

Systems of advocacies for the elderly in a comparative perspective

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Good morning ladies and gentlemen! When we talk about *advocacies* for frail and elderly people, we somehow refer to a *legal* framework supporting the aged. In the history of mankind, the notion of a specific legal institution fulfilling this task is a rather young phenomenon. Until today, the matter of taking care for the elderly is strongly determined by custom and religion. We only have to think of the fourth commandment: “Honor your father and mother”. Interestingly enough, it is – apart from remembering the Sabbath – the only commandment demanding and not prohibiting a certain kind of behaviour (“Thou shall not kill”, “Thou shall not steal” etc.). In fact, from a sociological point of view, an informal way of protection and representation by family members, beyond any actual legal framing, is still the most widespread normal case – not only in our countries, but all over the world.

Having said this, I would like to draw now an ideal-typical genealogy of advocacy-systems which will hopefully facilitate the legal comparison. From its very beginning until today, the law of guardianship and protection for incapable adults is characterized by the contradiction and dialectic between care on the one hand and disfranchisement on the other hand. At an early stage of legal history, facts and norms cannot easily be distinguished. This especially applies to the old Germanic notion of guardianship (the so called *munt*, which is still present in the German term *Vormund*). It was an all-encompassing relation of protection and power covering the person as well as the property of the ward. In comparison to this idea, the Roman law guardianship concepts of *tutela* (tutorship, for minors and free women) and *cura* (curatorship, for lunatic or prodigal free men) were already much more differentiated. As opposed to the wide-ranging tutorship, it was possible to limit a curatorship to certain economic tasks. In the case of curatorships for prodigal persons, a formal incapacitation procedure was required. However, it seems that the Roman jurists were not quite sure about the legal nature of their guardianship institutions. In the *Corpus Iuris Civilis*, we can find two almost identical definitions,



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distinguishing themselves just in one, albeit significant word. The first and older one defines the *tutela* as the *vis ac potestas in capite libero ad tuendum eum* (Dig. 26,1,1, pr) which can be translated as “authority and control over a free person in order to protect her”. In the second definition (Inst. 1,13,1), *vis* – “authority” or even “violence” – is replaced by *ius*, “right”, indicating a less actual and already more juridified understanding of a power relation stressing not only the rights, but also the duties of the guardian. In any case, the **early model of guardianship** conceptualises protection as a comprehensive prerogative of the guardian. Its function is the protection both of the weak person and her assets against abuse and neglect. The legal focus, however, clearly lies on the preservation and management of the family property. In contrast, the status of the ward comes close to a person without any rights.

In later times, the guardian’s activities were more and more controlled by public authorities. When the modern state emerged in Continental Europe, guardianship law also became a contested field of policing and disciplinary social control over the mentally unsound. The issue was somehow divided between private and public law. To make a long story short: only as a consequence of enlightened legal thought, it became clear that guardianship should be primarily seen as a matter of private law representation, and not state authority. At the same time, it was realised that guardianship seriously restricts civil rights and therefore needs at least some basic procedural safeguards. As a result, mandatory contradictory incapacitation procedures were introduced. The typical feature of this **traditional civil law model**, as I would like to call it, is the idea that legal protection of incapable adults is realised by the appointment of a proxy by a civil court: the guardian. Family members are preferred as guardians. As a consequence of the formal court decision, the ward loses his or her legal competence in almost all matters. The guardian remains the only chance to take part in legal life. The substantial statutory provisions of this traditional civil law model mainly emphasize the management of the ward’s property. An objectively defined best interest of the ward is considered more important than the actual wishes of the person under guardianship.

Since the 1970s and 80s, concerns about guardianship have been on the legal reform agenda of several Western countries. The paternalistic rationale of the traditional model

has successfully been challenged and modified into to a more **welfare oriented style of guardianship**. Now guardians have to take into account the wishes of their wards, even when they run contrary to objective reasonable interests. Persons under guardianship always retain at least a minimum of legal competence. The former two step procedure with a contradictory incapacitation procedure merges into a single stage guardianship procedure being situated in the area of non-contentious litigation. Substantially, guardianship law is complemented by a quite comprehensive principle of personal care prescribing the establishment of a personal relation between the guardian and the ward. Guardianship does not only become an individualized tailor-made solution, but also, at least in certain cases, a matter of professional social work, which is carried out by state-funded non-profit organizations. Additionally, new forms of advocacies, both alternatives and functionally specific complements of guardianship are introduced: advance directives and patient's or resident's advocacies. Although considerably changing the logic of the traditional notion of guardianship, this welfare model still operates through the figure of a proxy being entitled to make decisions on behalf of the ward.

The paradigm of substituted decision-making has been widely abandoned in our last ideal-typical regime, the **assistance model**. Here the focus clearly lies on supporting and assisting frail people in exercising their remaining capabilities as long as possible. An assistant – a new legal figure – can legally represent them, but only with their consent. The meaning of guardianship and incapacitation is limited to a narrow area of major economic dispositions. There is no such thing as an all-encompassing notion of personal care-taking by a guardian. At the same time, this model favours the establishment of powers of attorney, living wills and other advance directives.

In the reality of guardianship law, there are no such clear and simplified ideal-types. Furthermore, this typology does not necessarily imply any value judgement claiming a story of teleological progress. However, many differences between our countries actually follow these different historical and theoretical patterns. This can be well observed in the **Spanish and Catalanian** advocacy system. Although it was only introduced in 1983, a few years after the political change to democracy, it is still very close to a traditional civil law model. So, it heavily relies on guardianship and incapacitation, albeit divided in

different subcategories like *tutela*, *curatela* and the “patrimony administrator”. The law knows a contradictory incapacitation procedure with the Attorney General as a party. The legislator’s main concern was the establishment of a civil court control over families exercising guardianships. Additionally, non-profit making entities, the tutelary institutions, have been allowed to become guardians. This was also a move away from a pure family-oriented system already incorporating some elements of a welfare model. Nevertheless, the Spanish law still favours family members as guardians.

The **Czech Republic** has seen a completely different development. Nevertheless, its guardianship law resembles the traditional civil law model too, even though it went a typical Eastern-European path. What does that mean? In the Czech system, which still witnesses a two-step-procedure, the concrete decision of the court is very important. This is a consequence of the poor substantial regulation on *opatrovnictví*, which is a legacy of the communist era, when the role of civil legal relationships was downplayed. Following a strict state-paternalistic philosophy, legal guardianship was regarded as a matter of social defence by incapacitation against mentally ill people. Falling behind already established civil law safeguards, the civil procedural code from 1963 and the civil code from 1964 significantly simplified the legal framework dealing with incapacitation and guardianship. In 2005, the procedural law was amended with regard to fair trial. However, as critics say, the Czech Republic – like other post-communist states – has, at least until now, failed to bring its guardianship law in line with current human rights standards.

The **Austrian** system of advocacies for the elderly has been a forerunner model for a welfare-oriented style of guardianship law. Dating back to 1984 and triggered by concerns about psychiatry-reform, its basic aim has been the establishment of a principle of personal custody by professional state-funded social workers as guardians, organized in guardianship associations. The legislator’s perceived model cases of wards were not the frail elderly, but mentally ill and handicapped people in outpatient treatment. However, nowadays, the most widespread case is – as in other countries – guardianship for the aged exercised by family members. Until today, persons being put under guardianship automatically lose – apart from minor issues of daily life – their ability to conclude a valid contract with regard to the matters covered by the guardianship. The existence of special

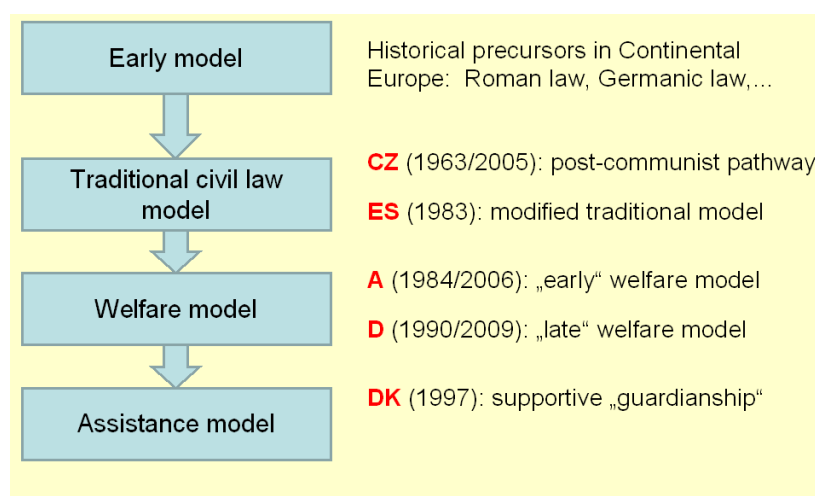
advocacies for inpatient psychiatry clients and residents of nursing homes is a very remarkable feature about the Austrian system. As opposed to Germany, guardians are not allowed to decide on any restrictions of personal freedom of movement. Facing an increasing demand for guardianship and growing costs, the Austrian legislator has enacted major law reforms in 2006, by which alternatives to guardianship were introduced: living wills, powers of attorney and the less formal “representation by family members”. The latter legal institution aims at the avoidance of guardianship by a “juridification of the informal”.

Powers of attorney have also become an established element of the advocacy system in **Germany**, but without specific provisions in the civil code. Quite similar to the situation in Austria, the German guardianship law and its notion of *rechtliche Betreuung*, legal care, follows a strong welfare-oriented pattern. Likewise, since its establishment in 1990, it has been challenged with exploding costs. The German guardianship model is rather broad. As opposed to the Austrian system, it includes decisions on forcible measures. Nevertheless, guardianship in Germany is less invasive insofar as it does not affect the legal capacity of the ward. There is a so called “double competence”, which means that people under guardianship maintain their legal ability to conclude valid contracts, unless the court orders an obligation to obtain consent (*Einwilligungsvorbehalt*). With regard to the relation between the guardian and the ward, the German law knows an explicit statutory obligation to explore and to follow the wishes of the ward. Consequently, the ward’s best interest is understood in a strictly subjective manner. In particular, since the latest reform in 2009, there is a provision establishing the guardian’s duty to secure the enforcement of living wills.

In **Denmark**, advance directives and powers of attorney also seem to play a major role, although there is no registration system like in Germany and Austria. Denmark has the youngest guardianship system of all countries. On the one hand, this is true in a literal sense: the law on guardianship, the *Værgemålsloven*, which is – contrary to all our other jurisdictions – not part of the civil code, was put into force only in 1997. On the other hand, the Danish system already approaches an assistance-model. It stresses self-determination and personal autonomy. Denmark is the only country where not only courts, but also

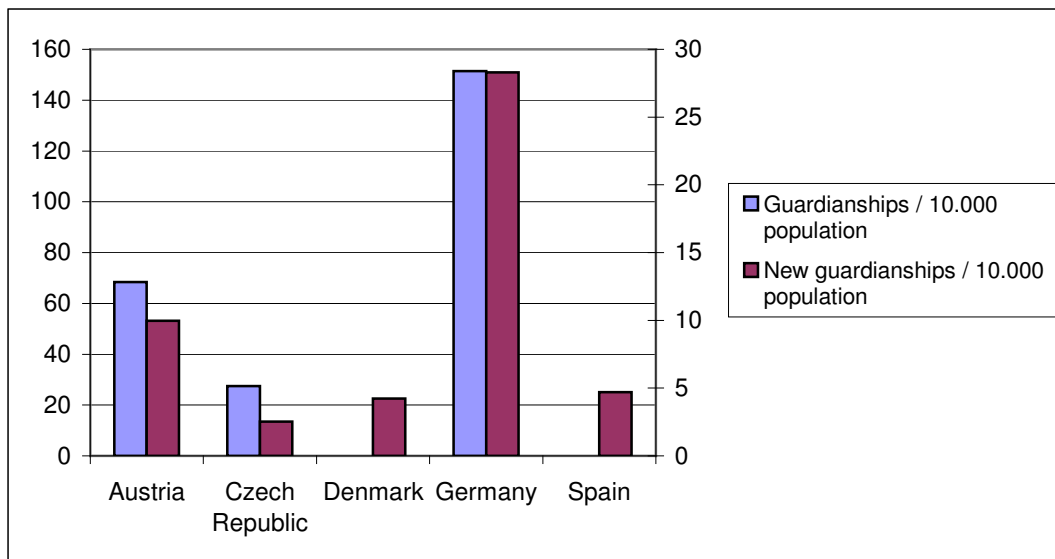
regional administrations are responsible for guardianships. The latter is true for a distinct form of supportive guardianship, which does not entitle guardians to make any decisions on behalf of the ward. The traditional court-controlled concept of guardianship is mainly narrowed down to major economic issues. Although the Danish law knows a possibility of guardianship for personal matters too, there is no elaborated legal notion of personal custody (*Personensorge*) like in Germany and Austria.

Figure 1: Ideal-typical and actual models of guardianship



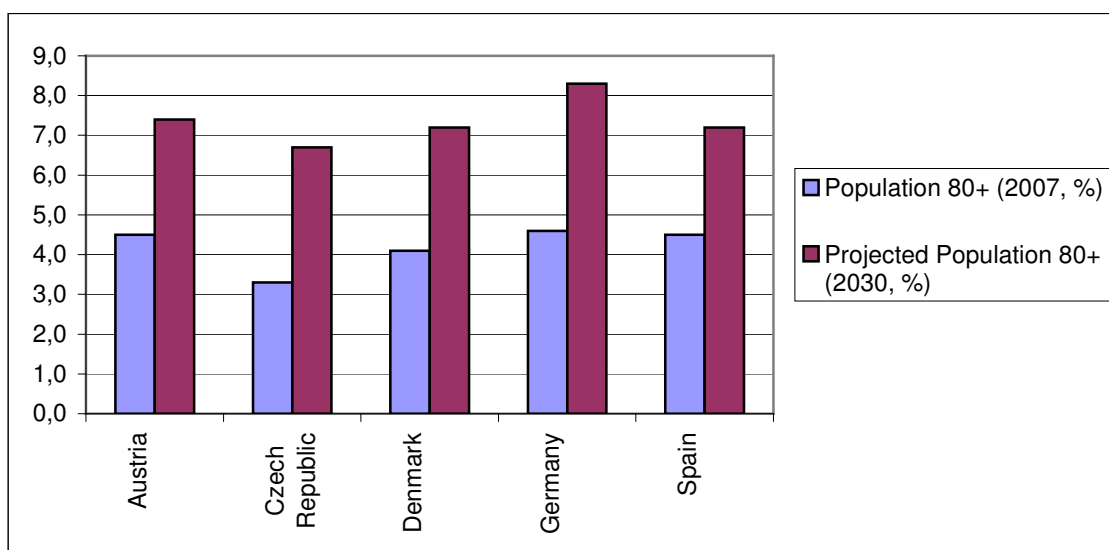
Now, I would like to briefly turn to the actual application of guardianship law (Figure 2). The existence of amazing disparities between our countries is one of the most interesting findings of this research project. So far, there are only incidence data available for all our jurisdictions at a nation-wide level. They indicate the number of newly established guardianships in 2006 or 2007. In the case of Austria, the Czech Republic and Germany, we were also able to collect prevalence data depicting the number of all guardianships. However, it seems that these two measures are highly correlated.

Figure 2: Guardianship statistics (Source: Project ADEL)



How can we make sense of these astonishing empirical differences? First and foremost, it is important to point out that there is no such thing as an automatic association between the ageing of societies and their demand for formal advocacies in the shape of guardianship. As the next chart shows, the demographic differences with regard to the population above 80 years – now and in the coming decades – are far too little to be able to account for the disparities with respect to the application of the law (Figure 3).

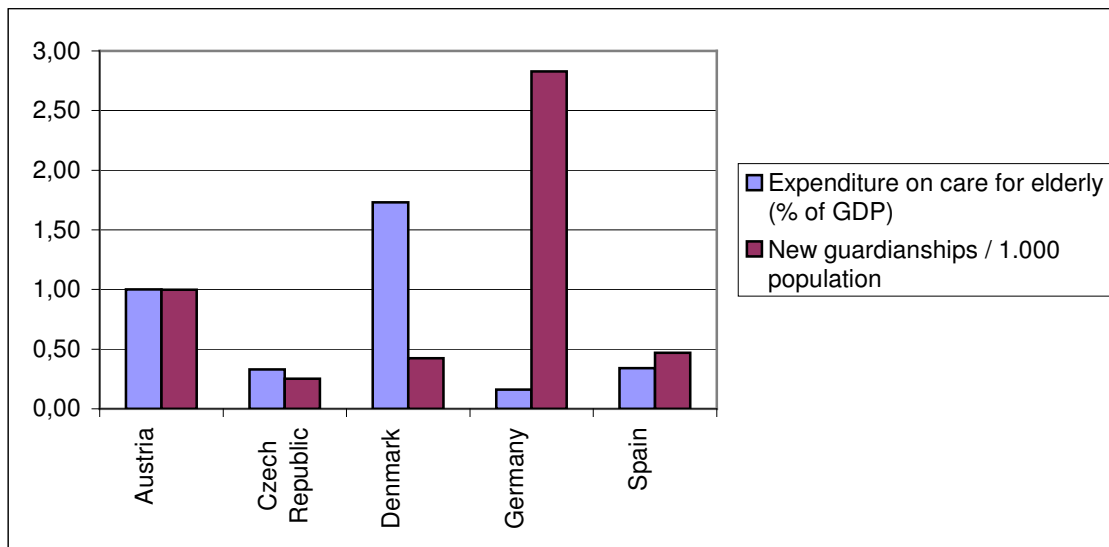
Figure 3: Demographic situation (Source: European Demographic Datasheet 2008)



Dear ladies and gentlemen, to conclude this overview, let me just present two rough assumptions which could explain at least parts of the empirical differences with respect to our advocacy systems. The first one refers to a possible **connection between specific guardianship models and particular welfare systems** using Esping-Anderson's famous typology of welfare regimes. It seems that "corporatist" or "conservative" regime types (which we have in Austria and Germany) with (insurance-based or means-tested) benefits in cash create a comparatively high demand for guardianship. Care allowances, for instance, have to be managed. Somebody has to apply for them, they have to be administered. Moreover, a welfare-oriented guardianship-system upholding a strong notion of personal care can easily be functionalised to compensate for social welfare spending cuts. Especially the German care insurance might, as experts say, just not be very well adjusted to cases of dementia. On the contrary, a "social democrat" welfare system like in Denmark, where wide-ranging social benefits in kind exist, seems to reduce the institutional and cultural significance of guardianship.

This can be exemplarily illustrated by looking at the Eurostat figures concerning expenditure on care for the elderly. In "Southern" or "transitional" welfare types like in Spain and the Czech Republic, informal or family-oriented ways of helping the frail and elderly are more widespread anyway. Their rather traditional guardianship systems are less able to replace social welfare benefits. It goes without saying that this quite rough and schematic account cannot explain the striking disparities between Austria and Germany. They somehow remain a puzzle. Solutions might be the existence of special collective advocacies in Austria and the more liberal market of professional guardianship in Germany, where – to put it simple – more supply creates more demand.

Figure 4: Expenditure on care for the elderly and guardianship (Source: Eurostat, Project ADEL)



Finally, my second assumption takes into account that different legal cultures witness **different degrees of juridification**. If we just look at the frequency of civil litigation, we find a pattern that fits well to the application of guardianship law. In the Czech Republic, in Denmark and in Spain, it is less common to resort to civil courts than in Germany and Austria. Or in other words: it is more widespread to resolve one’s own matters outside the realm of the formal law. This may also affect legal matters of frail elderly people.

Figure 5: Demand for civil litigation and guardianship (Source: National statistics offices, Project ADEL)

