DEMOGRAPHIC AGEING AND THE PROTECTION OF THE OLDER PERSONS IN CONTEMPORARY LEGAL SYSTEMS

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ABSTRACT: The essay aims to analyze, from a comparative law perspective, the impact of population ageing on traditional legal categories, highlighting the inadequacy of welfare systems and legal protection to meet the specific needs of the older persons, who seem relegated in a "grey area of the law".
The elderly represent a considerable and rapidly growing segment of the world's population: this is not only a demographic data, but is even a "silent revolution" in society, with profound repercussions in the public and private spheres. Therefore, the research is aimed at investigating whether and to what extent the national traditional legal systems are capable of taking account of the problems connected with the ageing of the population and, in this way, of providing legal protection for the elderly operating in the legal environment.
Underlying the issue of the protection of the older persons lies a fundamental dualism: on the one hand it seems essential to create specific protective instruments for the third age; on the other hand, the creation of a category to which a set of differentiated protections must be attached risks becoming blatantly discriminatory for those who, despite their age, retain their physical and intellectual faculties unaltered.
Therefore, the essay analyzes some of the main areas in which the lack of specific recognition of the "weakness of the old age" emerges, such as the protective measure and the formation of contract, giving account of the general problems and the specific solutions adopted in different legal systems.

KEYWORDS: Older persons, legal protection, protective measures, abuse of weakness.

SUMMARY: I. The relationship between demography and comparative law in the analysis of population ageing. II. The treatment of the elderly during and after the pandemic emergency. III. Elder law in contemporary legal experiences. IV. The transformation of protection measures for vulnerable adults in the face of an aging population. 1. International trends and the case law of the European Court of Human Rights. 2. The reforms that have taken place in Europe and the effects on older persons V. Contractual freedom and legal protection of the old vulnerable subject.

I. THE RELATIONSHIP BETWEEN DEMOGRAPHY AND COMPARATIVE LAW IN THE ANALYSIS OF POPULATION AGEING

Population aging, which is one of the most significant demographic phenomena of the 21st century[2], constitutes also a "silent revolution" in contemporary societies and, at the same time, one of the major social, legal and economic challenges of modernity.

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This is not the place to fully investigate the reasons for the demographic aging that has characterized the transition from pre-industrial to industrial society[3]; it is sufficient to mention the concomitant decline in birth and death rates, improvements in nutrition, primary health care and the control of many infectious diseases. This combination of factors has resulted in the significant increase in the number of people reaching an older age than in the past.

The phenomenon of aging, unprecedented in human history, brings with it radical changes in population needs with significant implications for employment, savings, consumption, economic growth, health care. It affects, directly and consequently, the traditional structures of modern societies, in all regions of the world, requiring adaptation of national and international policies to the demographic change taking place.

As a matter of fact, the qualitative and quantitative change of the population - due to longer life expectancy and the concomitant demographic implosion[4] - has not been accompanied by a parallel change in contemporary social and legal structures that are about to "grow old", without being fully capable of coping with demographic aging and ensuring adequate protection and safeguards for the increasing number of older persons.

Considering how different legal systems are reacting to this demographic phenomenon provides an interesting perspective of a legal analysis.

Indeed, despite the recent trend to compare "through and by numbers[5]" and the extensive use of statistical studies in legal researches[6], demography has traditionally been neglected by comparative law. Nonetheless, demography tells the story of our life[7]: demographic studies help, first of all, to understand the present, providing a rational justification - based on population change data - for a number of political and legislative strategies in place in certain legal systems. Above all, demography helps to look to the future, providing explanations for inevitable trends that will lead to convergences or divergences among legal systems. Understanding the causes of demographic transitions allows us to better manage their consequences and prepare for the future.

The relationship between demography and law is twofold. On the one hand, demographic changes can be influenced by political and legislative choices: the most glaring example is the impact of abortion and contraceptive policies on population

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[2] For updated dates see United Nation Department of Economic and Social Affairs*, World Population Prospects 2022,* https://population.un.org/wpp/.

[3] As clearly expressed in the *Demographic Transition Model*, W. S. THOMPSON, "Population", *American Journal of Sociology,* 34, 1929, p. 959.

[4] G.F. DUMONT, "De "l'explosion" à "l'implosion" démographique?", *Revue des Sciences morales et politiques*, 1993, 4, p. 583.

[5] M. SIEMS, *Comparative Law,* Cambridge, Cambridge University Press, 2014, p. 146 ss.

[6] M. SIEMS, "Numerical Comparative Law: Do We Need Statistical Evidence in Law in Order to Reduce Complexity", *Cardozo J. Int'l & Comp. L.*, 13, 2005, p. 521.

[7] EU Commission, "The impact of demographic change – in a changing environment", Bruxelles, 17.1.2023, SWD (2023) 21 final.

growth[8]. More in general, over time and in different geographical areas, policy instruments and legislative measures ("population laws"[9]) have been used to affect the demographic curve, for the purpose of population growth or decrease.

On the other hand, it is demographic changes that bring about legal changes. «Geopolitical realities are inseparable from demographic dynamics[10]», and history teaches us that societies have continually adapted to demographic changes. This profile appears to be of great importance, especially from a legal perspective, as it allows us to analyze whether and to what extent contemporary legal structures are able to adapt themselves to demographic fluctuations and to cope with the problems posed by population changes. Demographic dynamics, such as the evolution of the natural components (births and deaths) or social components (immigrations and emigrations) that change the size and structure of the population, are extremely important elements in understanding the political, legislative and institutional dynamics that characterize a legal system.

With this in mind, it is interesting to consider how different legal systems are reacting to the phenomenon of population aging[11], which implies the need for a revision of paradigms and institutions that arose and were established at a time when the number of older people was significantly lower than today and the average living and health conditions of the elderly were generally worse than today.

The analysis requires a constant comparison of the solutions offered by the different legal systems, in order to assess whether and where suitable instruments to cope with the aging of the population have been implemented.

The investigation must be carried out always keeping in the background the relationship between social security models and the emergence of private law instruments, between public intervention and private autonomy, between rules and practices, with the goal to frame and to understand the emerging models and to identify the best practices in the field of the promotion and protection of the rights of older persons.

Demographic aging constitutes, in fact, both a challenge for contemporary welfare systems, called upon to cope with the *longevity shock* (resulting from the increase in socioeconomic burdens related to care, assistance and social security expenditures destined for the elderly[12]), and a test case for assessing the resilience of traditional

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[8] DE SILVA – TENREYRO, "Population Control Policies and Fertility Convergence", *Journal of Economic Perspectives,* 31 (4), 2017, p. 205.
[9] L. T. LEE, "Population Law: A New Curriculum for Law Schools", UNESCO, *Readings on Population for Law Students,* 1976; V. MATHER, "Population Law and Policy: From Control and Contraception to Equity and Equality"*, St. Mary's Law Journal,* 50 (3), 2019, p. 917.
[10] G.F. DUMOND, "An Essential Geopolitical Stake of Demography: "Law of Numbers", *Diplomatie, Les grands dossiers*, 53, 2009, p. 8.
[11] See *amplius* C. M. CASCIONE, *Il lato grigio del diritto. Invecchiamento della popolazione e tutela degli anziani in prospettiva comparatistica,* Torino, Giappichelli, 2022.
[12] International Monetary Fund, "Global financial stability report: the quest for lasting stability" – 2012, https://www.imf.org/en/Publications/GFSR/Issues/2016/12/31/The-Quest-for-Lasting-Stability.

private law rules to cope with the need to protect the increasingly large segment of the population represented by the older persons.

II. THE TREATMENT OF THE ELDERLY DURING AND AFTER THE PANDEMIC EMERGENCY

The issue of the protection of the elderly was strongly revitalized, globally, during the recent pandemic experience, in which was evident the lack of adequate social and legal recognition of the older population, perceived as a unified "risk group"[13] vulnerable, defenseless and in need of society's social protection[14].

If it was immediately evident that the aged had a much higher risk of manifesting serious symptoms with often fatal outcomes than younger people, what then emerged, with dramatic evidence, was the social and legal vulnerability of such individuals, deprived of adequate health and social care.

Without going into details about the overall treatment of the older persons during the pandemic[15], some relevant aspects can, however, be highlighted.

First of all, especially during the first wave, at times of increased hospital congestion, some States allowed age to be used to exclude elderly Covid-19 patients from life-saving care. Older persons strained limited hospital resources and intensive care, placing each state in the dilemma of how to approach the elder care. In the first triage guidelines developed by the medical societies of Italy[16], and Spain[17] (the nations most affected by the virus), the utilitarian criterion was followed, tending to maximize not the lives saved but the number of years of life saved[18].

Second of all, the "fragility of age" justified, for example, proposals for selective lockdown only for the elderly, periodically put forward in various countries, in order to avoid general restrictive measures[19]. Such proposals have been formally justified by a

[13] E.M. KESSLER – C.E. BOWEN, "Covid Ageism as a Public Mental Health Concern", *The Lancet.com*, 2020, https://www.thelancet.com/journals/lanhl/article/PIIS2666-7568(20)30002-7/fulltext.

[14] V. KLUSMAN – A.E. KORNADT, "Current Directions in Views of Ageing", *European Journal of Ageing,* 17, 2020, p. 303 ss.

[15] C. M. CASCIONE, "The treatment of the elderly in time of Covid-19: attempts at protection or a new form of ageism?", *Comparative law in times of emergencies* (G. GIANNONE CODIGLIONE – L. PIERDOMINICI eds.), RomaTre Press, Roma, 2022, p. 473.

[16] SIAARTI, "Raccomandazioni di etica clinica per l'ammissione a trattamenti intensivi e per la loro sospensione, in condizioni eccezionali di squilibrio tra necessità e risorse disponibili", 6.3.2020, https://www.flipsnack.com/SIAARTI/siaarti_-_covid19_-_raccomandazioni_di_etica_clinica_-2/full-view.html.

[17] AA. VV., "Recomendaciones éticas para la toma de decisiones difíciles en las unidades de cuidados intensivos ante la situación excepcional de crisis por la pandemia por COVID-19: revisión rápida y consenso de expertos", *Med. Int.,* 44 (7), 2020, p. 439 ss., https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7158790/.

[18] A different approach was followed, from the beginning, in Germany, in which the Ethics Committee radically ruled out that age can be an acceptable criterion for excluding elderly patients from life-saving care even when resources are scarce, requiring that triage decisions be based entirely on clinical considerations. See Deutscher Ethikrat, "Solidarität und Verantwortung in der Corona-Krise", 2020, https://www.ethikrat.org/fileadmin/Publikationen/Ad-hocEmpfehlungen/deutsch/ad-hoc-empfehlung-corona-krise.pdf

protective intent for the group most exposed to the negative consequences of Covid-19; however, they concealed other goals, such as reducing the number of hospitalizations and resuming work activities for the rest of the "young" population[20].

Third of all, the rapid technological development during the emergency made evident the difficulty of the elderly in adapting to the virtual world, the tools of which were alien, especially in the first phase of the pandemic, to the mentality and practice of adults, who were faced with the difficulty of accessing the wide range of services and activities delivered electronically.

If it is true that, in general, technology has contributed to diminishing the negative effects of isolation for the majority of the population, it is also true that it had the opposite effect for the older persons, resulting in the paradoxical situation in which the population most affected by the blockade was also the one least helped by the digital tools that aim to mitigate its negative effects.

The pandemic has reinforced the so called "digital grey divide[21]", preventing the senior population from being able to fully benefit from the services (health, financial, etc.) increasingly provided through digital tools and fueling their sense of loneliness and isolation, as well as the perception of the inadequacy to keep up with the times.

Upstream, during the emergency there was a recrudescence of ageism[22], which is, in the classical definition of Neil Butler, «a systematic stereotyping of persons because they are old[23]»; it is a widespread attitude in modern industrialized societies towards the elderly who are perceived as weak, useless and non-productive. During the emergency the older persons have been considered no longer only as unproductive but also as harmful to the general health system and the recovery of economic activities.

As L. Avalon observed, «representing the elderly as a homogeneous and vulnerable group, as happened in the pandemic - instead of initiating a more sophisticated

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[19] See J. SAVULESCU – J. CAMERON, "Why Lockdown of the Elderly is not Ageist and why Levelling Down Equality Is Wrong", *Med Ethics* Epub, 46, 2020, p. 417.

[20] D. ACEMOGLU – V. CHERNOZHUKOV – I. WERNING – M. D. WHINSTON, "Optimal Targeted Lockdowns in a Multi-Group SIR Model", Working Paper 27102, NATIONAL BUREAU OF ECONOMIC RESEARCH, Cambridge, MA, 2020, http://www.nber.org/papers/w27102.

The same dilemma arose with regard to the exclusion of the elderly from access to some essential services, including transport. See D. SIQUEIRA – C. TATIBANA, "Restriction of Elderly People in Municipal Collective Transportation in Pandemic Times: Protection or Deprivation of Personality Rights?", *Direito e Desenvolvimento,* 12, 2021, p. 129.

[21] G. MARTINS VAN JAARSVELD, "The Effects of COVID-19 Among the Elderly Population: A Case for Closing the Digital Divide", *Front. Psychiatry*, 2020, p. 11

[22] HRC, "Report of the Independent Expert on the Enjoyment of all Human Rights by Older Persons, Claudia Mahler", 4.8.2021, A/HRC/48/51.

[23] R. N. BUTLER, "Age-ism: Another Form of Bigotry", *The Gerontologist*, 9, 1969, p. 243; see also ID., "Longevity Revolution: the Benefits and Challenges of Living a Long Life", New York, Public Affairs, 2008, p. 40.

J. JOHNSON – B. BYTHEWAY, "Ageism: Concept and Definition", *Ageing and Later Life* (J. JOHNSON - R. SLATER eds.) London, Sage, 1993, p. 200 define ageism in these terms: «people cease to be people, cease to be the same people or become people of a distinct and inferior kind, by virtue of having lived a specified number of years».

discourse aimed at underlining the heterogeneity typical of the elderly condition - has increased intergenerational conflicts[24]».

Lastly, the pandemic has highlighted the inadequacy of the welfare systems of many states to meet the care and assistance needs of the older persons, both in place and in designated facilities. For example, everywhere, nursing homes and assisted-living residences for the elderly have been hotbeds of epidemics: places institutionally intended for the support of the older persons have rapidly turned into vehicles of contagion and death[25], due to the high frailty of the residents, making evident many of the functional and structural deficiencies of such structures.

In a nutshell, the pandemic experience ended up highlighting the drama of the absence of adequate social and legal recognition of older individuals; it acted as a magnifying glass to bring into focus the inadequacy of existing protections and the urgency of specific interventions.

As a matter of fact, despite the circumstance that the older persons constitute - everywhere in the world - a rapidly growing segment of the population, modern societies do not seem able to fully absorb their needs in terms of protection, inclusion and social participation.

On the other hand, in spite of the recent normative recognitions, condensed in art. 25 of the Nice Charter[26], the traditional legal frameworks – concentrated on the first two phases of the human existence – still relegate the elderly in a “grey area of law”.

Despite the perception that population aging is not merely a demographic fact, but represents a social phenomenon with obvious economic and legal implications, and despite the recognition of the rights of this segment of the population on an equal basis, several problematic issues remain uncovered[27].

For these reasons, during and after the emergency, the debate around the opportunity of a specific convention for the protection of the human rights of the older persons has been revitalized[28]: elderly represent «in fact the only vulnerable population that does not have a comprehensive and/or binding international instrument addressing their

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[24] L. AVALON, “There is Nothing New under the Sun: Ageism and Intergenerational Tension in the Age of Covid-19 Outbreak”, *Int. Psychogeriatrics*, 2020, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7184144/.

[25] E. R. SEPULVEDA - N. M. STALL - S.K. SINHA, “A Comparison of COVID-19 Mortality Rates Among Long-Term Care Residents in 12 OECD Countries”, *J. Am. Med. Directors Assoc*., 21, 2020.

[26] C. O’CINNEIDE, “Art. 25 – The Rights of the Elderly”*, The European Charter of Fundamental Rights. A Commentary* (S. PEERS – T. HERVEY – J. KENNER – A. WARD eds.), Oxford and Portland, Hart Publishing, 2014, p. 693; E. BACCIARDI, “La tutela civile degli anziani alla luce dell’art. 25 della Carta di Nizza”, *Nuova giur. civ. com.*, 6, 2015, p. 293.

[27] C.M. CASCIONE, *Il lato grigio del diritto* (*supra* n.10), *passim*.

[28] On the debate around the opportunity of an international convention for the older persons see I. DORON - I. APTER, “The Debate Around the Need for an International Convention on the Rights of Older Persons”, *The Gerontologist*, 50 (5), 2010, p. 586; L. POFFÈ, “Towards a New United Nations Human Right Convention for Older Persons”, *Human Rights L. R.*, 15(3), 2015, p. 591; K. TANG – J. LEE, “Global Social Justice for Older People: The Case for an International Convention on the Rights of Older People”, *British Journal of Social Work*, 36 (7), 2006, p. 1135.

rights specifically[29]» as is the case for women, children, the disabled, and so on. There are soft law instruments[30], and the UN General Assembly has created a Working Group on Ageing[31]; however, there is a lack of a binding legislative instrument, representing an organic system of protection of the human rights of older people and imposing positive obligations on member states, sanctionable in case of non-compliance. And indeed, during and after the emergency, there have been increasing calls for the enactment of a specific Convention on the Rights of Older Persons that should take into account the peculiarities intrinsic to the elderly condition without, however, mortifying the inhomogeneities inherent in the group.

One of the main issues that a convention should regulate is that of the prohibition of discrimination on the ground of age, which, moreover, constitutes the primary condition for the perpetration of abuses: it requires very specific sanctions that, by contrast, are lacking in traditional international instruments[32]. Despite the recent formalization of the prohibition of discrimination on the basis of age - in the Inter-American Convention on the Rights of Older Persons (Art. 5), in the Protocol to the African Charter on the Rights of Older Persons in Africa, and in Art. 21 of the Nice Charter[33] - there still remains the doubt that, especially in Europe, age is not considered a “first level” discrimination factor (on a par with sex and race), but that the correlative prohibition of discrimination is understood as a mere regulatory measure that states are called upon to apply with a certain margin of discretion[34].

As for the digital divide, the digitization of many services, even beyond the pandemic emergency, continues to create difficulties of access and fruition precisely for the elderly. Just think of the automation of payment systems and the introduction of new forms of digital money; the digitization of health services or, in general, of many public services. The digital divide risks becoming, in this respect, a social divide, implying exclusion from many fundamental services for the most fragile individuals, including the older persons.

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[29] D. RODRIGUEZ PINZÓN – C. MARTIN, “The International Human Rights Status of Elderly Persons”, *Am. U. Int’l. L. Rev.*, 18, 2003, p. 915.

[30] For an organic overview see C. MARTIN – D. RODRIGUEZ-PINZÓN – B. BROWN, *Human Rights of Older People. Universal and Regional Legal Perspectives,* Dordrecht, Springer, 2015

[31] For an analysis of the composition and functions of the *Open-Ended Working Group on Ageing* see E. FLYNN, “International Discourse on Ageing – The Journey towards a Convention”, *International and Comparative Law on the Rights of Older Persons* (R. REUBNER – T. DO – A. TAYLOR eds.), Lake Mary, Vandeplas Publishing, 2015, p. 35, 42-46.

[32] V. DE SCHUTTER, “The Prohibition of Discrimination under European Human Rights Law Relevance for EU Racial and Employment Equality Directives”, European Commission, 2005, p. 49; with specific regard to Art. 14 ECHR see WINTERMUTE, “Within the Ambit: How Big is the “Gap” in Art. 14 European Convention of Human Rights”, *European Human Rights Law Review,* 4, 2004, p. 366.

[33] C. KILPATRIC, “Art. 21. Non-discrimination”, *The European Charter of Fundamental Rights. A Commentary* (S. PEER – T. HERVEY – J. KENNER – A. WARD eds.), Oxford-Portland, Hart Publishing, 2014, p. 579.

[34] O’ CINNEIDE, “Constitutional and Fundamental Rights Aspects of Age Discrimination”, *Age Discrimination and Labour Law. Comparative and Conceptual Perspectives in the EU and Beyond* (A. NUMHAUSER HENNING – M. RÖMMAR eds.), AH Alphen den Rijin, Wolters Kluwer Int., 2015, p. 51.

With this in mind, the need to promote knowledge - including intergenerational knowledge - and the diffusion of IT skills among the older population has emerged sharply[35].

At the European level, in the recent Green Paper on Ageing, *Fostering solidarity between generations*[36], is emphasized on the one hand, the need for "lifelong learning" throughout life and, on the other hand, the need to strengthen the so-called *ageTech* (that is, technological innovations at the service of the elderly and made according to their specific skills).

At a national level, in Italy, in the very recent Legislative Decree on the Elderly[37], Chapter V is dedicated to "Measures on computer literacy and digital facilitation", providing for "activities to train the digital skills of the elderly and to support them in the use of services provided online by public administrations" (…) "in order to promote the computer literacy of the older persons and to ensure their full civil and social participation, including through the use of digital services of public administrations" (Art. 19), as well as the activation at educational institutions "of training paths that promote in older people the acquisition of knowledge and skills on the use of digital tools" (art. 20).

Finally, the issue of elder care arises with particular urgency, especially as a result of the disintegration of traditional family models, the entry of women into the world of work and the heightened trend of mobility, which often distances many offspring from their parents. These data first result in elderly care, traditionally carried out in the family sphere, being outsourced, that is, entrusted to third parties, public and private.

While it is true that in most Western systems social security programs have been adopted, which provide welfare services to those deemed unfit for work, including the older persons, it is also true that the funds allocated have often proved insufficient, so much so that in the Italian *Piano Nazionale di Ripresa e Resilienza* (PNRR) - Next Generation EU, under the heading "social inclusion", an "extraordinary investment on social infrastructure, as well as on community and home-based social and health services to improve the autonomy of people with disabilities" has been allocated, affirming the need for a reform aimed at non-self-sufficiency that addresses "in a coordinated manner the different needs arising from the consequences of aging, for the

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[35] This is the thrust of statements by UN Secretary General Antonio Gutierrez, who, in pointing out that the whole world faced the challenge of technologies, during the pandemic emergency, said that «perhaps no population could benefitmore from support, than older persons*,* also specifying that «we must also work to strengthen the digital skills of the elderly as an important defense, and means to improve their well-being.

[36] Green Paper on Ageing, *Fostering solidarity and responsibility between* generations, COM (2021) 50 final.

[37] Legislative Decree No. 29 of March 15, 2024. *Provisions on policies in favor of the elderly, implementing the delegation of authority in Articles 3, 4 and 5 of Law No. 33 of March 23, 2023*. (24G00050), in *OJ General Series*No. 65, 18.03.2024.

purpose of an approach aimed at obtaining the best conditions for maintaining or regaining as much autonomy as possible in a de-institutionalized context[38]".

III. ELDER LAW IN CONTEMPORARY LEGAL EXPERIENCES

Beyond the emergency, the first question to be asked - which is prodromal to all the others - concerns the existence in contemporary legal systems of an "elder law", namely a specific body of law intended to provide legal protection to this group characterized by the age datum.

The answer, to a first approximation, is negative, for almost all states: traditional law, especially private law, is centered on the rigid dichotomy minor/adult to which corresponds the other dichotomy incapable/capable. Thus, if private law tells us the exact moment when capacity begins, it does not tell us when capacity ends[39], considering in a completely analogous way a young adult and an oldest old. Certainly, age is considered in some isolated provisions, to temper the rigidity of some dispositions[40] or to strengthen the protection granted to the person[41]; however, in most legal western systems, there is no a set of rules that can constitute a system of organic protection for the older persons.

The issue of elderly protection is one of the most controversial ones in the contemporary legal debate. Underlying the debate is an essential dualism: on the one hand, the aging population makes it crucial to introduce specific instruments for the older persons; on the other hand, the creation of a category to which a system of differentiated protections can be matched risks becoming blatantly discriminatory for those who, in spite of age, retain their physical and intellectual faculties unchanged[42].

Upstream, there is the question of identifying the moment from which old age begins and clarifying who are the older persons, possibly eligible to access a system of differentiated protections. There is no universally accepted and agreed answer. In most western countries, senility is identified with the attainment of an age threshold, in turn prompted by an economic interpretation of social roles (those who no longer work and/or acquire

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[38] In this perspective, the primary purpose of the Italian Elderly Legislative Decree (*supra,* n. 36), is to «reorganize, simplify, coordinate and make more effective social, health and socio-sanitary care activities for thenon-self-sufficient elderly, including through the coordination and reorganization of available resources, and to ensure the economic sustainability and flexibility of long-term care and assistance services for the elderly and the non-self-sufficient elderly» (Art. 1).

[39] S. PATTI, "Senilità e autonomia negoziale della persona", *Fam. pers. succ*., 3, 2009, p. 259.

[40] In Italy, Article 352(5) of the Civil Code provides the right for those who have reached the age of 65 to be relieved of the office of guardian.

[41] In criminal law the crime against the older person is always aggravated: for example, article 221-4 of the French Criminal Code expressly states that murder is punishable by life imprisonment if it is committed (para. 3): «*Sur une personne dont la particulière vulnérabilité, due à son âge, à une maladie, à une infirmité, à une déficience physique ou psychique ou à un état de grossesse, est apparente ou connue de son auteur*». In Italy, as a result of the amendment of Article 61, no. 5, of the Criminal Code on the subject of minor defense, reference to age was added in the assessment of the appreciation of « taking advantage of the circumstances of time, place or person». See, recently, Cass. Pen., 24.6.2019, no. 40476.

[42] P. STANZIONE, "Le età dell'uomo e la tutela della persona", *Riv. dir. civ*., 1989, p. 439; M. TAMPONI, *Nel diritto della terza età. Le rughe tra giudizio e pregiudizio*, Soveria Mannelli, Rubbettino, 2020, p. 50.

retired status). Upon reaching the age of sixty-five, a person, in general, is deemed unfit for work and, according to some statutory provisions, is presumed unfit to perform certain functions or assume certain roles and is eligible for the stipulation of certain contracts "reserved for the older persons" (such as, for example, the reverse mortgage[43]).

However, the time demarker is not universally valid, first of all because the retirement age varies in different states; moreover, it may be doubted whether a clear boundary line can be set to mark the entry into old age.

Assuming that the doubt is resolved with an affirmative answer, it remains uncertain, however, whether reaching the age of sixty-five constitutes the exact temporal demarker[44]: the distinction (between infra and over sixty-five) is unable to exhaust the complexity and differentiations that mark the elderly condition. Representing old age as a homogeneous group of people may lead to interpretative complexities and excessive generalizations, while also not allowing the peculiarities of the increasingly numerous "oldest old" to be highlighted.

While it is true that aging is a naturally degenerative process accompanied by various forms of physical and psychological decline, it is equally true that the passing of the years does not have the same impact on everyone, and the level of decline associated with old age also depends on economic, social and cultural factors[45]. Old age cannot be considered a homogeneous experience, as it manifestsitself with different characteristics depending on the physiological and social contexts that characterize each individual experience. The harshness of this stage of life also varies greatly depending on the resources available to protect or overcome it.

In addition, the lengthening of life also results in a lengthening of old age, with the possibility of very different conditions coexisting in it and with the need to draw a specific space for the oldest old.

The inhomogeneity of the senile condition does not detract, however, from the fact that there is asituation of vulnerability shared by a large number of the older persons that cannot be ignored: a progressive debilitation, accompanied by a weakening of vital and intellectual functions, a frailty resulting from the decline in the functional reserves of

[43] For the United States see, *ex multis,* C. W. NAUTS, "Reverse Mortgages Backing into 90s", *Prob. & Prop*., 8, 1994, p. 56.; A.E. NELSON, "Reverse Mortgages: Changes Brought about by the Housing and Economic Recovery Act", *N.C. Banking Inst.*, 13, 2009, p. 337. For the Spain, see H. ALVAREZ ALVAREZ , *La hipoteca inversa. Una alternativa económica en tiempos de crisis*, Valladolid: Lex Nova, 2009; R.M. ANGUITA RÍOS, "La hipoteca inversa y la transformación de los activos inmobiliarios en rentas", *El Consultor Inmobiliario*, 83, 2007, p. 3. For Italy see M. LOBUONO (ed.), *Il prestito vitalizio ipotecario*, Torino, Giappichelli, 2017 and, in particular, for an overview of the reverse mortgage in the different legal systems see C. M. CASCIONE, "L'ipoteca inversa tra discipline nazionali e prassi applicative: esperienze a confronto", ivi, pp. 1-32;

[44] M. I. HALL, "Old Age (or, we need a critical theory of law and aging?)", *Review of Legal and Social Issues*, 2014, p. 35; J. HERRING, *Older People in Law and Society*, Oxford, Oxford University Press, 2009, p. 3.

[45] OMS, "World Report on Ageing and Health", WT 104, 2015, https://apps.who.int/iris/bit stream/handle/10665/186463/9789240694811_eng.pdf;jsessionid=9F7EE3A55AF84095AB93471413F56 8E5?sequence=1

many physiological systems[46].

The aging of the population (and the progressive frailty that accompanies advancing years), therefore, requires political and legal thought - traditionally focused on the first two stages of existence - to also deal with senile age, in order to assess the buildability of a peculiar legal status.

How the law should deal with the older persons is a delicate question[47].

According to a certain hermeneutic perspective, old age in itself should generate the attribution of"category rights": within the population, the elderly present common existential needs, as well as concrete situations of necessity that are not necessarily material, to which society should provide a satisfactory unified response, as it does, for example, for minors. This perspective has been followed by some countries that have introduced specific regulations, making the elderly a defined category to which special status and differentiated protections are attributed. Emblematic in this regard is the experience of Brazil: according to the dictate of Article 230 of the Constitution, a statute was enacted to regulate the "legal status of the older persons"[48].

In contrast, in most western countries, the tendency to categorize the elderly is at odds with the consideration of the circumstance that senescence in itself does not result in a decline in a person's capabilities, in the absence of other medical, economic or social circumstances. Advanced age encompasses a varied range of conditions and does not, in itself, constitute deprivation of autonomy:only if senility affects health and, therefore, substantiates a pathological state, can it result in some form of incapacity.

Consequently, following this line of argument, the introduction of special legislation for the older persons would create discriminatory barriers, because exemptions, forfeitures and prohibitions would be set in relation to particular ages, regardless of the subject's objective psychical and physical condition, running the great risk of moving from "conjunctural marginalization" to "structural marginalization"[49] .

Between the two possibilities mentioned above, there is an intermediate option, which makes it possible to provide legal protection for the older persons without the need to create a "category", which would carry with it a presumption of incapacity or, at any rate, of weakness shared by anyone who has reached a certain age threshold.

First of all, the interpretation of certain institutions, which arose at a time when the number of older people was considerably lower and care entrusted to family structures, should be oriented. With this in mind, emphasis should be given, especially in judicial interpretation, to the special form of vulnerability that is associated with senility (in the interpretation, for example, of fault in civil liability, vitiating factors of contracts or wills

[46] S. BONDY – K. MAIESE (eds.), *Aging and Age Related Disorders,* New York – Dortrecht – Heidelberg - London, Humana Press, Springer, 2018

[47] C. IRTI, "La persona anziana. Sulla rilevanza giuridica della nozione", in *Liber amicorum per Paolo Zatti,* Vol. II, Napoli, Jovene, 2023, p. 1215.

[48] Lei n. 10.741, 1.10.2003, *Dispõe sobre o Estatuto do Idoso e dá outras providências.*

[49] P. STANZIONE, "Le età dell'uomo e la tutela della persona" (*supra* n. 41), p. 452.

or in the quantification of non-pecuniary loss).

In addition, there is a need for national and international legal frameworks to be enriched with legalinstruments exclusively for the benefit of the elderly, to address their specific needs, which are independent of any disabling conditions. Indeed, the lengthening of life implies an increase in the years of inactivity at work in which insufficient retirement income leads to increasing economic hardship for the elderly. It should be added that age-related physiological debilitation leads to increased care and assistance needs. This determines the need, on the one hand, for an increase in social welfare services intended for old age and, on the other hand, for the introduction of specific bargaining tools designed to meet the needs peculiar to old age[50] .

Finally, there should be mechanisms in place that - taking into account the inhomogeneity of the elderly condition and the varying degree to which advancing age affects the psycho-physicalcapacities of individuals - speculatively allow for a gradation of protections and for differentiated protection mechanisms. This is a point that deserves special attention, but one that makes the field of regulation treacherous: effective protection of the elderly requires a graduated approach, conditioned to real needs as well as anchored to different factors, and not aprioristic limitations or absolute forms of protection as, on the other hand, is the case for minors.

IV. THE TRANSFORMATION OF PROTECTION MEASURES FOR VULNERABLE ADULTS IN THE FACE OF AN AGING POPULATION

1. International trends and the case law of the European Court of Human Rights

The first area in which the inadequacy of traditional legal instruments to deal with the increasing number of vulnerable situations, including old age, has become evident is that of protection measures,in which a transformation is taking place in the major western legal systems. Nowhere have "specific" measures been provided for the older persons; however, one of the reasons behind the ongoing change is the aging of the population, which has led to the multiplication of situations of weakness and dependence, which require protection, regardless of an overt incapacity.

The system of traditional measures (such as *tutelle and curatelle* in France, *interdizione* e *inabilitazione* in Italy, *tutela* and *curatela* in Spain, to which correspond the U.S. *guardianship*) has entered into a crisis precisely because of its rigidity and unsuitability to cope with the increasing number of vulnerable subjects. Indeed, these measures, assuming a state of total or partial incapacity of the subject, do not allow for the absorption of the needs of those who, although not incapacitated, require aid and assistance.

Emblematic appears the position of the older persons: for a long time, the protection of the aged who is not incapacitated, but lacks, even in part, full self-sufficiency, has remained unfulfilled in terms of regulatory response, as traditional instruments could

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[50] J. LONG, "Caring by contract: care arrangements for older people", *The Future of Family Property in Europe* (K. BOELE WOELKI – J. MILES – J.M. SCHERPE eds.), Cambridge - Antwerp - Portland, Intersentia, 2011, p. 207.

not be used except in pathological cases.

The inadequacy and rigidity of traditional protection measures have led to a rethinking by European lawmakers of the protection of the incapacitated adults and, in particular, those made vulnerable by old age.

In this regard, the starting point is the Hague Convention on the International Protection of Adults[51].

Of significance, too, is that the Yokohama Declaration, issued at the end of the First World Congress on *Adult Guardianship Law 2010*[52], aimed at establishing principles and new guidelines on protective measures for adults, emphasizes in its preamble the close connection between an aging population and the insufficiency of traditional protective systems.

The main legislative reforms enacted in recent years and the decisions taken by the courts on the subject matter appear to be dominated by the concern to reconcile the needs for protection, related to vulnerability, with the respect for the autonomy, dignity and self-determination of the person. Protection does not mean eradication of the person from the decision-making process; instead, it implies an obligation to seek the participation of the vulnerable person in the decisions and acts of life that he or she is capable of performing[53]. In fact, the reforms are generally inspired by the goal of protecting without zeroing out autonomy, of adapting the measure to the needs of the represented, and of moving from a logic of substitution in consensus to one of consultation.

The global approach to the issue of protective measures has changed profoundly as a result of theConvention on the Rights of Persons with Disabilities, which in Article 12, after stating that "All persons with disabilities, regardless of the type or degree of disability, have the inalienable right to enjoy legal capacity on an equal basis with others", enshrines a principle of participation, focusing onthe notions of support and shared decision-making[54].

This provision has raised the question of whether existing protective measures in different states are legitimate, in light of the parameters set by the norm, or whether, on the other hand, they are excessively detrimental to individual autonomy or the dignity of the person. The Convention and thereflections that followed about the change in protection measures, dictated with regard to persons with disabilities, are filled with

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[51] For a recent analysis of the Convention, its implementation status, and, in general, the instruments of international law protecting vulnerable adults see M. CASTELLANETA, "La protezione degli adulti in situazione di vulnerabilità: il ruolo degli atti internazionali a tutela dei diritti umani", *Not*., 6, 2023, p. 653.

[52] M. ARAI – U. BECKER – V. LIPP (eds.), *Adult Guardianship Law for the 21st Century. Proceedings of the First World Congress on Adult Guardianship Law 2010*, Baden-Baden, Nomos Verlagsgesellschaft, 2013.

[53] This is the approach that inspired the French *loi* n. 2015-1776, 28.12.2015, *relative à l'adaptation de la société au vieillissement*; see A.L. FABAS SERLOOTEN, "«Vieillissement de la population: le point sur la réforme» – Adaptation de la société au vieillissement, un nouveau regard sur la perte d'autonomie", *AJ Famille*, 2016, p. 90.

[54] For an overview of the implementation of the CRPD see M. DOMÁNSKI – B. LANCKORONSKI (eds.), *Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). Private and Criminal Law Aspects*, London, Routledge, 2023.

concrete value also with regard to the elderly who, even in the absenceof disabling psycho-physical illnesses, often find themselves in the objective impossibility of fully caring for themselves[55] . This statement appears consistent with a tendency to consider health not asthe absence of illness, but as a state of psycho-physical well-being; hence, consequently, derives the propensity to expand the legislation protecting the disabled also in favor of those older individuals who, despite the absence of an overt disability, are limited in their autonomy.

In the sense of the inadequacy of the protective measures in force in some European states, the European Court of Human Rights has also ruled in several cases, finding itself judging on the legitimacy of measures limiting the subject's capacity and their compatibility with the rights enunciated in the Convention, establishing that, as a general rule, the existence of a mental disorder,even if serious, cannot - by itself - justify a declaration of total or partial incapacity. Specifically, the Court stated that "any legitimate restrictions on legal capacity defined by national law must be *proportionate*[56]" and *appropriate* to the personal needs of the subject[57] .

With specific regard to capacity-limiting measures ordered against old individuals, in the ruling *X and Y v. Croatia*[58] , was established that "it is legitimate to provide assistance to the sick or elderly, [...] who are unable to take care of themselves. However, it is an entirely different thing to deprive someone of legal capacity. [...] The person concerned is unable to perform any legal act and is thus deprived of his independence in the entire legal sphere. These people are put in a situation where they are dependent on others to make decisions regarding various aspects of their private lives [...]. To ensure that the sick and elderly are adequately cared for, state authorities have other means at their disposal besides deprivation of legal capacity. Depriving someone of legal capacity is a very serious measure that should be reserved for exceptional circumstances".

Most recently, with its recent ruling in *Calvi and C.G. v. Italy*[59], rendered at the outcome of a casethat had extreme media and legal prominence in Italy (so much so that it prompted the intervention of the Italian National Guarantor of the Rights of Persons Deprived of their Liberty), the Court took a clear position on the issue of self-determination of the older person subjected to a protective measure and the administrator's interference in the beneficiary's existential choices. The case, in a nutshell, concerned the lawfulness of a hospitalization of the applicant in a nursing home, ordered by the tutelary judge at the request of the support administrator, against the wishes of the beneficiary himself. The Court found entirely disproportionate the interference of the national authorities in the private life of the subject, implemented in the absence of procedural guarantees suitable to ensure the maintenance of the right balance between the need to protect the psycho-physical integrity of the applicant and that of respecting his dignity and right of self-determination.

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[55] A.S. KANTER, "The United Nation Convention on the Rights of Persons with Disabilities and its Implications for Rights of Elderly People under International Law", *Georgia State Univ. Law Rev.,* 25, 2009, p. 527
[56] ECHR, *Salontaji-Drobnjak v. Serbie*, app. n. 36500/05, dec. 13.10.200
[57] ECHR, *Stanev v. Bulgaria*, app. n. 36760/06, dec. 17.1.2012
[58] ECHR, *X and Y v. Croatia*, app. n. 5193/09, dec. 3.11.2011, spec. §§ 90-91
[59] ECHR, *Calvi e C.G v. Italy*, app. n. 46412/21, dec. 6.7.2023

The Recommendation of the Committee of Ministers of the Council of Europe (2014)[60], which states that "older persons have the right to receive adequate support in making their decisions and to exercise their legal capacity, when they feel the need, including through the appointment of a third-party guarantor of their choice to assist in their decisions" (§13), fits perfectly into this perspective. The latter should operate in accordance with the elder's wishes and preferences. It is also recommended that member states "provide for legislation to enable the elderly to regulate their affairs for the future for the event that they are unable to express their instructions" (§14).

All these references contribute to the affirmation of the need for new measures, which are independent of a notion of incapacity in the strict sense, in order to tie in with the more pliant concept of vulnerability, which does not necessarily presuppose a psycho-physical limitation, but it is rather substantiated by a weakening of self-management abilities.

By this route, new measures are emerging that do not involve a deprivation of capacity that leads to exclusion from civil and legal society, but are a means of aid and support. At the same time, the rigidity of traditional measures is being contrasted with mechanisms that allow the measure to be graduated in relation to the needs of the beneficiary (*e.g.*, German *Betreuung*).

Finally, many jurisdictions have introduced so-called durable powers of attorney in anticipation of future incapacity,which enhance the subject's self-determination[61].

2. The reforms that have taken place in Europe and the effects on older persons

The reforms that have taken place in recent years in Europe testify to this change, in part in place, in part in the making.

One of the first reforms took place in Italy twenty years ago, with the introduction of the flexible measure of the *amministrazione di sostegno* (support administration[62]); its practical application demonstrates the close interconnection between the fragility of old age and the flexibility of the measure[63]. The relevance of the measure for the aged is well spelled out in case law: the support administration has seemed, from the very beginning, to be a «ductile and elastic instrument» (unlike the rigid and totalizing measures of *interdizione* and *inabilitazione*, which now are of residual value), « of aid that

[60] Recommendation CM/Rec (2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons.

[61] K. BLANKMAN, "Guardianship Systems in Europe and Continuing Powers of Attorneys", *Adult Guardianship Law for the 21st Century. Proceedings of the first world Congress on Adult Guardianship Law 2010* (M. ARAI, U. BECKER, V. LIPP eds.), Baden-Baden, Nomos Verlagsgesellschaft, 2013, p. 39.

[62] L. 9.1.2004, n. 6, enacted with the «aim of protecting, with the least possible limitation of capacity to act, persons deprived wholly or partially of autonomy in the performance of the functions of daily living, by means of temporary or permanent support interventions».

[63] It should be noted that, in some draft laws on support administration, there was an express reference to "advanced age" among the prerequisites of the protection measure. This inclusion had led to criticisms and conflicting reactions, such as the removal of the reference to age in the final text of Article 404 of the Italian Civil Code.

translates in terms of assistance, without, however, in any way prejudicing the personality of the older person, who is not excluded from the civil consortium, so that his residual psychophysical energies are not mortified, but developed and safeguarded[64]».

However, the Courts have tended to break the automatism between advanced age and the need for the support administration, requiring a careful scrutiny of the person's actual conditions that would lead tojustifying the measure only when old age results in an objective impossibility of self-management. If the concrete prerequisites of non-self-sufficiency are not met, the support administration would be a "superfluous and unnecessarily burdensome" measure, as well as excessive compared to the real need to protect the person who is partially deprived of autonomy[65]. If, on the other hand, old age results in an appreciable limitation of the functions of daily living, the measure may be useful and effective[66].

From the analysis of the case law emerges the courts' attempt not to correlate the support administration with a situation of incapacity, «since the rule imposes a scrutiny not necessarily referred to pathologies with disabling reflections on the psyche, but related, rather, to practical and concrete aspects, in terms of incapacity and lasting difficulty in the exercise of one's rights, or with regard to the inability to cope, independently, with daily needs[67]».

Beyond the adaptability of the support administration measure to cope with the characteristic needs of old age, the Italian system of protection measures still seems to be deficient in many respects, which, by contrast, have characterized the reforms that have taken place in some European countriesin recent years. This is not the place to fully analyze the taxonomy of protection measures and the related innovations[68]; however, we would like to give an account of some trends taking place in Europe, which are also useful from the perspective of the protection of older persons. The reference is to the "voluntary measures", on the one hand, and to the formalization of "de facto custody" on the other one.

First, voluntary measures are spreading everywhere, with the goal of enhancing the self-determination of the individual. The older persons are the natural beneficiaries of such a measure, although they are not the only ones involved. Durable powers of attorney make it possible to better preserve the wishes and autonomy of the older person before his or her will is altered and, at the same time, avoids the need for recourse to a court-ordered protection measure. Obviously, they should be signed before the onset of cognitive impairment or the progression of a neurodegenerative disease; however, they will take effect only when the person can no longer independently provide

[64] Trib. Modena, 16.3.2018.
[65] Trib. Vercelli, Decr. 16.10.2015, *Nuova giur. civ. com.*, 6, 2016, p. 827.
[66] Cass., 5.2.2016, n. 2346; Cass., 23.12.2021, n. 41407.
[67] Trib. Bari, 15.6.2004, *Giur. mer*., 2005, I, p. 241; Trib. Varese, 18.6.2010, *Dir. fam.*, 2011, p. 1254.
[68] For a detailed analysis of measures for the protection of incapacitated persons in European countries, please refer to the national reports *Empowerment and Protection of Vulnerable Adults*, realized by the FL-EUR research group FL-EUR, *Family Law in Europe,* (https://fl-eur.eu/working_field_1__empowerment_and_protection/country-reports).

for his or her own interests.

In France, as early as 2007, the *mandat de protection future* was introduced by Decree No. 2007- 1702, dated November 30, 2007, which allows any adult, who is not subject to guardianship, to entrust one or more persons with the mandate to represent him - in the management of his property and/or in decisions concerning his person - in the event that he can no longer provide for himself due to an impairment of his mental or bodily faculties[69]. The reform implemented by Law No. 2019-222[70] established a "primacy" of the *mandat de protection future* over other protection measures by amending Article 428(1) of the Civil Code, which now specifies that «the judicial protection measure may be ordered by the court only in case of necessity and when the person's interests cannot be sufficiently ensured by the implementation of the future protection mandate concluded by the person concerned[71](...)».

Also in Germany, the "power of attorney granted in view of one's future incapacity", called *Vorsorgevollmacht* is partly governed by the general rules on power of attorney, partly by special rules which, with the reform that came into effect on January 1, 2023[72], are now formalized in §1820BGB[73].

In the German reform, priority is given to the voluntary measure of *Vorsorgevollmacht* over the court-ordered measure of *Betreuung*, considering that § 1814 BGB, paragraph 3, no. 1 states that if a person of full age is unable to manage all or part of his or her own affairs, by reason of illness or disability, it is not necessary to give rise to the appointment of a *Betreuer* (legal assistant) if a lawful voluntary representative can provide the same tasks.

The recent Spanish reform, implemented by l. 8/2021, *por la que se reforma la legislación civil yprocesal para el apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica*[62] , with the aim of fully implementing in Spain Art. 12 of the United Nations Convention on the Protection of the Rights of Persons with Disabilities, in addition to abolishing the civil status of *incapacitado,* revolves around respecting, to the highest degree, the subject's wishes. It results evident both in the preference given to voluntary support measures over legal ones (art. 249, c. 1 c.c.) and in the need to take into account the subject's wishes, tastes and preferences (art. 249, c. 1, art. 286, c.1 c.c.).

Interested persons may use voluntary measures to appoint a person to provide the necessary support for the exercise of legal capacity and determine the scope of that

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[69] F. ARHAB-GIRARDIN, "L'aide à la décision médicale de la personne âgée vulnérable", *RDSS*, 2018, p. 779, 785; J. D. AZINCOURT, "Les modes de gestion anticipés du patrimoine de la personne vulnérable", *RDSS*, 2015, p. 818.
[70] Loi no. 2019-222 du 23 mars 2019 *de programmation 2018-2020 et de réforme pour la justice* (JORF 24 mars).
[71] The rule had already been established by case law: see App. Paris, 14.1.2013, RG n. 12/03648, *AJ Famille*, 2013, p. 509.
[72] BGBl. I 2021, 882, *Gesetz zur Reform des Vormundschafts- und Betreuungsrechts* vom 4.5.2021.
[73] M. GIROLAMI, "La scelta negoziale nella protezione degli adulti incapaci: spunti dalla recente riforma tedesca"*, Riv. Dir. Civ.*, 5, 2023, p. 854, 863 -872.

support. Voluntary measures, which take priority over other instruments, include: “support agreements”, which aim to provide theassistance the person already needs, and *poderes o mandatos preventivos* (continuing powers of attorney)[63], by which the person grants powers to a representative in anticipation of a future need forassistance. Both instruments must be formalized in a notarized deed, which requires the explicit consent of the person concerned.

The second trend taking place in some European states is the enhancement of “*de facto* custody”:emblematic in this regard is the Spanish *guarda de hecho* (art. 250 c.c.), which indicates informal or non-formalized support typically provided by relatives, family members, or non-professionals[64].

If support is provided *de facto* by one person, courts may not appoint other administrators unless there is evidence that their assistance is insufficient or improper. The adult may at any time terminatethe *guarda de hecho* and seek a court order, or enter into a support agreement. The *guarda de hecho,*from being a residual measure in the former system, has been designed, by the reform, as a measure endowed with great effectiveness with a view to protecting the frail person.

The German reform also focused on enhancing “alternative forms of assistance” in order to avoid a judicial protection measure. The notion of “other assistance” in § 1814 (3) BGB includes both the support provided by social services for people with disabilities and the *de facto* support of family members, friends, and neighbors who ensure that the vulnerable person can manage his or her daily life.

In conclusion - and without falling into excessive trivializations - it can be said that, with regard to the older persons, the changes that have taken place provide more tools to support old age, allowing the use of measures that guarantee forms of help (even for the most common needs), without depriving the frail elderly of the ability or complete autonomy.

The tendency to emphasize the will of the subject and to give prominence to de facto care relationships should also be followed in those states that are in the process of rethinking the system of protection measures for subjects deprived wholly or partially of autonomy.

V. CONTRACTUAL FREEDOM AND LEGAL PROTECTION OF THE OLD VULNERABLE SUBJECT

A point that deserves particular concern is the impact of the age-related weakness on the validity of the consent expressed by an older person, basically in the contractual and testamentary fields[74]. Recurrent are the situations in which a legally capable subject –

[74] This contribution does not cover the discussion of the questions linked to the invalidation of wills, for which reference is made to R. J. SCALISE JR, “Undue Influence and the Law of Wills: A Comparative Analysis”, *Duke J. Comp. & Int’l L.*, 19, 2008, p. 41; R.B. KEATON, “Balancing Testamentary Incapacity and Undue Influence: How to Handle Will Contests of Testators with Diminishing Capacity”, *S. Tex. Law Rev.*, 57, 2015, p. 53.; M. CINQUE, “Testamenti e affievolimenti della consapevolezza affettiva”, *Riv. Dir. Civ.,* 6, 2023, p. 1239.

but made vulnerable by the age, the social and/or cultural condition, a situation of isolation, an emotional or relational dependency from his caregiver – finds himself concluding agreements with economic implications, that are not advantageous for him and that do not resemble his inner will.

The fragility of the advanced age makes the subject influenceable from the outside, keen to pick up exhortations or suggestions from who is close to him, it makes him an easy "victim" of will manipulations (more or less slight).

All these situations raise several issues and require certain legal answers.

The question entails, from the one hand, whether the act carried out by the vulnerable person shouldbe declared invalid and, on the other hand, the remedies this latter can exercise. Upstream, it is worth to assess the tightness of traditional rules to cope with the needs and the specificities of those groups of subjects, deemed as vulnerable, of which the elderlies embody a paradigmatic example.

As a matter of fact, the traditional codification-based systems do not appear to leave room to those situations in which a subject gives his consent in conditions of weakness and/or by virtue of a relationships of trust, dependency and subjection towards the counterpart (or a third person)[75].

In general, the problem is evaluating whether the different legal systems provide remedies for cases in which the consent, while not freely formed, had not been given as a result of a mistake, deception or threat, but because the peculiar situation of weakness, need or dependency of the subject had pressed him to accept contractual conditions that, in other circumstances, he would not have agreed to.

In particular, we need to scrutinize if worthy rules for protecting the peculiar weakness condition represented by senility are provided, verifying the suitability of traditional legal patterns in terms of incapacity and vitiating factors, considering the global occurrence of the ageing population. Actually, the fragility of the older persons assumes a peculiar position, which can be detected in itself or in the relationship of particular dependence with relatives, conjoined and caregivers. The older persons, regardless of the ontological inhomogeneity that features the group, suffer a decline of their intellective faculties, but also a functional and sentimental dependency towards people who stand next to them in the last stage of their life. The peculiarities of this condition make it extremely tough to balance the freedom of the subject with the need for protection from those who may deceptively take advantage from the cognitive and emotional frailty of the elderly.

Answers coming from a comparative analysis are quite jagged; the different relevance conferred to the abuse of dependency (*rectius*, of vulnerability), demonstrates the complexity of the problem and the struggle about its classification *tout court* into the causes for invalidity of contract.

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[75] A. FUSARO, *L'atto patrimoniale della persona vulnerabile. Oltre il soggetto debole: vulnerabilità della persona e condizionamento del volere*, Napoli, Jovene, 2019.

The abuse of dependency fluctuates between the area of deception and the one of duress and recalls conceptions of commutative justice, which also imply assessments regarding the entity of the disproportion between the performances as well as the reprehensibility of the other party's behavior.

The issue of the contractual protection of weakness has emerged in every country, especially as a result of the multiplication of situations of fragility and/or dependency due to the ageing of the population; the answers depend, mainly, on the institutional and legal factors featuring the different systems and, upstream, on the relationships between statute law and case law, and on the dialectic between contractual freedom and protection of the weaker party[76].

It can be preliminarily pointed out that different solutions are provided to the problem in differentlegal systems[77].

The majority of the European-continental jurisdictions, lacking specific legislative indications, has tried, through jurisprudence, to ascribe the cases of abuse of weakness to the remedies traditionally provided within the framework of vitiating factors and incapacity.

It can be anticipated that the decisions concerning the topic, that have regarded older people, have raised repeatedly contradictory solutions, making it thus complex to systematically arrange the several conducts materializing an abuse of the elderly's fragility.

It is fruitful to compare, in this perspective, the conclusions reached by the Italian and Spanish courts, that – given the lack of a clear legislative reference – have attempted to trace the facts back to the norms regulating natural incapacity or vitiating factors.

The Italian case law appears to be quite reluctant to embrace the claims for annulment of contracts concluded by older subjects, either through the way of vitiating factors[78] and the one of natural incapacity[79]. On the one side, the narrowness (including interpretative ones) of the borders of vitiating factors do not allow for inductive

[76] Sure relevance has the fact that in the European contractual law has been introduced the possibility to cancel a contract if one of the parties «(a) was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and (b) the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit» PECL, art. 4:109; DCFR, art. II. – 7:207; in the Unidroit Principles, art. 3.2.7 (Gross Disparity) provides that: « (1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and (b) the nature and purpose of the contract.».

[77] For a wider vision of the solutions provided from the different legal systems, refer to M. L. PALAZÓN GARRIDO, "El abuso de debilidad, confianza o dependencia", *Derecho contractual comparado. Una perspectiva europea y transnacional* (L. SISTO SANCHEZ dir.), t. 1, Cizuz Menor, Thomson Reuters, 2016, p. 1303.

[78] We make reference to the conclusive remarks of A. FUSARO, *L'atto patrimoniale della persona vulnerabile* (*supra,* n. 74), p. 52.

[79] Cass., 10.2.1995, n. 1484, *Foro it.*, 1995, I, p. 2499; Cass., 26.5.2000, n. 6999, *I Contratti*, 2001, p. 25; Cass., 26.3.2013, n. 7626, *Guida al dir.*, 27, 2013, p. 46.

behavior to be included therein, if they do not fall into the technical meaning of deception nor threats.

Likewise, where the path of invalidity due to natural incapacity is taken, one encounters the barrier of proofing the serious alteration of cognitive or willful capacities of the subject.

On the other hand, Spanish Courts have repeatedly proved to be braver in terms of sanctioning behaviors of who takes advantage from the other ones' vulnerability. The wideness by which the deception has been defined under art. 1269 c.c., has allowed the case law to encompass into this vitiating factor all the cases of deceit in the conclusion of contract, being cases of deceptions, impositions or captivation of the will. Frequently this vitiating factor has been used to invalidate acts concluded between an older person and someone who has profited of his weakness and of the relationship of confidence and trust occurring between the parties[80].

In France, on the contrary, on the background of the more general reform of contract law, rules concerning vitiating factors have been deeply amended: firstly, the notion of deception has been widened (art. 1137 c.c.), encompassing, besides to the mendacity, also the *dissimulation dolosif*, which is the intentional alteration by a party of an information of which he knows the determining character for the other party[81]; moreover, the specific vice of *abus de dépendance* has been introduced within the legal context of the moral violence (art. 1143 c.c.). Through this reform, the abuse of dependency has turned into a general vitiating factor[82]; the dependency has thus become a synonym of vulnerability applying in all the situations in which a contracting party, because of his fragility, is not autonomous, nor free to act independently[83] or to escape from pressures exerted by the counterpart. The rule stresses over a particular condition of weakness – deriving from a position of dependency on the other contracting party – regardless of the reason for this latter[84]: the vitiating factor, therefore, has a very broad scope of application, that can make legally relevant many situations of personal fragility[85], including the advanced age.

Peculiar, in the European context, appears to be the German solution, that, since the original wording of the BGB, has counted the exploitation of the others' situation of need among the causes of nullity of contract at § 138· The "weakness of the will", under c. 2 of the disposition, has allowed to invalidate contracts concluded by older persons, when

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[80] Tribunal Supremo, 15.7.1987 (RJ 1987/5494); Tribunal Supremo, 23.7.1998 (RJ 1998/6199); Tribunal Supremo, 28.9.2011 (RJ 658/2011).

[81] The French case law has tackled for a long time the problem of fraud in contracts concluded by older people. See CA Paris, 9.1.2002, then overruled by Cass., 29.10.2004, n. 51.

[82] G. CATTALANO - CLOAREC, "La validité du contrat", *AJ Contrat*, 2018, p. 257, 263.

[83] The "Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations ident" states that art. 1143 «provides vulnerable subjects with protection» and that «*toutes les hypothéses sont visée*», p. 16.

[84] S. SAUVAGE, Principales incidences de l'ordonnance du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve de l'obligation sur le droit des libéralités, *AJ Famille*, 2016, p. 475.

[85] A. GORGONI, "I vizi del consenso nella riforma del *code civil*: alcuni profili a confronto con la disciplina italiana", *Persona e mercato*, 1, 2018, p. 88, 107.

«this existential situation has been manipulated by the defendant in order to supply the applicant – whose resistance was weakened – with more or less useful services at a high price»[86].

For reasons of synthesis, it has not been possible to consider, in the present study, the relevance that the elder law has in the Anglo-American legal systems[87]; however, when the discussion touches the necessity to conform the regulation of contractual invalidities to the multiplication of fragility situations linked to the ageing population, we must mention the *doctrine of undue influence*, which for a long time has provided with wide protection all those vulnerable subjects whose consent had been manipulated for the purpose of the conclusion of a legal agreement with economic nature.

With specific concern to the older persons, in England, besides the massive case law[88], it is worth to point out the recent trend to involve into the relationships of *trust and confidence,* suitable for the *undue influence* to be presumed, even the one between an older person and his caregiver: «there are mandatory arguments suggesting that the relationship between an older person and his adults relatives, his financial advisor or his caregiver are going to be considered as qualified relationships for the purposes of the operation of the presumption»[89].

The issue of the weakness of older people is also particularly felt by the North American Courts, keen to admit presumptively that the formers are vulnerable to the *undue influence.*

Nevertheless, even in such case, the general statement is counterbalanced by the possibility to provide evidence to the contrary: «age, physical condition and suffering or pain furnish no basis for setting aside a conveyance if the party seeking rescission exercised a free and untrammeled mind» [90].

While recognizing the deep differences between common law and civil law traditions featuring the approach to contract law and, in particular, the vitiating factors, the reference to the operativity of the *undue influence* in the bargaining involving an older person, may be used as a model, at least as an interpretative one, in order to count the abuse of the elderly's fragility among the conditions relevant for the contract invalidity.

[86] OLG Düsseldorf (24. Zivilsenat), Hinweisbeschluss vom 11.10.2007 – I-24 U 75/07.

[87] For references see, for the United States, L. FROLIK, "The Developing Field of Elder Law: A Historical Perspective", *Elder L.J.,* 1, 1993, p. 1; N.A. KOHN, E.D. SPURGEON, "Elder Law Teaching & Scholarship: An Empirical Evaluation of an Evolving Field", *J. Legal Educ.,* 59 2010, p. 414; for the UK see H. MEENAN, G. BROADBENT, "Law, Ageing and Policy in the United Kingdom", *J. Int. Aging, L. & Pol'y*, 2, 2007, p. 67.For a comparison between the European and American models see I. DORON, "A Multi-Dimensional Model of Elder Law", *Theories on Law and Ageing. The jurisprudence of elder law* (I. DORON ed.), Berlin Heidelberg, Springer, 2009, p. 59.

[88] *Langton v. Langton* (1995) 2 FLR 890; *Christoudolou v. Christoudolou* (2009), VSC 583

[89] L. FOX O' MAHONY – J. DEVENNEY, "Undue influence, the Elderly and Equity Release Schemes", *Elder L. Rev.*, 5, 2006, p. 1, 9.

[90] *Anderson v. Nelson* (1927) 83 Cal. App. 1,5.