclusion, i.e. that the lack of a universal binding instrument protecting older persons and their dignity constitutes another gap. None of the presently binding treaties oblige states to take effective measures against ageism and its consequences. International protection against discrimination on the basis of age must be assessed as relatively weak. Including this ground for discrimination into general anti-discrimination clauses still requires an incisive and extensive interpretation. Simultaneously, all the documents that stress raising awareness in the area of combating ageist myths, stereotypes, prejudices etc. against older persons are usually (except for the OAS Convention) documents belonging to international soft law. They are undoubtedly acts of high moral value, but a violation of their ideas does not entail any international responsibility.

In practice, there is still a gap between the need for effective and holistic protection of the elder's dignity and the measures proposed in international norms aiming at its protection. This is why adoption of the long-postulated global convention on the protection of the elderly is crucial.¹¹⁹

Thus it may be concluded that, unfortunately, the first steps in this field have been met with apathy by many states. The UN General Assembly resolution of 2012, being the first step to a new treaty, was adopted by a mere 54 votes to 5, with 118 abstentions. None of the European states, including the EU Member States, gave their backing to the draft, so the success, if any, can only be described as mediocre. Perhaps this is an effect of implicit international ageism?

¹¹⁹ See generally K. Tang, J. Lee, *Global Social Justice for Older People: The Case for an International Convention on the Rights of Older People*. 36 *British Journal of Social Work* 1135 (2006); I. Doron, I. Apter, *The Debate Around the Need for an International Convention on the Rights of Older Persons*, 50 *Gerontologist* 586 (2010); M.V. Bras Gomes, *Human Rights of Older Persons: Policy or Implementation Gap?* in: 5th Warsaw Seminar on Human Rights Warsaw, 29 September – 1 October 2011 (KSAP, Warsaw: 2012), pp. 112-117; F. Mégret, *The Human Rights of Older Persons: a Growing Challenge*, 11 *Human Rights Law Review* 37 (2011); J. Williams, *An International Convention on the Rights of Older People?* in: M. Odello, M. Cavandoli (eds.), *Emerging Areas of Human Rights in the 21st Century: the Role of the Universal Declaration of Human Rights*, Routledge Taylor and Francis, London and New York: 2011, pp. 128-148; M. Fredvang, S. Biggs, *Protection and Gaps under Human Rights Law*. Social Policy Working Paper no. 16, Melbourne: 2012.