THE SUPPORTING ADMINISTRATION

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The main purpose of modern legal systems is the respect and the affirmation of the fundamental human rights.

A reform about incapable subjects of the rules of the Italian Civil Code, which since a lot of years, had been thought, both in doctrine and in judicial decision, with Statute n. 6 of the 9th of January 2004 has been approved.

Since eighty’s there has been the necessity to review the interdiction and disability institutes but above all to insert a new juridical institute for the disabled person, that is “Supporting Administration”.¹

The innovative stimulus already accepted and promoted in many European systems since sixty’s² and therefore it is considerable ahead compared to the Italian one, it is based on the necessity to protect and respect the rights and the will of the incapable person trying, where it is possible, to reduce and to invalidate the minimum his capacity to act (legal capacity).

The Italian legal system recognizes a “legal personality” to everybody since their birth, on the other hand it gives only to the people over 18 year’s old the “legal capacity”, which is the capacity to do considerable juridical acts (such as contract).

During these last years also in Italy there have been some social incisive changes in the so-called “world of incapacity” thanks to the carrying out of efficient and wide services.

¹ Cfr. P. Cendon, infermi di mente e altri “disabili” in una proposta di riforma del codice civile, in PD, 1987, 621 ss; nonché, per i vari contributi, P. Cendon (cur.), Un altro diritto per il malato di mente. Esperienze e soggetti della trasformazione.
the above mentioned reform has foreseen the recognition in favour of incapable persons of the power to do autonomously those juridical ordinary activities closely connected to the daily life and also to the most demanding and complicated activities (or the acts of extraordinary administration), to employ however the support of the new juridical figure that is just the “supporting administrator”.

The interdiction (article 414 Italian civil code) and disability (art. 415 civ. cod.) institutes, lightly touched up by the recent reform, though the disappointment expressed by doctrine, still exist into the Italian Civil Code. They were absolute and immutable measures for all the time that abolished the capacity to act of the subjects permanently suffering from insanity.

The two juridical remedies looked inadequate because they operated a real ablation of the capacity to act and besides they do not allow a diversified guardianship according to the degree and/or insanity. The situation was easier for the hypothesis of disability according to which the disabled subject could carry out some juridical acts of ordinary administration.

The interdiction institute, before the reform, was included in a “rigid, predetermined and without return context”.

There was not the possibility to pass from an institute to an other and even if it was accepted the revocation of the interdiction, this was admitted only in hypothesis of total recovery (now instead it is deducet by art. 429 civ. cod. that it is possible revoked the interdiction even if there is not total recovery).

The Statute n. 6/2004, in order to carrying out a better protection of incapable subjects and also to remove the discriminant remedies of the traditional discipline, has made easier and accessible the passing from each to other institute when there is the necessity.

The articles 413 civ. cod. e 414 civ. cod. show the flexibility of new system, according to which the judge, if he thinks it is right, can revoke the supporting administration and goes on interdiction or disability and vice versa.

New art. 413 “Revocation of the supporting administration” affirms in fact that “the tutelary judge acts also officially to the declaration of cessation of the

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suppppoting administration when this is unsuitable to carrying out the whole defence of the beneficiary.

Besides a new paragraph has been inserted to the article 418 civ. cod. which provides the possibility to pass to the supporting administration also “ in the course of the interdiction and disability proceeding ”.

The previous formulation of art. 414 civ. cod. foresaw a normative interest “against incapable subject” rather than the tutelage of the interests and the care of the incapable subject.\(^4\)

This article established that “adult and emancipated minor who are in condition of habitual insanity that makes them incapable to supply to their own interests must be interdicted; after the reform, instead, the verb “must” is eliminated and it is established that they “can” be interdicted only if it is necessary to guarantee them an adequate protection”.

The informing aim of the new reform is rectified in the art. 1 which states “the guardianship of the feeble person has to succeed with the least possible restraint of the capacity to act”.

A change introduced with the Statute n. 6/2004 is foreseen by art. 427 civ. cod. which confers to the interdict the possibility to do some juridical acts of ordinary administration excluding, so in the hypothesis, the assistance and the intervention of the guardian.

Such power is given too to the unable that can still do acts of extraordinary administration individualized by law without the help of curator\(^5\).

But such article, although the considerable progresses carried out, does not admit in favour of incapable subject the possibility “to do necessary acts to satisfy the requirements of his own daily life”.

This possibility instead had been attributed expressly in the hypothesis of the supporting administration according to art. 409 civ. cod. paragraph 2 that states: “the beneficiary of the supporting administration, in any case, can do necessary acts to satisfy the requirements of his own daily life”.

Therefore, incapable person just because absolute incapable, could not acquire any objects of minimal value necessary for the exigences of his own daily life.

\(^4\) Pescara, op. cit., p. 814.

\(^5\) The person who is elected by tutelary judge agent in the name and on behalf of unable person.
However, the focal point of reform is the forecast of the new juridical institute “of the supporting administration” which overcomes the dichotomy between the capacity to act and the typical absolute incapacity of the traditional protective patterns.

The 409 art. civ. cod. “Supporting administration effects” orders in fact “the beneficiary preserves the capacity to act for all the acts which don’t need the exclusive representation or the necessary assistance of the supporting administrator.

The beneficiary of the supporting administration can, in any case, do the necessary acts to satisfy the exigencies of his own daily life.

As consequence, it results that the incapable subject is restricted only for those acts that need the representation or the assistance of the supporting administrator.

The 409 art. civ. cod. orders a first phase of acts for which the subject is fully able. They are all acts of personal interest and of those of patrimonial interest that is the necessary acts to satisfy daily life needs.

The supporting administration considers the exigences of every incapable subject determining, in a specific way, the context of intervention with regard to his specific necessities, always respecting his capacity even if it is limited.

It may thus be inferred that the technique of protection must be graduated and adequate both to ability and to concrete exigences of the beneficiary.

In fact art. 405, paragraph 5 civ. cod., envisages the possibility of the co-existence of a substitutive administration with an assisting one (inspired, even if not explicitly, to the model of the curatorship).

Another change into reform consists of, differently from the past, the categories of subjects that can benefit of the supporting administration are several.

The 404 art. civ. cod. orders which is possible, but not compulsory, to appoint a supporting administrator for the safeguarding of the person suffering from insanity or physical or psychical disablement, which are for the person so serious to cause for the same, the partial or temporary impossibility, to provide for his own interests.

The appeal to the supporting administration is foreseen in all cases in which insanity or physical disablement, besides causing negative consequences for
body, involves, too the intellectual faculties of the subject, compromising them in a less or more serious way.

According to art. 404 civ. cod. the reference to physical disablement allows referring to the supporting administration even in those situations in which the incapacity of the subject does not come from a psychical change but from senses disablement (ex. a blind person).

With reference to the persons afflicted from insanity, the articles 414 civ. cod. and 415 civ. cod. not provide an adequate protection because theirs application is still today subordinated to the rigorous recurrence of the habitual and dangerous parameters (which it is considered surpassed also juridical context, after approval of Statute n. 180/1978)⁶.

Instead new art. 404 civ. cod. considers a general formulation which is deprived of adjectives about insanity, so as to extend the connected protection to the various manifestation of insanity individualized in reality.

In fact also even persons afflicted from psychological trouble can have the nomination of a supporting administrator in any case of their degree and/or their phase of insanity.

In accordance with extensive interpretation of art. 404 civ. cod., the supporting administration can not be applied to those subjects that they are simply well on in years while it can be applied to elderly people when elderly age, determining a diminution of psychic capacities, makes elderly person incapable to provide for his own interests.

An other important aspect of reform regards the individualization of the subjects legitimated to promote the supporting administration.

They are: the Public Prosecutor and the responsible persons of sanitary and social services which are obliged to activate this procedure when they know there are situations which impose it.

Then there are other subjects that have instead the right and they are: relatives, stably cohabiting persons and the interested person.

That being stated, an account deserves the procedure for the supporting administration. It develops in front of tutelary judge both in the first phase, which is the institution of the administration, and in the second phase, which is the management one.

It is fundamental the indication of the reasons for which the supporting administration is requested, in order to individualize the tasks of assistance to give to the administrator.

After suitable inquiries the tutelary judge, with decree issued within sixty days from the deposit of the appeal, establishes the supporting administration and provides for the appointment of the curator (art. 405 comma 5 civ. cod.). The decree must besides point out the period of the charge (art. 405 civ. cod.) of the curator which can be for a determinate or indeterminate period and the object of the administration or the acts that the curator can or must do on behalf of the beneficiary and the acts that the beneficiary can do only with the assistance of the supporting curator and of the limits of expense charged to the curator of beneficiary money.

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