

# The ethical and legal protection of the vulnerable individual: Current status and prospects for the application of the guardianship institution in Italy

*Rosagemma Ciliberti*

Section of History of Medicine and Bioethics, Department of Health Science (DISSAL), University of Genoa, Genoa, Italy

**Abstract.** The recent judgment of the European Court of Human Rights (ECtHR, July 6, 2023) condemning Italy for abusing the institution of legal guardianship to the detriment of Mr. C.G. provides an opportunity for reflection on the legislation itself. In the legislator's understanding, this tool was designed to address the various and specific deficiencies (and potentialities) of individuals in vulnerable conditions in compliance with ethical principles that uphold the respect for dignity, autonomous decision-making, and equality of every human being. These areas necessitate criteria of proportionality and caution in the application of measures that interfere with very personal rights, especially those of the "vulnerable" individual. It is evident that the attention given during the construction phase of the new legal guardianship framework has yet to find equal correspondence in everyday reality raising significant implementational issues of a political, social, and ethical nature. The legal guardianship like the entire Italian judicial system, undoubtedly suffers from a chronic shortage of human and material resources, despite the concrete efforts of numerous guardianship judges and appointed support administrators. The case examined by the ECtHR prompts us to consider the necessity of ensuring greater protections for the beneficiaries, as well as respecting their right to participate in decisions concerning them. It also prompts reflection on the nature and indispensability of a relationship that finds legitimacy only in consensus, listening, and respect.

**Key words:** legal guardianship, legal guardian, vulnerable person

## Introduction: Restoring voice to vulnerable people

The juridical institution of the legal guardianship was introduced into the Italian legal system in 2004 as a flexible tool to assist individuals who, due to illness or physical or mental impairment, find themselves unable, even partially or temporarily, to manage their own affairs (1-3). The instrument of legal guardianship holds significant ethical value as it aims to protect vulnerable individuals with minimal restriction on their activities and capacities, always respecting the actual resources available in their living environment and paying utmost attention to the individual's will and inclusivity (4, 5).

In a very different perspective from the past, caring for the needy person translates into recognizing the fragile individual as someone who can and should live within a relational context, preserving and fully enhancing their capacities and potential.

In the light of the regulatory framework outlined by Italian legislature, the legal guardianship represents an important and valuable bridge constructed among the beneficiary, services, and guardianship judge. It is capable of balancing various interests and defining boundaries and channels of communication.

In a perspective of broad recognition of individual needs, the law on legal guardianship introduces, therefore, a highly flexible and adaptable legal instrument

based on the capabilities of the vulnerable person in order to reconcile the most suitable protection for the specific case with the care of the weaker individual (6).

Such an approach is evident in many provisions of the regulations focused on the participation and direct involvement of the beneficiary, as well as on the collaborative logic adopted by the legal guardian (LG).

The ethical implications of this new legal perspective regarding individuals in need are evident when compared to previous cultural and protective schemes aimed at excluding vulnerable individuals from their relational context, with the appointment of a “third” party, namely a tutor who completely replaces the incapacitated individual, excluded from any activity (7). These implications also arise clearly from the fact that the legislator grants each individual the possibility to determine their own future through the appointment and selection of an authorized person to represent their wishes, before any state of incapacity or impossibility occurs (8-10).

The decision to appoint a LG in favor of an individual, involving a necessary limitation of their legal capacity (albeit to varying extents), still requires a careful and rigorous assessment of the prerequisites that can justify it. This gives rise to an ethical dilemma for healthcare professionals, who must seek a balance between protecting the individual and respecting their autonomy.

When such significant implications for an individual’s private life are at stake, the judge must carefully weigh all relevant factors to assess the proportionality of the measure to be adopted and minimize any opportunity for excess or arbitrariness. As constantly emphasized by Rodotà in this legal context, it is highly appropriate to invoke the principles of prudence, attention, lightness, flexibility, and humility for ethical conduct (11, 12).

It is interesting to note that in some cases, case law has excluded the establishment of a protective measure when the beneficiary, although lacking autonomy, is integrated into a family network attentive to their needs and free from conflicts or suspicions of abuse (judgment no. 21887/2022 of the Court of Cassation) or is supported by institutional entities, such as social services, tasked with assisting them. In situations where a certain health condition does not entail

a concrete limitation of autonomy, the establishment of a protective measure would be unnecessary and burdensome (13). As argued by the Vercelli Court, the provision of a LG would add further duties and expenses (such as reporting, document requests, and court access), which would only accumulate alongside activities more directly aimed at the daily, personal, and financial care of the interests of the needy individual, without any tangible benefit to their well-being (14).

Depriving an individual of their legal capacity, even partially, is a very serious measure, particularly when referring to intimate or essential rights, and is reserved for exceptional circumstances that can justify it solely for the benefit of the weak and non-self-sufficient person (15, 16).

In light of these ethical principles, which are a corollary of recognizing the centrality of the individual and their dignity, we examine the case of Mr. C.G., subjected to legal guardianship due to excessive prodigality. The case has also garnered media attention for being the subject of a report by a well-known Italian television program (“Le Iene”) and for the numerous interventions of the National Guarantor of the rights of persons deprived of liberty.

In this matter, the European Court of Human Rights (ECtHR) intervened with the judgment (ECtHR, first section, July 6, 2023, case of Calvi and C.G. v. Italy, application no. 46412/21), in which the Court deemed the interference by national authorities in the private life of the applicant completely disproportionate, carried out in the absence of procedural safeguards suitable to ensure the maintenance of the proper balance between the need to protect the physical and mental integrity of the applicant and the need to respect their dignity and right to self-determination (17).

Beyond the specific case, the judgment of the ECtHR provides an opportunity to reflect on an instrument of great ethical significance, aimed at offering support to vulnerable individuals, yet.

Twenty years after the approval of the law on legal guardianship, this reflection allows us to make an assessment of the adherence to the inspiring ethical principles since, as often happens, the attention given during the approval phase of a norm does not correspond to the attention of that of the application.

## The case

The story of Mr. C.G., born in 1930, a former teacher and owner of a substantial family estate, as reported in the final judgment from Strasbourg, is lengthy and complex.

The elderly man in his life “followed ‘Franciscan’ precepts, living simply and donating his money to those in need,” wrote the judges. In particular, he had granted access to some of his properties to a caregiver (later convicted, in June 2022, in the first instance for exploitation of incapacity)

According to his family members, C.G. “was not capable of managing the limits of this practice, which placed him in a vulnerable situation”. For this reason, in 2017, at the request of his sister, who had justified the request with his old age and tendency to spend excessively, a guardianship judge appointed a LG.

In 2018, C.G. and his sister had requested the court to revoke the measure, arguing that the circumstances justifying it had changed. The contrary opinion of social services, who believed instead that the intervention of a LG was necessary for various aspects of C.G.’s life, led the guardianship judge to confirm the legal measure. Indeed, over time, the same judge had progressively expanded the powers of the LG, entrusting it with the care of the applicant, as well as the management of issues concerning his health and place of residence. In particular, the LG had been expressly authorized to place Mr. C.G. in a care and nursing facility and to provide consent on his behalf (a power clearly substituting the will of the beneficiary).

In October 2020, upon the proposal of the LG, which reported that their ward no longer had a general practitioner or a health card allowing access to medical care, the guardianship judge finally ordered the admission of Mr. C.G. to a nursing home for non-self-sufficient elderly people. The applicant vehemently opposed this measure, even going as far as refusing food to protest against this decision. It is noteworthy that although the admission occurred without actual physical coercion, the guardianship judge had authorized the use of public force if necessary.

Following the media uproar surrounding the applicant’s case, the LG then decided to prohibit any communication between C.G. and third parties,

except for the mayor of the applicant’s municipality of residence. This decision of the LG was confirmed by the guardianship judge, who, a few days later, with his own order, prohibited third parties from meeting with C.G. or contacting him by phone.

On several occasions, between 2021 and 2023, the National Guarantor of the rights of persons deprived of liberty visited the nursing home where C.G. was placed, presenting a formal recommendation to the public prosecutor’s office (whose outcome has never been known, as noted by the European Court of Human Rights), urging the magistrates operating there to turn to the guardianship judge to request the cessation of the applicant’s forced admission and the adoption of a guardianship regime suitable for his needs and in accordance with his will. The Guarantor had indeed emphasized that the placement of the applicant in the nursing home had been decided against his will. Moreover, the gradual return of the applicant to his own home had also been recommended by one of the experts appointed by the guardianship judge.

This is a saga that started in 2020 and lasted for years seeing three legal guardians, six psychiatric evaluations, and, as mentioned before, the intervention of the Guarantor. Furthermore, since 2021, the evaluations, with different diagnoses not far apart (such as narcissistic personality disorder initially and obsessive-compulsive disorder with elements of depression later), had nevertheless highlighted the need for a gradual return to G.C.’s home, as he had never lost his capacity for social integration according to the appointed experts. However, this recommendation was never considered or implemented by either the LG or the guardianship judge.

## The decision of the European Court

The application was lodged by Mr Calvi (“the first applicant”) on his own behalf and on behalf of his cousin C.G. (“the second applicant”), following C.G.’s admission to the nursing home in October 2020.

Before the European Court of Human Rights (ECtHR), Mr. Calvi, on his own behalf and on behalf of his cousin C.G., complained about his inability to have contact with his cousin C.G. and regarding C.G.,

his forced placement in a nursing home since 2020 and the impossibility of returning to his own home or receiving visits in the institution where he was living.

The applicants argued that there had been a violation of Articles 5 (Right to liberty and security) and 8 (Right to respect for private life) of the European Convention on Human Rights (“the Convention”). However, the ECtHR considered that the issues raised in this case should be examined exclusively in the light of Article 8 of the Convention, which reads as follows: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

With the decision in *Calvi and G.C. v. Italy*, published on 6.7.2023, the ECtHR found a violation of Article 8 (right to respect for private life) of the Convention (right to respect for private life) by the Italian State.

The ECtHR, considering the impact of legal guardianship placement on C.G.’s private life, observed that although the judicial authorities had initially conducted a thorough assessment of his situation before placing him in a nursing home, during his stay they had not taken any measures to maintain his social relationships, nor had they developed a strategy to facilitate his return home, taking into account his particular vulnerability which they considered to have identified.

According to the ECtHR, C.G. remained isolated from the outside world, particularly from family and friends. All visits and requests for phone calls were screened by his LG or by the guardianship judge, and the only person allowed to visit him during his three-year stay in the nursing home was the mayor of the city where he lived.

The ECtHR observed that this monitoring had been carried out since the moment of admission to the institution, and that the guardianship judge had based his decisions on reports submitted solely by the LG, deeming it unnecessary to interview C.G. and rejecting Mr. Calvi’s requests for contact.

The ECtHR attached particular importance to the fact that C.G. had never been declared legally incapacitated or been subject to any measure of total administration of his affairs, with experts indicating, to the contrary, that his capacity for social integration was not completely compromised. The Court noted

that, despite these factors, C.G. was nonetheless entirely dependent on his LG in nearly all aspects of his life and that the measure had not been limited in time.

The ECtHR declares itself fully aware of the difficulty that national authorities have encountered in reconciling respect for the dignity and self-determination of the individual with the need to protect and safeguard their interests, especially in cases where the person concerned, due to their abilities or individual circumstances, finds themselves in a state of great vulnerability.

The Court nevertheless considers that in the present case, a fair balance has not been struck between the effective safeguards in place to prevent abuse, as required by norms of international human rights law, and G.C.’s wishes and preferences. Indeed, despite the ethical principle of autonomy and the protection of vulnerability, G.C. was heard personally only once during his placement in the care home, was not involved in the decisions made at various stages of the proceedings, and was subjected to contact restrictions with his family.

The decision regarding the admissibility of the application, as previously mentioned, presented by Mr Calvi for himself and on behalf of Mr G.C to ECtHR, is also interesting. Mr. Calvi’s position was declared inadmissible by the Court due to failure to exhaust domestic remedies (the complaint under Article 720 bis of the Italian Code of Civil Procedure). However, the appeal filed by Mr. Calvi on behalf of Mr. G.C. was considered admissible.

The ECtHR noted that Mr. G.C. was unable to personally submit an appeal to the Court, as he had a LG, and considering that in this case, the appeal concerned precisely the restrictions imposed on him by the LG, with the consent of the guardianship judge. This implied, first of all, a real risk that G.C. would be deprived of the effective protection of the Convention rights invoked. Moreover, in the absence of a conflict of interests between Mr. Calvi and G.C., concerning the subject matter of the proceedings.

Finally, the ECtHR considered that Mr. G.C.’s case raised serious issues regarding the living conditions of elderly people placed in nursing homes, which were of general public interest due to the vulnerability of people living in such institutions. Consequently,

according to the Court, in the present case, there were exceptional circumstances that – according to its case law (Lambert et autres v. France ([GC], no 46043/14, § 102, ECtHR 2015; on the necessity of a duly signed written authorization, Hirsi Jamaa et autres v. Italy [GC], no. 27765/09, §§ 52 and 53, ECtHR 2012) – it was recognized that Mr. Calvi was authorized to act in the proceedings before it, as a representative of his cousin.

The ECtHR further establishes that there has been a violation of Article 8 of the Convention, as, according to the Court, Mr. CG found himself placed under the complete dependence of his guardian in almost all areas and without any limits in duration.

Furthermore, the Court observes with concern that the authorities effectively abused the flexibility of the LG to pursue objectives that Italian law assigns, with strict limits, to compulsory medical treatment (TSO) regulated by Italian Law 833 of 1978, arguing that the TSO legal framework had thus been circumvented by means of abusive recourse to legal guardianship.

The Court also notes that “a strict regime of isolation was decided by the LG even though C.G. requested to return home. Consequently, he was deprived, with few exceptions, of any contact with the outside world and of any requests for autonomous phone calls or visits. The Court further concluded that, in the present case, ‘if the interference pursued the legitimate aim of protecting the general well-being’ of Mr. CG, such interference ‘was not, however, compared to the range of measures that the authorities could adopt, neither proportionate nor suitable to his individual situation’ (17).”

The European Court’s judgment finally states that: “any protective measure taken against a person capable of expressing their own will must, as far as possible, reflect their wishes.”

Considering the impact that the placement of CG under guardianship had on his private life, the ECtHR observes that, although the judicial authorities undertook a thorough assessment of his situation before placing him in a nursing home, they did not attempt, while he was there, to put in place any measures to maintain his social relations or to implement a specific path to facilitate his return home, in view of

the particular vulnerability they claimed to have identified. On the contrary, following his placement in the nursing home, CG was subjected to isolation from the outside world, particularly from his family and friends.

## Considerations

Legal guardianship, as a tool for safeguarding vulnerability, represented, at least in the legislator’s intentions, a turning point compared to traditional measures for protecting incapacitated individuals. In full adherence to the ethical principles of safeguarding the fragile person, the establishment of this figure is designed and constructed not by providing pre-packaged and serial measures, but tailored to the specific individual and their fragility, taking into account their desires, aspirations, and will.

Illustrative of the purposes of the LG is the ruling of the Civil Section n. 3751 of the year 2024, which states that “legal guardianship is a tool aimed at protecting the person, wholly or partly lacking autonomy due to any type and severity of disability or impairment, without demeaning them and without limiting their ability to act unless strictly necessary”. In the same judgment, it is stated that ‘the law calls upon the judge to undertake the challenging task of adapting the measure to the individual’s specific situation and of varying it over time in order to ensure the maximum possible protection with the least sacrifice of their capacity for self-determination”.

In many cases, the expectations of Italian Legislature have been met, and human stories frozen for years in stagnant situations, not necessarily attributable to improper conduct of the individuals involved, have evolved positively. Examples of this are the numerous measures in support of emotional ties and the continuity of affection (18).

There is no doubt that the case brought to the attention of the ECtHR is fraught with critical issues. As aptly emphasized by the Court (which has cited multiple international sources), any protective measure taken against a person capable of expressing their own will must reflect that will as closely as possible. The objective is therefore to limit the person’s freedom as little as possible while providing maximum protection.

When significant implications for a person's private life are at stake, the judge must carefully weigh all relevant factors to assess the proportionality of the measure to be adopted. Furthermore, necessary procedural safeguards require minimizing any risk of arbitrariness.

The story of C.G. illustrates well the enormous power disparity between fragile individuals and those who decide their fate, raising questions about the actual achievement of the institutional objectives of the law on legal guardianship.

The relationship between the LG and the beneficiary is an indispensable aspect and, at the same time, a vulnerability that requires attention.

Recognizing and giving space to reciprocal relationships emerges as the most effective method for understanding and responding to the needs and aspirations of the fragile person. However, this operation is anything but simple and straightforward. All too often, within the broader social landscape, there is a tendency among some professionals to interpret the will of others in a self-centered and uncritical manner.

When a person struggles to clearly express their own will or make decisions with firmness, there is no codified and universal answer on the best course of action in their interest. In these situations, the relational dynamics can become risky, especially when the boundaries and roles of the individuals involved around the fragile person are not clearly defined.

In some situations, services themselves require legal guardians to maintain an emotional distance from the beneficiaries, limiting their involvement to purely administrative or financial matters. While establishing a "right distance" in every relationship is crucial to avoid potential complications, a clear separation of roles could, however, compromise the comprehensive understanding of the beneficiary's needs and aspirations. This understanding is essential for ensuring a respectful intervention on the person, as the more intense and richer the exchange of information between all parties involved—the beneficiary, the LG, the family members, and the services—the more likely it is to approach the desired goal.

This exchange, which represents a form of relationship in itself, entails significant commitment for all participants, although closed and oppositional attitudes may emerge from some individuals.

Filtering and selecting tasks based solely on what is aseptically established in the appointment decree of the LG, without considering the importance of a comprehensive and thorough understanding of the person, risks going against legislative and ethical principles. This narrow and sectoral approach could overlook crucial aspects of the beneficiary's life and fail to address their individual needs and desires. The ethical principles underlying this legislation, particularly the principles of vulnerability, autonomy, and beneficence, require a holistic and sensitive approach that recognizes the complexity of the person, ensuring adequate support and accompaniment that truly reflect their needs and preferences. Therefore, even in cases where the appointment decree exclusively references the management of the financial aspect, the LG retains the duty to start from the beneficiary's will, whether it is consciously expressed or must be carefully interpreted and reconstructed. Furthermore, it should be noted that financial or administrative management rarely has no consequences on "non-material" aspects of the beneficiary's life, which can be equally important, such as the choice of place of residence or the ability to maintain daily routines.

Respecting the law indeed requires that the decree, using the words of Cendon, the law's inspirer, be like a "custom-made suit," tailored to the specific needs of the beneficiary and, as such, flexible and adaptable to changes in the wearer's life.

Another critical issue concerns the progressive exponential growth of appointments, especially for individuals residing in care facilities, with a significant increase in the recourse to trusted lawyers who are sometimes tasked with overseeing a high number of beneficiaries. This situation often makes the role of the LG extremely challenging, sometimes resulting in a mere administrative task.

This scenario can compromise the quality of care provided to individual beneficiaries and jeopardize the overall effectiveness of the LG system, without the implementation of adequate assurances for appropriate and responsible workload management.

Closely related to this situation is the issue of reimbursements for LG also regarding the concern that for some lawyers, this activity may evolve into a sort of standalone profession, contrary to the norm

that provides for LG to be free of charge and that the guardianship judge may possibly allocate a fair allowance to the LG, taking into account the extent of the estate and the difficulties of administration.

Within this framework of reflections, considerations arise regarding the possibility that the role of an LG could be assumed with a professional perspective or motivations and sensitivities that extend beyond this sphere. Even noble motivations deserve careful evaluation, as pure compassion towards others can transform into sentimentality, cynicism, or manipulation. In such situations, a professional approach might prove more effective and functional. Those undertaking the role of LG must possess not only technical skills but also an adequate repertoire of personal tools to manage the emotional and relational challenges that may arise.

Nor can the impacts of appointing a LG for a family member be ignored, as it often entails the separation of spouses' assets, as well as reporting obligations that imprison the family member in fear of making mistakes and constant anxiety over every spending decision.

## Conclusions

In the past twenty years, since the parliamentary approval of the law on the appointment of LG, few private institutions have experienced such rapid growth as the one under examination, significantly expanding the range of individuals benefiting from this tool. In addition to individuals with mental disorders, whose cases were initially more common, there are now to be considered in this context, all those who, for various reasons, struggle to manage their lives independently. This includes elderly individuals who are no longer self-sufficient, individuals with physical disabilities, those temporarily facing difficulties due to illness, as well as individuals struggling with dependencies, debilitating disorders, and, according to some, even individuals with limited education, detainees, hermits, homeless individuals, and migrants. The Italian Court of Cassation has also recognized that those previously subject to interdiction measures.

The LG, like the entire Italian judicial system, undoubtedly suffers from a chronic shortage of human

and material resources, despite the commitment of numerous guardianship judges and appointed legal guardians.

However, Mr. G.C.'s case should prompt us to consider the need to always ensure greater protections for those under guardianship in every situation, as well as to value their involvement and voice before the guardianship judge, especially once the legal guardianship has commenced.

Traditional alternative instruments to guardianship, such as delegation or power of attorney, appear to have lost value, while the opportunities offered by more recent legislative interventions and legal rulings on healthcare and end-of-life issues struggle to be integrated into everyday practice, even when the appointment of a guardian could be replaced by lighter and more flexible support (19, 20).

Physicians can play a fundamental role as allies and advocates for patients with cognitive impairment, helping to maintain their autonomy for as long as possible and ensuring the implementation of appropriate protective measures should the patient lose decision-making capacity (21).

Certainly, to address the current challenges associated with the implementation of the legal guardianship law, concrete actions aimed at improving the effectiveness and adequacy of this protection instrument are necessary. One of the initial actions could be the repeal of incapacitation and interdiction, which represent more restrictive forms of guardianship and can excessively limit the autonomy of the person.

This intervention would enable a more person-centered approach, focusing on their real abilities and needs. Additionally, it is important to strengthen the investigative and oversight tools to ensure accurate assessment of individual situations and effective supervision of LG's activities. All this is aimed at contributing to preventing abuse and ensuring transparent and responsible management of the assets and interests of vulnerable individuals.

At the same time, it is crucial to strengthen the tools aimed at ensuring the flexibility of the legal guardianship system, allowing for better adaptation to the diverse needs and circumstances of the beneficiaries. For instance, this could involve introducing mechanisms for periodic review of protective measures.

An additional and shared specification of the scope of application of the legal guardianship system could be beneficial to avoid excessively broad or restrictive interpretations that may differentially affect the rights and freedoms of the individuals involved. This could be achieved through a thorough reflection on situations where LG is genuinely necessary and appropriate, while ensuring the respect for fundamental principles of dignity, autonomy, and human rights of vulnerable individuals.

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### Correspondence:

Rosagemma Ciliberti  
 Department of Health Science (DISSAL)  
 University of Genoa, Genoa, Italy  
 E-mail: ciliberti@unige.it