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# Legal protection of older persons from neglect. The effectiveness of the continental criminal law system and the illusion of the protective function

Protección jurídica de las personas mayores contra la negligencia. La eficacia del sistema de derecho penal continental y la ilusión de la función protectora

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## Abstract

This article seeks to answer the question of whether the modern legal systems of selected countries allow a criminal justice response in the case of neglect of basic duties towards older persons. The consequences of neglect may be far-reaching for that category of victims because of their psychophysical properties. Solutions have been proposed to increase the effectiveness of protecting older persons from neglect. Given the subsidiarity of criminal law, these calls are of a universal and systemic nature. They refer not only to the proposals for changes in the field of law, but they draw attention to the need for a debate across wider society on caring for the elderly and meeting their needs.

## Keywords

Ageism, older persons, senior's best interests, neglect, legal duty.

## Resumen

Este artículo busca responder a la pregunta de si los sistemas legales modernos de países seleccionados permiten una respuesta de justicia penal en caso de negligencia de deberes básicos hacia las personas mayores. Las consecuencias de la negligencia pueden ser de gran alcance para esa categoría de víctimas debido a sus propiedades psicofísicas. Se propusieron soluciones para aumentar la eficacia de la protección de las personas mayores contra la negligencia. Dada la subsidiariedad del derecho penal, estos llamados son de carácter universal y sistémico. No sólo se refieren a las propuestas de cambios en el ámbito jurídico, sino que llaman la atención sobre la



necesidad de un debate en toda la sociedad sobre el cuidado de las personas mayores y la satisfacción de sus necesidades.

### Palabras clave

Edadismo, ancianos, los mejores intereses de las personas mayores, negligencia, deber legal.

## 1. Introduction

One of the major problems, on an axiological, legal, and practical level, is the neglect of older persons as one of the forms of violating their rights. There is an interdependence between the three above perspectives. Equally important is the indicated order of these levels, which form a complete picture of the protection of older persons from neglect. Ultimately, this is the order in which decisions on senior care should be taken. First, it is necessary to agree on an axiological (cultural and systemic) level on a universal model for meeting seniors' needs. Then it is time for legislative action. Finally, implementing praxeological tools should be proposed.

The importance of the problem (Martin et al., 2015) is evidenced by the work undertaken at the international level, which is intended to lead to the adoption of a joint document – The Convention on the Rights of Older Persons. The fruitless time since the first attempts were made to regulate those issues comprehensively shows how difficult they are (in 1948, Argentina submitted a draft declaration of old age rights to the UN). Although older persons fall within the category of vulnerable persons, no legal instrument of international importance that regulates actions to protect their rights has been adopted so far. There is no instrument of importance similar to, for example, the Convention on the Rights of the Child 1989, which would comprehensively capture the specificity of the problems associated with older persons. Moreover, there is no instrument that focuses on combating discrimination or violence against seniors, being on a par with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979 or the Convention on Preventing and Combating Violence Against Women and Domestic Violence 2011. Although the scope of protection for women also covers those at an advanced age, there is no doubt that the above instruments do not give top priority to that age group (Mikołajczyk, 2023a; Mikołajczyk 2023b).

Our analysis is based on the dogmatic method. The examination covered continental law regulations of different liability regimes (criminal and civil liability in the broad sense). The research questions posed below were compared with regulations from two normative systems – Poland and Germany. A different perception of the family and a different place of each member in its



structure were the most important criteria of selection. This is because family models are an essential part of social identity, giving guidance in life decisions related to relationship building, parenthood and determining the time and place of starting a family.

The interpretation of the applicable provisions is of a contextual nature (Villa, 2012; De Sloovere, 1936). Extensive use has also been made of criminological findings and own experiences gained during the implementation of a legal part of a project titled 'Creation of a system of protection of older persons experiencing violence' (EOG – K1d/0468).

In Poland, at least at the level of ideological declarations, a traditional (Catholic) multi-generational family, where all members support each other but each performs a traditional role correlated with age and gender, is the most acceptable family model (Osewska, 2021). This model should generate an optimal sense of security for its members (Filipek, 2020). Nonetheless, the number of marriages is steadily decreasing, so is the number of births. By contrast, the number of divorces and single-parent and patchwork families is on the rise. In recent years, among others, due to the COVID-19 pandemic, progressive secularization, profound changes in social and cultural mentality, the Polish family model has undergone accelerated verification (Kwak, 2022; Suwada, 2021). Sociological studies show that young Poles, for whom the family is still the highest value, put off a decision to start it, striving to strengthen their professional position and material status in the first place. At the same time, being single is becoming increasingly common. In Poland, there has been a steady increase in the number of basement dwellers, who, at approximately 30 years of age, have not become independent and are afraid of taking responsibility for their own decisions, including marriage, which in a cultural sense involves forming a relationship 'for life' (Kraus et al., 2020).

The German family model is utterly different. The distinct differences are revealed by the fact that, in Germany, apart from heterosexual marriages, same-sex marriages can be concluded since 2017, and registered partnerships could be concluded since 2001. The latter two options are not available in Poland. A report released by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth shows that divorce rates are falling, birth rates are slowly rising, and the acceptance of the variety of modern family models is increasing in Germany. Within the last few decades, the family model morphed from a major traditional concept of 'a couple with children' into a model of joint independent life, not necessarily regulated by law. The young German family expects equal treatment (a partnership approach) without a permanent assignment of specific roles determined, in particular, by gender and flexibility in reconciling work and family life (Bundesministerium für Familie, Senioren,



Frauen und Jugend, 2017; Bundesministerium für Familie, Senioren, Frauen und Jugend, 2020). The changes in the family model are also caused by migration processes, which, on the one hand, bring greater openness to diversity and cultural changes and, on the other, force state authorities to support migrant families, particularly children (Christ & Etzold, 2022).

Numerous extremely valuable and significant studies have been produced on older persons' condition, whether in medicine, gerontology, psychology or psychiatry (Brody, 2010; Hiller & Barrow, 2015). It can be concluded in the light of scientific findings that vulnerability to victimization of older persons as vulnerable persons is highly specific. On the one hand, older persons are not a uniform group. For further considerations, it is necessary to define old age and indicate its time frame (given the heterogeneity of the analysed population) (Escourrou et al., 2020). Thus, 'Old age or advanced adulthood is a time of essentially personal and individual experience and, above all, a period of life whose beginnings are largely individual. Therefore there can never be a clear-cut borderline which could specifically denote the moment of reaching the transition to old age' (Zwartka-Czekaj, 2014). The specific chronological markers of old age are defined differently by various authors. The definition of old age varies depending on a perspective and a pursued objective. However, the literature review shows a division of old age into three groups: the young old (aged 60–75), old old (aged 75–85) and oldest old (aged 85 and over) (Kirch, 2008). The quoted time range shows that old age can last over 40 years and thus be the longest period of human life (Kramkowska, 2016). Moreover, the deficiencies in strength, health, perception, consciousness occur to varying degrees, varying intensity, and at a different time. This means that the victimization potential varies among seniors. Violence and the infliction of harm take very different forms. However, the above deficiencies imply that seniors need different types of support, which frequently secures their existence. In most cases, the lack of support results in neglect typical of that group. Apart from mere discomfort (a sense of loneliness, disappointment, longing), neglect may cause severe and far-reaching consequences – illness or even death. This area of neglect includes problems of 'the abandonment' of older persons in hospitals or other institutions or a refusal to collect them after a medical treatment. It also includes seniors for whom no one did the shopping or cooked dinner.

The list of breaches of seniors' rights is very long and it differs from the 'classic' criminal forms of violence. An attempt to reconstruct that list comes up against a problem associated with respect for seniors' subjectivity (Dunn, 2012). After all, we are dealing with adults. The question thus arises whether banning a senior from owning a cat is a form of limiting the rights of an elder person. The same is true for alcohol prohibition, leaving home alone, and participating in parliamentary elections. There is some doubt as regards such a person's needs



– who is to decide on what is a senior's good in a given situation? Does the prohibition on leaving home infringe the right to self-determination (freedom of locomotion), or is it the right approach to a particular illness of an elder person (e.g., periodic dementia, which may cause an old man to get lost)? It is really difficult to capture the boundary and strike a balance between the right to self-determination and a paternalistic, protective approach, which is sometimes justified but frequently motivated by the convenience of a carer (including, for example, the organizational matters in a care home). It is hard on a case-by-case basis and the inclusion of that specificity into the system of care and support for older persons is a daunting task. From the legal system's perspective, the valuation of behaviour breaching a senior's will is an extremely arduous task.

This is why the neglect of seniors is our central research problem. As it is rightly pointed out in the literature, the problem of neglect of older persons attracts less attention from researchers and the public than, for example, the issue of child abuse (Bland et al., 2018). Physical, mental, sexual and economic violence is beyond the scope of our analyses because it does not arouse any legal controversy. However, we are aware of how difficult it is to diagnose and adequately respond to this phenomenon.

Given the above, the following research questions can be distinguished:

Q1. Is neglect a form of violence or a separate form of violating a senior's rights, and what criminological and legal consequences follow from that approach?

Q2. What are a senior's needs that should be covered by the obligation of fulfilment by third parties?

Q3. Why does neglect occur? Where does carers' behaviour come from?

Q4. Who is or should be under an obligation to meet a senior's particular needs? Where can and should the sources of that obligation be found?

Q5. Does (or should) the non-fulfilment of obligations towards a senior result in a criminal justice response?

Q6. Finally, the most important question – how to prevent neglect?

Some of the questions have a general value and the considerations relating to them are universal. Some questions (Q4 and Q5) must take into account domestic regulations and conditions. The following distinct parts of this article attempt to answer the above questions.



## 2. Concepts of violence and neglect and their interconnectedness

There is no broad consensus among professionals dealing with violence on the question of terminology defining that phenomenon (Hamby, 2017). In essence, there are two ways of thinking about violence – in terms of an act of force or in terms of a violation. Those authors who define violence as an intentional act of excessive or destructive force represent a narrow conception of violence (the Minimalist Conception of Violence or MCV). Others – perceiving violence in terms of a violation of rights – endorse a broad conception of violence (the Comprehensive Conception of Violence or CCV) (Bufacchi, 2005). The World Health Organization and the International Network for the Prevention of Elder Abuse (INPEA) use the following definition of elder abuse: ‘Elder Abuse is a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person’ (WHO/ INPEA, 2002).

It is therefore claimed that neglect is one of four subtypes of abuses that make up the term ‘maltreatment’: physical violence, sexual violence, emotional violence and neglect. At the same time, it is not disputed that neglect can be intentional and unintentional (Bland et al., 2018). Neglect is also described as a hidden form of violence (Music, 2018). In turn, in the 2002 Toronto Declaration on the Global Prevention of Elder Abuse, elder abuse was defined as ‘...a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person’ (WHO, 2002). It can be of various forms: physical, psychological, emotional, sexual, and financial or simply reflect intentional or unintentional neglect (UN, 2013).

Symbolic violence can sometimes also be distinguished. It is defined as forcing older persons to behave in a manner convenient for dominant groups. It manifests itself in discrediting one’s own cultural heritage, enforcing the wearing of appropriate clothes and the use of appropriate language, and consequently, a violation of rights, loneliness, isolation (Halicka, 2014).

Moreover, the concept of ‘violence of ties’ appears in the literature. It involves instrumental action aimed at taking control of another person, depriving him or her of sovereignty in thought and/or actions for the fulfilment of needs and expectations of a perpetrator of violence (Lipowska-Teutsch, 1997). The literature review shows studies based on a concept having a much broader meaning, namely – abuse (Baumann, 2006).

The issue becomes more complicated by a narrower interpretation of the term violence, frequently recalled by criminologists and persons supporting



victims. Violence is defined as an intentional action or omission of one person toward another, which infringes an individual's rights and personal goods and by taking advantage of power imbalance causes suffering and damage (Niebieska Linia, n.d.). This leads to the conclusion that violence should not be equated with aggression. What sets violence apart from aggression is the power superiority of one party. In the case of violence, a perpetrator always enjoys power superiority, but there is a balance of power in the case of aggression (Pospiszyl, 2000). From this perspective, neglect does not fall within the category of violence as it does not require power superiority. But above all, neglect does not have to be intentional.

It should ultimately be held that neglect is a form of violation of the rights of persons in relation to whom there is an obligation to meet their needs by the non-fulfilment of those needs; neglect can be intentional and unintentional, one-time or repeated, single-type or multiple-type. The victims of neglect are persons who objectively cannot independently fulfil their justified life needs (most frequently children and elderly or sick persons). Neglect can accompany various forms of violence, in entirety constituting an abuse of, among others, older persons. Neglect can give rise to discomfort in everyday functioning, it can also have dangerous and far-reaching consequences, including death.

The above definition is useful and applicable to all the three indicated research levels (axiological, normative and practical).

### 3. A senior's needs

The care for older persons is comparable to childcare. There are specific features that ultimately do not allow the use of the legal parental care scheme to senior care. Child development is a predictable and relatively harmonious process, so it is fairly easy to determine the needs of a child at a given age. In an average situation, their fulfilment does not require special skills, competence and strength. The very concept of 'the child's good' (referred to as 'the best interests of the child' in international regulations) – despite disputes in the doctrine – is quite precise, which certainly does not exclude doubts in a particular case (Child Welfare Information Gateway, 2018). Finally, children are under the authority of their parents, so the process of making decisions relating to a child can be regulated relatively easily. Moreover, all these factors enable (or even require) taking into account both at a normative level and in everyday reality the growing maturity of a child and his or her right to self-determination. That method of regulation is consistent with our cultural perception of the role of parents or guardians. It is anchored in our biological conditioning (de Waal 2014; Tomasello, 2016).



Things look very different with seniors. In short, there are no rules. Two 60-year-olds can function completely differently and a boon for one may be harmful to another. Senior care is like walking in the dark and it is very hard to find the best options for taking care of an ageing loved one or for oneself. Older persons are a heterogeneous group. Old age has different connotations depending on a country of residence, wealth, health state, family situation, etc.

It would be extremely difficult to prepare a list of older persons' needs, the neglect of which can endanger their health, life, and other rights. Although lists of a type 'A senior's five everyday needs that need to be fulfilled' have been drawn up, they offer generalities that in every case must be given a more specific expression.

It is hard to disagree with an argument that care plans for individuals need to take into account functions that can be preserved or maintained and any disability already observed. A global evaluation would be helpful, such as the Comprehensive Geriatric Assessment recommended by the British Geriatrics Society for frail older people, which includes a physical, psychological, and social assessment, from which a list of areas of need can be used to generate a care plan aimed at maintaining autonomy (Escourrou et al., 2020). It is clear that such an assessment or, as a rule, assessments should have a universal dimension; every older person should be subjected to them and they should be repeated relatively frequently.

The problems outlined above are exacerbated by mental problems, which are frequently a feature of a very advanced age. The literature even identifies a concept of 'a happy patient with dementia' (Jaworska, 1999). We put forward a slightly different concept. We propose that a universal concept of 'the interests of the (healthy or ill) senior' should be developed – 'the best interests of the senior', who should exercise the right to self-determination to the longest and broadest possible extent, as long as the behaviour fulfilling a senior's wish does not cause excessive damage to him or her. We believe that a senior has the right to consume alcohol, go for a walk in the rain, and define his or her priorities time and again (Jaworska, 1999).

The question may also arise as to the extent to which the needs have been met. Every state and every person involved in the fulfilment of older persons' needs may address a senior's needs to varying degrees. However, it can be argued that their minimal level should be set by the concept of human dignity, which prompts consideration of, among other things, self-esteem and agency. Their maximum level should be set by financial and organizational possibilities. In other words, the concept of 'the best interests of the senior' should also appear in the space of senior politics. It may be the only parallel derived from





childcare. Its development will allow the standard of optimal care for the elderly to take shape. Its introduction will mean that the area of rights and freedoms vested in older persons will no longer be a no-man's-land.

#### 4. Reasons for the neglect of older persons

The literature review shows that scant attention has been given to the reasons for the neglect of older persons. There is more research on the conditions and reasons for 'classic' violence. However, it is indicated, for example, that: 'attachment theory may help explain why a small proportion of adult offspring neglect their elderly parents, as these individuals may have been insecurely attached to their parents as young children, minimizing their feelings of affinity and filial obligation now that the elderly parent is in need of their assistance. It must be recognized that there are cases in which someone is simply incapable of caring for an elderly parent due to the person's own physical or cognitive limitations, but such cases are less likely to be designated as elder abuse' (Jackson & Hafemeister, 2013). It is clear that the list of the reasons for the neglect of one's own older parents or grandparents is much longer.

Talks with experts (physicians, carers in social assistance homes, workers of foundations giving support to seniors – victims of domestic violence) make it possible to enumerate the following reasons: 1. Lack of time; 2. Lack of physical and mental strength; 3. Economic reasons; 4. Lack of competence; 5. Lack of the sense of duty; 6. Long distance from a senior's place of residence; 7. Dislike for a senior or 8. Reluctance to perform specific activities, including those of a nursing nature.

In institutional care, senior neglect occurs most frequently due to: a lack of personal involvement of professional carers, low wages of carers, labour shortages, and a low level of professional preparation (Hawes, 2003).

Importantly, studies point to a category similar to neglect – a sense of neglect. The reason for this may be loneliness (Chawla et al., 2021), isolation, alienation, regardless of a senior's place of stay.

Slightly ahead of the further findings, it must be stated already at this point that the conducted normative analyses make it possible to indicate another important reason for 'neglect' – a lack of an established, specific group of persons obliged to care for seniors. In that situation, it is difficult to think of 'neglect', given that no obligation to behave in a certain way was imposed.



## 5. Persons obliged to meet seniors' basic needs

The Polish *de lege lata* legal system has not developed precise rules for taking care of older persons when their state renders them incapable of fulfilling their needs independently. The Law on Social Assistance of 12 March 2004 (hereinafter LSA) is the basic legal act in that regard. It is of a subsidiary nature. Art. 2 LSA provides that social assistance is an institution of state social policy aimed at enabling individuals and families to overcome difficult life situations, which they are unable to overcome using their own powers, resources and possibilities. This is confirmed by Art. 50 LSA, pursuant to which, a single person who, due to age, illness or other reasons, requires the assistance of other persons and is deprived of it, is entitled to assistance in the form of care services or specialized care services. These services include assistance in fulfilling everyday life needs, hygienic care, doctor-recommended care and, as far as possible, providing contact with the environment. In turn, specialized care services are services tailored to special needs due to the type of ailment or disability, provided by persons with specialized professional training. Moreover, care services or specialized care services may also be granted to a person who requires the assistance of other persons, and the family, the cohabiting spouse, ascendants, descendants cannot provide it. At the same time, pursuant to Art. 54 LSA, a person requiring round-the-clock care due to age, illness or disability, unable to function independently in daily life, who cannot be provided with the necessary assistance in the form of care services, is entitled to a placement in a social assistance home. Pursuant to Art. 61 sect. 1 LSA, the order of the persons obliged to pay the fee for a stay in a social assistance home is as follows: 1) a resident of a home, in the case of minors, a statutory representative out of the child's income; 2) the spouse, descendants before ascendants; 3) the commune from which the person was referred to a social assistance home.

The above provisions may suggest that a senior's family is under an obligation of care of a personal and economic nature. However, it is not the case. The Polish Family and Guardianship Code is completely silent as to the non-property relations between adult family members. The provision of Art. 87 of that Code, which prescribes that 'parents and children owe each other respect and support,' has the nature of only a moral and customary directive and it merely formulates a specific social obligation (Sitarz, 2022); it is a general and programmatic norm. This means that personal (non-property) obligations towards an older person, which are the primary criteria for assessing whether neglect has occurred, have not been formulated at all in the Polish Family and Guardianship Code. However, the Family and Guardianship Code provides for the maintenance obligation (that is an obligation of a property nature). Pursuant to Art. 128, lineal relatives and siblings are under an obligation to provide means



of subsistence and, where necessary, means of education (maintenance obligation). The indigence of an eligible person (a senior – Art. 133 § 2) is the material premiss for the obligation, and the scope of the maintenance provided depends on the justified needs of an eligible person and the earning capacity and assets of an obliged person (Art. 135 § 1). Although the further provisions regulate maintenance obligations towards (minor and adult) children and spouses (even ex-spouses) quite precisely, the obligation towards parents or grandparents has not been specified in any way. The Polish legal system does not have any other regulations that would impose an obligation on adult family members to care for older persons personally or financially.

The German Civil Code is silent on non-property relations between adult family members too. § 1618a provides only that parents and children owe each other assistance and respect. As regards that provision, commentators agree only on the fact that it gives legitimacy to transform moral obligations into legal ones. They disagree on whether it is the source of those obligations. The aspect of children's age is also problematic. The range of the provision seems to include not only minors but also adults. Its universality, consisting of the possibility to apply it to all parent-child relations (von Sachsen Gessaphe, 2020), is in fact an ostensible strength. The failure to specify the time and nature of assistance and support in the quoted norm is indeed particularly acute.

The maintenance obligation is defined in § 1601, pursuant to which, lineal relatives are under an obligation to maintain each other. Only a person who is incapable of maintaining himself or herself is entitled to maintenance (§ 1602 item 2). A person who, taking into account their other duties, is incapable of paying maintenance without endangering their reasonable maintenance has no obligation to maintain (§ 1603).

Pursuant to the provisions of Division 12 of the German Social Security Code, social assistance is not provided to those who are able to maintain themselves, due to their work, income and assets, or who receive the required benefits from other persons, especially from relatives or from persons providing other social benefits. However, seniors are entitled to basic old-age security benefits and benefits in the case of diminished earning capacity. Where a person eligible to benefits (a senior) is simultaneously eligible to maintenance based on the provisions of civil law, the claim shall be transferred to the social assistance institution up to the amount of expenses incurred for a period for which those benefits are provided (§ 94 item 1). In turn, as of 1 January 2020, maintenance claims of a beneficiary (a senior) against his or her children and parents shall not be taken into account, unless their gross total income exceeds € 100,000, whereby it is presumed that the annual income of persons under an obligation to provide maintenance does not exceed the indicated amount (§ 94 item 1a).



A general assessment of the current Polish and German legal state from the perspective of identifying persons under an obligation to care for the good of an older person shows that this state is highly unsatisfactory. It is imprecise and inconsistent, but most of all, fundamentally not well-thought-out. It is true that only the issue of material needs is regulated quite precisely (a separate question is the extent to which those measures are adequate to the economic situation of older persons and their families).

In formulating *de lege ferenda* proposals, first, it should be noted that there are three options for building a senior support system and they can determine a group of obliged persons differently. The duty of care in terms of property and non-property benefits may be imposed on:

- a) family members; then it is necessary to define normatively the degree of kinship that obliges to care, the scope and form of obligations;
- b) specialized state entities, which – as a rule – provide comprehensive care in return for an earned pension (in the absence of a pension, the social intergenerational solidarity principle is applicable);
- c) seniors themselves, who have an interest in preparing an income for their old age and deciding on the forms of support to be used.

The above models may (theoretically) apply in pure form or any combination.

The development of a system is essential in the context of fulfilling seniors' life needs and it will make it possible to 'complete' accurately the definition and forms of violence and/or neglect. Consistent systemic assumptions will also allow for, among others, deciding who may incur criminal liability for such neglect.

We believe that there are several indications that the social option (the state takes over the care for older persons) is the most relevant and functional, as it provides protection for childless persons and for those who have children who, for example, changed their place of residence or emigrated abroad. Moreover, state care offers effective protection also when both parents and children are seniors and require support (e.g., 80- and 60-year olds). Medical advances are making such situations increasingly common. This model enables children to take up and remain in employment regardless of the state of their older parents. This may admittedly give rise to an objection that the model of state care deprives seniors of contacts with their children. However, the personal component of care for a senior person – undoubtedly hugely important – cannot be guaranteed even in the option of family senior care. Adult children cannot be prohibited from placing older persons in private nursing homes (upon the con-



sent from the seniors), which is also an increasingly common way of solving the problem of care for a senior person, though available to better-off individuals.

In this regard it is essential to undertake debates across wider society with the broad participation of experts on a model of care for older persons. The answer to the question about the model of senior care requires 'social mediation'. It is clear that we all face this problem – as persons eligible for and/or obliged to such senior care today and in the future. Thus societies, according to their own capabilities, means, and value system, should decide who is under an obligation to care for an older person (to put it in practical terms – who has the obligation to give an older person medicines and do the shopping). Notably, the UN leaves the decision on the care model to the internal regulations of individual states (Martin et al., 2015; Mikołajczyk, 2023b).

#### 4. Criminal justice solutions relating to neglect

In the Polish criminal law system, there is no type of explicitly prohibited act forbidding the neglect of, among others, an older person or ordering care, nursing, or caring activities (Bek et al., 2020). In a search for a provision adequate to a criminal justice assessment of that conduct, reference should primarily be made to the crime of maltreatment (Art. 207). It would seem that *prima facie* the content of the provision of Art. 207 and the phenomenon of neglect are coextensive in meaning. In § 1, the Polish legislator prohibits physical and mental maltreatment of an immediate family member or another person being in a permanent or temporary relation of dependence to the perpetrator under penalty of deprivation of liberty between 3 months and 5 years. In turn, the provision of § 1a prohibits physical and mental maltreatment of a person who is helpless due to that person's age, mental or physical condition under penalty of deprivation of liberty between 6 months and 8 years. However, the applicability of these provisions to a particular situation of neglect is limited on two levels.

First, neglect as a criminal law omission may burden only a person who is under an obligation to behave in a certain way. Inasmuch as it is easy to identify a responsible person and check his or her job description in institutionalized care homes, the identification of a group of obliged persons, the scope of duties and the legal basis for such identification, in the light of the above remarks, must encounter serious problems in private homes, where an older person resides with the next of kin. It is hard to indicate definitely the source and scope of an adult daughter's duty of care for her mother or father. The lack of such indications will in fact prevent her from being charged.



The subjective side of that crime is the second factor limiting the applicability of Art. 207 – it is an intentional crime. Neglect arising from carelessness, negligence, forgetfulness, etc., does not constitute a prohibited act under Art. 207. In other words, that provision may be the legal basis for punishment for an act referred to as neglect only in extreme situations.

A criminal justice assessment of the neglect of an older person may also be carried out based on Chapter XIX of the Polish Criminal Code titled ‘Crimes against life and health’. Reference can be made to Art. 156 (grievous bodily harm), Art. 157 (medium and minor bodily harm), and Art. 160 (exposition to grave danger). In exceptional situations, i.e. extreme neglect threatening to cause a loss of life or a grievous bodily harm, such behaviour may satisfy the attributes of an act under Art. 162 § 1, which consists of a failure to provide aid to a person being in an immediate danger of a loss of life or sustaining a grievous bodily harm.

The first three quoted crimes (Art. 156, Art. 157 and Art. 160) are consequential offenses, which, pursuant to Art 2, requires in the case of neglect the establishment of the presence of an effect and a causal relationship envisaged in the statute, and the identification of the so-called guarantor of the non-occurrence of effect. Again, an attempt to identify the legal source and, for example, an adult child’s specific obligation to prevent an older parent’s health disorder must bring insurmountable difficulties. As discussed above, the Polish Family and Guardianship Code defines a parent’s duties toward a minor child, whereas the duties of an adult child toward a parent are more of a moral and cultural nature (closely related to the old tradition of multigenerational families). Some scholars see the origin of that obligation in ‘the principles of social coexistence’ from the Polish Civil Code (Wąsek, 2004), however, it is a highly debatable category. It is quite consistently indicated in Poland that, pursuant to Art. 2, the obligation of a guarantor must be of a legal nature and therefore it cannot be justified only by moral or customary norms. Insofar as there is no problem with assigning responsibility for bodily harm caused by action, since everyone is prohibited from causing it, the infliction of bodily harm by omission may burden only the person who is under an explicit obligation to prevent it. The identified problems will not occur in hospitals, social assistance homes, etc., because concluded contracts and regulations applicable to doctors, nurses, or other care personnel make the responsibilities of every person taking care of an older person relatively clear.

Out of the above typifications, only not providing aid (Art. 162 § 1) is a common crime – everyone has the duty to provide aid to a person in a position of imminent danger of a loss of life or a grievous bodily harm if he can provide it without exposing himself or another person to the danger of a loss of life or a



grievous bodily harm. That provision will be applicable very rarely – only when a person harmed due to neglect was in a position of imminent danger of a loss of life or a grievous bodily harm.

In contrast to the crime of maltreatment, the typifications envisaged in the provisions of Art. 156, Art. 157 and Art. 160 provide for liability also for unintentional behaviour. Thus, behaviour causing the indicated effects through a perpetrator's reckless conduct (when he did not have a 'wrong' intention) is punishable. However, under Art. 9 § 2, it should be determined in each case that, among others, there is a causal relationship between the violated carefulness principle and the committed prohibited act. In turn, the crime of not providing aid (Art. 162 § 1) can be committed only intentionally, which rather drastically reduces the scope of criminalization.

In extreme situations, the neglect of care for an older person can lead to his or her death, which must be assessed based on Art. 148 (as regards intentional behaviour – a perpetrator intended to kill a senior in that manner) or Art. 155 (in the case of unintentional behaviour). The current issue is to establish the person and the scope of responsibilities. Moreover, as practice shows, the problem with a criminal justice assessment lies not so much in neglect leading to death as in ordinary, 'everyday', highly inconvenient neglect.

Neglect of an emotional nature – a lack of visits, contact, kindness, tenderness and emotional coldness eludes criminal justice legislation. In that case, it is hardly surprising because it is not the role of criminal law. Igor Andrejew argued that 'A criminal penalty is in general a miserable means of developing gentleness in a person' (Andrejew, 1964).

In a sense, some specific support is lent in Poland to the issue of neglect in the area of a criminal justice response by highly significant - Art. 225 § 4. The provision prohibits the frustration or obstruction of the performance of an official action by a person authorized to carry out an inspection and an audit in social assistance organizational units or in institutions providing round-the-clock care to disabled, chronically ill or elderly persons.

Art. 225 § 4 is an example of criminality much before a violation of a good, which is fully justified and does not breach the proportionality principle. The auditing of the fulfilment of the duties incumbent on the staff is one of the means of preventing the neglect of older persons in care centres. In the case of obstruction or hindrance of supervision and audit acts in social assistance organizational units or in facilities providing round-the-clock care to disabled, chronically ill or elderly persons, the possibility of being punished, or even the initiation of criminal proceedings, can be a strong preventive measure, even if not preventing neglect completely, then certainly preventing the duration of a





pathological situation. As indicated by words of the proposer of the amendment to the Law on social assistance, which also introduced a new provision into the Polish Criminal Code, its major aim was to strengthen mechanisms for supervision and control in social assistance, as well as impact mechanisms for eliminating the dangers of unlicensed operation of facilities providing round-the-clock care to disabled, chronically ill or elderly persons by natural or legal persons.

The above reflections may lead to the conclusion that in the actual legal state, criminal law provisions fairly adequately address the issue of neglect in various care facilities, but neglect from the next of kin eludes criminal justice assessments. It seems that in-depth criminological and victimological studies in that regards will make it possible to formulate a *de lege ferenda* proposal for the criminalization of the most drastic forms of neglect. There is no doubt that criminal law should be the last link in a legal mechanism to protect the elderly from neglect.

The problem of a criminal justice response looks slightly different in relation to another phenomenon affecting older persons – abandonment, which some include in the category of violence or neglect, while others see it as a separate form of violation of human rights. In the Polish criminal law system, two provisions may essentially be taken into account. The former is the above-mentioned Art. 160, which foresees liability for exposing a human to an immediate danger of a loss of life or a grievous bodily harm. Given that it is another consequential offense, only a person who has a legal, specific duty to prevent situations posing a threat to a senior's life or threatening to damage his or her health severely may be held liable for omission. Art. 210 seems to be more adequate. According to its content, whoever, in defiance of a duty to care for a person helpless due to that person's mental or physical condition, abandons such person shall be held criminally liable. Doubts have been expressed also against the background of that regulation, ultimately limiting its applicability. There is no consensus in the criminal law literature on whether that crime may also be committed by omission (alongside the obvious form of a crime by action) (Jodłowski & Szewczyk, 2017). However, it is clear that the quoted provision of the Polish Criminal Code narrows the group of potential persons to those who have a duty of care for a person who is helpless due to his or her mental or physical condition. That duty may arise from a law, a court decision, or a contract. It is questionable (again) whether a factual situation or the principles of social coexistence may be such a source. In particular the latter category raises a strong objection in the Polish doctrine, although there is no unanimity (Wąsek, 2004). Similar doubts appear if it is assumed that an obligation in criminal law arises from moral principles.

It is stressed that abandonment may not be identified with the evasion of care by an obliged person, provided that the evasion does not constitute leav-





ing an eligible person to his or her own fate, without securing care from other persons. The Supreme Court held that a failure to collect an eligible person from hospital, despite the completion of treatment and showing no interest in his or her fate, does not constitute abandonment.

In principle, the German Criminal Code has no typifications that foresee a specific criminal justice protection of older persons from neglect. Seniors are covered by the same basic protection as the rest of the population (Weiss-Brummer, 2020).

In the regulations of the general part of the German Criminal Code, similarly to Polish law, the legislator regulated criminal liability for consequential crimes committed by omission in § 13. It is assumed that this provision constitutes the figure of the so-called guarantor of the non-occurrence of effect, therefore a person who has a legal, specific duty to prevent a negative effect.

In reference to the typifications in the special part, there are several types of crimes of a general nature that protect older persons, though not from neglect but from its subsequent effects. Reference can be made to Division 17 containing crimes against physical integrity, including bodily harm of the basic type (§ 223) and in qualified types (§ 224 – dangerous bodily harm; § 226 – grievous bodily harm; § 227 – bodily harm resulting in death) and unintentional crime of negligent bodily harm (§ 229). The same is true of Division 16 containing crimes against life, including: murder (§ 212) and its qualified type – murder under specific aggravating circumstances (§ 211), and negligent killing (§ 222).

Against the background of the above regulations, § 225 item 1, which deals with the ill-treatment of persons in one's charge, seems to be an exception. Pursuant to its content, whoever tortures or roughly ill-treats or by maliciously neglecting their duty of care for a person damages the health of a person under 18 years of age or a person who is defenceless due to frailty or illness and who 1. is in their care or custody, 2. belongs to their household, 3. has been left under their control by the person who has the duty of care or 4. is subordinate to them within a service or employment relationship incurs a penalty of imprisonment for a term of between 6 months to 10 years. The penalty is imprisonment for a term of at least 1 year in the case of offenders who put the person in their charge in danger of 1. death or serious damage to health or 2. substantial impairment of their physical or mental development (§ 225 item 3).

Older persons are covered by criminal justice protection under § 225 item 1 if they are defenceless due to frailty or illness. The age is not a condition limiting the scope of criminalization in that case. The provision includes cases of a senior's extreme dependency caused by illness or frailty (disability). German



commentators agree that § 225 item 1 focuses primarily on the protection of children. Nevertheless, it is noted that so-called crippled adult family members fall within the scope of the normalization of that provision (Sternberg-Lieben, 2019), including parents whose inefficiency arises from broadly understood senile decay (inability to move, blindness, deafness, intellectual infirmity) (Paeffgen & Böse, 2017).

The criminal justice protection may be actualized most frequently in the circumstances mentioned in item 2, i.e. when an older person belongs to the household of his or her adult child. It is surprising that such a case is not discussed in detail by commentators. Surprisingly, other categories of persons that may belong to a joint household, for example, an *au-pair*, a tutor, supporting personnel (cook, gardener, etc.), are meticulously listed (Hardtung, 2021b).

The causative actions listed by the legislator are nowhere near the precision expected in criminal law. This also refers to the neglect of the duty of care, which must be 'malicious'. Commentators hold that neglect is malicious if it is based on reprehensible motivations such as hatred, stinginess or sadism. There is no question of maliciousness where an adult child is unable to provide necessary medical care to a senior parent due to financial problems (Paeffgen & Böse, 2017). Similarly, indifference or inaction resulting from physical or mental impotence (mental retardation, alcohol addiction) may exclude 'maliciousness' (Sternberg-Lieben, 2019). The same is true of 'numbness' resulting from depression, exhaustion or excessive demands from a harmed person. Moreover, not every egocentric behaviour can be interpreted as 'malicious' (Eschelbach, 2022b).

The addition of the adjective 'malicious' to the term neglect of the duty of care results not only in a violation of the principle of certainty in criminal law but it may also possibly prompt law enforcement organs to qualify an offender's behaviour under the other two behaviours describing causative action. For example, the neglect of nursing activities consisting of not taking a senior to the toilet may be considered, with a certain accumulation of behaviour, to be torture or rough ill-treatment.

Notably, an offender's behaviour must result in harm to a senior victim's health and § 225 item 1 is an intentional offense, meaning that an offender has a mental approach in the form of willingness to commit it.

The above shortcomings were amply illustrated by the factual state underlying a judgment of The Federal Court of Justice of 17 January 1991 (4 StR 560/90), in which a 90-year-old defenceless woman was left on a bare PVC floor in an unheated room for over a week by her son and another household member (both were alcoholics). The accused were unable to lift the woman and bring her to her bed, yet they did not seek help outside. The accused gave the



woman food and drink. The harmed woman was dehydrated and emaciated and covered in dried excrement and vomit when an ambulance arrived. Annulling the contested judgment, the Court held, among others, that the court of the first instance did not find that the accused ‘maliciously’ neglected the duty of care for the harmed woman, which is crucial if the offenders were to be attributed one of the forms of the crime under § 225 item 1. However, the Court held that it was an open question whether the offenders’ behaviour was not a form of rough ill-treatment.

The senior is not better protected from neglect by § 221, which contains the crime of abandonment. Commentators point out that due to the way it is constructed, it is of little relevance to the criminal policy and it causes serious interpretative problems (Neumann & Saliger, 2017). The criminal justice prohibition contained in § 221 focuses on further consequences arising from neglect.

Under item 1, whoever 1. places a person in a helpless situation or 2. abandons a person in a helpless situation although that person is in their care or they are otherwise obliged to support that person, and thereby exposes a person to the danger of death or the risk of serious damage to health, incurs a penalty. In § 221 item 2 the sanction is aggravated in the case of offenders who: 1. commit the offense against their own child or a person entrusted to them for education or care or 2. cause serious damage to the victim’s health by means of the act. In turn, in § 221 item 3, the German legislator foresaw a qualified type with the victim’s death caused by the committed act as the qualifying attribute – then a penalty of imprisonment may not be less than 3 years.

As regards § 221 item 1 point 2 and item 2 point 1, it is indisputable that the duty of care may arise from a court decision establishing a guardian for an adult person based on the German Civil Code (§ 1896 et seq.). Then, under § 1901 item 4, such a person’s carer should contribute to taking advantage of every opportunity to nullify the care receiver’s illness or disability, improve his or her health, or prevent its deterioration. The duty may also arise from a contract concluded, for example, between a geriatric nurse and a senior.

A problem occurs in the case of relations between a senior parent and an adult child. It can be easily seen in the context of § 221 item 2 point 1, where the term ‘child’ appears. Some commentators assume that one is a child until the age of majority (18 years of age) (Neumann & Saliger, 2017). Others point out that the term ‘child’ is defined in § 176 item 1 (a minor under 14 years of age) in connection with behaviour consisting of performing sexual acts. Some others draw attention to the need to interpret that concept taking into account the method of expediency – limiting the term ‘child’ to a person who still requires parental care (Eschelbach, 2022a). It is hard to accept the interpretation



under which a father ‘abandoning’ his 50-year-old child would be subjected to the legal qualification under § 221 item 2 point 1. However, there is no doubt in the case where an adult son abandons his frail 85-year-old father (Neumann & Saliger, 2017). Unfortunately, the sources of the duty of care are not explicitly indicated. Only sometimes it is argued that this duty arises, for example, when a harmed person is admitted to a joint household (Hardtung, 2021a).

All the behaviour contained in § 221 must be intentional to be punishable. This means that an offender must want to commit the act. Thus, unintentional acts are beyond the scope of that norm.

The criminal justice protection of a senior from neglect arises also from § 323c, which contains an intentional common crime – failure to render assistance. Under item 1, whoever does not render assistance in the case of an accident or a common danger or emergency although it is necessary and can reasonably be expected under the circumstances, in particular if it is possible without substantial danger to that person and without breaching other important duties, incurs a penalty of imprisonment for a term not exceeding 1 year or a fine.

In summary of the Polish and German criminal law in the context of a criminal justice response to neglect, it must be stated that it is extremely hard to hold anyone criminally liable if a senior suffers harm or damage as a result of some unmet needs, especially when a senior stays at home and is under institutionalized care. This state of affairs results from a lack of adequate civil law solutions that determine who has the obligation to meet such needs. Urgent consideration should therefore be given to the question of persons obliged to care for seniors. Subsequently, it is necessary to consider the justifiability of criminalizing the neglect of duties toward older persons and the scope of that criminalization. Given that an older person may die or lose the will to live and demand euthanasia as a result of neglect, extreme forms of neglect should undoubtedly give rise to criminal liability. Criminalization decisions in that regard should consider the best interests of the older person, the social and individual costs of criminalization and other ways of solving the problem of the neglect of seniors. The *ultima ratio* principle of criminal law takes on special significance in the area of protection of the elderly. Criminal law may not be a panacea for systemic deficiencies and a lack of a coherent model of care for seniors.

## 5. Conclusions - prevention of neglect

Obviously, it is not lawyers, and especially not criminal law experts, who should be looking for solutions to minimize the risk of neglect. As crim-



inal law experts, we can definitely state that criminal law regulations should be the last measure used by the state. The subsidiary nature of that branch of law is clearly evident. The above analysis enables the formulation of several recommendations preventing neglect:

- 1) it is necessary to establish and decide normatively on a group of persons obliged to care;
- 2) it is necessary to ensure the availability of trainings and (e.g. Internet) tutorials for formal and informal carers and family members to explain the specifics of old age, the ensuing difficulties, potential needs and instructions for meeting those needs;
- 3) in the case of the adoption of a 'family' model of care, institutionalized support is necessary (so-called respite care);
- 4) in the case of the adoption of a 'social, state' model of care, it is necessary to encourage families to undertake caring activities that give seniors emotional satisfaction;
- 5) it is necessary to conduct 'individual mediations' in cases of family conflicts that will allow their solution (Craig, 1994, Herro et al., 2021). Resolving the conflict in the case of a senior is a priority, in particular when a perpetrator of neglect is the only person important to a senior. We believe that the prevention of further neglect and the elimination of the consequences of neglect are the right space for mediation and all its benefits.
- 6) it is necessary to make decisions in terms of the criminalization of behaviour to the detriment of seniors, taking into account the adopted system of care, having regard to the best interests of the senior (the senior's good) and the proportionality principle; special consideration should be given to a criminalization decision relating to behaviour consisting of omission and unintentional behaviour; criminalization policy should be rational and free from penal populism, which means that it should be a last resort, fulfilling both a repressive and preventive function.

Moreover, the above measures have a broader significance than just preventing and reducing the effects of neglect. They have an antidepressant, anti-suicidal and anti-euthanasic effect. The introduction of the above recommendations will mean that a senior will be able to enjoy life longer.



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