Rethinking Vulnerable Adults' Protection in the light of the 2000 Hague Convention

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1. Introduction

The protection of adults who have become dependent upon others because of an impairment or insufficiency of their personal faculties has increasingly gained the attention of the international community. In 2000, the Hague Conference replaced a previous Convention dating back to 1905 with a new Convention on the protection of 'adults'. Although the new instrument, which severs the symmetry between incapacitation and protection (see section 5 below), does not refer to incapacity or vulnerability, the purpose remains the safeguarding of adults 'who are not in a position to protect their interests'. In 2006, the United Nations prepared for signature the Convention on the Rights of Persons with Disabilities which details the rights of persons with 'long-term physical, mental, intellectual or sensory impairments which… may hinder their participation in society' and sets out a code of implementation. In 1999 and 2009, the Committee of Ministers of the Council of Europe adopted two specific recommendations: Recommendation No. R (99) 4 on 'the legal protection of adults' and Recommendation CM/Rec(2009)11) regarding the 'continuing powers of attorney and advance directives for incapacity' .

This article focuses on the 2000 Hague Convention on the International Protection of Adults which entered into force on 1 January 2009 and aims at enhancing the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in position to protect their interests, by harmonizing conflict of laws rules and creating a system of co-operation between central authorities of the member states (art. 1 para. 1). Despite the recommendation of the European Parliament that it should be ratified,[2] the Convention has so far been ratified only by the Czech Republic, Estonia, Finland, France, Germany, Switzerland and the United Kingdom (where, however, it applies only to Scotland).

The article argues that, although its scope is limited to private international law, this international instrument also interacts with substantive law. First, it reflects the principles and values underlying 'vulnerable adults' law' in the majority of the countries represented in the Drafting Commission.[3] In addition, it exerts indirect influence on domestic substantive law both by promoting the worldwide circulation and acceptance of these principles (see Borrás: 2000) and by encouraging the convergence of the two different approaches to the protection of vulnerable adults which seem to characterize Western legal tradition. One approach is traditionally centered on tutors and curators, appointed by courts in order to replace or to assist the person in the performance of legal acts. The other is focused on personal autonomy and self-determination and therefore on the individual's right to appoint an agent to protect his or her personal and economic interests in the event of a future incapacity.

This 'indirect influence' of the 2000 Convention on substantive law is essentially determined by: a) the codification (for the first time in an internationally binding instrument) of the principle of the (best) 'interests of the vulnerable adult'; b) a wide notion of 'vulnerability'; c) the dissolution of the symmetry between the protection of the frail adult and his or her incapacitation; and d) the preference for advance planning for incapacity.

In the following paragraphs I describe the two different approaches to vulnerable adults protection in Western legal tradition. I then examine how the 2000 Hague Conference interacts with these models. , arguing that, although it is certainly true that caution should be used when trying to derive substantive law consequences from private international law, the dynamic interactions between conflict of laws rules and substantive law should also be considered positively, especially in fields, like family law and vulnerable persons' law, which are strongly influenced by ethical values and social norms.

2. A comparative perspective

A. A two-level system of protection

In Western legal systems the protection of vulnerable adults is generally structured on two levels.A first level, common to basically all jurisdictions, allows the person unable to understand and make his own decisions because of a mental disability or temporary conditions (e.g. drug addiction or abuse of alcohol) to obtain an *ex post* judicial declaration of invalidity of the single unilateral act or contract already concluded.[4] The law sometimes requires evidence that the contracting partner was aware that the person lacked capacity.[5] In England and Wales, regardless of the validity of the contract, the person providing goods or services can claim a reasonable price if the goods or services are 'necessary' for the actual requirements of the person.[6]

A second level provides general protective measures available *ex ante* that apply before the vulnerable person performs any act harmful to his or her interests. There are two different ways in which this general and preventive protection can be granted.

a) The intervention of courts

A first model, which includes continental European countries as well as Scotland, is based on the intervention of courts, which deprives or limits the person of unsound mind of his or her legal capacity to act and exercise rights (*capacità di agire, capacité d'éxercice, capacidad de obrar, capacidade de exercício*, *Handlungsfähigkeit*) followed by the appointment of a representative who acts as his or her substitute or, less frequently, of an assistant who participates in the performance of all or some acts predetermined by the law (Pousson-Petit, 1995). In Portugal, for instance, the system works with a major measure, the *interdição*[7] and a subsidiary measure, the *inabilitação*[8] that applies if and when the mental impairment is not as severe as to justify the *interdição* (see Pais de Vasconcelos, 2005: in part.117 ff.). In Scotland, the Adults with Incapacity Act 2000 allows others to make decisions on behalf of adults who lack capacity, provided that the authorized person acts in compliance with the principles established by the law. Public bodies monitor the actions of those authorized to decide on behalf of persons with incapacity.

In civil law countries this paternalistic approach can be traced back to the 'interdiction' of artt. 489 ff. of the Napoleonic Code and ultimately originates from the *curia furiosi* of Roman Law. It is grounded on the idea that

'lunatics', like children, do not know what is best for them. This symmetry between legal protection of minors and the protection of vulnerable adults is still present in many national laws. The Portuguese Civil Code expressly states that the person under *interdição* is 'equivalent to a minor' and that, consequently and with the necessary limitations, the provisions concerning guardianship of children also apply to adults.[9] The Italian Civil Code states that the rules governing guardianship and emancipation of minors apply respectively to adults under *interdizione* and *inabilitazione.*[10] According to the Estonian Family Law Act, the provisions regulating guardianship over a child also apply to guardianship over an adult.[11]

During the 19th century and the first half of the 20th century, the legal incapacitation of incapable adults was often accompanied by their physical segregation in asylums (Foucault, 1972). As the awareness of the importance of preserving the capacity and personal freedom of vulnerable adults grew, almost all countries using this paternalistic model (except, for example, Portugal or Croatia, where the law remains unchanged) reformed their systems (Pousson-Petit, 2006; Doron, 2002). On the one hand, the protection was extended to causes of vulnerability other than lunacy: many national laws now provide protection for adults who are unable to take care of their interests as a consequence of any alteration of their personal faculties[12] and sometimes contain express references to physical impairment.[13] On the other hand, loss or limitation of legal capacity is no longer seen as the only instrument of protection and is, if applied, generally confined to single acts or groups of acts predetermined by courts (see section 5 below).

In addition, several countries have introduced, alongside the traditional measures, a general measure aimed at offering assistance 'à la carte' (Lagarde, 2000: 162). Indeed, this new instrument is available both for adults who lack capacity of understanding and those who have capacity but are vulnerable and, as a general rule, it does not deprive the person of his or her legal capacity to act. The French *sauvegarde de justice* ('judicial protection') was introduced by *loi* n° 68-5 of 3 of January 1968 and was recently modified by *loi* n°2007-308. Unlike the traditional instruments of *tutelle* and *curatelle,* which protect the adult who needs to be represented or assisted in the performance of legal acts, the new measure applies to persons who need a temporary patrimonial protection (art. 433 French Civil Code); the adult under *sauvegarde* retains the exercise of his rights, with the exception of those for which a special agent has been designated.[14]In Italy, the *amministrazione di sostegno* ('administration of support') was introduced in 2004 and protects the personal and property interests of the vulnerable person through the judicial appointment of an administrator (*amministratore di sostegno)* who, temporarily or indefinitely replaces or assists the vulnerable adult in the performance of the single acts listed in the judicial decree of appointment. Unlike the *interdizione,* which completely deprives the adult of his legal capacity, the *amministrazione di sostegno* limits incapacitation to the acts listed in the decree of appointment of the agent. [15]In Spain, the *Ley 41/2003 de 18 de noviembre* introduced the *patrimonio protegido* ('*protected assets*"'). The new instrument offers protection to physical or mentally disabled persons by allowing them to keep a certain pool of assets separate from the rest of their wealth, with the aim of ensuring him or her a certain degree of quality of life in the future .

In contrast, another group of countries rejected the old model by abolishing the traditional institutions. The first country to eliminate the old protective measures in favour of a new comprehensive one was Austria where the

Sachwalterschaft was introduced in 1984 to protect a mentally disabled person who was unable to look after his or her interests by the appointment of an agent. [16] In Sweden, two forms of protection were introduced: the designation of a 'god man' acting on behalf of the vulnerable adult, who keeps his legal capacity to act; and the *forvalarskap*, which is the appointment of an administrator or trustee for several circumscribed areas (ING, 2009; Doron, 2002). In Germany, the *Betreuungsgesetz* of 12 December 1990 repealed the long-standing *Vormundschaft* ('Guardianship') of §§ 1773 ff. German Civil Code and introduced the *Betreuung* ('Care and control') as a general measure of protection for vulnerable adults. The *Betreuung* does not necessarily deprive or limit a person's legal capacity and is flexibly tailored to his or her needs.[17] In Greece, the new measure is the 'judicial assistance' introduced by law 2447/1996 in artt.1666-1688 of the Greek Civil Code. It replaced both 'judicial interdiction' and 'judicial supervision'. The new assistance can be 'privative', where the person is fully or partially deprived of her legal capacity so that the judicial assistant acts as a judicial representative,[18] or 'concurrent', where the assistant must authorize all or some of the protected person's acts.[19] The assistance can also be a combination of the previous two.[20] In Switzerland there will soon exist only one comprehensive protective measure: the 'curatela' (or *curatelle* or *Beistandschaft*). [21]

b) The autonomy approach

A second approach traditionally focuses on the autonomy of the vulnerable person, probably originating from the ethical principle of individual responsibility which was a significant feature of the Protestant Reformation.

Every adult whose capacity has been duly assessed has the right to give advance directives regarding the type of medical care desired if he or she becomes incapable of making such decisions (for an overview of the relevant legislation in England and Wales, see Maclean, 2008). In addition, he or she can appoint a representative ('attorney') to make decisions on financial and property matters and/or his or her health and personal welfare in the event of future incapacity. In England and Wales, this latter institution is the 'Lasting Power of Attorney' (Mental Capacity Act, 2005). In Ireland it is the 'Enduring Power of Attorney' (Powers of Attorney Act, 1996).

The legal document which appoints the 'attorney' specifies the group of decisions that the person wants to be taken on his or her behalf in case he or she loses the capacity to act (e.g. property and affairs; personal welfare). It further contains the criteria to be followed by the attorney when taking these decisions. The health and welfare Lasting Power of Attorney (LPA) can only be used once the donor (the person needing help) is unable to take his own decisions. [22]

Since the Lasting or Enduring Power of Attorney involves the transfer of considerable powers to the attorney, the law establishes a number of legal safeguards.

In England and Wales, a person who has either known the donor personally for a minimum period of 2 years, or has the relevant professional skills and expertise (e.g. doctor or a solicitor) has to certify that the donor understands the purpose and contents of the LPA and is not being influenced into giving it. Also, the Lasting Power of Attorney has to be registered with the Office of the Public Guardian which checks the application to make sure the legal requirements are met. In any case, a personal welfare LPA can be exercised by the attorney only *after* a person has lost capacity.

In Ireland the procedure for executing the enduring power of attorney (EPA) requires the involvement of a solicitor and a doctor: the solicitor has to assess that the donor understands the effects of creating the power of attorney

and that he is not under undue influence; the doctor verifies that the donor has the mental capacity to understand the effect of creating the power at the time the document is executed. In addition, the EPA can only come into force if it has been registered with the High Court by the future attorney and only once a medical certificate states that the donor has already become or is becoming mentally incapable. The court has an extensive supervisory role with regard to the EPA.

B. Circulation of models.

These two approaches which apparently are very different from each other are increasingly converging.

Most countries using the first model provide incapacity planning instruments. In some civil law systems, contractual agency (*mandatum*) is not extinguished by the incapacity of the principal[23] so that this type of contract can be used to organize one's care in case of future incapacity. In addition, many have introduced *ad hoc* instruments for adults to provide for their own future incapacity (Röthel, 2012). In 1989, the legislator of Québec created the *mandat en prévision d'inaptitude* (mandate in case of incapacity), a written document in which a person designates another who will act to protect his or her person and property in the event an illness or an accident temporarily or permanently deprives her of her faculties.[24] In Germany, the *Vorsorgevollmacht* grants the power of attorney for personal and patrimonial care in the event of a future incapacity, avoiding the court procedures for the *Betreuung*. In Spain, the *Ley* 41/2003 amended art. 223.2 *Código civil* stating that every person legally capable of acting can, for the event of a future incapacity, adopt any provision on his personal welfare and assets, including the appointment of an agent (Spanish writers call this instrument *autotutela:* Martínez Gallego, 2004: 146, 160 ff.). In France, the *Loi n.2007-308* of 5th March 2007 *portant réforme de la protection juridique des majeurs* created a *mandat de protection future* (mandate for future protection) for appointing the person who will take care of the principal's personal and economic affairs in the event of future incapacity.[25] The Swiss legislature recently introduced the *mandat pour cause d'inaptitude* (mandate in case of incapacity), an instrument to empower a person or a legal entity to take care of the personal and economic interests of the principal or to be his or her representative in the event the principal loses mental capacity.[26]

Conversely, the approach focused on personal self-determination is tempered by the *parens patriae* doctrine which allows the state, acting as *parens patriae*, to make decisions regarding mental health treatment on behalf of one who is mentally incompetent.

This inherent jurisdiction of the courts to make decisions concerning children or adults who are not able to take care of themselves has been progressively supplemented by legislative acts that define the scope of the State intervention. As far as vulnerable adults are concerned, the Lunacy Act of 1890 gave courts the power to allow a relative or a friend to take charge of a lunatic and to make orders for the commitments of his or her estate. Now the Mental Capacity Act of 2005 gives the Court of Protection the power to make the decision needed or to appoint a 'Deputy' to make decisions on behalf of the individual who has lost capacity and who has no lasting power of attorney in place (sect. 16). Besides, the analysis of the case law shows that the Mental Capacity Act gives the courts a wide margin of interpretation allowing to judge invalidate or make inapplicable advance directives if their implementation leads to consequences deemed unreasonable or inappropriate (Maclean, 2008: 21-22). Furthermore, the inherent jurisdiction is increasingly used not only where the vulnerable adult is disabled by mental incapacity, but also where the person has capacity but is unable to communicate his or her decision (Herring, 2009: 499).

3. **The codification of the principle of the 'interests of the vulnerable adult'**.

The 1996 Hague Convention on the Protection of Children mentions in its preamble the 'best interests of the child' as its guiding principle, repeatedly using it to allow the derogation of the general rule on jurisdiction (art. 8 paras.1 and 4, art. 9 para. 1, art. 10), to limit the effect of the public policy clause (art.22, art. 23 para.2, lett. d) and to guide the enforcement of protective measures abroad (art. 28).At first glance, the choice of the 2000 Convention seems more reticent: the 'interests of the adult' are expressly mentioned to a much lesser extent, namely to allow the derogation from general conflict of laws rules on the basis of the assessment of which law/jurisdiction betters suits that vulnerable person's needs (art. 7 para. 1, art.8 para 1, art. 13 para. 227, art. 16). Besides, neither in the text of the 2000 Convention nor in its preamble refer to the 'best' interests of the vulnerable person, though the preamble states 'that the interests of the adult and respect for his or her dignity and autonomy are to be *primary considerations*' (my italics).[28]

This limited use of the 'interests of the adult' is probably due to the concern over the greater vagueness of the clause compared to the corresponding (best) 'interests of the child', whose content has been progressively clarified both by national legislators and case law.[29] According to the Drafting Committee, reference to the 'best' interests of the vulnerable adult was omitted since this adjective did 'not add much of substance to the text' and 'could be awkward in the event of a conflict between the interests which are equally respectable and best (for example, between the interests of the adult and those of a child)' (Lagarde, 2003: para. 109). Moreover, it was argued that while the interests of children should clearly prevail over the competing interests of the parents, in the case of vulnerable adults there seem to be no counterparts (Borrás, 2002: 3).

An in depth analysis of the 2000 Hague Convention shows that the 'interests of the adults' play a vital role, a) *in concreto*, as a tool to ensure 'practical' justice and b) *in abstracto*, as a guiding principle.

a) As previously mentioned, the 'best interests of the adult' allow derogation from general conflict of laws rules in order to determine which law/jurisdiction better suits *that* vulnerable person's needs. Thus the welfare of the vulnerable person prevails over both the general interest of the State in international harmony of decisions and the interests of other family members. This use *in concreto* of the clause seems to derive from the common law which tends to work with principles in order to ensure practical justice. Besides, it appears worth mentioning that in these countries the principle of the best interests of the vulnerable person has been accepted and codified only with reference to a person who 'lacks capacity' being 'unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain'.

The underlying idea is that if the person has duly planned the care of his own interest in case of a future incapacity, a paternalistic approach is not justified. In England and Wales, the Mental Capacity Act of 2005 authorizes substitute decision-making in the 'best interests' of the person lacking capacity.[30] The same Act, similarly to the approach with regard to the 'best interests of the child', lists the factors to be (and not to be) taken into consideration for the specific assessment of the best interest of the incapable person.[31]

b) The principle of the (best) interests of the vulnerable adult also inspires *in abstracto* the choice of the grounds of jurisdiction and applicable law, as well as the automatic recognition of the protective measures abroad.Habitual

residence is chosen (art.5) because the State of residence is better placed to assess the factual life situation of the vulnerable person since it is 'physically closer' to her or him[32]. Other grounds of jurisdiction are established only when the authorities of those countries are deemed better prepared to assess the interest of the adult (artt. 7 para. 1 and 8 paras. 1 and 2)[33].
Courts withg jurisdiction will apply their own laws since it is – as previously explained – the law which corresponds to the 'territorial' interests of the person and because it ensures that the judicial proceedings run smoothly (and a reasonable duration is vital in family law proceedings since they affect personal interests). Only in exceptional cases and in so far as the protection of the person or property so requires, can the authorities exercising their jurisdiction apply or take into consideration the law of another State with which the situation has a substantial connection (art. 13 para.2).

Aiming at ensuring the global protection of vulnerable persons, the Convention provides for the automatic recognition of protective measures abroad (art. 22). It encourages upholding the validity of acts granting power of representation for future incapacity, allowing however its withdrawal if it is not exercised in a manner sufficient to guarantee the personal and patrimonial interests of the vulnerable adult (art. 16).
Also, the very mechanism of cooperation between central authorities set in the Convention seeks to ensure effective protection of vulnerable adults involved in cross border situations (artt.28 and ff.).

This abstract use of the interests of the vulnerable adult's clause is typical of civil law countries. Indeed, in these countries the principle of the (best) interests of the vulnerable adult has been guiding the transition (already completed in most of them) from a model of 'care', historically developed to protect public safety and the lunatic's estate, to a system focused on the personal welfare and rights of the vulnerable person. The process started in the 1960s, with the growth of the idea that people with disabilities should be viewed as rights holders and not as mere 'objects' of charity, medical treatment and social protection.

The principle of the best interests of the vulnerable adult was implemented in many domestic laws. So for example with regard to the requirements of necessity and subsidiarity of the protective measure ,[34] its flexibility and proportionality, [35] and the 'suitability' with regard to taking care of the vulnerable person's interests as the only factor to be considered when choosing the custodian.[36]Unlike France and Italy, which only refer to the 'interests' of the vulnerable adult,[37] the German BGB expressly refers to the adult's 'best' interests: 'if the person of full age suggests a person who may be appointed custodian, this suggestion should be followed unless it is inconsistent with the best interests of the person of full age';[38] 'the custodian must attend to the affairs of the person under custodianship in a manner that is conducive to his welfare. The best interests of the person under custodianship also include the faculty, within his capabilities, to shape his or her life according to his or her own wishes and ideas'.[39]The use of the 'interests of the adult' principle in the 2000 Convention is similar to the use of the 'best interests of the child' both in the 1961 and in the 1996 Hague Convention on the Protection of Children: namely a 'materialization' of private international law rules which should be 'neutral' according to the traditional approach, i.e. indifferent with regard to the result of the practical operation of the applicable law.[40] Indeed, through the use of the (best) 'interests' clause, private international law is influenced by the principles underlying substantive law.

The gradual recognition of the value of respect for the individual led to the elucidation of so called third-generation human rights and to the state's positive obligation to provide for a 'special' protection for those who are unable to take care of their own interests, as well as to respect their personal freedoms and self-determination. In fact, the clause of the best interests of the child was alleged to be vague, ambiguous and even 'totally useless in practice' (Donnier, 1959: 180), but history shows the spread of common values in substantive law determined its success both in substantive law and later on in conflict laws, encouraging its use and gradually clarifying and harmonizing its contents.[41] As far as vulnerable adults' law is concerned, the (best) interests clause could prompt a reform in those systems which still lack flexible and tailored protective measures. Moreover, it encourages the countries belonging to the autonomy model both to assess whether the actions of the appointed attorney are in the vulnerable person's interests and to create safeguards to protect vulnerable adults who have not planned their own protection in the event of future incapacity.

4. The wide notion of "vulnerability"

The 2000 Hague Convention applies to the protection of adults who, 'by reason of an impairment or insufficiency of their personal faculties are not in the position to protect their interests' (Preamble and art.1 para. 1).
A minority opinion states that this provision should ('probably') be interpreted in the sense that the Convention only covers 'those who lack decision- making capacity', excluding those merely affected by physical disabilities, since 'on human rights grounds, compulsory measures of protection would not be justified in relation to persons who have full decision-making capacity' (Clive, 2000: 5).[42]

This view is probably attributable to the cultural background of Anglo-American countries where, despite the increasing use of the inherent jurisdiction (referred to earlier) protective measures have long been available only for persons who lack capacity. For the following reasons, however, the idea of confining the scope of the Convention to people with mental disability cannot be shared.

The Explanatory Report expressly states that 'the adults whom the Convention is meant to protect are the physically or mentally incapacitated'.[43] The choice of the international instrument not to restrict its scope to 'mental' impairment or insufficiency was intentional. A specific proposal by the UK delegation to clarify that 'the incapacities within the scope of the Convention should not be sensory or physical but related to mental faculties or powers of communications' was rejected by a large majority.[44] Moreover, the underlying idea of the Convention is precisely that vulnerable adults' protection does not necessarily coincide with incapacitation. Indeed, unlike the 1905 Convention, this international instrument does not require incapacitation for its application, since not every adult in need of protection is also incapable of understanding.

In addition, even for a person of unsound mind, legal incapacitation is not always the best form of protection. This international instrument is not limited to protective measures which affect legal capacity such as guardianship and curatorship, the use of which would certainly violate the right to self-determination of a vulnerable person who is capable of understanding.[45] Indeed, some measures of protection listed (for illustrative purposes) in art. 3 do not automatically lead to limiting the capacity to act (e.g. 'assistance', administration, conservation of the adult's property).

This is why, from the very beginning of the drafting process, it was decided to avoid using the term 'incapacitated adults' and the very title of this international instrument shows that the 'protection serves as guide and yardstick for defining the scope of application of the Convention… a measure taken by the authority of a State falls or does not fall within the scope of the Convention depending on whether it is or is not aimed at the protection of adults' (Lagarde, *Explanatory Report*, § 8).

Doubts could also arise whether this international instrument covers vulnerabilities which do not strictly fall into the medical concept of psychological or physical 'impairment' or disability, such as age, squandering, drug addiction and alcoholism. As is well known, the legal determination of a person's decision-making ability is often complex, due to the number of personal conditions which can affect the capacity of understanding, as well as the existence of different degrees of capacity and the variability of the capacity over time and depending on the nature of the decision to be taken (Herring, 2008: 1619).

According to the Explanatory Report, these vulnerabilities remain outside the scope of the Convention, since the 'impairment or insufficiency of personal faculties' of art. 1 para. 1 as has to be interpreted as a 'disease'. (Lagarde, *Explanatory Report*, § 9). Furthermore, as the proceedings show, delegates from common law countries were concerned that prodigality and drug addiction should not be covered by the Convention, as that would allow an undue restriction of a person's freedoms (see *Procès verbal N.1 Minutes N.1 Meeting of 20 September 1999*, cit., p.223 f).

Nevertheless, in favour of a broad functional idea of vulnerability regardless of any medical condition, it could be said that according to the title of the Convention and its underlying principle of the best interests of the vulnerable adult, emphasis should be placed on the effect and not on the cause. Hence, the Convention should apply to all 'those who need protection'. The reference to 'impairment or insufficiency of their personal faculties' should therefore be interpreted in the sense of excluding from the scope of this legal instrument vulnerabilities arising from external situations such as domestic violence (*Explanatory Report*, § 9). Besides, the proceedings show that the Special Commission of 1997 deemed the Convention should apply to 'an adult whose impairment of personal faculties takes the form of prodigality'.[46] Commenting the Convention, several authors state that it applies to the elderly who are incapable of taking proper care of their interests regardless of the existence of a pathology (Borrás, 2000: p.3; Durán Ayago, 2004: 456). In any case, a 'social' and 'functional' idea of vulnerability would lead to a notion of vulnerability quite similar to that of 'dependency' in geriatric literature and thus reflect the social dimension of health in medical and sociological literature.[47]

From a comparative point of view, two different approaches to vulnerability seem to exist.

A first group of countries requires both a *medical condition* and *the inability to take care of one's own interests*. Under the Mental Capacity Act, for instance, 'a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter *because of an impairment of, or a disturbance in the functioning of, the mind or brain*' (Sect. 2(1), my italics). The French Civil Code requires a medical assessment of the physical or psychological 'alteration' which makes the person incapable of managing his or her affairs. In Germany, 'if a person of full age, by reason of a mental illness or a physical, mental or psychological handicap, cannot in whole or in part take care of his affairs, the custodianship court, on his application or of its own motion, appoints a custodian'.[48] In

Austria, the law establishes as a prerequisite for *Sachwaltershaft* that the person finds itimpossible to manage his or her own affairs due to a mental disability or impairment.[49]

Other jurisdictions put a special emphasis on the *result* of the insufficiency of personal faculty, that is to say on the incapacity to protect one's own interests, considering the medical diagnosis of a 'disease' not always necessary. In Italy, for instance, courts grant the *amministrazione di sostegno* in every case of inability to provide for one's interests without the necessity of a medical assessment of a disability or an infirmity, e.g drug addiction[50], gambling addiction[51] and also, under certain circumstances like social isolation and illiteracy.[52] According to Portuguese doctrine, the all-encompassing care of *interdicao* can also be used in severe cases of prodigality, drug addiction and alcoholism (Pais de Vasconcelos, 2005: 117).
Doubts can be raised on whether an interpretation of vulnerability covering not only medical conditions could jeopardize the recognition of the protective measure abroad. I do not think that after the ratification of the 2000 Hague Convention, this would be permissible.

5. The dissolution of the symmetry between the protection of the vulnerable adult and his or her incapacitation

One of the merits of the 2000 Hague Convention is undoubtedly the dissolution of the symmetry between the protection of the vulnerable adult and his or her incapacitation (Borrás, 2000: 3; Gonzáles Beilfuss, 2000:85). Hence, the protection of the vulnerable adult does not necessarily imply the limitation of his or her legal capacity. As the Council of Europe points out in its 'Principles concerning the Legal Protection of Incapable Adults' of 1999, protective measures 'should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned' (principle n.2 para.4).

As previously illustrated, a large group of countries, mainly from the civil law tradition, has long been characterized by the symmetry between the protection of vulnerable persons and their incapacitation.[53] Indeed, the typical instrument for the protection of children and lunatics was the limitation of their legal capacity and the appointment of a representative: the children's parents, or an agent, guardian or curator (see section 2 above).
In order to protect the vulnerable person's remaining capacity and personal freedoms, many civil law countries have been introducing new protective measures which do not necessarily limit the legal capacity of the vulnerable adult (see section 2 above). In Germany, the person under *Betreuung* retains full power to enter into legal transactions by himself, independently of the fact that the law gives the *Betreuer* the power of representation in judicial and extrajudicial matters (art.1902 BGB) and that the court could have given him additional rights (Gottwald, Schwab and Büttner, 2001: 98).[54]The only limit is natural incapacity, in compliance with the general rule of art. 104 para. 2 BGB. In Austria, France and Italy, the person placed under *Sachwalterschaft*, *sauvegarde de justice* or *amministrazione di sostegno* retains the legal competence to perform all acts not expressly attributed to the competence of the agent by the court [55].

As far as private international law is concerned, in civil law countries, the traditional symmetry between protection and incapacitation justified the choice of the law regulating capacity in matters of vulnerable persons' protection. Since

capacity was seen as belonging to the 'personal status' of the person, the chosen connecting factor used to be nationality. In fact, *ab origine* the connecting factor for 'personal status' (Hunter-Henin, 2004; Farge, 2003) was domicile, but it was replaced by nationality in art.3 of the Napoleonic Civil Code in application of the principle of sovereignty: the jurisdiction of the authorities and the application of the law of the State of origin were seen as fundamental aspects for the States' control over its own citizens.[56]Signs of dissolution of the symmetry between the protection and the capacity of the vulnerable person have been present for a long time. Both in children's law and in vulnerable adults' law, habitual residence has progressively been chosen as connecting factor. Indeed, the 1902 Hague Conference on the Protection of Children and the 1905 Hague Conference on the Protection of Incapacitated Adults introduced habitual residence as a subsidiary criterion.[57] Habitual residence became the main connecting factor in the 1961 Hague Convention and in the 1996 Convention on the Protection of Children.[58] As far as this latter Convention is concerned, another clear sign of the dissolution of this symmetry is the extension of its scope to protective measures which do not deprive or limit legal capacity, like the continuous power of attorney and anticipated decisions. On the contrary, the 1905 Convention only applies to protective measure limiting or depriving the adult of legal capacity (see art. 13).

In order to ratify the 2000 Hague Convention, several countries amended their domestic private international law rules. France amended art. 1211 of the Civil Procedure Code by *Décret n.2008-1276 du 5 décembre 2008*. Scotland introduced a provision on the point in Section 3 of the Adults with Incapacity (Scotland) Act 2000. A minority of legal systems already comply with the Convention's choice of habitual residence as the main connecting factor. Switzerland, for instance, recently modified art.85 of the Federal Act of 18 December 1987 on private international law incorporating the 2000 Convention in the domestic system through a direct reference. The connecting factor, however, remains unchanged since the original text of the law declared the principles of the 1961 Hague Convention (and therefore the general criterion of habitual residence) applicable by analogy to adults' protection. It is interesting to notice that in Italy, where the Convention has not yet been ratified, courts have already recalled its principles to recognize the jurisdiction of domestic courts and the application of Italian law for the protection by *amministrazione di sostegno* of a Moroccan citizen habitually resident in Italy[59].

6. The general preference for advance planning for incapacity

According to the Preamble of the 2000 Convention, respect for the 'dignity' and 'autonomy' of vulnerable adults 'are to be primary considerations'. Thus, the preservation and enhancement of existing freedoms and capacity of the vulnerable adult is a guiding principle of the whole text.

This goal to protect the individual's self-determination is pursued on the one hand by a maximum preservation of capacity (and the consequent dissolution of the symmetry between protection and incapacitation, see section 5 above) as well as by procedural safeguards, mainly the vulnerable person's right to be heard in the proceeding in which the measure of protection is chosen.[60]

In addition, the Convention also promotes advance planning for substitute decision making and financial management in the event of a future incapacity (for some examples of delegation of decision making powers in domestic laws see section 2 above). This aim is achieved by encouraging the cross border recognition of the power of representation

granted by an adult, either by contract or by unilateral act.[61] With the same purpose, the Convention recognizes the choice expressed by the adults as a subsidiary jurisdiction criterion.[62]

Actually, the effects on substantive law would have been much more incisive if the proposal to grant the adult the right to choose any law, regardless of a specific connection with his or her situation, had been adopted. In Italy, for instance, the possibility (under art. 13 of the 1985 Hague Convention) to choose any law for the settlement of a trust led courts to admit also 'domestic trusts;, hitherto unknown. A similar development could have taken place also with regard to different measures of protection unknown to certain ratifying states. In this regard, it is interesting to note that the *rapporteur* seemed to recognize an indirect substantive effect of art. 15 and 16 of the 2000 Hague Convention when he considered these provisions as a *petit manuel* ('short handbook') on the power of representation.

Common law authors (Fagan, 2002) point out that the principle of mutual recognition of the powers of representation and consequently of advance medical directives, is threatened by the provision according to which 'the manner of exercise of such powers of representation is governed by the law of the State in which they are exercised'. [63].In spite of this, the provisions on advance planning in the Convention are of great interest for countries which do not (yet) provide specific tools to plan for the management of personal, financial and legal affairs in the event of a future incapacity. Indeed, each person can designate his assistant or representative (*amministratore di sostegno*) for the event of future incapacity, but the court is not bound to appoint that very person if it thinks that it is not in the best interests of the person (art. 408 para. 1 Italian Civil Code). Thus, this instrument is very different from the mandates for future protection examined above (section2).
Indeed, the 2000 Hague Convention compels all countries to become familiar with advance planning tools already existing in other countries, at least in cross-border situations. It is true that the Convention leaves it to the receiving State to govern the exercise of the power of representation conferred abroad, but, as illustrated above, it is clear that one of the objects of this international instrument is to 'provide for the recognition and enforcement of…measures of protection in all Contracting States'.[64] Moreover, the European Parliament expressly encouraged the ratification of the 2000 Hague Convention, stating that the recognition abroad of 'protection regimes' is essential to ensure the free movement of persons and that therefore 'the legal protection regimes must… have continued legal effect, not least to ensure the continuity of decisions taken at a judicial or administrative level, or by the person him/herself. Such is the case with incapacity mandates or future protection mandates, which it must be possible to apply throughout the European Union'. [65]

From a more general point of view, one could wonder whether the total lack of specific tools to plan for the organization of personal, financial and legal affairs in case of a future incapacity is consistent with the general system of protection of human rights. Indeed, the right to self-determination should be limited *only if strictly necessary for the public interest or higher fundamental rights of other individuals*. From this perspective, for instance, the Strasbourg Court of Human Rights found a violation of art. 8 of the European Convention on Human Rights (right to private and family life) with regard to a person who under Croatian law had not been allowed to legally recognize his son since he had previously been divested of his legal capacity. According to the Court, 'a fair balance has not been struck between

the public interest in protecting persons divested of their legal capacity from giving statements to the detriment of themselves or others, and the interest of the applicant in having his paternity of K. legally recognized'. [66]

7. Conclusion

It is certainly true that caution should be used when trying to derive substantive law consequences from private international law. The aim of conflict of law rules is to regulate cross-border situations, resolving conflicts between legal systems with regard to jurisdiction, applicable law, as well as recognition and enforcement of measures taken by foreign authorities. Thus one of the main aims of the 2000 Hague Convention is, according to its Preamble, to avoid conflicts between legal systems in respect of jurisdiction, applicable law, and recognition and enforcement of measures for the protection of adults. Moreover, in the traditional view, conflict of law rules are considered to be neutral, i.e. indifferent with regard to the practical results achieved by the identified substantive law (see section 3 above). Finally, it is argued that the 'materialization' of private international law threatens legal certainty because it reduces the clarity of the factors that determine the applicable law.

Nevertheless, the dynamic interactions between private international law and substantive law should also be considered positively, especially in fields, like family law and vulnerable persons' law, which are strongly influenced by ethical values and social norms. Indeed, private international law acts increasingly 'import' principles of substantive law and values shared by the majority of the Member States. A good example of this interaction between private international law and domestic substantive law is the principle of the 'best interests of the child' (see section 3 above). Another is the implementation of the material principles of European Union Law, such as the promotion of the internal market, the increase of legal security and the protection of the weaker party (e.g. consumer protection), in the new EU private international law (Weller, 2011: 429).

Furthermore, recent international instruments formally classified as private international law are likely to affect also substantive law. The Convention of 29 May 1993 on Intercountry Adoption, although developed within the Hague Conference on Private International Law, establishes a definition of adoption (art. 2 para.2), acknowledges the importance of preserving information about the child' s origin (art. 30) and introduces procedural safeguards in order to ensure that cross-border adoptions take place in the best interests of the child, namely requiring an assessment by a public authority of the adoptability of the child (art. 4), as well as the evaluation of the suitability and eligibility of the perspective adopting parents (art.5). The same Council Regulation (EC) N. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters equalizes divorce, legal separation and annulment of marriage. This equalization is of great importance in countries, such as Italy, where the case law sharply distinguishes divorce from religious marriage annulments and from separation, excluding both *lis pendens* and the conflict of judgments which prevents the enforcement of a later decision of marriage breakdown between the same parties, with the consequence that, the divorce decision and its consequences on former spouses' maintenance can be overcome by the later decision of enforcement of religious annulment (Long: 2007, 167 ff.).

As has been shown in this article, the 2000 Hague Convention provides an interesting test case for substantive law. On the one hand, it promotes the further diffusion of principles already accepted by most states, namely the

principle of the (best) interests of the vulnerable adult, a notion of vulnerability that encompasses mental impairment, and the dissolution of the symmetry between protective measures and incapacitation. On the other hand, this international instrument encourages convergence of the two different approaches to vulnerable adults protection which characterize the Western legal systems by a) recognizing the importance of protective measures in favour of vulnerable adults through their automatic recognition abroad and b) by compelling countries traditionally centred on tutors and curators to become familiar with advance planning tools already existing in other countries.

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[2] European Parliament Resolution of 18 December 2008 with recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123(INI).

[3] As will be mentioned below, these principles are at the heart of the Recommendation N.R (99) 4 of the Committee of Ministers of the Council of Europe “on principles concerning legal protection of incapable adults” (adopted on 23 February 1999).

[4] See for instance art. 414-1 French Civil Code, art. 428 and art.1425 Italian Civil Code, art. 257 Portuguese Civil Code, artt. 104 para. 2 and 105 para. 2 German Civil Code.

[5] Art. 428 para. 2 Italian Civil Code; art. 257 Portuguese Civil Code.

[6] Sect. 7 Mental Capacity Act 2005.

[7] Articles 138 ff. of the Portuguese Civil Code.

[8] Articles 152 ff. Portuguese Civil Code.

[9] Art.139 Portuguese Civil Code.

[10] Art.424 para.1 Portuguese Civil Code.

[11] Sect. 202 Estonian Family Law Act.

[12] Art. 425 para.1 French Civil Code; art. 1896 para.1 German Civil Code; art. 404 Italian Civil Code.

[13] Art. 1896 para.1 German Civil Code; art. 404 Italian Civil Code.

[14] Art. 435 French Civil Code. For an overview regarding the new system of adults protection in France see Fulchiron, 2008.

[15] Art. 409 Italian Civil Code. There is a third protective measure, the *inabilitazione* (curatorship), whose practical importance is however scarce.

[16] Artt. 273 ff. Austrian Civil Code.

[17] Artt. 1896 ff. For an introduction in English, see Doron, 2002: 377; Gottwald, Schwab and Büttner, 2001: § 222 ff.; Martiny: 2005, 268.

[18] Art.1682 para. 1 Greek Civil Code.

[19] Art.1678 para 2 Greek Civil Code.

[20] Art.1679. See Agallopoulou, 2005: pp.111 ff.; Kerameus and Kozyris, 2008: § 197.

[21] Artt. 390 ff. Swiss Civil Code, as previously said, the reform will come into force in 2013.

[22] Sect.11(7.a) Mental Capacity Act.

[23] Art.672 German Civil Code and, since 2003, art. 1732 Spanish Civil Code.

[24] Art. 2131, artt. 2166-2174 e art. 2183 Code civil, for an overview see Fabien, 2007.

[25] The Reform entered into force in 2009. This instrument was described by the French legal doctrine as a contractual (“conventionelle”) *sauvegarde de justice* which pursues the same objectives as the *tutelle* (Batteur, Deglise, Dalle, Fossier, Pécaut-Rivolier, Verheyde, 2009: 23). See also Delfosse and Baillon-Wirtz, 2009: 167 ff ; Massip, 2009, 451 ff.

[26] Art.360 Swiss Civil Code, in force by 2013.

[27] It is interesting to notice that art. 13 para. 2 does not expressly mention the “interest of the adult” but refers to “protection of the person or the property of the adult”, probably with the aim to give precise directions to national

authorities, avoiding the risk of vagueness of the concept of the "interest" of the person. Despite this linguistic difference, the provision seems however similar to art. 15 para. 2 of the 1996 Hague Convention.

[28] The wording is very similar to the one used by the Council of Europe: "in establishing or implementing a measure of protection for an incapable adult the interests and welfare of that person should be the paramount consideration" (principle n.8 of the "guiding principles concerning the legal protection of incapable adults" of the Committee of the Council of Europe).

[29] Rather critical on the use of the clause of the "interest of the adult" in the 2000 Hague Convention is Seatzu, 2000: 1235-1236.

[30] Sect.1(5); sect.5(1)(b)(ii) Mental Capacity Act.

[31] Sect.4 Mental Capacity Act. On the problems which can arise in practice when using this clause see Dunn, Clare, Holland, Gunn, 2007.

[32] The connection between proximity and the interest of the vulnerable person is clearly stated in § 12 of the Preamble to EU Regulation n.2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility: "the grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity". On this point see, Hammje, 2005, 372 f.

[33] Unlike with children, where the conflict of jurisdiction is often a real risk since there are many private parties (namely the two parents) and States willing to act, for vulnerable adults it is sometimes difficult to find someone to take on the role of representative and therefore the provision of subsidiary criteria seems very useful (Clive, 2000: 4; Lagarde, 2000: 164).

[34] Art. 404 and art.414 Italian Civil Code; art.224 Spanish Civil Code; § 203 para. 2 Estonian Family Law Act; art 415 para. 1 and art. 440 para. 2 an 4 French civil code. On the "necessity" and "subsidiarity" of the protective measure under the French Civil Code see Delfosse and Baillon-Wirtz, 2009: 29 f.; Malaurie, 2009: 281.

[35] Art. 405 Italian Civil Code.

[36] Art. 408 para. 1 Italian Civil Code; art. 1897 paras.1 and 4 BGB.

[37] See for France art. 415 para. 2 French Civil Code and for Italy art.407, art. 408 para. 1 and art.410 para. 2 Italian Civil Code.

[38] Art. 1897 para. 4 German Civil Code.

[39] Art. 1901 para.2 German Civil Code.

[40] On the penetration of values and principles of substantive law in private international law and specifically on the "materialisation" of conflict of laws rules see Gonzáles Campos, 2000, in part. 309 ff.

On the role of the best interest of the child in private international law see, in addition to Gonzáles Campos, 2000: 319, 322; Borrás, 1994: 976; Cannone, 1998: 570.

On the best interest of the vulnerable adult, see Borrás, 2005: 1287 ff.; Seatzu, 2000.

[41] Literature on the best interests of the child is rich: Alston, 1994; Freeman, 2007; Dogliotti, 1992: 1099; Moro, 2000; Rivero Hernández, 2000; Roca Trias, 1994; Villagrasa Alcaide, 2011.

[42] This opinion is particularly interesting since the author served as Chairman of the two Special Commissions which prepared the Convention.

[43] Lagarde, Explanatory Report, § 9. The situation is therefore very different from the one considered by the Council of Europe both in the Recommendation CM/Rec(2009)11 of the Committee of Ministers to Member States on principles concerning continuing powers of attorney and advance directives for incapacity and in the Recommendation R(99)4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults.

[44] See Procès verbal N.1 Minutes N.1 Meeting of 20 September 1999, in Proceedings of the Special Commission with diplomatic character of September-October 1999, SDU Publishers, The Hague, 2003, p.223. The situation is therefore very different from the one considered by the Committee of Ministers of the Council of Europe

both in the Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity and in the Recommendation R(99)4 on principles concerning the legal protection of incapable adults. The reference to this Recommendations is worth noticing because the expression "adults, who by reason of an impairment or insufficiency of their personal faculties" comes from there.

[45] There are often (but not always) mechanisms aimed at preventing coercive measures against the vulnerable person's free will. The German BGB expressly states that "A custodian may not be appointed against the free will of the person of full age" (art. 1896 para.1a). The Greek Civil Code states that in case a person is only physically disabled, the court decides solely upon his own petition (art.1667 para.2).

[46] See Report of the Special Commission (3 to 12 September 1997), in Proceedings of the Special Commission with diplomatic character of September-October 1999, cit., p.93.

[47] See for instance the definition of "health" by the WHO or the statement, in lett. e of the Preamble of the UN Convention on disabilities that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".

[48] Art. 1896 German Civil Code.

[49] Art.273 para. 1 Austrian Civil Code.

[50] *Tribunale di Modena, Sezione civile*, decree 8 February 2006, in <www.altalex.com>.

[51] See for instance *Tribunale Varese*, decree 25 November 2009, in <www.personaedanno.it>.

[52] See for instance *Tribunale Pinerolo*, decree 9 April 2004, in Ferrando e Lenti (ed. by), 2006, 405 (the vulnerable adult was a sixty-seven years old lady, illiterate and who had been leaving in social isolation since her childhood) and *Tribunale Varese*, decree 16 April 2010, in <http://www.personaedanno.it (in this case a man without any family and without money who did not have any pathologic condition but was discouraged and unable to cope with his financial collapse, making unnecessary expenses but didn't paying the healing).

[53] On the contrary, the separation of the protection of vulnerable adults and the limitation of their legal capacity is deeply rooted in English law which traditionally "dissociate judicial welfare measures from deprivation of capacity" (Heldrich and Steiner, 2007: 19). The situation somewhat changed with the Mental Capacity Act 2005 which, in contrast with the Mental Health Capacity Act of 1983 that did not refer to "capacity", provides a legal framework for acting and making decisions on behalf of adults who lack the capacity to make particular decisions for themselves. Among the principles stated in art.1 of the UK Mental Capacity Act 2005, however, it is stated that "A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success", "Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action".

[54] The authors acknowledge that this overlap of responsibilities may cause problems when both persons decide on the same matter in a diverging way: the general rule is that the act prior in time will be valid.

[55] Art. 237 ff. Austrian Civil Code, art.435 para. 1 French Civil Code, art. 1 Act 6 of 9 January 2004 and 405 Italian Civil Code.

[56] For the historical and cultural basis of the choice of the nationality as connecting factor, see Capotorti, 1963; Guinand: 17 ff. and 29 f.; Glenn, 1975: in part. 10 ff. and 70 ff. on the choice of nationality as ground of jurisdiction for the protection of incapable adults see B. Dutoit, 1967: 467 ff.

[57] See respectively art.3 and art. 8.

[58] See respectively art.2 and art. 5,

[59] *Tribunale Verona*, 11 March 2011, in <http://www.personaedanno.it>.

[60] Art.22 para.2 b 2000 Hague Conv.

[61] Art.15 2000 Hague Conv.

[62] Art.8 para. 2 lett. d 2000 Hague Conv.

[63] Art. 1 para.3 2000 Hague Conv.

[64] Art.1 para.2 lett. d 2000 Hague Conv

[65] Recommendations to the Commission on cross-border implications of the legal protection of adults, 24 November 2008 (2008/2123(INI).

[66] *Krušković v. Croatia*, judgment 21st June 2011, para. 34.