LEGISLATION AND CHALLENGES: CIVIL CODE, EUROPEAN UNION'S LAW AND INTERNATIONAL MEDIATION

THE NATURAL PERSON'S ANTICIPATED FULL CAPACITY OF EXERCISE AS PROVIDED BY THE CIVIL CODE

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Abstract: In the system of the 1864 Civil Code, the emancipated minor acquired a limited capacity, and the emancipation was a period of transition between full incapacity and full freedom. The 1954 system maintains "implied emancipation", but removes the term reminding of the past and allows only women to marry before turning 18. In addition, through the "limited" capacity of exercise, minors aged 14–18, regardless of sex, acquire an "intermediate" capacity. In search of a balance between tradition and modernity, the current system maintains "implied emancipation", preserves the "antechamber" of full capacity and restores "express emancipation". Two hypotheses are regulated, i.e. when a natural person can acquire full capacity of exercise before turning 18: the conclusion of a valid marriage and judicial recognition. In both cases, the minimum age required is 16 years and specific "solid grounds" must be proved.

Keywords: civil capacity; anticipated full capacity of exercise; marriage of the minor; solid grounds.

1. Preliminaries. The Romanian Civil Code contains in Book I – "On persons" –, Title II – "The natural person" –, Section II entitled "The capacity of exercise" (art. 37–48), two articles that govern the possibility for the natural person to acquire the capacity of exercise before reaching the age of 18. First, art. 39 of the Civil Code, with the marginal name "*The situation of the married minor*", provides: "The minor shall acquire, through marriage, full capacity of exercise" (par. 1); "If the marriage is annulled, the minor who was in good faith at the time of concluding the marriage shall retain full capacity of exercise" (par. 2). In turn, art. 40 of the Civil Code, with the marginal name "*Anticipated capacity of exercise*", stipulates in a single paragraph: "For solid grounds, the guardianship court may recognize to the minor who has reached the age of 16 the full capacity of exercise. For this purpose, the parents or guardian of the minor shall also be heard, requesting, whenever necessary, the consent of the family council".

The above-mentioned provisions have been analyzed, interpreted and applied in different concrete situations in the doctrine and case law, and the points of view

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expressed and the judgments pronounced in the 10 years of application of the Civil Code have highlighted several aspects that will be highlighted in these lines[1]. In the new Code we find a beneficial use of the rules outlined in the doctrine and case law on various issues, from different legal institutions, discussed in the previous period, so that those solutions and arguments remain valid and relevant[2]. In the matter of the civil capacity of the natural person, which is of interest here, the legal principles and solutions that remain are those enshrined by the previous legal rules, which were repealed by art. 230 of Law no. 71/2011 for the implementation of Law no. 287/2009 in the Civil Code. In this context, it can be said that the aspects and arguments supported in the doctrine regarding "the notion, elements and vocation of civil capacity", as well as those regarding "the notion, premises and legal characters of the capacity of exercise", elaborated during the application of Decree no. 31/1954 (repealed by art. 230 letter n of L. no. 71/2011), remain topical. Professor Gheorghe Beleiu masterfully captured the specificity of the legal notions in question, and his opinion influenced, through the strength of arguments and clarity of presentation, the legal solutions in this matter[3]. Synthetically, civil capacity is that part of the legal capacity of the natural person which expresses the possibility of having and exercising his civil rights and that of having and assuming civil obligations, by concluding legal acts.

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[1] E. Chelaru, Comentariu art. 39 – 40 C.civ., in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordonatori), *Codul civil. Comentariu pe articole*, ed. 3, C. H. Beck Publishing, Bucharest, 2021, pp. 54–56; M. Nicolae (coord), V. Bîcu, G.- A. Ilie, R. Rizoiu, *Drept civil. Persoanele*, Universul Juridic Publishing, Bucharest, 2016, pp. 199–201; C. T. Ungureanu, *Drept civil. Partea generală. Persoanele*, Hamangiu Publishing, Bucharest, 2016, p. 81; E. Chelaru, *Drept civil. Persoanele*, ed. 5, C. H. Beck Publishing, Bucharest, 2020, pp. 90–92; O. Ungureanu, C. Munteanu, *Drept civil. Persoanele în reglementarea noului Cod civil*, ed. a 3-a, revăzută și adăugită, Hamangiu Publishing, Bucharest, 2015, pp. 221–225; I. Reghini, Ș. Diaconescu, P. Vasilescu, *Introducere în dreptul civil*, Hamangiu Publishing, Bucharest, 2013, pp. 136–142; M. Avram, *Drept civil. Familia*, Hamangiu Publishing, 2013, pp. 43–52; C. C. Hageanu, Dreptul familiei și actele de stare civilă, ed. a 2-a, revizuită și adăugită, Hamangiu Publishing, Bucharest, 2017, pp. 24–28; E. Florian, *Dreptul familiei. Regimuri matrimoniale. Filiația*, ed. a 6-a, C. H. Beck Publishing, Bucharest, 2018, pp. 36–39; A. – M. Nicolcescu, *Capacitatea de exercițiu anticipată a minorului*, "Dreptul", nr. 7/ 2016, pp. 85–90; C. R. Romițan, *Vârsta matrimonială – condiție de fond la încheierea căsătorie*, in "RSJ", nr. 1/ 2020, pp. 18–26. For the case law in this matter, we have used the database www.rolii.ro, accessed between July and September 2021. This study includes aspects presented in several debates in the last period, and the Romanian version is to be published. The translation into English is provided by Assoc. Prof. Simina Badea, PhD, Faculty of Law, University of Craiova.

[2] V. Stoica, Noul vechi Cod civil, prefață la "Drept civil. Drepturile reale principale", C.H. Beck Publishing, Bucharest, 2009, pp. XI–XII – ed. a 2-a, 2013, pp. XIII– XV–, which emphasizes the openness of the current Civil Code "to the rich contribution of case law and doctrine with regard to various institutions" previously regulated by laws repealed by the entry into force of the new Code.

[3] Gh. Beleiu, Drept civil. Persoanele, Bucharest, 1982, pp. 40–135; Gh. Beleiu, Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil, ediția a XI-a, revăzută și adăugită de Marian Nicoale, Petrică Trușcă, Universul Juridic Publishing, Bucharest, 2007, pp. 309–360; I. Dogaru, S. Cercel, *Drept civil. Persoanele*, C. H. Beck Publishing, Bucharest, 2007, pp. 22–106; G. Boroi, *Drept civil. Partea generală. Persoanele*, ed. a III-a, revăzută și adăugită, Hamangiu Publishing, Bucharest, 2008, pp. 474– 499.

It has been emphasized that three essential ideas should be kept in mind for the content of the definition of civil capacity: a) civil capacity is part of a person's legal or lawful capacity; b) civil capacity expresses the possibility for the person to have and exercise his civil rights and to have and assume civil obligations; c) the phrase "by concluding legal acts" refers only to "exercising civil rights" and "assuming civil obligations", and not to the aptitude to "have" civil rights and obligations, which is not conditioned by the conclusion of civil legal acts. On the other hand, civil capacity is a branch capacity, "civil law-related", which differs from the capacity of other branches of law by structure, beginning, content, termination[4]. Finally, the capacity of exercise of the natural person is that part of the civil capacity of a person which consists in the aptitude to exercise his civil rights and to assume his civil obligations by concluding civil legal acts. It has been highlighted that the "vocation of civil capacity" requires that the definition given to the capacity of exercise of the natural person should retain only the "elements of civil law" of this capacity: a) a person's aptitude to acquire and exercise civil rights; b) the aptitude to assume, fulfill or perform civil obligations; c) both performed by civil legal acts[5].

2. "Solid grounds" within the meaning of art. 40 of the Civil Code in case law. The interpretation and application of the provisions of art. 40 of the Civil Code in the various situations raised several practical issues concerning the existence of solid grounds which entitle a minor to have anticipated full capacity of exercise recognized.

a. Circumstances that constitute solid grounds. First, *the possibility and necessity of exercising parental authority in the event that a minor has, in turn, a child, has been constantly assessed as a solid ground*. Thus, it was held that a minor who was 16 years old and lived with her parents, gave birth to a child, who

[4] In the doctrine, on the contrary, the widely extended previous thesis sustained the idea that the natural person had only one capacity of use and of exercise which together made civil capacity as capacity in society, not civil law capacity, with limitations that may vary from one branch of law to another, Tr. Ionașcu, in Persoana fizică în dreptul R.P.R, autori: Tr. Ionașcu, I. Chiristian, M. Eliescu, P. Anca, V. Economu, Y. Eminescu, M. I. Eremia, V. Georgescu, Academiei R.P.R. Publishing, Bucharest, 1963, p. 153; C. Stătescu, Drept civil. Persoana fizică. Persoana juridică. Drepturile reale, Didactic and Pedagogical Publishing, Bucharest, 1970, p. 14, that mentioned: "the capacity of use is the general aptitude of persons to acquire rights and assume obligations"; S. Ghimpu, I. T. Ștefănescu, Ș. Beligrădeanu, Gh. Mohanu, Dreptul muncii, tratat, vol. I, Scientific and Encyclopedic Publishing, Bucharest, 1978, p. 173, considering that the regulations specific to each branch of law on capacity do not contain differences of essence and structure which would justify such a great peculiarity of the notion of capacity and determine that, instead of single, civil capacity, we should conceive as many legal capacities as branches of law. For the respective controversy and the arguments of the branch capacity thesis, Gh. Beleiu, *Drept civil. Persoanele*, 1982, pp. 43–46.

[5] Gh. Beleiu, *Drept civil. Persoanele*, 1982, pp. 104–105. At present, the provisions of art. 34 of the Civil Code, for the notion of capacity of use of the natural person, and art. 37 of the Civil Code, for the notion of capacity of exercise of the natural person, provide *expressis verbis* "the elements of civil law" of these notions, unlike art. 5(2)(3) of Decree no. 31/ 1954, where the term "civil" was absent.

was in her care and in that of her maternal grandparents, was entitled to have full capacity of exercise recognized "in order to receive the state allowance for her minor child"[6]. It was also held that a minor, who was close to the age of 18, had the mental development and necessary discernment to conclude civil legal acts by herself, being able to act critically and predictively with regard to the socio-legal consequences that might arise from the exercise of civil rights and obligations. Moreover, given that she also had a minor child, it was in the latter's interest for the mother to be able to fully exercise her rights and fulfill her obligations under parental authority[7]. In one case, in which the minor had a child for whom the maternal grandmother had been appointed guardian, it was considered that, at the age of 16, the minor mother was entitled to acquire full capacity of exercise and thus the guardianship would cease[8]. It was also held that a minor, who was the father of a child, met the conditions of art. 40 of the Civil Code, taking into account that the child's mother had interrupted the connection with the family. The court stated that the birth of a child justified the granting of full capacity to exercise parental rights, because the newborn child must be able to benefit from the protection of a parent with full capacity to exercise all parental rights in favour of the newborn[9]. In another case, the court held that the minor applicant "gave birth to

[6] Oradea District Court, civ. sent. no. 12608 of 7.11.2012, www.rolii.ro, the solid grounds concern the exercise of parental authority, in general, and not only the interest of collecting the state allowance for the minor of the petitioner. Gura Humorului District Court, civ. sent. no. 1138 of 27.11.2013, www.rolii.ro, the minor is 17 years old, has a minor child as a result of a cohabitation relationship, she cannot receive the state allowance for the minor child, and the court considers that the reasons invoked are well founded, as it was in the interest of the claimant and her minor child to acquire full capacity of exercise, in order to be able to benefit from all the financial rights due to the minor.

[7] Rădăuți District Court, civ. sent. no. 2646 of 11.07. 2018, www.rolii.ro, in this case, the claimant requested to have anticipated full capacity of exercise recognized from the date of birth of her child (April 23, 2018). The court correctly considered that the notion "anticipated" meant, in this matter, "before reaching the age of 18", and the full capacity of exercise could be acquired from the date when the judgment became final, and not from a specific date related to an event in the minor's life (wedding, birth of a child, etc.).

[8] Carei District Court, civ. sent. no. 1519 of 18.11. 2015, www.rolii.ro; Satu Mare District Court, civ. sent. no. 4027 of 22.12.2020, www.rolii.ro, the court found that the minor, who had reached the age of 16, was the mother of two minor children and it was necessary for her to have the opportunity to make all decisions regarding the raising, education and optimal development of her children. Even if she was only 16 years old, the mother must assume the exercise of parental authority and act accordingly, the recognition of the anticipated capacity of exercise being both in the interest of the minor parent and in the interest of her children.

[9] Strehaia District Court, civ. sent. no. 57 of 17.03.2017, www.rolii.ro; Carei District Court, civ. sent. no. 299 of 2.03.2016, www.rolii.ro, the court found that the petitioner, who was already 16 years old, and gave birth to a child on 05.06.2015 was entitled to receive full legal capacity; Câmpulung District Court, civ. sent. no.1188 of 25. 06. 2012, www.rolii.ro, denying the application of the aunt of a minor requesting to be appointed curator. It was taken into account that the minor's mother was alive and was not placed under interdiction, that the minor had turned 17, that she also had a minor child, and the court considered that the interests of the minor and the dependent child could be highlighted through another action (art. 40 of the Civil Code).

a child whom she raises and educates together with her mother and the baby's father, being actively involved in household activities, but also in those related to raising the child. At the same time, she is concerned with graduating, in order to obtain a work qualification and to ensure a future for herself, her child and her family", so that the conditions of art. 40 of the Civil Code were met[10].

On the other hand, in practice there were other situations which were appreciated as solid grounds within the meaning of art. 40 of the Civil Code. Thus, in one case, the court held that the minor who had reached the age of 16, "is no longer under the care of her parents, lives with her stepmother's sister and cannot receive a survivor's pension from her father, as there is no legal guardian to approve her acts", so there are solid grounds for the anticipated granting of the capacity of exercise[11]. Similarly, in another case, the court held that the minor attended the full-time classes of a high school, and had recently given birth to a child, who had the legal affiliation established with the father, that she lived with the child's father and the paternal grandparents. Considering that in accordance with the provisions of G.E.O. no. 111/2010 "the petitioner would be entitled to receive a child raising allowance, the court considers that there are solid grounds for the anticipated granting of full capacity of exercise. The minor has a real need for the legal allowance for raising the child, taking into account that she does not earn and did not earn any income before the birth"[12].

In a case in which the minor was an associate of a company, the court recognized his full capacity of exercise. Specifically, it was noted that the minor co-owned with the claimant, his mother, a building located in Bucharest. The minor also held 275 shares representing 50% of the share capital of a company, based in C. and having 2 working points located in other localities. "The minor was born on 12.07.2005, and will turn 16 on 12.07.2021, according to the birth certificate". The court took into account the provisions of art. 144(2), art. 145, art. 146 and art. 502 of the Civil Code and considered that the sale of the studio for which the authorization was requested was, undoubtedly, a benefit for the minor. On the other hand, pursuant to art. 40 of the Civil Code, noting that the minor "has a satisfactory degree of maturity and a complete and correct representation of the acts necessary for the administration of his patrimony, taking into account his agreement

[10] Satu Mare District Court, civ. sent. no. 4053 of 17.06.2013; Satu Mare District Court, civ. sent. no. 3682 of 29.05.2021, www.rolii.ro, the court finds that the recognition of the anticipated capacity of exercise is both in the superior interest of the minor parent and in the interest of her child. Accordingly, it authorizes the minor to conclude all legal acts and to carry out all the necessary administrative and legal actions and steps regarding the person and property of her daughter, including those regarding the state child allowance and other legal benefits for raising and educating the child. .

[11] Bucharest, Sector 4, civ. sent. no. 1516 of 8.02.2021, www.rolii.ro, in the case, the minor's father was deceased, and the claimant did not know her mother, who was never interested in the fate of the minor.

[12] Miercurea Ciuc District Court, civ. sent. no. 2782 of 23 September 2015, www.rolii.ro.

expressed before the court, it will recognize his full capacity of exercise starting with 21.07.2021", i.e. the date on which he reached the age of 16[13].

b. Circumstances that do not constitute solid grounds. On the contrary, in other cases, the courts considered that there were no solid grounds within the meaning of art. 40 of the Civil Code. For example, "the mere fact that the minor is in love and wants to get married" is not in itself a justification for giving her full legal capacity for anticipated exercise. Even if it is specific to the ethnic group to which she belongs that young people marry at an early age, the primary legal source is the law, and the use of customs must be done only if for a specific situation there is no legal regulation and only if that custom is not contrary to fundamental principles of law[14]. In one case, the minor requested the granting of

[13] Buftea District Court, civ. sent. no. 10868 of 30.06.2021, www.rolii.ro, in the case, the claimant invoked art. 40 of the Civil Code, because the minor with limited capacity at that moment, her son, is associated in the company "A. C." SRL, owns half of the shares, and the income obtained through the economic activity of this company provides them with the necessities of living (food, clothing), housing maintenance, expenses necessary for transport, education and professional training, frequently requiring the consent of the guardianship court, in particular for accessing bank credit lines necessary for carrying out the commercial activity, the possibility of negotiating with other banks, in order to grant a credit line, if their offer were more advantageous, to take important decisions for optimizing the activity. "Decisions must be taken quickly in carrying out an economic activity, especially in the current global and national situation of general crisis. However, the obligation to notify the competent authority for the approval/authorization of each decision impedes, through the slowness of the procedures, the economic efficiency of the company's activity, sometimes seriously affecting the obtaining of opportune income and prejudicing the superior interest of the minor". It is noted that, although the development of trade may constitute a solid ground within the meaning of art. 40 of the Civil Code, as expressly provided in art. 433 of the 1864 Civil Code, in this case the substantive condition regarding the minimum age of the minor is not met. Even if the court seems prudent and expressly mentions that the effects of the judgment occur from the moment of reaching this age, in reality the entire legal mechanism built by art. 40 of the Civil Code – the parents are "heard", the solid grounds are "analyzed" and "exist", and the court "recognizes" –, takes into account the premise that the minor "turned 16 years old". The conditions imposed by law are verified and must be met when (and if) the minor "has reached the age of 16". It can be appreciated that a request made before this date, even if it seems well-founded, is premature. It could be discussed, given the complexity of the circumstances, but also that between the time of pronouncing the judgment and that of reaching the age of 16 there was a period of several weeks, if this aspect could be "covered" in the event that the court granted a new trial term, "ruling after" the minor reached the age of 16. On the contrary, more judiciously, another court held that the claimant was only 14 years old, so she was not granted the right to acquire full capacity of exercise in the procedure of anticipated recognition, see Mediaș District Court, civ. sent. no. 1011 of 1.07. 2016, www.rolii.ro; In the present case, the court held that even if the claimant's claim was well-founded, the defendant DGAPC Sibiu had no procedural capacity in such a claim, under the law or as being obliged in the legal report submitted to the court. In the case, the minor's maternal grandmother was appointed guardian.

[14] Târgu-Mureș District Court, civ. sent. no. 4774 of 18.12.2020, www.rolii.ro, in the case, at the request of the court, the minor's representative emphasized that, in the reasoning of the request, he invoked the fact that she wished to marry and stated that the request was for minor emancipation and not marriage approval. In turn, the minor showed that she was not pregnant, had no children, but wanted to have in the future, that she had just turned 16 and wanted to marry, according to the custom of her ethnicity, being in a friendship relationship with a boy. The court found that the law relatively presumes that minors under the age of 18 do not fully know their own interests, which is why they are

full capacity "in order to obtain the state allowance in her name, in order not to create difficulties for her parents. The court held that the minor lived with a man who worked occasionally to support himself, was a 7-year graduate, failed to attend school, and her parents accepted this situation". She requested that her allowance be transferred to a personal account, not to her parents. The claim was rejected as unfounded, the court noting that an essential condition was that "the beneficiary of the state allowance should attend the courses of a legally organized education institution, a requirement that was not met by the petitioner, who, although a minor, had abandoned school, living in cohabitation"[15]. Finally, in another case, the court found that there were no solid grounds to grant the claimant anticipated capacity of exercise, which argued that this measure was necessary because the state allowance for her minor child was not paid and the town hall had sent the allowance to the child's father, who had used it in his personal interest. Or, "the problem related to the payment of the state allowance can be solved in another way, not being necessary to grant full capacity of exercise". It was considered that "this measure has several particularly important consequences in terms of the claimant's civil rights and obligations", and the court found that "the minor has not yet reached a sufficient degree of maturity and experience necessary for a legal life. In the hypothesis of art. 40 of the Civil Code a person must have the will and sufficient discernment to realize the importance and consequences of his actions"[16].

3. *Nihil nove sub sole* (…?). The draft Civil Code adopted by the Senate on 13 September 2004 proposed as a "novelty", with regard to the natural person, the recognition of the possibility for the minor who has reached 16 years of age to acquire anticipated full capacity of exercise, for solid grounds. Basically, the text of art. 26 of that project is found in art. 40 of the Civil Code[17], and that hypothesis

not granted the right to decide on acts of disposition without the assistance of the legal representative. The exception to the rule cannot be established solely on the basis of traditions specific to an ethnic minority.

[15] Carei District Court, civ. sent. no. 2699 of 18. 10.2012, www.rolii.ro, from the provisions of Law 61/1993 the court finds that young people up to 18, even those over 18, benefit from state allowance until the graduation from high schools or vocational schools, organized in accordance with the law. In this case, the minor has the possibility of resuming the courses of a legally organized education institution, so that she is entitled to obtain a state allowance. In fact, precisely the concrete situation in which she finds herself, she lives with a man who does not have the certainty of maintaining a family, and this situation which (possibly corroborated with other circumstances regarding the family she comes from) made her drop out of school, demonstrates that there are no solid grounds within the meaning of art. 40 of the Civil Code. It is not excluded that the minor, who turned 16, will lie in the future under art. 39 of the Civil Code.

[16] Rădăuți District Court, civ. sent. no. 1401 of 17.04.2014, www.rolii.ro, in this case, the claimant, aged 16, has a minor child, and as a result of the misunderstandings between her and her concubine, she and the minor left the domicile of her concubine's parents for the domicile of her mother.

[17] For some comments on the draft Civil Code 2004, V.V. Popa, *Drept civil. Partea generală. Persoanele*, 2005, pp. 448–465. That project was sent for adoption to the Chamber of Deputies, which had a decision-making role, and was not worked on until 2009, when it was replaced by the new Civil Code, adopted by Law no. 287/2009, being rejected as having no object, see M. Nicolae, *Codex iuris civilis*, tomul I, Noul Cod civil. Ediție critică, Universul Juridic Publishing, Bucharest, 2012, Introducere, pp. LII – LIII.

is not a novelty for Romanian law (either). On another occasion, we reminded that such a proposal was part of the wider concern of modern society to grant more rights to individuals before the age of 18, so that their political rights or the reduction of the age of civil majority were discussed. Moreover, the 1864 Civil Code regulated the "emancipation" of the minor, in Chapter III, Title X, entitled "On minority, on guardianship and on emancipation" of the first Book, art. 421–433, which, in essence, brought an *enlargement* of the content of his capacity of exercise, acquiring important rights over his person and, especially, the administration and use of his goods[18].

From a historical perspective, in the analyzed matter, three stages can be distinguished in the national regulatory framework. First, during the period of application of the provisions of the 1864 Civil Code, two hypotheses were regulated: a) implied or legal emancipation, which results automatically from marriage; b) express emancipation, which results from the solemn declaration of the persons designated by law. Secondly, during the period of application of the provisions of art. 8(3) of Decree no. 31/1954 and art. 4 of the 1954 Family Code, only the hypothesis of acquiring the full capacity of exercise through the conclusion of marriage by the woman before reaching the age of 18 was regulated. Thirdly, the period opened by the provisions of art. 39–40 of the Civil Code, which regulates (again) the two hypotheses. In this paper, in analyzing the anticipated full capacity of exercise, we will take into account the doctrine and case law of the respective periods, in order to capture the evolution of the stated legal solutions, and also their continuity, where appropriate.

The rule according to which the natural person can have a full legal life of his own only from the date of reaching a certain age is old, it is found in Roman law and in old Romanian law[19]. First, children up to 7 years old (*infantes*) were incapable in Roman law and also children between 7 and 14 years old (*infantiae proximi*). Early Roman civil law granted full capacity from the age of 14, but over time this early majority proved dangerous for the interests of the child. In the mid-6th century AD, the Plaetoria law extended minority to 25 years of age. Under these circumstances, minors had the possibility of contracting only assisted by a curator. The legal acts concluded without the curator's assistance could be annulled through

[18] *I. Dogaru, S. Cercel, op. cit.*, p. 106. For the acts that the emancipated minor had the possibility of concluding alone or assisted by his curator, D. Alexandresco, *Explicațiunea teoretică și practică a dreptului civil român în comparațiune cu legile vechi și cu principalele legislațiuni străine*, tom. II, ed. a II-a revăzută, complet refăcută și mărită în mod considerabil, Librăriei Leon Alcalay Publishing, 1907, Bucharest, pp. 842–867.

[19] *Vl. Hanga, coord*., Istoria dreptului românesc, Academiei Publishing, Bucharest, 1980, pp. 489–490; D. Alexandresco, *op. cit.*, tom II, ed. a II-a, Bucharest, 1907, pp. 539–543; Manualul juridic al lui *A. Donici*, ediție critică, Academiei Publishing, Bucharest, 1959; Codul Calimach. Ediție critică întocmită de Colectivul pentru vechiul drept românesc condus de A. Rădulescu, Academiei R.P.R. Publishing, Bucharest, 1958; Legiuirea Caragea. Ediție critică, Academiei R.P.R. Publishing, Bucharest, 1955; D. Alexandresco, *Principiile dreptului civil*, vol. I, Bucharest, Atelierele grafice SOCE& Co, 1926, pp. 387–395.

institutio in integrum if they caused harm to the minor. Gradually, the curator of the minor under 25 was assimilated with the guardian. In essence, in classical and imperial law, if in the first years of childhood the incapacity is total, after puberty the minor is incapable only with regard to acts that are likely to prejudice his interests[20].

The old Romanian laws applied the principles of Roman law regarding majority, which began at the age of 25 (Code of laws of Matei Basarab, chapter 287; Caragea Code, chapter 3, art. 1, part 1; Calimach Code, art. 33 letter b and 228). For example, the Calimach Code (like that of Andronache Donici) divided persons into: "a) *infants* who have not reached the age of seven; b) the *non-elderly* on the male side, who have not turned 14, and those on the female side, who have not turned 12; c) those *towards elderly*, i.e. those who have turned 14 or 12 and have not yet turned 25" (art. 33). Similarly, in the matter of "parental power" it provided that it ceased "immediately after reaching the *full age*, that is, the age of *twenty-five*" (art. 228). Finally, in the chapter entitled "For bargains in particular" it provided that "the mindless, as well as those who have not reached the age of fourteen, being a male, or twelve, being a female, are not worthy to give or to receive a promise" [21].

The 1864 Romanian Civil Code reduced the majority age to 21 years, abandoning the distinctions of Roman law. First, art. 342 provided that "a *minor is one who is not 21 years of age yet*, either male or female". On the other hand, art. 434 provided that "both men and women who have reached the age of 21 are considered major; at this age everyone *is capable to perform all the acts related to civil life*, except for the restrictions provided ... "; by exception from the common regulatory framework, the king was of age from the moment of turning 18, in accordance with art. 87 of the 1866 Constitution, which provided: "The ruler is major from the age of 18 years"[22]. In the doctrine, regarding the moment when this

[20] Vl. Hanga, *Drept privat roman*, Didactic and Pedagogical Publishing, Bucharest, 1978, pp. 223–234; Vl. Hanga, M. D. Bocşan, *Curs de drept privat roman*, ed. a II-a, Universul Juridic Publishing, Bucharest, 2006, pp. 154–160; A. Burdese, *Manuale di dirito private romano*, quatra edizione, Unione Tipografico-Editrice Torinese, Torino, 1993, pp. 139–143, pp. 271–289; C. Hamangiu, I. Rosetti- Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, ALL Beck Publishing, Bucharest, 2002, pp. 361–362.

[21] *A. Donici*, chap. 29, § 1 and 2, names *anilix* the 14-year-old male minor and the 12-year-old female minor, and after this age up to the age of 25, *afilix* (in Roman law, *infans* was a child under 7 years of age). The Caragea Code, chap. 3, part I: 1. "Men and women from the age of twenty-five shall be counted elderly, and up to the age of twenty-five, non-elderly"; 2. "The elderly are masters to administer their wealth as they wish and to do whatever they want according to the law. And the non-elderly cannot, and the administration of their wealth and their acts hang from the power of their parents or their guardian"; 3. "Whatever bargain or promise the non-elderly may make, without the parent's or guardian's consent, has no power, to their detriment; and if it is for their benefit, it has power"; 4. "The non-elderly, from twenty to twenty-five years of age, are allowed to ask the Lord for an exemption of age in order to be counted among the elderly"; I. Dogaru, S. Cercel, *op. cit.*, pp. 100–101.

[22] For the text of this constitution, *I.M. Bujoreanu*, Colecţiune de legiuirile României vechi şi noi câte s-au promulgat până la finele anului 1870, Noua Tipografie a Laboratorilor români, Bucharest, 1893; the provisions of art. 388 of the Fr. Civil Code (corresponding to art. 342 of the 1864 Rom. Civil Code) and art. 488 of the Fr. Civil Code (art. 434 of the Rom. Civil Code) also established majority at the age of 21. By Law no. 74–631 of 5 July 1974, in the French system,

age is considered completed, it has been discussed whether the 21 years are calculated by days, *de die ad diem* (art. 1887 of the Civil Code) or by hours, *de momento ad momentum, de hora ad horam*. It has been considered that here time should be calculated "by hours", and not by days, because, first, the legislature imposed the calculation by days only in the matter of prescription, and, on the other hand, because the birth certificate mentions the "time of birth" precisely for this purpose (in accordance with art. 43 of the1864 Civil Code). As a result, the baby born at 8 a.m. will be an adult on the corresponding day of the 21st year, at 8 a.m.

If the birth certificate does not mention the "birth hour" and it cannot be proved by other means of proof (such as the notes of the parents, witnesses), the majority age is to be completed after the expiration of the day corresponding to the day of birth[23]. The system by which the minor becomes major "suddenly, by reaching the legal age and without a period of transition" between total incapacity and full capacity has been criticized in the doctrine. It has been considered that the lack of experience of the former minor, who at the age of 21 can conclude any civil legal act of disposition (sale, donation, transaction, etc.), without anyone's assistance, exposes him to the risk of contracting onerous, even dangerous obligations. Young people reaching the age of majority risk being deceived and exploited by third parties, who will mislead them with disastrous legal commitments. This danger, called in Roman law *circumscriptio adolescentium*, was avoided by the Plaetoria law, which protected the interests of minors up to the age of 25[24].

4. The hypothesis of concluding a marriage. The solution of acquiring full capacity of exercise in the case of the minor who marries is traditional in Romanian law, and the legal reasoning on which it is based has a universal value. Initially, the force of the "accomplished fact" urged law to find that a minor who married because she had given birth or would give birth to a child, was entitled to be assimilated to a person with full capacity of exercise. Over time, the importance of marriage and the need to correlate its legal effects with the status of the person have imposed a simple truth: the age of puberty proved by the conclusion of a valid marriage is equal to the age of civil majority. In this context, the verification of "solid grounds" will take into account the possibility for the individual to honour

majority was set at 18 years, which in art. 11 provides: "Dans toutes les dispositions légales où l' exercice d'un droit civil est subordonné à une condition d'âge de vingt et un ans, cet âge est remplacé par celui de dix-huit ans".

[23] D. Alexandresco, *op. cit*., tom II, ed. a II-a, Bucharest, 1907, pp. 542–543; C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op. cit.*, p. 361, who emphasizes that the 21 years must be completed and recalls the two calculation systems, considering that "the majority age is calculated *by hours* from the moment of birth". In the matter of the matrimonial age, the text of art. 144 of the Fr. Civil Code specified that the 18 or 15 years must be completed, but the Romanian legislature deleted the word "révolus" in art. 127, hence the opinion that it is enough to have begun that year, S. A. Brădeanu, G. N. Luțescu, Codul civil român coordotat cu textele modificatoare, derogatorii ori complectatoare, Bucharest, 1947, p. 17.

[24] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op. cit.*, p. 362.

the status of "married person". The full capacity of exercise acquired by the minor becomes the natural legal effect of marriage. The search for legislative solutions in this matter is not easy, given that individual interests may be in conflict with general interests, and reasons of a biological and eugenic nature, or psychological and moral reasons, meet with those related to the demographic policy of states at different times[25].

a) 1864 Civil Code and Decree 31/1954. First, art. 421 of the 1864 Civil Code provided imperatively: "*The minor is emancipated de jure through marriage*". In the interpretation and application of these legal provisions, corroborated with those that imposed the matrimonial age, the doctrine and case law have established a series of rules that are still topical[26]. It was appreciated that the minor able to marry had enough maturity and experience to be able to administer his own assets. The minor's incapacity does not match the marital status of a married person, which implies a wide independence. For a man, marriage confers marital power and parental power, which he cannot exercise if he depends on others. For a woman, the obedience she owes to her husband would be even less compatible with the authority that the parent or guardian can exercise over her[27].

In accordance with the provisions of art. 8(3) of Decree no. 31/1954: "The minor who marries shall acquire, through this, the full capacity of exercise". The acquisition of full capacity of exercise *by marriage* before reaching the age of 18 was recognized practically only to women. This solution resulted from the corroboration of art. 8(3) of Decree no. 31/1954 with art. 4 of the Family Code, which provided imperatively: (1) "A man can marry only if he has reached the age of 18, and a woman, if she has reached the age of 16"; (2) "However, for solid

[25] There is no place here for developments in this regard, but news about minors becoming parents or information on the demographic policy are easily accessible. https://www.libertatea.ro/stiri/mama-la-doar-12-ani-tatal-e-un-minor-de-15-ani;https://evz.ro/tata-12-ani-marea-britanie.html; https://ec.europa.eu/eurostat/statistics;https://www.dw.com/ro/ce-face-atat-de-eficienta-politica-demografica-din-franta, accessed in July-August 2021.

[26] "The man before 18 years and the woman before 15 years is not allowed to marry" (art. 127 of the 1864 Civil Code; "Only the Lord can give age exemptions for serious reasons" (art. 128 of the 1864 Civil Code). Nicolae Titulescu pointed out that if "the future spouses have proved that they are pubescent before proving the legal age, an exemption will be granted. Thus, *when the bride is pregnant before the age of 15, the Lord for this serious reason will exempt her from subjecting to art. 127*" (our emphasis), in "Drept civil", All Beck Publishing, Bucharest, 2004, p. 240. The provisions of art. 421–433 of the 1864 Civil Code were repealed by Decree no. 185/1949 for the admendment and abrogation of some provisions on the age of majority, the capacity in the matter of employment contracts and emancipation.

[27] D. Alexandresco, *op. cit.*, tom II, ed. a II-a, Bucharest, 1907, pp.820– 880; C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op. cit.*, pp. 435–445; C. Nacu, *Drept civil rumân*, I. V. Socecü Publishing, Bucharest, 1901, pp. 660–681; M. B. Cantacuzino, *Elementele dreptului civil*, All Educational Publishing, Bucharest, 1998, ediție îngrijită de G. Bucur, M. Florescu, pp. 94–97; C. Hamangiu, *Codul civil adnotat*, All Beck Publishing, Bucharest, 2003, ediție îngrijită de M. Florescu, pp. 530–544. For the matrimonial age, D. Alexandresco, *Explicațiunea teoretică și practică a dreptului civil român*, tom I, ed. a II-a, Tipografia Ziarului "Curierul Judiciar" Publishing, Bucharest, 1906, pp. 546–549.

grounds, the marriage of a woman who has reached the age of 15 may be approved. The approval can be given by the general mayor of Bucharest or by the president of the county council within which the woman has her domicile and only on the basis of an approval given by an official doctor"[28]. In this respect, the provisions of 1954 seem to be a setback compared with the solution of the 1864 Civil Code, which ensured access to the mechanism of implied or legal emancipation without distinction of sex, and through the leverage of the age exemption given by the king it (theoretically) ensured a uniformization of the matrimonial age and, implicitly, of the age of emancipation of the minor in that period.

b) Current regulations. The Civil Code regulates the hypothesis discussed in art. 39 (which recalls the previous provisions) in conjunction with art. 272, regarding the matrimonial age. Undoubtedly, the conclusion of the marriage under the exceptional circumstances provided by art. 272(2) of the Civil Code produces de jure the acquisition of the full capacity of exercise, *ipso jure* (*by themselves*, as provided by art. 2 of the 1833 Code of Wallachia). No other formality is needed, as the doctrine at the beginning of the last century remarked. In this situation, the court checks whether there are "solid grounds" for the minor who has reached the age of 16 to be able to get married.

In the case law, the circumstance under which the minor is in a cohabitation relationship with the future spouse and they have a child together or the minor is pregnant, is the most common situation and appreciated as a solid ground for marriage authorization by the court[29]. In one case, the age close to 18 years and the fact that the two minors have had a consensual union relationship for about 1 year and 4 months was appreciated by the court as a solid ground[30]. However, the fact

[28] Gh. Beleiu, *op. cit.*, 2007, p. 358; I. P. Filipescu, A. I. Filipescu, *Tratat de dreptul familiei*, ed. a VIII-a, Universul Juridic Publishing, Bucharest, 2006, p. 30; I. Dogaru, S. Cercel, *op. cit.*, pp. 102–103, which signals that from the perspective of constitutional rules, men and women are not in "relevantly different situations" to admit a differentiated legal treatment. Law no. 288/2007 eliminated this discrimination, and the Civil Code took over the solution and no longer distinguishes between man and woman. For the matrimonial age in the current regulation, O. Ghiță, R.G. Albăstroiu, Dreptul familiei. Regimuri matrimoniale, Hamangiu Publishing, Bucharest, 2013, pp. 16–17.

[29] Tecuci District Court, civ. sent. no. 998 of 6.05.2021, www.rolii.ro; Satu Mare District Court, civ. sent. no. 1806 of 10.05.2018, www.rolii.ro; Satu Mare District Court, civ. sent. no. 1265 of 9.06.2020, www.rolii.ro; Brașov District Court, civ. sent. no. 10892 of 08.11.2017, www.rolii.ro; Câmpulung Moldovenesc District Court, civ. sent. no. 656 of 11.08.2021, www.rolii.ro. For "solid grounds" in this matter, M. Avram, *op. cit.*, p. 46; E. Florian, op. cit., 36; C. C. Hageanu, *op. cit.*, p. 25.

[30] Tecuci District Court, civ. sent. no. 1134 of 20.05.2021, www.rolii.ro. If, as a rule, the court identifies the future spouse (first name, surname, ID, etc.), so that it authorizes the marriage to a certain person, as the consent of the parent considers the marriage of the minor to a certain person, in some situations this aspect is ignored. See, Rădăuți District Court, civ. sent. no. 1815 of 9.06.2015, www.rolii.ro; Satu Mare District Court, civ. sent. no. 1806 of 10.05.2018, www.rolii.ro; Satu Mare District Court, civ. sent. no. 2128 of 4.06.2018, www.rolii.ro. When this "omission" meets the situation in which the court superficially analyzes the "solid grounds", considering that the reaching of the age of 16, the medical certificate showing that the minor is healthy, her will and parental consent "demonstrate that there are solid grounds in the case", "Court authorization" turns into an urgent procedure for granting the "marriage permit", see Moinești District Court, civ. sent. no. 151 of 27.06.2019, www.rolii.ro.

that the minor lives with her future husband, who provides maintenance to her in order to complete high school studies, given that the minor's mother died and she must do all household chores in her father's family and there is a risk of dropping out of school, was appreciated by the court as a "solid ground"[31]. On the contrary, the "solid ground" invoked by the parties in the sense that they have already set the date of the marriage celebration, rented the location for the party and made this public, was censored by the court[32]. Finally, it was held that, although the conditions provided by art. 272(2) of the Civil Code were met, in the sense that the petitioner had reached the age of 16 and had the consent of her parents, was medically fit to conclude the marriage, in this case there were no solid grounds to authorize the marriage before reaching the legal age of 18. Thus, the wish of the minor and even of her parents could not constitute a legal basis for the authorization of the marriage, as long as it was found that the minor had only been able to attend school up to the 5th grade, given that the compulsory education consists of 8 grades. Otherwise, the court would be called upon to respect and authorize the wishes of some minors, in violation of the general provisions of the law[33].

5. The hypothesis of recognition by the court. *a) 1864 Civil Code.* Express emancipation was regulated in art. 422 of the 1864 Civil Code which provided that the minor "may be emancipated by his father, or in the absence of his father, by his mother, when he is 18 years of age". Further on, art. 423–424 regulated the hypothesis of express emancipation in the situation of the minor "whose father and mother passed away", which was possible "only after he turned 20, and if the family council finds it appropriate". The right of emancipation belongs, first of all, to the legitimate parents, in the order that also enshrines here the male ascendant in family relations. The express and written statement of the person entitled was given before the civil court, which took note of this statement. The effects of emancipation started from the day it was published in the Official Gazette or in the official gazette of the court, because only from this moment on was it enforceable to third parties. The

[31] Baia de Aramă District Court, civ. sent. no. 80 of 10.12.2015, www.rolii.ro, in this case the public relationship between the two future spouses was less than half a year old.

[32] Tecuci District Court, civ. sent. no. 1676 of 12.09.2019, www.rolii.ro, the court finds that the "event hall rental agreement" was concluded on the date of submitting this application, 06.09.2019, for an event that will take place on 14.09.2019, date on which, regardless of the admission or rejection of this application, the judgment is not final, so the marriage cannot be concluded. A possible judgment authorizing the marriage of the minor would be used, according to the parties, only to be presented to the priest. In these conditions, the parties did not show why they could not wait another two months, until 11/18/2019, when the minor petitioner was to become major. It is also noted that, although the need to comply with the rigid rules on family in the community in which they live is invoked, the parties do not have the same attitude towards legal rules, respected by society as a whole, planning a marriage that the law prohibits without the consent of the guardianship court.

[33] Arad District Court, civ. sent. no. 3223 of 10.07.2018, www.rolii.ro, the court considers that if strong feelings encourage the two young people to get married, they will resist even after reaching the legal age of marriage, an age that also involves ensuring the livelihood for the family.

mere will of the parent was sufficient to operate the emancipation, and the minor was not consulted in this procedure[34].

In the absence of the parents, the minor can be emancipated by the family council, which checks whether he is worthy and can "lead himself". The legislature prevented the guardian from receiving the power to dissolve the guardianship at will, so that he could only ask the court to convene the council. The minutes of the family council and the court's statement that the minor is emancipated are published for enforcement against third parties.

b) Current regulations. Decree 31/1954 did not regulate "express emancipation", an impossible legal institution in the socio-political conditions of that period. For the minor aged 14–18 years, the "limited capacity of exercise" was regulated, and the respective stage was appreciated by the doctrine and case law as a transition between the lack of exercise capacity (up to 14 years) and the full exercise capacity (from 18 years). In terms of legal effects, this solution brings an enrichment of the content of the minor's capacity of exercise, with the role of ensuring a gradual transition to maturity and full liability.

In the hypothesis regulated by art. 40 of the Civil Code, the capacity of exercise is "recognized" by the court. It is not done *de jure*, as in the hypothesis of art. 39 of the Civil Code, but must be ordered by the (guardianship) court which verifies whether there are "solid grounds" and ensures compliance with the procedure ("hearing" the parents or guardian and obtaining the approval of the family council "when appropriate").

In the procedure by which he requests to have the full capacity of exercise recognized, the person is "a child", within the meaning of art. 263(5) of the Civil Code, since he has not reached the age of 18 and has not acquired full capacity of exercise. Therefore, in this procedure the principle of the best interest of the child, provided by art. 263 of the Civil Code is applicable, and the court must decide in compliance with the elements that give it content depending on the circumstances of the case[35]. On the other hand, even if the text of art. 40 does not expressly provide it, "hearing the child" is mandatory, as provided by art. 264 of the Civil Code, and the case law seems to be consistent in this respect.

A distinct question is whether "this measure" can be taken against the will of the minor, and the answer is categorically negative. It would seem that such a hypothesis is excluded, since, in this matter, only the minor can be the holder of such a request, and "not the legal protector, who cannot remove his obligations

[34] D. Alexandresco, tom. II, *op. cit.*, p. 830, who recalls that in Roman law, at the time of Justinian, when emancipation resulted from the declaration of the family parent before the magistrate, the consent of the minor was also required, as he might have had an interest in remaining under parental authority. Only those who were *infantes* could be emancipated without their consent. It is accepted that the declaration of emancipation can also be made through an agent, vested with a special and authentic power of attorney, and the court must take note of this declaration, its role being passive in this procedure.

[35] For this principle, S. Cercel, O. Ghiță, Interesul superior al copilului, in "RRDP", nr. 3/ 2020, pp. 130–148; A. M. Ardeleanu, *Principiul interesului superior al copilului. Abordare europeană*, in "Dreptul", nr. 3/ 2020, pp. 158–178.

towards the minor"[36]. It is certain that the procedure in question cannot be followed in order for the parents to relieve themselves of the duties and obligations that give content to parental authority (art. 487 of the Civil Code), even if the immediate legal effect is precisely this.

The meaning of the phrase "solid grounds", essential in this matter, is left "to the light and wisdom of the magistrate" (art. 1203 of the 1864 Civil Code). The doctrine considers that the need of the minor to conclude legal acts by himself will be taken into account, without requesting the prior consent of the legal protector and the authorization of the guardianship court. The fact that the minor manages himself, being an employee or having a business, living separately from his parents may entitle him to request anticipated full capacity of exercise. It has been emphasized that the solid grounds justifying this measure must be analyzed separately from the condition which requires the minor to have discernment and maturity for a legal life of his own. First, this measure exposes him to danger in the event that there are "solid grounds", but the minor does not prove that he can take care of his own interests. Secondly, even if the precocious development of the minor demonstrates his degree of maturity, the measure cannot be ordered if there are no solid grounds, given that the reason of the law does not require that the simple growing up of the minor should ensure full capacity of exercise before the age of 18. The two cumulative conditions can be analyzed in such situations as: establishing residence in another locality, continuing high school or vocational training, carrying out artistic or sports activities, the minor is the parent of a child born out of wedlock[37].

The content of the notion "solid grounds" is different in the sense of art. 40 of the Civil Code compared to the one in art. 272(2) of the Civil Code, which in conjunction with art. 39 of the Civil Code has the same legal effect: anticipated full capacity of exercise. In addition, it is constantly admitted that the applicable procedure is the non-contentious judicial procedure, regulated by art. 527 et seq. of the Civil Procedure Code, in the absence of a "dispute" and an "adversary" in the classical sense[38].

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[36] M. Nicolae, V. Bîcu, G.-A. Ilie, R. Rizoiu, *op. cit.*, p. 200; I. Reghini, Ș. Diaconescu, P. Vasilescu, *op. cit.*, pp. 140–141, who consider that the application may be submitted by the minor, assisted by his legal protector, and if the latter opposes it, recourse may be needed to the establishment of a special curator. In one case, the claimant, the minor's mother, requested the recognition of her son's full capacity of exercise. In the request she mentioned that the court could find, during the hearing of the minor, both his agreement regarding the above-mentioned, and his intellectual capacity, the correct and complete representation, necessary in the manifestation of his agreement in an assumed and consented, conscious and mature way, of all the requests, arguments, considerations in the introductory application. The action was admitted, and court clarified the issue under discussion during the trial, see Buftea District Court, civ. sent. no. 10868 of 30.06.2021, www.rolii.ro.

[37] M. Nicolae, *Codex iuris civilis*, tomul I, p. CIX; I. Reghini, Ș. Diaconescu, P. Vasilescu, *op. cit.*, p. 141.

[38] A.–M. Nicolcescu, *op. cit.*, p. 86; For non-contentious procedure, V. M. Ciobanu, M. Nicolae, *Noul Cod de procedură civilă comentat și adnotat*, vol. II art. 527–1.134, Universul Juridic Publishing, Bucharest, 2016, pp. 4–19.

6. Effects of acquiring anticipated full capacity of exercise.

a) 1864 Civil Code. Regardless of whether the emancipation was express or implied, in accordance with art. 425 of the 1864 Civil Code, the emancipated minor had a curator until adulthood, appointed by the family council. Unlike the guardian, who represents the minor in all his actions and acts on his behalf, under the power conferred by law, the curator only assists him *auctoritatem interponendo*, in the cases established by law with regard to the minor's property. Emancipation entails the cessation of parental power (art. 326 of the 1864 Civil Code) and guardianship (art. 426 of the 1864 Civil Code), so that the emancipated minor is, in terms of his person, considered major. The emancipated minor establishes his own domicile and can complete his studies or education as he deems appropriate[39]. As for his property, the emancipated minor has its administration and use, since the administration and legal use of his parents ceases[40]. He enjoys, like the major, full capacity regarding the acts of pure and simple administration ("*his own master and free manager of his fortune*" – art. 335 of the Calimach Code). He can rent a building or rent a plot of land for a maximum period of 5 years (art. 427 par. 1 of the 1864 Civil Code), he can receive income from his buildings or capitals, gradually at each maturity (not anticipated), issuing a valid receipt for reception and use as he wishes. He can also perform all the conservation acts (interruption of a prescription, summons, registration of a mortgage, exercise of a possessory action) and can make the necessary repairs to a building on his own. The emancipated minor cannot be sued in a real estate action without the assistance of the curator, as he cannot receive or raise a capital (art. 428 of the 1864 Civil Code). He is assimilated to the minor in the matter of the loan contract or property transfer acts having as object a real estate, being bound to comply with the forms prescribed for the unemancipated minor for acts that go beyond simple administration (art. 429–430 of the 1864 Civil Code). On the other hand, certain civil legal acts are forbidden to him: donation, acceptance of an inheritance other than under the benefit of inventory, he cannot be a testamentary executor or guardian. Finally, the emancipated minor has the right to be a trader recognized and has the capacity to do all the acts related to his trade (art. 433 of the 1864 Civil Code). The minor trader is not entitled to an action for annulment for gross disparity regarding the obligations assumed in the interest of

[39] For the effects of emancipation, D. Alexandresco, *op. cit.*, tom. II, pp. 841–871, who emphasizes that the emancipated minor cannot marry without the consent of those entitled (art. 131 et seq.) or be adopted without the consent of his parents. For the capacity of the emancipated minor, C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op. cit.*, pp. 439–444. For French law, Fr. Terré, D. Fenouillet, *Droit civil. Les Personnes*, Dalloz, Paris, 2012, pp. 368–371; J. Carbonnier, *Droit civil. Les personnes*, PUF, Paris, 2000, pp. 195–198; L. Bach, *Droit civil*, tom 1, 13e édition, Sirey, 1999, pp. 189–190; P. Courbe, F. Jault-Seseke, *Droit des personnes, de la famille et des incapacités*, Dalloz, Paris, 2020, pp. 254–256.

[40] Pursuant to art. 341 of the 1865 Civil Code, the right of use *will not extend to the wealth that children could earn through their special work or industry*, nor to the wealth that would have been given by donation or legacy to children, provided that the father and mother do not use it.

his trade (art. 1160 of the 1864 Civil Code). The law assimilated minor artisans to traders, i.e. those who had "a different art or craft" from those of their parents.

b) Current regulations. The one who invokes art. 40 of the Civil Code seeks to acquire full capacity of exercise before reaching the age of 18, by the final judgment admitting his request. In the hypothesis of art. 39(1) in conjunction with art. 272(2) of the Civil Code, the conclusion of the marriage lies in the foreground, and the emancipation is a legal consequence of it. Naturally, in terms of the person's capacity of exercise, the legal effects are the same regardless of whether the emancipation is implied (art. 39 of the Civil Code) or express (40).

It can be observed that the hypotheses regulated by art. 39(1) of the Civil Code and art. 40 of the Civil Code, constitute, to an equal extent, exceptions to the rule established by art. 38(1) of the Civil Code, in accordance with which "the full capacity of exercise begins on the date when the person becomes of age". On the other hand, none is an exception to the rule established by art. 38(2) of the Civil code which stipulates that "the person becomes of age when turning 18". Consequently, in terms of exercise capacity, the minor to whom art. 40 of the Civil Code is applied, is in the period delimited by the moment of finality of the judgment admitting the request and until reaching the age of 18, "a minor with full capacity of exercise", and simpler, to use the consecrated term, "an emancipated minor", but he is not of age[41]. Along the same line, in the case of concluding the marriage, it is about "a married minor", impliedly emancipated. In terms of capacity of exercise, in both situations, the minor is assimilated to a major, but his legal status is not identical to that of the person who has reached the age of 18.

On the other hand, starting from the rule that "civil capacity is a branch capacity" and given that we are in the presence of "part of the civil capacity", it can be argued, in principle, that the effects of the judgment by which the court "recognizes full capacity of exercise to the minor who has reached the age of 16" occur "in civil law". Equally, the effects of art. 39 C. par. 1 are of "civil law". Moreover, it has been emphasized that emancipation gives the young person only the right to conclude civil legal acts[42]. In general, it can be appreciated that in the situation where the law requires a person to have full capacity of exercise, and the

[41] Law no. 272/2004 on the protection and promotion of children's rights, includes in art. 55 the expression "the young person who acquired the capacity of exercise" in order to delimit him from the "child", hypothetically without full capacity of exercise.

[42] I. Reghini, Ș. Diaconescu, P. Vasilescu, *op. cit.*, p. 141. If, in this matter, civil law constitutes the common regulatory framework in relation to other branches of law, the effects also apply within that branch. For the role of common regulatory framework of civil law in relation to other branches of law, M. Nicolae, *Drept civil. Teoria generală, vol. I. Teoria dreptului civil*, Solomon Publishing, Bucharest, 2017, pp. 147–156. On the other hand, the effects of that judgment are limited in time, cease when the person reaches the age of 18 and becomes of age (there are also other causes of termination, which are not of interest here, such as the intervention of a judgment laying a person under interdiction). The solutions in the matter of civil liability in tort are not changed – art. 1366 of the Civil Code; for civil liability in tort in respect of the action of the minor, see Fl. Mangu, *Răspunderea civilă delictuală obiectivă*, Universul Juridic Publishing, Bucharest, 2015, pp. 29–113.

reason of the law takes into account the capacity of the person, the young person who benefited from art. 40 of the Civil Code is "eligible" for the legal effects in question. On the contrary, when the law requires a person to have reached the age of 18, and the reason of the law (also) takes into account the age ("years of life") of the person, the young person in question "is not eligible" for these legal effects[43].

In employment law, *exempli gratia*, the natural person acquires the capacity to work at the age of 16, but has the possibility of concluding an employment contract as an employee from the age of 15, "with the consent of the parents" and only "for activities appropriate to his physical development, skills and knowledge, if thus his health, development and professional training are not endangered" (art. 13 par. 1–2 of the Labour Code). However, employment "in difficult, harmful or dangerous jobs can be done after reaching the age of 18" (art. 13 par. 5 of the Civil Code). Therefore, the young person who has acquired anticipated full capacity of exercise does not meet this condition, so he cannot be "employed", cannot conclude an individual employment contract, for an activity that violates the mandatory provisions on work "in difficult, harmful or dangerous conditions".

In criminal law, while regulating the "limits of criminal liability", the legislature has mentioned the situations in which, in relation to the age and discernment of the minor, the latter is or is not criminally liable, i.e. is or is not required to bear a sanction under criminal law, as a result of committing an act provided by the criminal law[44]. Currently, art. 113 of the Criminal Code, with the marginal name "*Limits of criminal liability*", stipulates that "*a minor who has not reached the age of 14 shall not be criminally liable*". In turn, "*the minor who is between 14–16 years old shall be criminally liable only if it is proved that he committed the act with discernment*". Finally, "*a minor who has reached the age of 16 shall be criminally liable in accordance with the law*". In order to determine the limits of this liability, the law takes into account the stages that the minor goes through in his life, from

[43] In the sense that, in the 1864 Civil Code system, the emancipated minor under 16 years cannot dispose of his property freely, and after this age he acquires the capacity to dispose by will, but only up to half of his property, considering art. 806–807 of the 1864 Civil Code, see, D. Alexandresco, *op. cit.*, tom. II, pp. 866.

[44] In the Carol II Criminal Code, the "Minority" was regulated in Title VI, chap. II – "Causes that exempt from liability or reduce it", art. 138–153, and in the view of the criminal law, "*a minor is the one who has not reached the age of 19*", "*a child is the minor who has not reached the age of 14*", and "*an adolescent is the minor between 14 and 19 years not completed*" (art. 138), see Codul penal Carol al II-lea adnotat de C. G. Rătescu, I. Ionescu-Dolj, I. Gr. Perieţeanu, V. Dongoroz, H. Asnavorian, Tr. Pop, M. I. Papapadopolu, N. Pavelescu, Vol. I. Partea generală, art. 1–183, Librăriei SOCEC& Co Publishing, Bucharest, 1937, pp. 345–372. In the Criminal Code of 1968, Title V, entitled "Minority", regulated the conditions of age and discernment in which the criminal liability of the minor occurs, the specific sanctions – educational measures – that were applicable, as well as the extent to which the penalties provided by the criminal law were applicable, see Virgil Rămureanu, in Codul penal al R.S.R. comentat și adnotat, Partea generală, Scientific Publishing, Bucharest, 1972, pp. 522–573; R. Răducanu, *Minorul – autor și victimă a infracțiunii din perspectiva noilor reglementări penale,* Universul Juridic Publishing, Bucharest, 2013, p. 25; T. Toader, s.a., *Noul Cod penal. Comentarii pe articole*, Hanagiu Publishing, 2014, pp. 214–234;

birth to adulthood. The third stage of the minority, in which the minor is between 16–18 years old, is characterized by the existence of criminal liability of the minor. He is presumed, in all cases, to be able to understand his acts and to consciously direct his will. And yet, art. 114 of the Criminal Code, with the marginal name "*Consequences of criminal liability*", stipulates that, as a rule, "*a non-custodial educational measure shall be taken against the minor who, at the time of committing the crime, was between 14 and 18 years old*". As an exception, in two cases provided by the criminal law, "a custodial educational measure" may be taken against this minor. Therefore, the young person who has acquired anticipated full capacity of exercise is criminally liable like a "minor who has reached the age of 16", and not like a person who has reached the age of 18.

Pursuant to art. 484 of the Civil Code, "parental authority shall be exercised until the date when the child acquires full capacity of exercise". Consequently, art. 39(1) and art. 40 of the Civil Code will also have the effect of terminating the "parental authority", with all its legal consequences[45]. Similarly, the guardianship ceases – regulated as a measure to protect the minor – and the family council set up to "supervise" the way in which the guardian fulfills his mission loses the reason for its existence. On the other hand, electoral capacity, consisting in fulfilling the constitutional conditions imposed in the matter, is acquired by going through the specific imperative mechanism, so that the one who acquires anticipated full capacity at the age of 16 does not acquire the right to elect and the right to be elected. Pursuant to art. 36 of the Constitution, "Every citizen having *turned eighteen up to or on the election* day shall have the right to vote" *(our emphasis – C. S.).* Electoral majority, like civil majority, is reached at the age of 18, but in this matter there is no (yet?) legal solution for anticipated recognition[46].

Even if in the considerations of the judgment (or even in the operative part) in analyzing the situation of the minor who invokes art. 40 of the Civil Code the court examines a certain legal act or a certain aspect that constitutes a "solid ground", as this is natural, its effects are *general*: the minor acquires full capacity of exercise ("all", "entire"). Therefore, wording suggesting that full capacity of exercise is recognized "in order to collect the state allowance for his minor child" or "to collect the child-raising allowance" does not have a legal effect on the

[45] The young person who has acquired anticipated capacity of exercise has the "duty of respect" imposed by art. 485 of the Civil Code, which stipulates: "a child owes respect to his parents regardless of his age". The word child has a different meaning here from the one in art. 263(5) of the Civil Code, of direct descendant, a quality that is never lost. For the issue of the marriage of the emancipated minor, M. Avram, *op. cit.*, pp. 44–46; E. Florian, *Comentariu art. 272 C.civ.*, in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordonatori), *op. cit.*, pp. 350–354. In the sense, in the system of the 1864 Civil Code, that the emancipated minor cannot marry without the consent of those entitled, nor be adopted without the consent of the parents, D. Alexandresco, tom. II, *op. cit.*, p. 841.

[46] For electoral capacity, E. M. Nica, *Drept electoral*, ediția a II-a revăzută și adăugită, Universul Juridic Publishing, 2016, pp. 114–117. In this context, the mention in the constitutional norm "*up to or on* election day", is an application of the general solution of art. 38(2) of the Civil Code, "when *reaching* the age of 18" (our emphasis – C. S.).

content of the legal capacity in question. In this matter, if the "recognition" is judicial, the effects are "legal", and the capacity of exercise remains "the creation of the law". From the moment of acquiring this capacity of exercise, the person has the aptitude to exercise his civil rights and to assume civil obligations, by concluding *all* (any) civil legal acts, except those that are prohibited by law. The *generality* of the exercise capacity of the natural person is the one that gives the measure of its content in the hypothesis in question as well. If there is only the issue of "court authorization" for a *certain* civil legal act, which will be concluded under certain circumstances, we are in the classical hypothesis of the minor with limited capacity of exercise (art. 41, and not art. 40 of the Civil Code). Equally, the minor who marries can subsequently conclude *any* civil legal act, and not only those concerning the "relations between spouses" or "relations between parents and children".

7. Revocation of emancipation. *a) 1864 Civil Code.* In the system of the old Civil Code express emancipation can be revoked in accordance with the provisions of art. 430 par. 2–431, as in the French system by which the Romanian legislature was inspired (art. 484–485 of the Fr. Civ. Code). First, the obligations of the emancipated minor were reduced to "due prices" when they were "overburdened". Secondly, in such situations the court had to take into account the "wealth of the minor, the good or bad faith of the persons that have contracted with him, as well as the use or non-use of those expenses". Finally, as a consequence of the judicial reduction of the assumed obligations, the minor loses the benefit of emancipation. The partial capacity acquired through emancipation cannot be harmful to him. It was appreciated that the minor who had a bad behavior or a debauched life, but without contracting excessive obligations, did not lose the benefit of emancipation. In essence, acquired capacity, although limited, can only be lifted by virtue of an express text and under the law[47]. From the day the revocation of emancipation was published, the minor was placed again under parental authority or guardianship. He can no longer be expressly emancipated, since it is proved that he cannot lead his own life (art. 432 of the 1864 Civil Code; art. 486 of the Fr. Civil Code).

In the case of implied emancipation, the annulment of the marriage entails the revocation of the minor's capacity (*quod ab initio nullul est, nullus producit effectus*), but not in the situation where the marriage was concluded in good faith. The termination and dissolution of the marriage does not revoke the emancipation of the minor, who cannot be placed again under guardianship or parental power in the absence of an express text of the law[48]. It was appreciated that the benefit of implied emancipation could not be withdrawn from the minor, even in the situation

[47] D. Alexandresco, tom. II, *op. cit.*, pp. 872– 878; C. Nacu, *op. cit.*, pp. 677–681.

[48] It was admitted that in the event of revoking express emancipation, provided by art. 431 of the Civil Code of 1864, the minor who marries can be impliedly emancipated, in order to respect his status as a married person.

when he remained a widower and without children, although the text of art. 431 of 1864 the Civil Code speaks in general terms of "any emancipated minor", because the modification of the capacity of the spouses would be incompatible with the obligations arising from the marriage.

b) 1954 Family Code. Under the provisions of the Family Code and Decree no. 31/1954, the issue of revoking the "implied emancipation" appears in the hypothesis of the nullity of the marriage. Through marriage, the minor woman acquires full capacity of exercise, which she does not lose due to subsequent termination or dissolution of the marriage. With regard to nullity, it was estimated that if the dissolution of the marriage took place before one of the spouses reached the age of 18, s/he could not benefit from art. 8(3) of Decree no. 31/1954 and, consequently, did not have the capacity of exercise, because it is considered that s/he was not married and did not have this capacity in the past. In the case of a putative marriage, in which at least one of the spouses is in good faith, the issue of the minor spouse's full capacity of exercise has been the subject of controversy[49]. Professor I. P. Filipescu claimed that the *bona fide* spouse, who at the time of the marriage was not 18 years old, had acquired full capacity of exercise. In the event that the declaration of nullity of the marriage occured before the woman reached the age of 18, she maintained her full capacity of exercise, because this capacity was lost only in the cases and under the conditions established by law (art. 6 of Decree no. 31/1954), and the law does not provide such a solution. On the contrary, it was considered that in the case of a putative marriage, if the woman was in good faith when concluding the marriage, and the annulment decision remained irrevocable before she turned 18, the full capacity of exercise ceased. This loss of capacity is temporary, until the age of 18, and occurs only if the woman has not reached that age before the judgment remains final.

c) Current regulations. In the current system, express emancipation cannot be revoked, there are no legal provisions in this regard. The solution is explicable if we consider that the time stake is low, but some risks remain, at least theoretically. With regard to implied emancipation, the doctrine has observed that before spouses reach the age of 18, their marriage may cease (by death), may be dissolved (by divorce) or may be terminated (by absolute or relative nullity). Receptive to the doctrinal discussions already mentioned, the legislature intervened and expressly provided in art. 39(2) of the Civil Code that "*the minor who was in good faith at the conclusion of the marriage shall retain the full capacity of exercise*" in case of its dissolution. By the logical interpretation of the text – per *a contrario*; *qui dicit de uno, de altero negat* –, it is understood that the minor in bad faith "does not keep" this capacity. Even if the legal text provides only the hypothesis in which "marriage is annulled", it is admitted that the beneficial effect of good faith extends equally in the situation of absolute and relative nullity – *ubi eadem est ratio, eadem lex esse debet.* It is admitted that good faith is presumed in this matter as well.

[49] I. P. Filipescu, A. I. Filipescu, *op. cit.*, pp. 219–226; C. Stătescu, *op. cit.*, pp. 227–229; Tr. Ionașcu, *op. cit.*, pp. 155–156; Gh. Beleiu, 2007, *op. cit.*, pp. 359; G. Boroi, *op. cit.*, pp. 496–497.

On the other hand, the minor, widowed or divorced, retains the full capacity of exercise[50]. It can be argued that, in this matter, the principle of civil circuit security and the fact that the condition and capacity of persons are of concern to public policy, may make it impossible to alternate the hypostases of the natural person – from limited capacity to full capacity and back to limited capacity –, in the absence of an express text based on a strong reason. A return to limited capacity may be justified by the bad faith of the person in question, but in its absence it becomes a sanction that is difficult to sustain. In the theoretical hypothesis, in which the marriage is concluded "only for the purpose of acquiring the full capacity of exercise by the minor spouse", the fictitious marriage raises the issue of nullity, so that the legal effect in question is solved in this context[51].

8. Conclusions. The Civil Code regulates two hypotheses in which a natural person can acquire full capacity of exercise before reaching the age of 18. First, in the event of a valid marriage, full capacity of exercise is the traditional consequence of marriage. Secondly, the court may recognize the minor's full capacity of exercise. In both cases, the minimum age is 16, and those involved must prove specific "solid grounds". In compensation, the law does not regulate the possibility of extending the minority.

Emancipation by marriage was regulated in the 1864 Civil Code, in the 1954 Family Code and is naturally found in the current regulation, even if the solution of "early marriage" is subject to criticism. In turn, express emancipation, present in the 1864 Civil Code, is found in the current regulation after it was repealed in 1949. It is thus explicable why in the doctrine and even in the case law the term "emancipation" makes its presence felt, which can be "implied" or "express" and the minor is "emancipated", even if the current provisions never use this term (yet). On the other hand, the legal solution in question was maintained or reintroduced, with the indispensable "updates", inspired by comparative law or the tradition of Romanian law.

[50] I. Reghini, Ș. Diaconescu, P. Vasilescu, *op. cit.*, pp. 139–140; M. Nicolae (coord), Vasile Bîcu, George-Alexandru Ilie, Radu Rizoiu, *op. cit.*, p. 199; C. Stătescu, *op. cit.*, pp. 225–229; Tr. Ionașcu, *op. cit.*, pp. 155–156; S. Ghimpu, S. Grossu, Capacitatea și reprezentarea persoanelor fizice în dreptul R.P.R., Scientific Publishing, Bucharest, pp. 41–42; C. Munteanu, S. Cercel, Fișe de drept civil. Persoanele, Universul Juridic Publishing, Bucharest, 2020, pp. 132–139, with this situation we also clarify the erroneous mentions in that work, which could be understood in the sense that the minor returns to the limited capacity of exercise in this matter in case the marriage is terminated by divorce (see grid 1, p. 137 and the answer on p. 139).

[51] For a fictitious "screened" marriage, see the movie "Buletin de București", without necessarily claiming that such a situation is impossible in reality. Theoretically, the legislature may provide that in the event of divorce (possibly due to the minor) or termination of marriage, the minor returns to limited capacity, and the reason may be related to the idea of discouraging divorce and early marriage, but such a solution may be contrary to the current trends of law; see also, C. O. Mihăilă, C. O. Mihăilă, Căsătoria copilului. "Sweet 16". O privire comparative, in "Revista de dreptul familiei", nr. 1/2020, pp. 251–268.

In the system of the 1864 Civil Code, the emancipated minor acquires limited capacity, and the emancipation is a period of transition between the full incapacity of the non-emancipated minor and the full freedom enjoyed by the adult[52]. In turn, the system of the 1954 Decree maintains "implied emancipation", but removes the term that reminded of the past and gives only women the opportunity to marry before the age of 18 and thus acquire full capacity of exercise. Instead, through the "limited" capacity of exercise, minors aged 14–18, regardless of sex, acquire an "intermediate" capacity, which allows them to validly conclude some legal acts. Invited into the "antechamber" of full capacity of exercise (Gh. Beleiu), the minor may conclude certain acts "personally and by himself", and others "personally and with prior consent". Finally, in search of a balance between tradition and modernity, the current system maintains "implied emancipation", maintains the "antechamber" of full capacity and restores "express emancipation".

The reality is that today the minor has more possibilities of becoming major faster, but the time stake is decreasing. In the doctrine, regarding the matrimonial age, it has been emphasized that the equalization of the legal minimum age for marriage must be done by raising the age in the case of women, and not by lowering it in the case of men[53]. In the general picture of legal capacity, the updating and modernization of the civil capacity of the natural person seems to be a progress. For the child, there is a risk of being lured earlier into the "lion room", where the joy of freedom is accompanied by the traps of responsibility. Through the legal acts that he is entitled to conclude before reaching the age of 18, the young man can acquire rights, but also obligations, sometimes for life time. The legal mechanism and the "solid grounds" specific to each case of emancipation should be sufficient guarantees. In the case law, the situation of the minor, who was no longer under the care of her parents, determined "to take life in her own hands", or the situation of the minor encouraged by his mother to become an "equal partner" in the family business, encountered in the first decade of enforcement of the Civil Code, seem to justify the option to restore express emancipation in our law[54].

[52] In the doctrine, in the interwar period, it was mentioned that emancipation "is little used", because the age of majority is low, and the cases in which there is a need to increase the capacity of the minor are rare. "It was different in the old French and Roman law: the minor's incapacity was extended up to 25 years and it was often necessary for the minor to run his business before reaching the legal age", C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op. cit.*, p. 436.

[53] C. C. Hageanu, *op. cit.*, p. 27, who emphasizes that the solution of art. 272 of the Civil Code is contrary to the recommendations of the Committee for the Rights of the Child, with reference to par. 16 of the General Instructions on the Form and Content of the Final Conclusions of the Second Report submitted by Yemen, a country in which the legal minimum age for the marriage of men has been reduced from 18 to 15 years.

[54] Those who have not found out yet if they have wings will try to fly out of the window thus opened. In the absence of statistics on the situation of minors who in the 1954–2011 system were in circumstances requiring the acquisition of full exercise capacity before the age of 18, other than those who supported early marriage, it is difficult to assess whether the current solution responds to real needs or is determined by "trends" in comparative law. It is important that the civil capacity system remains coherent and efficient, given the general regulatory law role it plays in the legal capacity system.