Disability, the person, the market

Andrea Bortoluzzi
1. **Post-modern complexity, the paths of language and deontic power.**

Jurists, doctors and social workers, however diverse the routes they may have taken in their training, professions and careers, all face the same problems generated by post-modern complexity. Those problems call for an exceptional interdisciplinary effort, both in the scientific field and in training.

We all find ourselves travelling down unmarked routes, and compasses may be of some help in our need if we combine them with a certain expertise in cartography.

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Admittedly, it is a rare commodity in the professions.

This is because the world is changing at an ever faster pace and we, heedlessly, continue to act out our roles as if nothing were happening, reciting lines that are incomprehensible to most people, speaking languages whose meaning cannot be conveyed and failing to understand the languages spoken by those with whom we talk.

This irreconcilability of languages is not experienced as a powerful incentive for exploring the unexplored and for embarking on new paths; rather, it triggers off an immunity to diversity, a defence of the status quo.

The person who is different is the one who seeks to beat new paths within the professions and is soon relegated to the sidelines because he experiments in new languages. The other traveller entrusts himself to the care of the professional, asking for help in his own language, but without finding it because the professional tries to protect himself from any contamination by speaking the only language he knows.

The professional parses the request using his own grammar and his own syntax, and in so doing, standardises the request and immunises himself.

It starts as a request for help, but becomes the delivery of a service in the light of criteria agreed according to the professional’s own language.

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This is linguistic standardisation, which exempts one from responsibility for one’s choice and whereby one protects oneself, whereas the person asking for our care is unprotected.

The price paid for this immunisation from diversity is the loss of credibility, in what I have on occasion defined as ‘deontic power’: the capacity to accept and keep faith with duties, obligations, commitments and demands.\(^2\)

2. **The routes of legal subjectivity: its deconstruction in the administration of support. The principles.**

You will say ‘but these problems have been with us since the world began ... there's nothing new under the sun!' But this is not how things are. Those of us with greater awareness have noted it. Let us look at the subject of disability.

This takes us away from the modelling to which we were accustomed. The model of the legal subjectivity of the person, the person with stable territorial roots, who is measured against and relates to the State, an abstract expression of capacity as expressed in power over things as the object of ownership, and in the expression of will in the contract as the subject of activity.

A person having rights but also powers derived from the capacity to enter into an obligation.

The introduction of the institution of the ‘Amministrazione di Sostegno’ into Italian law abandons the model of subjectivity handed down by tradition; indeed, it deconstructs it. In its aim of protecting, with the least possible limitations, the personal capacity of persons wholly or partially deprived of autonomy in performing the functions of everyday life, this new institution delineates a person no longer in abstract terms but as a person of flesh and blood, one whose relationship is not with the State but with the society of which he is a member. His society is considered in terms of its potential to provide for the interests of that person, whose power over things is no longer covered by the right to a legitimate interest under private law.\(^3\) and

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The concept has also been taken up by myself, in Bortoluzzi, *Potere deontico notarile*, Contratto e impresa, 3, 2006, 815.

\(^3\) The concept of interest under private law has been investigated by an Italian jurist, who defines it as a ‘substantive situation of advantage (in that it is directed towards the substantive attainment of a favourable result consisting, depending on the circumstances, of preserving or modifying – and therefore also of extinguishing – a given legal reality), however inactive that advantage; when it is directly protected as a subjective advantage, its satisfaction depends not on the behaviour of the person aspiring to it – the absence of *agere licere* – but on the behaviour of a different subject, the holder of a situation of right and duty, *rectius potestà*. BIGLIAZZI GERI, item headed *Interesse legittimo, diritto privato* in *Digesto*
whose will is diminished by the propensity to inaction\textsuperscript{4}, let alone the lack of ability to act.

The legislative event\textsuperscript{5} that came to fruition late at night in the semi-deserted Chamber of Deputies shortly after the Christmas holidays did not originate just by chance. Or rather it came into being according to today’s tradition of the extemporaneous in legislative measures, combined with the partial or indirect procedure giving rise to them, whose effects on the citizens to whom they are addressed and on those called upon to interpret them can be psychologically destabilising.

But the birth of the law was not fortuitous. Its gestation was lengthy and the routes it took were tortuous. And those routes have left their traces in the chosen itinerary for the measures.

The beneficiary’s ‘needs’, ‘aspirations’ and ‘requirements’, as stated in article 410 of Law 9, mark the end of a journey that began in 1948 when Italy’s Constitutional Charter came into force. Article 2 of the Constitution, recognising the inviolable rights of man, ended the long dialogue à deux between the soggetto di diritto – the person having legal capacity – and the State as defined by twentieth century codes, with a third element bursting onto the scene in the middle spaces in which that person expresses his personality in his relationship with other actors in civil society, bound to each other by their inderogable duties of economic and social solidarity. Only now, sixty years after its introduction into the legal system, has the constitutional concept of the person entered the Civil Code.

But there is more. Another journey comes to an end with the definition of the element characteristic of the vulnerable person as being the impossibility of providing for his own ‘interests’, and the concept that his carer, or ‘Amministratore di sostegno’, is to be chosen (according to article 404) ‘with sole regard to the care of the [beneficiary’s] interests’ (article 408), so much so that ‘negligence in pursuing [the beneficiary’s] interest’ (article 410) is highlighted as a failure of the duty of support. What began in 1957 when the EEC Treaty became enforceable – with, under article 153,  

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\footnoteref{4} Action is defined by the inaction of the subject: not by what he has done but by what he has not done, not by what he can do but by what he cannot do. To clarify, think of the expression ‘you don’t know what I haven’t done’ after a long day’s work, in which what is done is defined by what has not been done. Here we come to the Chinese idea of wu wei, symbolising effortless action. On this question, see François JULLIEN, A treatise on efficacy: between Western and Chinese Thinking, University of Hawaii Press, 2004.

\footnoteref{5} Translator’s note: On 9 January 2004, the Italian Parliament passed Law 8 introducing into the Civil Code a new civil law institution for the protection of the incapacitated, under the name of ‘Amministrazione di sostegno’ – the administration of support. In this English text it is rendered as ‘Carership’, the Amministratore di sostegno as the ‘Carer’, the person represented as the ‘Person under carership’. The measure is designed to protect persons with little or no autonomy in performing the functions of everyday life, through the provision of temporary or permanent support, with the least possible limitation on their capacity to act.
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recognition of consumers’ rights through the protection of their health, safety and economic interests, as well as the promotion of their rights to information, education and to organise themselves in order to safeguard their interests (and this should also be viewed in relation to the far broader social rights laid down in articles 136 and 137) – led to the arrival on the scene of a new subject no longer bound by the dialogue à deux between individual sovereignty and State sovereignty, a space occupied by a subject holding rights, a subject having interests, who is taken into consideration because of his tertiary nature as a living person, forming part of the civil community, not separate from or implanted into life but coinciding with that community.

This, then, is something entirely new. The Constitution and its values have entered into the Civil Code, together with the interests established by the EC Treaty (as a result, I would add, of the powerful pressure of those interests).

And, together with these, there is the concept of the person (article 2 of the Constitution uses the far more lapidary word, ‘man’) as clearly distinct from the concept of the soggetto di diritto or legal entity, or its predicates (legal capacity, capacity to act, natural capacity), implemented in the fullness of his prerogatives, not just social but also economic.

3. **The routes taken by the laws: the beneficiary as a person. Disability, consumerism and care.**

The law on Carership calls for a deconstructive approach that goes far beyond what I attempted when first considering the new measures in terms of civil law. It demands of the interpreter of the law the humility imposed on those who must give up received ideas of tradition and embark on new paths to be explored in the field of the law of the market.

The law faces us with an interlocutor never before encountered: the soggetto di interesse, the person having interests. This forces us to speak and understand a language hitherto unknown to us or little practised in the performance of our functions: the language of interests combined with values. In the sphere of the legal capacity of the subject, the constitutional principles directed towards protecting the dignity of the person prevail over the measures restricting or removing that capacity. They have a direct impact on the constitutionally efficient application of the regulatory norms in the field of legal subjectivity (articles 2 and 3 of the Constitution on personality and dignity and article 32, the right to health). They provide the backdrop against which the normative measures on the Amministrazione di

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6 A ‘way of being a man that coincides neither with the person nor with the thing. And not even with the perpetual transition from one to the other to which we always seem to have been destined’, as a living person, is referred to by Roberto ESPOSITO, *Terza persona, Politica della vita e filosofia dell'impersonale*, Einaudi, Turin, 2007.
sostegno are projected, in itself implementing the constitutional precept whose reference parameter is that homo oeconomicus (whom the consumer laws define sometimes as a consumer and sometimes as a trader/entrepreneur, under article 3 of the Consumer Code) should be able to pursue his own interests and therefore exercise his personal capacity (the Consumer Code refers to the ‘person’), in the sense of the possibility of providing for his own interests. As we shall see, at the time of implementation the interpreter of the law will have to comply directly with the constitutional standards, without the mediation of the law.

I refer to the Consumer Code because this constitutes the only body of positive law that, exceptionally, has entered the Civil Code (via its article 1469 bis), from which can be inferred, in compliance with the principles of the Constitution and the EEC Treaty, as stated by article 1 of the Consumer Code, a concept of the person that is distinct from the concept of the codes anchored in the twentieth century acceptance of subjectivity. The threefold structure contained in the German Civil Code – the person (§1), the consumer (§13) and the entrepreneur (§14) – becomes, by way of exception to the Code, a soggetto di diritto in Italian law (article 1 of the Civil Code) and a person in the Consumer Code (articles 2, 3 and 4), structured as the consumer, the trader, the producer, being defined again as a person in relation to Carership (article 404 of the Civil Code).

The Civil Code concept of legal subjectivity is subject to the constant monitoring of its constitutional legitimacy because it arose before, and separately from, the idea of the person that it is intended to implement by means of consumer legislation and by the legislation considered here.

The institution of Carership opens up a horizon for new investigation that signposts the way for new routes. We are not embarking on the Way of the Imperial Fora trod by the cives romanus but on the Street of Crocodiles, on which walks the soggetto di interesse as a natural subject⁷, the extreme outcome of the deconstruction of the legal subject so clearly depicted by Bruno Schulz as a ‘reality .. as thin as paper and betraying with all its cracks its imitative character’, ‘a mask that decomposes and crumbles before us into a pile of chalk and sawdust in the stock room of an immense empty theatre’⁸.

The consumer wandering down the Street of Crocodiles is a strange subject suspended midway between fear and desire. A very distant relation of the abstract individuality indicated by the capacity and the expression of the uncontaminated will of the subject of right.

⁷ On six unnumbered handwritten pages attached to the text of the lecture at the Collège de France on 21 March 1979, in the course devoted to the birth of biopolitics, Michel Focault notes ‘Technology of the environment of risks, the freedom of play between demand and supply. But does it perhaps mean that we are dealing with natural subjects?’. Michel FOCAULT, The Birth of Biopolitics, Lectures at the Collège de France (1978-1979), Palgrave Macmillan, 2008.

We are brought closer to the fragilities of the consumer if we again steal our words from Bruno Schulz: ‘From no other place but this do we feel ourselves so threatened by possibilities, overwhelmed by the approach of realisation, or are we rendered so fearful and inert by the voluptuous consternation of implementation.’

Until the legislation on Carership and the Consumer Code came into force, our interlocutor was the subject of rights whose relationship was with the State, limiting his own action and that of the State; he paid the levy for those limits, deriving from them the advantage of immunisation from diversity, and the proclamation of his normality obtained by linguistic standardisation, the fact of speaking the same language as the State, the institutional language of the Civil Code.

Or at least this was so until the dialogue became a monologue in the language of power, exerting its force over the dialectal language of the subject.

Today the soggetto di interesse is divesting the State of its power. The State merely promotes each person’s capacity to compete by attempting to neutralise the obstacles that might exclude him from competition. The State governs at a remove, and has lost its capacity to immunise from diversity by allowing everyone to act on the market, on the assumption that they are all the rational agents of that market. The language common to us and to our interlocutors becomes the language of interest of the Consumer Code, this being the language used by those who ask us to guarantee individual freedom of choice. The method of freedom of choice is an alternative to the method inherent in the nation State: ‘govern, discipline, punish’. It is an alternative to the behavioural manipulation that creates no dissent or rebellion, and presents the obligation to choose as being freedom of choice. Institutional language used to allow the recognition of normality by immunising it from diversity. Anyone speaking another language, the person who was different, was relegated to total institutions. The language of interests does not immunise from diversity, it too is unique but it promotes dispersed consumer individualities by guaranteeing each one the freedom (or rather the obligation) to choose. Those who spoke the institutional language on behalf of the State (and here today we are all on various counts the carriers of that language, either because we are holders of munus publicum (public office) or because we administer justice in the name of the State), today have the task of taking care of speakers of the language of interests, taking account of their different attitude in pursuing those interests. Both the person needing care and the provider of care, the caree and the carer, are in the same position in terms of the protection of the rights constitutionally guaranteed to the human person. And they are required to comply with the same duties as are imposed on them by the Constitutional Charter.

Zygmunt BAUMAN, Homo consumens, Lo sciame inquieto dei consumatori e la miseria degli esclusi, Trento, p. 46.
Looking, on the other hand, at the market and the laws by which they are regulated in the case of those exercising public office, today something more and different is incumbent upon them in terms of protecting the interests of the economic subject: the obligation to take care of that subject (the obligation that his freedom – or rather the obligation – to choose must be made fair), on penalty of the carer being expelled from the market.

Today, to speak the institutional language rather than the language of interests means that we do not exercise the deontic power of which we have spoken. It means risking being sidelined, and functional marginalisation.

4. The care of the incapacitated person and the right to choose. Limitation on that right in the light of the principle of proportionality, together with the principles of dignity and personality.

Caring means, according to the laws on Carership, facing the possibility of the person providing for his own interests. Every person (the term ‘person’ is used by the Consumer Code in article 3, and ‘person’ is also used by article 404 of the Civil Code) as from the introduction of Carership into the system, is granted recognition of what can be defined as ‘personal capacity’, in the sense of the possibility of providing for his own interests (article 409 of the Civil Code), also according to the constitutional principle of personality. This is subject to the limitations contained in the measure establishing Carership, although it must protect the right to carry out all those acts needed in order to satisfy the demands of the beneficiary’s own daily life (again, according to article 409).

Such a capacity is assessed having regard to the person’s potential for providing for his own interests. The concept of legal capacity contained in the Civil Code and its predicates (natural capacity, capacity to act) comes before, and is outside, the normative scope of Carership and, in procedural terms, it relates to a sphere other than that of Carership, or should be so related. As stated, Carership implements the constitutional principles in matters of the protection of the person if it is applied in accordance with the dictates of law. Where, for reasons of procedural economy, it has to be used outside its area of action – as in the case of the invalidating Amministrazione di sostegno, a horrendous oxymoron, forced recourse to which must be made under certain provisions issued by the Tutelary Judge and applied with the intention of ‘minimum cost’ invalidation (a sort of ‘interdictive Carership’), thus surreptitiously entering the field of the incapacitation of a subject of rights – a procedure will be followed that guarantees the right of all parties to be heard, which here becomes a matter

\footnote{Others speak of it as material or de facto personality, as clearly distinct from legal personality.}
of constitutionally protected rights (Court of Cassation judgment 25366/2006).

On the other hand, it should be pointed out that the anxiety of the Court of Cassation to map out the area of Carership, marking the confines between this and the traditional incapacitating measures, succeeds only in aggravating the confusion among the various steps in a single journey that treads different paths. Without indulging in metaphor, the road of Carership may lead to the *inabilitazione* [limited interdiction] or the *interdizione* [full expropriation of any legal faculty] of the person (article 413(3)), who becomes a subject of law, and vice versa (article 429(3)), but each stretch of the road has its own rules, which are contained in a single code – that of the protection of the person rather than the man, as inscribed in the Constitutional Charter.

From this visual angle the judgment cited is of absolute relevance, if it is accepted that the problem of guarantees is today shifting from the substantive terrain to the procedural terrain. The function of the substantive norm in the matter of guarantees, because of its lack of predefined meanings, exists only in combination with the architecture of procedural guarantees.

On the assumption that each subject has *personal capacity*, ‘care’ consists of exercising vigilance to ensure that he is in a position to provide for his own interests. If this were not so, his freedom of choice as protected by article 2(2) of the Consumer Code and Directive 2005/29/EC\(^{11}\) on misleading commercial practices between traders and consumers in the internal market\(^{12}\) could be limited by its partial or total exclusion from the market pursuant to the provisions on the *Amministrazione di sostegno* (and now, under article 11(2)(b) of Directive 2005/29/EC, by means of an appropriate judicial measure ordering the cessation of the unfair practice).

The judicial measure limiting such a capacity will be based on a principle that can be used to measure personal capacity in terms of the efficiency of the choices made by the consumer agent on the market, which comes under Community Law (article 5 of the Treaty, article 52 of the EU Charter of Fundamental Rights, article 1(11) of the draft European Constitution, and recitals 5, 6, 18 and 22 and article 9(d) of Directive 2005/29), and under Italian law (article 3 of the Constitution, article 1 of Law 241/1991, § 1669 *bis* of the German Civil Code), the principle of proportionality being influenced by German law. The principle that underlies the system of

\(^{11}\) Given force of law in Italy by Legislative Decree 146 of 2 August 2007, which has made changes to the ‘Consumer Code’ referred to in Legislative Decree 206 of 6 September 2005

\(^{12}\) Recitals 14 and 16 of the Directive: recital 14 deems advertising to be misleading if, by ‘deceiving the consumer [it prevents] him from *making an informed and thus efficient choice*’; recital 16 defines as aggressive those commercial practices that ‘*significantly impair the consumer’s freedom of choice*’
carership, in particular in § 1896.2 and § 1901 and of the German Civil Code with regard to the sub-principles of necessity, in § 1896.2 (carership does not take place if the disability can be catered for by other social services) and adequacy, in § 1901.3 (the carer must comply with the wishes of the person under carership provided that this does not conflict with the latter’s welfare and is not excessively onerous on the carer), together with a general principle of self-determination and protection of the rights of personality in § 1903.2 (the right to contract a marriage, register cohabitation and make testamentary provisions and provisions for death, and to make declarations of will not requiring the approval of the legal representative).

The principle of proportionality should be applied according to the body of law on carership, having regard to the limits placed on the beneficiary, the foundation for which is to be found in article 407(2) of the Italian Civil Code, which states that there must be comparability between the interest of and need for the person’s protection and that person’s own needs and wishes. This principle should be applied according to the sub-principles derived from German public law tradition: necessity (the limitation must be such that there exists no other measure less restrictive of the beneficiary’s personal capacity that would pursue the same preset objective); adequacy (the objective can be pursued only by recourse to that limitation); and proportionality in the strict sense of the term (there must be a proper proportion between the choice of the limitation of the beneficiary’s personal capacity and the soundness of the reasons justifying that limitation). This principle should not be applied mechanically or mathematically (merely by assessing the ‘costs and benefits’), but the judge and the medical practitioner required to support the judge’s decision (article 407 of the Civil Code) should take account of the principles of the Constitution and the EEC Treaty as they relate to the protection the personality and dignity of the human person (articles 2 and 3 of the Italian Constitution and articles 136, 137 and 153 of the EEC Treaty).

The dignity and personality of the human person, therefore, are the subjective counterweights in what might be a mechanical and objective manner of applying the principle of proportionality. In this case, it could be said that it is a principle of just and personal proportionality.

We could also state the same as regards a judgment by the Court of Cassation (no 13584/2006), which places the emphasis on the activities that are and might be performed by the beneficiary as the criterion for the limitation of his personal capacity.

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13 On this subject, I have compiled an item under the same heading for the update appended to Digesto Civile III, and have written two essays: ‘La radice errante dello squilibrio contrattuale’ [The errant root of contractual disparity], in Contratto e Impresa, 6, 2007, p.1431, and ‘The principle of proportionality. A comparative approach from the Italian perspective’, which can be consulted at http://works.bepress.com/andrea_bortoluzzi/1/
The judge, therefore, with the support of the medical practitioner, is responsible for assessing not the beneficiary's legal incapacity but the possibility that he can provide for his own interests. The field of investigation will be that of inaction, in other words the possibility of providing for one's interests is determined by the margin between the subject's activity and inactivity in his daily life. The broader the scope of inaction, the greater the influence exerted on the judge's decision by the capacity to act.

Such a procedure in the protection of the person implies that the professionals and judiciary involved must distance themselves from any predefined, standard conceptions: their supervision is of the acts of the person taken into account, to be considered in the light of his indivisible unity of bios (the finite life of an individual) and zoe (the infinite phenomenon of life), calling for care, by looking at the effectiveness of his behaviour rather than considering him by comparison with an abstract model. Each case, therefore, will follow its own course.

This entails the need to be able to speak the language of interests, for which our institutional armoury of languages seems to be ill-equipped and unserviceable.

Proportionality and the personal capacity of the consumer subject should be investigated when the circumstances call for recourse to the appointment of a Carer. It should not be possible to resort to normative stereotyping, since the lawmakers have confined themselves to determining the borders of the institution of Carership (and, on this subject, I have had occasion to use the oxymoron ‘legislative normlessness’), but have taken as their reference not the abstract model of capacity designated by the Civil Code but the concrete model of the homo oeconomicus, one who acts on the market sometimes as a consumer, sometimes as a trader/producer. We are then called upon to probe not the will but the intention attributed to the trader by the consumer. The accuracy of that intention is subject to the consumer's scrutiny as regards the information given or denied, according to the criteria of behavioural economics, since the possible margins of error of the presumed beneficiary must be examined in the light of a criterion of normality, in what is commonly called the consumerist pathology of over-confidence, the over-estimating of one's own capacities of assessment of the questions implied by the act of consumption. It will therefore be a matter of assessing capacity in the light of the standard of protection required of the trader and the protection expected by the 'average consumer' (representing in practical terms the concept of good faith in the consumer field) in an asymmetrical transaction such as consumption. Directive 2005/29/EC can come to our aid in this respect. It holds that the obligation of information is not discharged by referring to objective criteria, resorting to a list of statements that do not satisfy such an obligation (Annex 1 to the

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Directive) and subjective criteria such as the laying down of a general principle of transparency. It rules that the obligation of information is satisfied only when the information provided or omitted is such as to prevent the consumer from making an uninformed and inefficient choice (recital 14). **Over-confidence** is defined as a marked impairment of the consumer’s capacity to take an informed decision, inducing him to take a transactional decision that he would not have taken otherwise (article 2(e)), and a breach of the trust placed by the consumer in the trader, when the trader exploits a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way that significantly limits the consumer's ability to make an informed decision (article 2(j)). In application of the principle of proportionality, it defines unfair commercial practice in relation to a notional typical consumer, the average consumer, a subject of interest who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. But it is very careful not to provide an abstract or impersonal definition of the consumer. It points out to the interpreter that the application of the principle of proportionality in this case cannot be decided by objective, mathematical criteria (the concept of the average consumer, the Directive points out, ‘is not statistical’) but must take account of certain subjective characteristics such as age, physical or mental infirmity or credulity, making the consumer particularly susceptible to a commercial practice or to the underlying product (recitals 18 and 19, article 5(3)).

In general our vocabulary as carers will change: no longer the will, as we have said, but the ability to grasp favourable situations, through propensity, the capacity of evaluation, individual courage; not the capacity of being the holder of rights, but the capacity to aspire to new achievements focussing on one’s own interests and one’s own advantages; not through a contract but through doing, distinguished by inactivity and dealing with that inactivity, which is a process and a transformation.

5. **The application of principles. The responsibility for care as a deontic responsibility.**

Compliance with the general principles and standards on which Carership is based is subject to direct selection by the judge, with the support of the medical practitioner (or the notary, if the subject is not so vulnerable as to require recourse to the appointment of a support administrator), as recently confirmed by the Constitutional Court (Ordinance 128, 19 April 2007).

This is something entirely new. The limits placed on human actions are not laid down by law as before, which used to imply that compliance with constitutional principles was subject to review by the Constitutional Court, but it is the judge who is called upon to apply those principles. The
constitutional legitimacy of a measure adopted by the judge may be subject to verification if the measure does not abide by the principles that laws and regulations require the judge to observe (the absence of a constitutionally-oriented interpretation of the legislation that has been challenged renders the question manifestly inadmissible, Ordinance 128/2007).

The human person should be protected – to borrow a metaphor recently proposed by the jurist Natalino Irti – not by regulating the course of the river with dams and diversions, but by allowing it to flow along its own watercourse.

As the custodians of the river banks, we must be vigilant to ensure that it does not overflow those banks, and if necessary make good any breach.

Vigilance is quite different from prohibition. Vigilance implies taking care. Institutional language, with all its inherent categories, which assumed the most brutal tones of coercion in the relegating institutions, when used in the open was founded on a dense network of prohibitions that guarded against diversity by means of standardisation. I am thinking of what are known as the secondary norms of my language that made up and still make up a close-knit web of bans that regulate the life of the subject of rights, sanctioning non-existence, nullity and annulability, and which today are being substituted by a set of ‘civil sanctions’ such as re-establishment of conformity, the reduction of prices, termination, the right of withdrawal, and performance in the specific form of an obligation not to act.

In the sphere of Carership, our goal is not the imperative but retributive justice (it was Kelsen who alerted us that proportionality is attributable to the field of retributive justice\textsuperscript{15}), achieved in accordance with the principle of proportionality and in the light of the principles of dignity, personality and the right to health, which ensures that the limits placed on the behaviour of the subject of interest are lawful on condition that they satisfy such a principle – the principle implemented in the field of ‘yes’ – that of freedom of choice – and not in the field of ‘no’, the prohibition of choice.

Justice of this kind is realised on condition that one assumes the responsibility of deciding.

The responsibility of exercising one’s own deontic power. It is a matter of attaining neither an ethical sphere on the one hand nor the deontological sphere on the other.

The ethical sphere is outside and beyond the discipline of Carership. The assumption of responsibility for the Other, the moral act of shouldering an ineradicable responsibility for the fate and wellbeing of another person: all this is absent, painfully absent, from these norms. Absent from the

\textsuperscript{15} ‘The relationship between action and reaction in the norm of justice of retribution is not equality but proportionality.’ Hans KELSEN, I problemi della giustizia, Turin, 1975, p. 35.

legislation is any reference to the act of donating rather than the concept of a market exchange, any reference to the symbolic dignity of the gift of themselves made by those who provide the care.\footnote{Zygmunt BAUMAN, Am I my brother’s keeper? European Journal of Social work, no 3., 2000, pp. 5-11.}

One should merely consider how weak is the concept of the ‘impossibility of providing for one’s own interests’ contained in Italian law by comparison with the 1999 Israeli law on the equal rights of the disabled person, which establishes the right to support for human needs in such a manner as to ‘enable the person to live with the maximum degree of independence, with his personality and in dignity, realising his potential to the full’.

Also absent – and here we can add ‘fortunately’ – is any deontological or protocol indulgence, any indulgence in the proceduralisation deployed in the field of social welfare to neutralise the ethical option. The uniqueness of human suffering should be exempt from any classification that places more stress on procedural performance than on moral assessment.

A form of proceduralisation is present in the care provided to the disabled person by the 1994 Swedish law, which bases its intervention on a set of social provisions. There is the god man, to whom recourse is made for mental disabilities and who does not intervene in the sphere of the beneficiary’s civil rights, acting only with the person’s consent, whose rights and duties are similar to those of an attorney. There is the trustee (forvaltare), who is appointed in the case of marked disability and whose tasks are similar to those of the Italian Administrator. There is the contact person (kontact), paid out of public funds and used to alleviate the disabled person’s inactivity and isolation. There is the personal assistant, who helps the person with many transactions. And there is the escort, who accompanies the disabled person so that he can indulge his interests in sporting, cultural and leisure pursuits.

What is asked of the carer is that he exercise his deontic power: the capacity, as we have seen, to assume his duties and fulfil his obligations and keep faith with them.

And that he provide the care required to the one who asks it of him, following his own individual path.

Even if this exercise has a price. And by being unwilling to pay this price one seeks to evade this responsibility, transforming the recipients of care into legal categories of case histories, setting in full motion the process of depersonalisation endemic in any bureaucracy.

To quote Kafka again: ‘The chains of tortured humanity are made of ministerial papers’\footnote{Michael LÖWY, op. cit., p.11.}.

Our task, the minimum task assigned to us by law, is to overturn this procedure, to use a script that, to the extent possible and within the
restricted confines of this law on the person, releases from his chains the one who is different. And, therefore, it is to combat any pigeon-holing of the content of the law by bureaucratic classification.

These are minimum objectives, the objectives of those who compile the ministerial papers but leave it to literature and poetry – the vital and not too far distant touchstones – to subvert the pretentions of the powerful.

We need merely recall what Emperor Constantine wrote in an edict in 316 AD: ‘An individual condemned to fight as a gladiator or to work in the mines for crimes in which he has been caught in flagrante will be tattooed … not on the face, because the penalty for his condemnation will already be expressed by his hands and his calluses. So that his face, which has been formed in the image of the divine beauty, should be defiled as little as possible’.

Andrea Bortoluzzi.