



ORIGINAL PAPER

Full Legal Capacity Acquired before the Age of Majority

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Abstract

The legal capacity to exercise rights concerns one's aptitude to conclude civil legal acts by oneself. The existence and the quality of mental capacity are taken into account in this field, therefore it is considered that the "life experience" which is necessary for "one's own legal life" is acquired gradually, with age. Civil law regulates three distinct situations: a. the lack of legal capacity of minors up to 14 years of age; b. limited legal capacity of minors between 14 and 18 years of age; c. full legal capacity, starting when a person has turned 18. There are two exceptions to the rule of acquiring full legal capacity to exercise rights when attaining the age of majority. First, the minor acquires full legal capacity by marriage. On the other hand, on serious grounds, the guardianship court may recognize the full legal capacity of the minor who has turned 16. This latter exception, regulated in the 1864 Romanian Civil Code, was abandoned during the communist regime and is now "rediscovered".

Keywords: *full legal capacity to exercise rights, civil age of majority, married minor, guardianship court, serious grounds*

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Preliminaries

The civil capacity of the natural person is regulated in the new Romanian Civil Code i.e. in Book I – On persons, Title II – The natural person, Chapter I - Civil capacity of the natural person (Boroi, Stancu, 2011). The former section of this chapter, namely articles 34-36 New Civil Code (hereinafter NCC) focuses on the natural person's capacity to have rights, while the latter section, namely article 37-48 NCC concerns the natural person's capacity to exercise rights (Ungureanu, 2011; Vasilescu, 2012; Ungureanu, Munteanu, 2011; Nicolae, 2013; Chelaru, 2014; Stănescu, Bîrsan, 1995). Civil capacity is recognized to all persons (article 28 paragraph 1 NCC), and its structure consists of two elements: the capacity to have rights and the capacity to exercise rights. Under article 34 NCC, the capacity to have rights is a person's aptitude to have civil rights and obligations. It begins at birth and ends upon death. Exceptionally, the children's rights are recognized from conception, but only if a child is born alive (*infans conceptus pro nato habetur, quoties de commodis ejus agitur*). The capacity to exercise rights is the person's aptitude to conclude civil legal acts by oneself (article 37 NCC) so that he will acquire and exercise civil rights, also assuming and performing civil obligations. The existence of the natural person's capacity to have rights and the mental capacity constitute the premises of the natural person's capacity to exercise rights. The first premise does not raise any questions, since in modern law the legal nature of man's capacity to have rights is its *universality*, in the sense that it belongs to all persons. The second premise concerns the human faculty to discern, to distinguish between things, to think right and in depth, and to appreciate the real value of things. In civil law, the mental capacity includes human power to properly understand the civil legal consequences of his willful acts. The physical, biological existence of a person determines his legal existence, but it is not enough in order to support "one's own legal life". The legal capacity to exercise rights is regulated in such a way that the absence of the mental capacity or its existence to a lesser extent does not affect the interests of the person participating in the legal life. The law intervenes in the sense that the recognition of a person's legal capacity depends on his power to understand and assess correctly the significance of his taking part in the legal life.

In this context, the mental capacity expresses the human ability to correctly appreciate the significance of his conduct acts, and the conclusion of any civil legal act necessarily involves such an ability. The existence of the mental capacity depends on the attainment of a certain stage of development of human mental life, which is reached only at a certain age, as well as on the normal development of human thought processes. Essentially, the mental capacity depends on the *age and health of the human mind*, elements that the civil law considers while regulating the legal capacity to exercise rights.

Classification of natural persons according to the existence of the capacity to exercise rights

Based on the existence and quality of mental capacity, seeing that the "life experience" necessary for "one's own legal life" is acquired gradually, with age, the civil law regulates within the scope of the legal capacity to exercise rights, *three* distinct situations and, accordingly, classifies natural persons into three categories, according to the existence of the capacity to exercise rights.

The first category comprises persons *lacking legal capacity to exercise rights*, thus including minors up to 14 years of age, on the one hand, and mentally ill persons laid under interdiction, on the other hand. It is considered that their legal situation corresponds to the total lack of mental capacity. For those who do not have the legal capacity to exercise rights, legal acts are concluded on their behalf by their legal representatives, i.e. parents or guardians. Nevertheless, the person lacking legal capacity may conclude or perform, by himself, certain acts expressly provided by law, preservation acts, as well as current disposal acts of little value, performed at the time of their conclusion (article 43 NCC).

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Secondly, a minor who has turned 14 has *limited legal capacity to exercise rights*. The period between 14 and 18 years of age corresponds to a developing mental capacity, a transition situation between the lack of mental capacity and the full mental capacity. The legal acts of the minor with limited legal capacity are concluded by himself, with the consent of his parents or, where applicable, of the guardian, and in such cases provided by law, with the authorization of the guardianship court. The consent or authorization may be given, at the latest, at the time of concluding the act. A minor who has turned 14, therefore with limited legal capacity to exercise rights, may perform acts of preservation, acts of administration which do not prejudice him, and current disposal acts of little value, performed at the time of their conclusion (article 41 NCC). He cannot enter into contracts of donation or legal documents that guarantee the obligations of another person, even if he had the guardian's consent. Likewise, he cannot conclude legal acts with his guardian, the spouse of the guardian, relatives in a straight line or with the latter's siblings (article 147 NCC). The third category includes natural persons who have *full* legal capacity to exercise rights. Under article 38 NCC, full legal capacity begins when a person comes of age, i.e. at the age of 18. At this age a person is mature enough to have a legal life of his own. In this case, the presumption of mental capacity is *relative*, therefore it can be reversed if the lack of mental capacity is proved.

It has been argued that it is not right that maturity, on which the legal capacity to exercise rights is based, should be appreciated according to criteria depending on each individual. It would not be possible in practical terms to ascertain the existence of each person's mental capacity and it would not be in compliance with the interests of legal life security, to determine legal capacity at the individual level, based on the development of each person. Therefore, the only possible and rational solution adopted by law is to establish a certain age, from which a person can participate alone in the conclusion of all his civil legal acts. Historically, we can mention the controversy in Roman law between the two schools of Roman legal thought regarding the age at which boys reach puberty. On the one hand, the Sabinians established it on an individual basis, after bodily examination, in relation to the physical development of the young, and, on the other hand, the Proculians established it at the age of 14. The latter opinion prevailed in Justinian's law, hence we can find it in modern legislations.

Capacity to exercise rights and capacity in tort

The capacity to exercise rights cannot be confused with the natural person's capacity in tort, which resides in his aptitude to be liable for the tort committed. The rules on acquiring full or limited legal capacity solely refer to a person's aptitude to conclude civil legal acts. These rules do not concern liability in tort. The only requirement for the existence of capacity in tort is the effective existence of mental capacity, not of a certain age. The capacity in tort, also called discernment capacity is regulated as a condition for the existence of the tortfeasor's guilt in the context of the regulations on the condition of guilt for entailing liability in tort for one's own actions. As a matter of principle, in order to be liable in tort, the natural person must be aware of his actions. The intellectual factor of guilt refers to the person's mental ability to understand the meaning of his actions, to discern between what is allowed and disallowed, licit and illicit.

In this field, article 1366 NCC provides: (1) "a minor who has not turned 14 years of age or a person laid under judicial interdiction shall not be liable for the damage caused, unless his mental capacity is proved at the time of committing the act; (2) a minor who has turned 14 years of age shall be liable for the damage caused, unless he proves that he lacked mental capacity at the time of committing the act". Regarding the mental capacity, the text establishes two contrary presumptions. The former, a presumption of lack of mental capacity in the case of minors under the age of 14 and the persons laid under interdiction. The latter, a presumption of the existence of mental capacity for the person who has turned 14 years of age. Both are

relative legal presumptions that may be rebutted by evidence to the contrary. As for the lack of mental capacity necessary to entail liability in tort, article 1367(1) NCC provides that the one that caused damage is not liable if at the time of committing the act he was in a state, even temporary, of mental disorder that made it impossible for him to realize the consequences of his act. The state of mental disorder must be accidental, because if “it was caused by himself, through intoxication produced by alcohol, drugs or other substances” the doer is guilty and shall remedy the damage caused to the victim (article 1367 paragraph 2 NCC). One can notice that, while the capacity to exercise rights is defined only in relation to legal acts, the capacity in tort concerns only illicit and guilty acts attributable to the tortfeasor. The very existence of mental capacity is deemed according to different landmarks in the two fields. In the case of illicit acts, mental capacity involves the person’s aptitude to distinguish between right and wrong, between what is generally permitted and forbidden in society. In the case of legal acts, mental capacity implies the person’s aptitude to distinguish between what is useful or harmful at the personal level, appropriate or inappropriate for oneself.

First exception: the status of the minor who gets married

Pursuant to article 39 NCC, a minor acquires, by marriage, full legal capacity to exercise rights. In case the marriage is annulled, the minor who was in good faith at the time of marriage retains full legal capacity.

The first exception to the rule according to which full legal capacity is acquired at the age of majority is the situation of the minor who gets married. He acquires full legal capacity to exercise rights as an effect of marriage. Under article 259 paragraph 2 NCC, it is considered that the purpose of marriage is to start a family, therefore it cannot be admitted that the spouses, who are able to become the guardians of the children who will be born of their marriage, should be themselves under the protection of their own parents. On the other hand, the principle of equality of spouses requires the solution of full legal capacity of the minor who gets married. Otherwise, it would be difficult to support equality if one spouse has full legal capacity and the other spouse has limited capacity to exercise rights (Chelaru, 2012: 53).

On serious grounds, a minor who has turned 16 can get married on the basis of a medical opinion, with the consent of his parents or, accordingly, of the guardian, and the authorization of the guardianship court within the jurisdiction of which the minor lives (article 272 paragraph 2 NCC). If a parent refuses to consent to the marriage, the guardianship court rules on this issue, for the interest of the child prevails. As a rule, the marriage may be concluded if the future spouses have turned 18, the age at which they acquire matrimonial capacity. The age waiver may be granted on condition that several cumulative requirements provided by law are met. First, it has been considered that in this field there are “serious grounds” where, *exempli gratia*, the young woman is pregnant or a child has already been born. On the other hand, the medical opinion is essential and prior to parental consent and court authorization. In the absence of a favorable medical opinion, the marriage cannot be concluded. This medical document must prove a level of physical, physiological and mental maturity enabling the minor to assume duties specific to marriage. The paper also certifies the existence of serious medical reasons, if any. As for the consent of the parents or guardian, it can be given before the guardianship court, while deciding on the application for the authorization of the minor’s marriage. It is considered that the minor is under the protection of these persons. The consent is a unilateral act given in consideration of the minor’s marriage to a particular person. The purpose of the guardianship court’s authorization is to ensure the seriousness and solidity of the grounds. It appears as an opportunity filter in the interest of the minor, which is prevalent, as assessed from the perspective of the circumstances of the case, taking into account the medical opinion and the position of the parents or guardian in relation to the minor’s marriage project. (Emese, 2012: 276). From a historical perspective, in the 1954 Family Code, now repealed, only the woman could marry before the age of 18 and could

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thereby acquire full legal capacity when she turned 15. The difference in legal treatment between men and women in matters of marriage, was traditional in Romanian law, and could be found in the old Romanian law, in the system of the 1864 Romanian Civil Code, also maintained in the 1954 Family Code (Dogaru, Cercel, 2007: 102). The new Romanian Civil Code admits, by exception, that marriage may be concluded at the age of 16, without distinguishing between male and female.

Second exception: anticipated legal capacity to exercise rights

Article 40 NCC establishes a second exception to the rule that full legal capacity is acquired at the age of majority and provides the minor who has turned 16 with the possibility of acquiring full legal capacity to exercise rights. This solution is part of the general concern of modern society to grant more rights to the persons under 18 years of age, from the perspective of the well-known debates regarding their political rights, even the reduction of the age of civil majority. Historically, one can mention the fact that the 1864 Romanian Civil Code regulated the *emancipation* of minors in Chapter III, Title X – “On minority, on guardianship and on emancipation” of Book I, article 421-433. Emancipation *enhanced* the content of the minor’s capacity to exercise rights, the minor acquiring important rights as a person and, in particular, the administration and use of his goods. Moreover, the 1817 Calimach Code, applicable until the entry into force of the 1864 Romanian Civil Code, regulated “the privilege of age” (articles 230-231, articles 333-336), an institution originating in Roman law, in the institution of *venia aetatis*, according to which the *sui juris* minor, that is a woman who was 18 and a man who was 20 years of age, could obtain the right to alienate or mortgage her/his real estate.

The Romanian Civil Code of 1864, which established civil majority at the age of 21, regulated implied or legal emancipation, on the one hand, and express emancipation (articles 422-433 Civil Code 1864), on the other hand. First, the minor was automatically emancipated by law, *ipso jure*, by marriage. Secondly, the unmarried minor could be emancipated by his father, and in his absence, by his mother at the age of 18. This express emancipation arose from a declaration of the person vested by law with the right to emancipate the minor before the civil court and it was recorded in a special register. For enforceability against third parties the declaration of emancipation was published in the Official Gazette (Alexandresco, 1907: 829). The emancipated minor had a “guardian until the age of majority, appointed by the family council” in accordance with article 425 of the 1864 Civil Code. Under the provisions of article 40 NCC, “on serious grounds, the guardianship court may recognize the full legal capacity of the minor who has turned 16. For this purpose the court shall also hear the parents or the guardian of the minor, and shall require, whenever necessary, the opinion of the family council”.

Under these circumstances, a minor who has turned 16 is entitled to lodge an application with the guardianship court, requiring the recognition of anticipated legal capacity to exercise rights. Hypothetically, he has limited legal capacity and can start legal proceedings *by himself*, without any prior permission or authorization. The minor’s application must state the “serious grounds” for requiring anticipated legal capacity, as well as the evidence supporting his request. These grounds must essentially relate to the importance and real interest of the minor to access full legal capacity. Such a request may be made only in the *interest of the minor*, and its seriousness is solely appreciated by the guardianship court. In comparative law, it was considered that the following were not serious grounds: the intent of the parents or guardian to cease fulfilling the tasks of parental authority or guardianship; the fact that the minor wanted to require alimony or welfare benefits. One should take into account that pursuant to article 42 NCC, a minor may conclude legal acts concerning his work, artistic and sporting pursuits or profession, with the consent of his parents or guardian and with the

observance of the special law, if applicable. In this case, the minor *alone* exercises the rights and performs the obligations arising out of these acts and may dispose of the income received.

In accordance with the Labor Code, which can be the special law that article 42 NCC refers to, the natural person acquires the capacity to work at the age of 16, so that the minor at this age may conclude an employment contract by himself without anyone's consent. A minor may also enter into an employment contract at the age of 15, but only with the consent of his parents or legal representative. This contract may be concluded only for activities suitable for the physical development, skills and knowledge of the minor who has turned 15, if this does not jeopardize his health, development and professional training. Finally, it is prohibited to employ minors under the age of 15.

Under such circumstances, the minor who claims full legal capacity cannot lodge an application only on the basis of his wish to conclude certain "legal acts concerning his work, artistic and sporting pursuits or profession". If the parents supported these pursuits of the minor or consented or were to consent to these legal acts, it does not seem to be a request based on article 40 NCC. These acts can be concluded under article 42 NCC without any need to obtain anticipated legal capacity. On the other hand, the fact that the minor takes care of himself, as an employee or employer, while living separately from his parents, corroborated with the fact that his parents, due to their age and lack of education, cannot consent to his legal acts appropriately, may constitute a situation enabling the application of article 40 NCC. Likewise, the fact that the minor is precocious, having the physical, intellectual and mental development of an adult, in the absence of other elements, is not enough in this matter.

To decide on such an application, the guardianship court must hear the parents or guardian of the minor, and in the case of guardianship, the opinion of the family council is also necessary. The opinions expressed by the parents or guardian and that of the family council have *advisory status* in this matter. As a consequence, the court may also rule against their will expressed within this procedure. The legal proceedings are not contentious (articles 527-537 Civil Procedure Code), since in the case there is no defendant against whom the minor has a claim (Reghini, Diaconescu, Vasilescu, 2013: 141).

Similarities and differences between the two exceptions

The situation of the minor requiring the guardianship court to recognize his full capacity to exercise rights cannot be confused with the situation of the minor who gets married, even if in both cases the minor acquires full legal capacity for the future.

First of all, both exceptions are accessible to the minor who has turned 16 (article 272 paragraph 2 NCC for the matrimonial age, and article 40 NCC accordingly). Under this age, it is impossible to conclude a marriage or admit a request for anticipated full legal capacity. Secondly, in the case of marriage, acquiring full legal capacity is a consequence of marriage, so it legally arises out of the marriage act. On the other hand, in the case of the application lodged by the minor to obtain full legal capacity, the solution is pronounced by the court. Thirdly, although in both cases the law imposes the need for "serious grounds", the content of this notion is different. In the case of marriage the grounds concern the conclusion of marriage, so they are also accompanied by an appropriate medical document. In the case of the minor's request, the grounds concern directly the acquisition of legal capacity. The law does not require a medical opinion here, but it is possible that the court may seek the opinion of an expert to see the state of physical and mental development of the minor requiring anticipated capacity to exercise rights. Finally, one can mention the role of the parents or guardian, in both cases, but with significant differences. First, the minor's marriage requires parental consent or, where appropriate, the consent of the guardian, person or authority empowered to exercise parental rights. In the event that a parent refuses to consent to the minor's marriage, the guardianship court decides on this divergence in the best interest of the child. On the other hand, under article 40 NCC, the parents or guardian of the child, as applicable, are only listened to. But, at

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least for the situation in which the minor's parents, present before the guardianship court, oppose vehemently, the admission of the minor's request will be difficult to motivate. Only under article 40 NCC is the consent of the family council required.

In the doctrine there is a dispute on the situation of the person who obtained anticipated full legal capacity under article 40 NCC and who wants to marry. The question arises whether under these circumstances the special conditions required by article 272(2) NCC must be met, concerning serious grounds, medical opinion, consent and authorization of marriage. It is important to note that in French law, although the emancipated minor is fully capable, similarly to a major, in case of marriage and adoption the same rules are applicable as to the non-emancipated minor, under article 413-6 of the French Civil Code. With regard to the consent of the parents, given the rationale and effect of emancipation in the sense of ceasing parental authority, it is acceptable that it is no longer required at the time of concluding the marriage by the emancipated minor. By judicial emancipation, the minor is no longer under his parents' authority, therefore he no longer needs their consent.

But the problem remains for other special conditions and one can bring arguments in the sense of maintaining them in the analyzed hypothesis. For example, one can invoke the rationale of the medical opinion in relation to the purpose of marriage, that the guardianship court is not compelled to verify when ordering the emancipation of the minor. We believe that, if we consider that the exception regulated by article 40 NCC is part of a wider concern of modern society to give more rights to people before the age of 18, we can admit that the emancipated minor can conclude the marriage by himself, without further consent or authorization (Avram, 2013: 45-46).

Conclusions

In Romanian law, the natural person has full legal capacity to exercise rights, namely the aptitude to conclude civil legal acts by oneself when the person comes of age, i.e. at the age of 18. There are two express exceptions to this rule, when the natural person acquires full legal capacity before the age of majority, but not prior to reaching the age of 16. In case the minor acquires full legal capacity through marriage, the provisions of the New Civil Code removes the traditional distinction in this matter, between male and female. For the future this possibility is admitted regardless of sex. The doctrine and case law have clarified the problems in this matter in time, in the interpretation and application of the provisions of the Family Code and the 1864 Romanian Civil Code. This experience is also useful in the interpretation and application of article 39 and article 272 NCC which regulate the possibility of the minor who has reached the age of 16 of getting married and the legal consequences of this act. In case the minor lodges an application with the guardianship court for the recognition of full legal capacity, the application of article 40 NCC may encounter in practice, at least in the beginning, some difficulties. Given the novelty of this solution, it was expected that the notion of "serious grounds" should be clarified by the legislature. The enumeration of several examples that might constitute serious grounds in this matter can be supported by *de lege ferenda*. On the other hand, the 1864 Romanian Civil Code expressly regulated the revocation of emancipation (article 431-432), a situation in which "the minor shall have a guardian again – or be subject to parental authority – and this situation shall last until he reaches the age of majority". The new Civil Code does not contain provisions on this possibility, so one can argue that, once acquired, full legal capacity is irrevocable. One can notice that the age from which, in accordance with the provisions of the 1864 Civil Code, the minor could be emancipated by his father or mother, the age of 18 respectively, became the age of majority in time. It is possible that, under the new Civil Code, the age at which one can obtain anticipated full legal capacity, i.e. the age of 16, might become the age of majority in the future.

Last, but not least, the law provides certain exceptions in the sense of acquiring full legal capacity *before* the age of 18, but not in the sense of acquiring it after the age of majority.

Theoretically, one can mention the hypothesis of the minor between 14-18 years of age who is laid under judicial interdiction in accordance with article 169(2) NCC. As long as the interdiction is banned, pursuant to article 177 NCC, after reaching the age of 18, it is an exceptional situation in the sense of acquiring full legal capacity after the age of majority.

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