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The Protection of Vulnerable Adults in Europe: Between Guardianship and Autonomy

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FROM GUARDIANSHIP/SUBSTITUTION TO AUTONOMY. KEY-CONCEPTS

Guardianship	Judicial supported autonomy	Protective mandate
Judicial procedure	Judicial procedure	Private autonomy; subsidiary role of the courts
General incapacity, substitution	Support (no formal declaration of incapacity to act)	Support
Patrimonial affairs	Personal needs and patrimonial affairs	Personal needs and patrimonial affairs

1. GUARDIANSHIP. GENERAL CONCEPTS

Legal personality/capacity: capacity to hold rights and duties (*static* dimension of legal subjectivity)

Acquired at birth

Capacity to act: capacity to perform legal acts (*dynamic* dimension of legal subjectivity)

Acquired at majority (standard rule)

Guardianship

Traditional law institutes (Italian legal framework)

Interdiction

Art. 414 civil code: "Adults and emancipated minors who, due to a *persistent mental disorder*, are unable to manage their own affairs may be placed under interdiction where necessary to ensure their adequate protection"

⇒ complete restriction of capacity to act: guardian substitutes for patrimonial acts; personal acts cannot be performed

Inabilitation

Art. 415 civil code: "An adult with a *mental infirmity* whose condition is not so serious as to justify interdiction may be placed under inabilitation"

2. JUDICIAL SUPPORTED AUTONOMY

The judicial "support administration" under Italian law (amministrazione di sostegno)

Law No. 6 of 9 January 2004

Art. 404 civil code: "A person who, due to *an illness or a physical or mental impairment*, is wholly or partially, permanently or temporarily unable to manage his or her own affairs may receive the assistance of a support administrator…"

The person under support administration (beneficiary) retains capacity except in relation to those acts which the court empowers the administrator to perform

⇒ the protection does not affect the legal status, but supports the person in carrying out those acts that is unable to perform independently

The support administration (amministrazione di sostegno)

Italian Supreme Court, judgment of 11 May 2017, n. 11536:

"...support administration is distinct from the other protective measures applicable to persons lacking capacity, such as interdiction and inabilitation.

In comparison with those measures, the scope of application of support administration must be determined...by reference to the greater suitability of that measure to accommodate the needs of the person concerned, given its flexibility and the more streamlined procedure governing its application

In short, support administration was introduced to move beyond the nineteenth-century framework under which a person with a mental illness was regarded as being subject to a special and inflexible legal regime, and under which capacity and incapacity were treated, so to speak, as an unavoidable all-or-nothing dichotomy. It does so by means of a flexible instrument capable of tailoring, on a *case-by-case basis*, the protective measures most appropriate to the person's particular disability, thereby giving due recognition...to the vulnerable person's residual abilities.

It follows that the two measures* [interdiction and support administration], *one aimed at depriving the person of legal capacity and the other at providing support, that is, at protecting whatever elements of capacity remain unimpaired, are not analogous but operate on entirely different planes"

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3. PROTECTION MANDATE

Mandat de protection future - France

Law No. 2007-308 of 5 March 2007; Artt. 477-494 *Code civil*

Principle of priority of the *mandat de protection future*.

Art. 428 code civil

"A judicial protection measure may be ordered by the judge only in cases of necessity and where the interests of the person cannot be sufficiently safeguarded by implementing the future protection mandate (*mandat de protection future*) concluded by the person concerned…"

⇒

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Mandat de protection future - France

1. *Scope:* personal care and/or management of patrimonial interests in the event of future incapacity
2. *Requisite and form*: adult with legal and natural capacity appoints one or more representatives. The mandate requires notarial deed or private instrument
3. *Activation*: authorised physician certifies supervening incapacity
4. *Publicity*: entry in a dedicated register
5. *Control*: supervision of notary or judicial control

Vorsorgevollmacht – Germany

§ 1820 BGB (German civil code)

Notion: unilateral legal act with a protective purpose concerning the management of the protected person's affairs ("*Wahrnehmung seiner Angelegenheiten*")

Existing *Vorsorgevollmacht* makes court-appointed *Betreuer* unnecessary (§ 1814, III BGB)

No general formal requirements; must be conferred in writing and in complete and specific terms powers concerning essential dimensions of life (such as healthcare decisions; § 1820, II BGB)

Distinction between the legal effectiveness of the *Vorsorgevollmacht* in the internal relationship between the protected person and the representative (*Innenverhältnis*) and its effects in relation to third parties (*Außenverhältnis*)

General principle of modern protection for vulnerable persons:

Anticipation

Key principles governing *protective mandates*:

"Privatisation" (contract)

Dejudicialisation

Thank you for your attention!