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ACQUISITION OF THE GENERAL LEGAL CAPACITY

Abstract

The subject of this research paper is the institution of legal capacity, as an element of the main and complex institution of civil law, called "subjectivity". The study shows that the author of this paper aims to present and analyze the acquisition of the general legal capacity that belongs only to natural persons as subjects of civil law relations (real, obligational, and hereditary). In this study, the author presents the acquisition of general legal ability both from the aspect of modern civil law (Macedonian and foreign), as well as from the aspect of modern civil law science (domestic and foreign). Pointing to the different modern norms (as well as the different doctrinal positions) regarding the determination of the time (the moment) of the acquisition of the general legal capacity of natural persons, the author concludes that in legal life they can lead to the adoption of different court rulings, so accordingly, and to the other occurrence of possible real, bond or inheritance rights in favor or to the detriment of the natural person who, by birth, acquires general legal capacity.

Key words: subjectivity, general legal capacity, acquisition, natural persons.

I. Conceptual determination (definition) of general legal capacity

In continental legal systems (civil law) a clear differentiation is made between passive and active legal capacity. This differentiation goes beyond the distinction found in classical Roman law which speaks of "capacity to sue" and "capacity to be sued". In continental legal systems, passive legal capacity means a person's ability to have rights and obligations. In contrast, active legal capacity means that a person can cause rights and obligations to arise through his actions, both about himself and others. On the other hand, in common law systems, the logic of classical Roman law is respected according to which there is no clear differentiation between passive legal capacity (capacity for rights) and active legal capacity (capacity to act)¹.

In legal terminology, the term "person" means the subject of law, i.e. "an organism or subject able to be the bearer of rights and obligations, independently of its consciousness and will".

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¹ S. Vukadinović, *Građansko pravo – opšti deo*, Pravni fakultet Univerzitet Union, Beograd, 2021, p. 5-9.

Almost nothing else today is as well protected in terms of basic human rights as the passive legal capacity of the natural person. A person is a "natural person" simply because he is a human being, and as such is protected by the constitutions as constituent acts of every country. Constitutions do this by guaranteeing the human right to life. This means that a person has legal capacity as long as he is alive.

Legal theorists write that human life is the factual side of legal capacity, while legal capacity is the legal side of human's existence as a human being. That is why legal capacity is usually defined as the power or ability of a person to act within the legal system.

1.1. The determination of general legal capacity according to international acts

At the beginning of the presentation of the conceptual determination of legal capacity, it is desirable to indicate its determination according to the Universal Declaration of Human Rights from 1948. It decisively prescribes that: *everyone has the right everywhere to be recognized as a person before the law*². In the same way, the International Covenant on Civil and Political Rights of 1966³ proclaims the right to recognition of personality before the law.

The European Convention on Human Rights and Fundamental Freedoms⁴ of 1950 does not speak decisively about legal capacity, prescribes the right to life as a presumption of the existence of legal capacity, and concomitantly proclaims that this right for every person is protected by law.

The 2007 Charter of Fundamental Rights of the European Union⁵ discusses human dignity instead of the right to life. Namely, in Article 1 of the Charter, it is prescribed that: *human dignity is inviolable and must be respected and protected*.

It should be pointed out that the Convention on the Elimination of All Forms of Discrimination against Women specifically talks about the legal capacity of women. Article 15 of the Convention obliges the member states to give women, in the sphere of civil law, a legal capacity identical to that of men, as well as the same opportunities for exercising that capacity⁶.

² *Everyone has the right everywhere to be recognized as a person before the law*, Art. 6, Universal Declaration of Human Rights, available at:

https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf.

³ See: Art. 16, International Covenant on Civil and Political Rights, available at:

<https://www.coe.int/en/web/compass/the-international-covenant-on-civil-and-political-rights>.

⁴ *No one can be intentionally deprived of life, except by execution of a death sentence, pronounced by a court verdict, by which he is found guilty of a crime which, according to the law, is punishable by such a sentence.*, Art. 2, Convention for the Protection of Human Rights and Fundamental Freedoms, available at: <https://rm.coe.int/1680063765>.

⁵ Charter of Fundamental Rights of the European Union, Official Journal of the European Union, 2007/C 303/01, available at: https://fra.europa.eu/sites/default/files/charter-of-fundamental-rights-of-the-european-union-2007-c_303-01_en.pdf.

⁶ Art. 15, Convention on the Elimination of All Forms of Discrimination against Women (Convention on the Elimination of All Forms of Discrimination against Women), adopted in 1979 by the UN General Assembly, entered into force on September 3, 1981, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>.

1.2. Determination of general legal capacity in the countries of the European Union (EU)

When discussing the French Civil Code⁷ of 1804, one should take into consideration its article 8 according to which *every Frenchman enjoys civil rights*.

According to the Austrian Civil Code⁸ of 1811, every human being is reasonable to have inherent rights and should therefore be regarded as a person. *Everyone can acquire rights under conditions prescribed by law*. The Institute of Legal Ability in the work "Brief Overview of the Austrian Legal Information System and Laws", the Austrian professor H. Weichsel (H. Weichsel) determines that *any natural or legal person can acquire legal rights and obligations*⁹.

The German Civil Code¹⁰ from 1900 does not determine the legal capacity of natural persons but speaks about the moment of its acquisition and nothing more. The Constitution of the Republic of Germany¹¹ determines: *that human dignity is inviolable. Its respect and protection are the obligation of all state authorities*.

As for the German doctrine, it talks about the institute "legal subjectivity" (Rechtsfähigkeit) which was introduced by the famous German jurist Savigny. German science equates the term, that is, the institute of legal subjectivity with the term "legal capacity". According to Savigny, the concept of legal subjectivity 'Rechtsfähigkeit' implies *the ability to be the bearer of rights and obligations and participate in legal relations*¹².

The Constitution of the Republic of Italy¹³, as to the right to life and legal capacity, recognizes and guarantees the inviolable rights of man as an individual in all socio-economic formations in which the human person exists. However, in addition to the necessary rights of man, this Constitution also proclaims the fulfillment of mandatory duties in the political and economic sphere additionally social solidarity.

The Swiss Civil Code of 1907, regarding the institution of legal capacity, declares that every person has legal capacity. He emphasizes that *every person has the same capacity to have rights and obligations within the limits of the*

⁷ Code Civil, available at: <https://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code-english-version.pdf>.

⁸ § 18, Allgemeines bürgerliches Gesetzbuch (ABGB), available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622>.

⁹ H. Weichsel, A Brief Overview of the Austrian Legal Information System and Laws, 2021. Available at : <https://www.nyulawglobal.org>, (22.11.2024).

¹⁰ See: § 1, par. 15, Bürgerliches Gesetzbuch (BGB), available at: https://www.gesetze-im-internet.de/englisch_bgb/.

¹¹ See: Art. 1, par. 14, Constitution of the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland), available at: https://www.gesetze-im-internet.de/englisch_gg/.

¹² V. A. J. Kurki, A Theory of Legal Personhood, Oxford legal philosophy, United Kingdom, 2019, p. 72.

¹³ See: Art. 2, par. 2, Constitution of the Republic of Italy (Costituzione della Repubblica Italiana), available at: https://www.governo.it/sites/governo.it/files/Cost_art117.pdf.

law¹⁴. Article 7 of the Federal Constitution of the Swiss Confederation¹⁵ entitled "human dignity", proclaims that human dignity must be respected and protected.

In the Slovenian civil law science, it is claimed that the legal capacity enables everyone to be the bearer of rights and obligations and thus the subject to be the bearer of rights (but not an object in law). Therefore, professor Barbara Novak believes that "recognizing the legal capacity of the subject simultaneously recognizes his **legal subjectivity**, i.e. the authority of the person in law¹⁶. According to the professor, nowadays the legal capacity should be unconditionally recognized for every physical person and that capacity should not be based on nationality, race, gender, language, religion, education, or any other personal characteristic. According to professor Barbara Novak, the conceptual determination of legal capacity is based on the human right to personal dignity, which is constitutionally guaranteed¹⁷. In addition to this constitutional principle, the professor points to the constitutional principle of equality in the enjoyment of fundamental rights¹⁸.

From the determinations shown here, it can be concluded that Slovenian civilians, just like the Macedonian ones, consider that legal capacity is an opportunity to be the bearer not only of rights but also of obligations¹⁹.

Paragraph 1 of Article 17 of the Law on Obligatory Relations of the Republic of Croatia²⁰ decisively stipulates that: "*every natural and legal person is capable of being the bearer of rights and obligations*". In this sense, professors P. Klarić and M. Vedriš determine legal capacity as the basic capacity of legal entities because they cannot exist without legal capacity. If the legal entities (individuals and legal entities) are deprived of their legal capacity, then they would cease to exist as legal entities and according to them, the entities would be transformed into things. This means, the natural person (as a legal entity) with the deprivation of legal capacity, from a legal point of view, would be transformed into a 'thing'²¹.

According to the Law on Persons and Family of the Republic of Bulgaria²², "*every person from the moment of his birth acquires the ability to be*

¹⁴ See: Art. 11, Swiss Civil Code (Schweizerisches Zivilgesetzbuch (ZGB)), available at: https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en.

¹⁵ Constitution of the Swiss Confederation (Bundesverfassung der Schweizerischen Eidgenossenschaft), available at: https://www.constituteproject.org/constitution/Switzerland_2002.

¹⁶ M. Juhart, D. Možina, B. Novak, Ada Poljanar-Pavčnik, Viktorija Žnidaršič Skubic, Uvod v civilno parvo, Ur. List R Slovenije, Ljubljana, 2023, p. 71.

¹⁷ See: Art. 34, Ustav R Slovenije, Ur. list R Slovenije, št. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a and 92/21 – UZ62a, available on: <https://pisrs.si/pregledPredpisa?id=USTA1>.

¹⁸ See: Art. 14, Ustav R Slovenije...

¹⁹ Compare: P. Живковска Р, Т. Пржеска, *Граѓанско право - опит дел*, Европа 92, Скопје, 2021, p. 68 and M. Juhart, D. Možina, B. Novak, Ada Poljanar-Pavčnik, Viktorija Žnidaršič Skubic, *op. cit.*, p. 71.

²⁰ Zakon o obveznim odnosima, N. novinama, R Hrvatske, [35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23](https://www.zakon.hr/z/75/Zakon-o-obveznim-odnosima#google_vignette), available at: https://www.zakon.hr/z/75/Zakon-o-obveznim-odnosima#google_vignette.

²¹ P. Klarić, M. Vedriš, *Gradjansko parvo, 12. Izdaja*, Narodne Novine, Zagreb, 2009, p. 32.

²² See: Art. 1, Закон за лицата и семейството, Р България, Обн., ДВ, [бр. 182](#) от 9.08.1949 г., в сила от 10.09.1949 г., попр., [бр. 193](#) от 22.08.1949 г., изм. и доп., Изв., [бр. 12](#) от

the bearer of rights and obligations". Article 6 of the Constitution of R. Bulgaria²³ declares that "all people are born free and equal in dignity and rights".

In Bulgarian civil doctrine, professor А. Джероџ defines legal capacity as an abstract possibility of a natural person to be the bearer of rights and obligations²⁴, that is, to be a legal entity. Others, such as professor Л. Василев underline that legal capacity is a general abstract possibility of a person to be the bearer of rights and obligations permitted by objective law²⁵. According to professor Ф. Бояноџ, legal capacity is a presumption for acquiring and realizing other specific civil subjective rights and obligations²⁶. Similarly, the legal capacity is determined by professor М. Павлова according to which legal capacity is an abstract possibility for a person to be the bearer of rights and obligations that may arise based on objective law²⁷.

1.3. Determination of general legal capacity in the countries of the Balkans

According to the Constitution of the Republic of Serbia²⁸, every person has legal capacity. As far as the Serbian Civil Code²⁹ is concerned, regarding legal capacity, it stipulates that the natural person is the holder of civil rights and obligations inherent to him as a natural being which are provided by the legal order of the Republic of Serbia.

According to Serbian civilian I. Babić legal capacity is the subject's ability to have rights and obligations, that is, to be a legal subject. Today every human being has this ability, regardless of health, gender, and age³⁰. In contrast to him, the civilist V. V. Vodinelić determines that general legal capacity means that everyone, by the very fact of being human, can acquire and have all the rights and obligations recognized by the legal order³¹.

9.02.1951 г., изм., бр. 12 от 8.02.1952 г., бр. 92 от 7.11.1952 г., бр. 15 от 20.02.1953 г., попр., бр. 16 от 24.02.1953 г., изм. и доп., бр. 89 от 6.11.1953 г., бр. 90 от 8.11.1955 г., бр. 90 от 9.11.1956 г., бр. 50 от 23.06.1961 г., изм., ДВ, бр. 23 от 22.03.1968 г., в сила от 23.05.1968 г., изм. и доп., бр. 36 от 8.05.1979 г., изм., бр. 41 от 28.05.1985 г., бр. 46 от 16.06.1989 г., бр. 20 от 9.03.1990 г., доп., бр. 15 от 18.02.1994 г., изм., бр. 67 от 27.07.1999 г., бр. 81 от 6.10.2000 г., в сила от 1.01.2001 г., бр. 120 от 29.12.2002 г., available at: <https://lex.bg/laws/ldoc/2121624577>.

²³ Конституция на Република България, Обн., ДВ, бр. 56 от 13.07.1991 г., в сила от 13.07.1991 г., изм. и доп., бр. 85 от 26.09.2003 г., изм. и доп., бр.18 от 25.02.2005 г., изм. и доп., бр. 27 от 31.03.2006 г., бр.78 от 26.09.2006 г. - Решение № 7 на Конституционния съд от 2006 г., изм. и доп. бр. 12 от 6.02.2007 г., изм. и доп. бр.100 от 18 .12.2015 г, изм. и доп. бр. 106 от 22.12.2023 г, available at: <https://www.parliament.bg/bg/const>.

²⁴ See: А. Джеров, *Гражданско право*, София, 2003, р. 126.

²⁵ See: Л. Василев, *Гражданско право (обща част)*, Варна, 1993, р. 98.

²⁶ Thus: Г. Боянов, *Основи гражданското право*, София, 1998, р. 61.

²⁷ Thus: М. Павлова, *Гражданско право (обща част)*, Софи – р, 1995, р. 212.

²⁸ See: Art. 37, Ustav Republike Srbije, Sl glasnik R Srbije, br. 48/94 i 11/98, available at: https://www.paragraf.rs/propisi/ustav_republike_srbije.html.

²⁹ See: Art. 25, Civil Code Republike Srbije, available at: <https://www.mpravde.gov.rs/files/NACRT.pdf>.

³⁰ See: I. Babić, *Uvod u građansko parvo & stvarno pravo*, Projuris, Beograd, 2022, р. 29.

³¹ See: V. V. Vodinelić, *Građansko parvo, Uvod u građansko parvo i Opšti deo građanskog prava, četvrto izdanje*, Sl. glasnik, Beograd, 2020, р. 338.

According to Serbian professors D. Stojanović, O. Antić *legal capacity of a natural person is the ability to be the bearer of rights and obligations that the legal order recognizes for natural persons. It is an institute of public order, which belongs to jus cogens and where the will of the person is not important*³².

The Albanian Civil Code on the institution of legal capacity determines *that every natural person enjoys full and equal capacity to have civil rights and obligations within the limits established by law*³³. In the same way, the Draft Civil Code of the Republic of Kosovo stipulates *that every natural person enjoys full and equal ability to have civil rights and obligations within the limits established by law*³⁴.

The legal capacity of Kosovar professor A. Aliu defines *it as the ability of natural persons to acquire rights and obligations*. The professor underlines that natural persons acquire the right of ownership from birth, for example, a newborn acquires the right of ownership of things by gift or by inheritance³⁵. According to professor A. Aliu natural persons, apart from civil subjective rights, also have civil subjective obligations that are complementary with their subjective rights. For example, professor A. Aliu grants the inheritance of the mother's debts by the infant. In this case, the child's obligation to repay debts is an integral element of legal capacity, because the child acquires rights and obligations at birth, which are exercised through the legal representative, the parent, or the guardianship authority until the moment of acquiring business capacity³⁶. This claim of professor A. Aliu is completely acceptable because, according to generally accepted legal decisions, upon reaching the age of majority, the natural person realizes his rights and obligations independently, i.e., he does not need more help from the parents or the guardianship authority because upon reaching the age of majority, that person acquires business capacity.

1.4. Determination of general legal capacity in the Republic of North Macedonia

Starting from the above-mentioned acts of the international community, the Constitution of the Republic of Macedonia proclaims *the inviolability of human life*³⁷. This constitutional proclamation is a presumption of the legal capacity of the natural person, that is, the possibility of the natural person being the bearer of rights and obligations.

³² D. Stojanović, O. Antić, *Увод у Грађанско право*, Правни факултет Универзитета у Београду, Београд, 2004, p. 134.

³³ See: Art. 1, Kodi civil i Republikës së Shqipërisë, available at: https://www.drejtësia.gov.al/wp-content/uploads/2017/11/Kodi_Civill-2014_i_azhornuar-1.pdf.

³⁴ See: Art. 12, par. 1, Projekt kodi civil i Republikës së Kosovës, available at: <https://md.rks-gov.net/desk/inc/media/5582524D-4557-43D6-A814-D541D7E8E037.pdf>.

³⁵ A. Aliu, *Edrejta civile*, Prishtinë, 2013, p. 232.

³⁶ Ibid.

³⁷ See: Art. 10, Устав на Република Македонија, Сл. весник на Р Македонија, бр. 52/1991, 1/1992, 1/1992, 31/1998, 31/1998, 91/2001, 91/2001, 84/2003, 84/2003, 107/2005, 107/2005, 3/2009, 3/2009, 13/2009, 49/2011, 49/2011, 6/2019 и Сл. весник на РС Македонија, бр. 6/2019, available at: <https://www.sobranie.mk/ustav-na-rm.nspх>.

Starting from the Constitution, the Law on Obligation Relations of the Republic of North Macedonia stipulates *that every natural and legal person is competent to be the bearer of rights and obligations in obligation relations*³⁸.

Just as the Law on Obligation Relations, legal science also considers that legal capacity should be defined as an abstract possibility (ability) to be the bearer of rights and obligations³⁹.

According to professors Р. Живковска, Т. Пржеска legal capacity in civil law represents *an opportunity to acquire civil subjective rights and civil subjective obligations*⁴⁰.

Contrary professors Р. Живковска, Т. Пржеска, their professors as predecessors give longer determinations (definitions) of general legal capacity. In determining the legal capacity of professors accept the teaching on the determination of legal capacity by professor А. Групче that explains in a very flexible way what it is, that is, how legal capacity should be understood. In this sense, the professor underlines that *legal capacity means the possibility of every person being the subject of rights or obligations, i.e. to acquire rights and obligations*. Professor А. Групче contrary professors Р. Живковска, Т. Пржеска, does not use abstract possibility but only talks about possibility. At the same time, he explains possibility implies *the assumption that rights and obligations arise*, or decisively as the professor says: *that possibility does not mean that a certain person is also the subject of a certain right*⁴¹. Rightly so, professor А. Групче says that capacity is only a legal presumption for the acquisition of rights or obligations. The very acquisition of those rights is conditioned by special circumstances that must occur to realize the legal capacity, that is, the right.

A broader definition of general legal capacity is also provided by the former professor Д. Поп – Георгиев. He talks about the so-called *general property legal capacity that arises in the area of property relations*, instead of general legal capacity. According to him, *the general property-legal capacity of natural persons is the possibility for them to be the bearers of all subjective property rights and all property-legal obligations, except for those that require a special property-legal capacity*⁴². Most likely, this broad determination of legal capacity on the part of professor Д. Поп – Георгиев is due to the then (socialist) designation of civil law as property law, which civil law relations were named as property law.

Unlike professors А. Групче and Д. Поп – Георгиев, their colleague professor С. Георгиевски talks about civil relations and civil capacity. Starting from civil law terminology, he defines legal capacity as follows: *legal capacity is the ability to acquire civil subjective rights and undertake civil legal*

³⁸ See: Art. 45-a, par. 1, Закон за облигационите односи, Сл. весник на РМ, бр. 18/01, 78/2001, 4/2002, 59/2002, 5/2003, 84/2008, 81/2009, 161/2009, 23/2013, 123/2013, и Сл. весник на РС Македонија, бр. 215/2021, 154/2023, и 220/2023, available at: <https://www.pravda.gov.mk>.

³⁹ Thus: Р. Живковска, Т. Пржеска, *op. cit.*, p. 68. А. Групче, *Граѓанско право (опит дел)*, Скопје, 1976, p. 129. Ibid: С. Георгиевски, *Правна и деловна способност на физичките лица (предавања одржани во учебната 1969/1970 година)*, Универзитет “Кирил и Методиј” во Скопје – Правен факултет, Скопје, 1970, p. 6. Also: Д. Поп – Георгиев, *Основи на имотното право*, Култура, Скопје, 1977, p. 27.

⁴⁰ Thus: Р. Живковска, Т. Пржеска, *op. cit.*, p. 68.

⁴¹ See: А. Групче, *op. cit.*, p. 129-130.

⁴² See: Д. Поп – Георгиев, *op. cit.*, p. 28.

obligations. Although he does not decisively use the expression general legal capacity, professor С. Георгиевски points out that *the acquisition of rights and obligations is abstracted from legal capacity*⁴³. Professor С. Георгиевски concludes that legal capacity is reduced to an "abstract possibility" that does not require any action by the natural person.

II. Acquisition of general legal capacity

When talking about the time (moment) of acquiring general legal capacity in law, the position of civilians differs from criminologists. Therefore, in this part of the paper, first, the civil legal solutions regarding this issue will be presented, as well as the civil doctrinal opinions, and then the criminal legal solutions and the opinions of the criminal legal doctrine will be presented.

2.1. Acquisition of general legal capacity according to the civil doctrine

In the previous part, it was said that the legal capacity in the Republic of North Macedonia is proclaimed by the Law on Obligation Relations. The moment in which the legal capacity of the natural person is acquired in the Law on Obligation Relations is determined in paragraph 2 of Article 45-a: *the natural person acquires legal capacity at the moment of his birth*⁴⁴. From the rule given in paragraph 2, there is an exception that prescribes paragraph 3 of article 45-a: *it is considered that the conceived child is born when necessary for the protection of its rights, provided that it is born alive*.

In developed countries such as Germany, regarding the moment of acquisition of legal capacity the German Civil Code (BGB) stipulates that: *a natural person acquires legal capacity upon completion of birth*⁴⁵.

The Italian Civil Code⁴⁶ of 1942 regarding the moment of acquisition of general legal capacity is not as precise as the German Civil Code, but it only stipulates that *legal capacity is acquired at the time of birth*. The birth can last for a longer time, but most likely this Code considers that that moment will be when the child is separated from the mother, that is, when the umbilical cord is removed.

Just like the Italian Civil Code, the Ukrainian Civil Code⁴⁷ considers that *the general legal capacity of a natural person is acquired at the moment of his birth*.

Similar to the German Civil Code and the Spanish Civil Code, the moment of legal capacity is considered to be the completion of birth. Specifically, Article 30 of the Spanish Civil Code stipulates that *legal subjectivity is acquired at the moment of live birth after complete separation from the mother's womb has occurred*⁴⁸.

⁴³ See: С. Георгиевски, *op. cit.*, p. 6.

⁴⁴ See: Art. 45-a, par. 2, Закон за облигационите односи...

⁴⁵ See: § 1, par. 15. Bürgerliches Gesetzbuch (BGB)...

⁴⁶ See: § 1, par. 16. Codice Civile Italiano...

⁴⁷ Art. 25, Civil Codex Ukrainy, available at: <https://cis-legislation.com/document.fwx?rgn=8896>.

⁴⁸ Art. 30, Código civil Español, available at: [https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Spanish_Civil_Code_\(Codigo_Civil_Espanol\).PDF](https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Spanish_Civil_Code_(Codigo_Civil_Espanol).PDF).

In modern civil law, a natural person becomes a legal entity at birth. Professor R. Kovačević-Kustrimović believes that acquiring legal capacity does not require an additional condition, but only one - birth. It is enough for a child to be born and from that moment his legal life as a legal entity begins⁴⁹. From this determination, legal capacity resembles a "gift from birth" or a "right by birth". It is assumed that the child was born alive unless the contrary is established⁵⁰.

Slovenian legal doctrine also considers that legal capacity arises at birth, but Slovenian civilians emphasize that it is enough for the child to be born alive⁵¹.

To acquire legal capacity, professor A. Групче believes that: *the person doesn't need to meet any special conditions regarding age and mental state, nor any social qualifications. That is why the ability is acquired at birth and remains as long as the person is alive*⁵². To acquire the ability, the professor thinks that it is sufficient that the person was born alive and human-like, i.e. not a monster. It indicates that the newborn doesn't need to be viable.

According to Professor Д. Поп – Георгиев, the general property legal capacity of natural persons arises at the moment of their birth. In the law of socialist Yugoslavia, every natural person, who is born alive and human, now of his birth receives general property rights. The vitality and humanity of the natural person are assumed. However, that assumption, according to the professor, is rebuttable. He who claims that a certain natural person was stillborn, or that he is not human, can prove it⁵³. If he proves it in a prescribed procedure and before a competent state authority, it is considered that the stillborn or non-human born person does not acquire property legal capacity.

According to the Bulgarian professor А. Джеров, for any human being to acquire legal capacity, the legal order must recognize that capacity and that is on the condition that the person is born alive and is capable of living. He believes that both the infant and the mentally ill have legal capacity if they meet the additional condition of "viability"⁵⁴.

Professor O. Kadriu agrees, he considers the acquisition of legal subjectivity to be related not only to birth but also to the condition of humanity. Regarding the case of a newborn without a human appearance who became human in Macedonia, he believes that "with the removal of severe deformities" with the help of medical science and surgery, the newborn acquired the status of a legal entity⁵⁵.

⁴⁹ Р. Ковачевић-Куштримовић, М. Лазић, *Увод у грађанско право*, Пунта, Ниш, 2018, р. 66.

⁵⁰ Art. 17, para. 3, *Zakon o obveznim odnosima*, N. novinama, R Hrvatske... "*In cases of doubt whether the child was born alive or dead, the former is assumed. Anyone who claims otherwise must prove it*", § 23, 21. Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch* (ABGB))...

⁵¹ М. Јухарт, Д. Моџина, В. Новак, Ада Полajнар-Павчник, Викторија Џнидаршић Скубић, *op. cit.*, р. 71.

⁵² See: А. Групче, *op. cit.*, р. 129-130.

⁵³ See: Д. Поп – Георгиев, *op. cit.*, р. 28.

⁵⁴ А. Джеров, *op. cit.*, р. 126.

⁵⁵ Thus, professor Osman Kadriu gives us an interesting example of acquiring legal capacity: In 2008, an interesting event spread throughout Europe. A male child was born in the Bitola hospital but with many deformities and no chance of life. The medical council decided to operate on the child as the only option for life. The child's parents opposed the operation and gave up

The opinions of professors Д. Поп – Георгиев and О. Kadriu are not accepted today, that is, modern civil studies believe that an additional condition for acquiring legal subjectivity should not exist, but only the basic condition, which is that the child should be born alive.

Professor V. V. Vodinelić regarding the moment of acquisition of legal subjectivity belongs to the group of civilians who think that *a natural person acquires legal capacity with the act of birth*. His position, expressed in all his works, is that *a person becomes a legal subject at birth, since then that person can have rights and obligations, and since then rights and obligations can become his rights and obligations*⁵⁶.

Professor I. Babić, even though is one of the more recent civilizes, still believes that, for a newborn to become a physical person (have a legal personality), in addition to the basic condition - to be born alive, additional conditions are needed. The first additional condition is that it gives signs of life after birth. The second condition is only that the newborn was created from a woman and a man, and regardless of his appearance and vitality, will he die very quickly - for example, in a few minutes⁵⁷. It is concluded that according to I. Babić, the newborn does not have to cry as required in Roman law, but in addition to the basic condition that it was born alive, it should also show signs of life and that it was created by a woman and a man, regardless of appearance and vitality for further life.

Just like professors V. V. Vodinelić V and I. Babić, as well as the Serbian professor О. Станковић, В. Водинелић think that the general legal capacity based on which the individual has access to all the rights recognized by the legal order is acquired first of all by birth as a basic condition, of course assuming that the child is born alive⁵⁸.

According to Serbian professors D. Stojanović, O. Antić, a natural person acquires legal capacity by birth. According to them, the birth ends when the child is physically separated from the mother, that is, by cutting the umbilical cord⁵⁹.

Professor S. Vukadinović underlines that there is no explicit legal norm at which moment the child is considered to be born, but the knowledge and opinions of doctors are used, the so-called. The medical sciences (and the common law). It follows from this that, according to professor S. Vukadinović, the newborn should be born, and that one should *not wait for the moment of*

the child. A lady from Great Britain called and offered to adopt the child. Because the parents opposed the operation of the child, at the last moment the Ministry of Health issued an order for the child to be operated on. The operation was performed with the most modern techniques and equipment and with special care according to medical rules - *lege artis*. The child survived the difficult surgery and great pain to remove rarely severe deformities in medicine. The hospital decided on the child's name. Considering that the child was born on Christmas holidays, he was baptized with the name Bosko. This means that, the child born without the appearance of a human became human and acquired the status of a legal subject, O. Kadriu, *Hyrje në të drejtën civile, botimi i tretë*, Tringa design, Tetovë, 2021, p.193.

⁵⁶ More about the acquisition of legal capacity can be seen at: V. V. Vodinelić, *op, cit.*, p. 338.

⁵⁷ See: I. Babić, *op, cit.*, p. 29.

⁵⁸ О. Станковић, В. Водинелић, *Увод у грађанско право*, Београд: Номос, 2007, p. 67.

⁵⁹ *A child who was stillborn or died during childbirth did not become a legal subject. It is enough that the child lived and gave signs of life shortly after birth, so death after birth means that the child's legal subjectivity ends, not that it never existed*, D. Stojanović, O. Antić, *op, cit.*, p. 134.

*cutting the umbilical cord*⁶⁰. However, in addition to the condition of birth, professor S. Vukadinović believes that there should be a condition of live birth. According to him, a child is born alive if, after leaving the mother's womb, it shows signs of life: a child's cry, the pulsation of the umbilical cord, the work of the heart, lungs, etc. The doctor's assessment at birth, impressions (subjective assumptions) about the expectation of whether he will survive or not, assessments of the child's vitality, and facts about the child's appearance or possible physical defects are not important for the acquisition of legal capacity nor can they reduce its scope⁶¹. From this determination, it follows that the only condition for acquiring general legal capacity, according to professor S. Vukadinovic, is the live birth of the natural person (child).

According to the Bulgarian professor Г. Боянов, for the acquisition of legal capacity, it is sufficient for the natural person to be born alive. The physical condition of the child according to professor Г. Боянов is not important⁶². It follows from this that the professor also considers persons with physical disabilities, for example, with an ugly appearance, to be fully legally capable. Likewise, the mental health of the physical person does not influence the acquisition of legal capacity, so no one can deprive these persons of the opportunity to be subjects of the law.

Professors Р. Живковска, Т. Пржезка, due to the legal consequences caused by birth, consider the act of birth as the moment of separation of the newborn from the mother. At the same time, the professors point out that, due to the various cloning experiments that are carried out in modern society, the newborn should be born exclusively by a woman. According to the professors, birth is one of the most significant legal facts (sources of civil relations) known as events, due to the legal consequences that birth causes⁶³. The professors consider the moment of birth to be when the child becomes an independent being, the umbilical cord is cut, and of course, the child is alive and born of a woman. Professors Р. Живковска, Т. Пржезка consider the birth of a living child to be a basic condition, that is, it occurs at the moment when the newborn is separated from the mother and it is decisively determined (in minutes, hours, days, and years). That's why the moment of birth (year, day, hour, and minute) in addition to other circumstances, is recorded in a special book (Register of Births), and the extract from that book is proof of the child's birth⁶⁴.

According to professor С. Георгиевски essential for the acquisition of legal capacity is that the newborn was born of a woman. Professor С. Георгиевски thinks that natural persons acquire legal capacity at birth. According to him, for natural persons to acquire legal capacity, the general condition should exist, which is to be born. According to professor, an additional condition is that the newborn should be born of a woman and be alive. His pointing out that it is inhumane and anti-social to consider a human a being who is not born of a woman is quite justified. Although he is from the older generation of professors, he criticizes the additional condition for humanity, rightly considering that this "additional condition" would pose a danger that the

⁶⁰ See: S. Vukadinović, *op. cit.*, p. 11.

⁶¹ *Ibid.*

⁶² Г. Боянов, *op. cit.*, p. 62.

⁶³ See: Р. Живковска, Т. Пржезка, *op. cit.*, p. 71-72.

⁶⁴ *Ibid.*

human race would not be legally protected, which is certainly legally dangerous and undesirable⁶⁵.

2.2. Acquisition of general legal capacity according to criminal law doctrine

Regarding the time of acquisition of the general legal capacity of natural persons, there are differences between civilians on the one hand and criminologists on the other hand.

Eventually, the civilizes believed that the legal capacity, that is, the abstract possibility for the creation of rights and obligations, arises at the moment of separating the newborn from the umbilical cord from the mother, because at that moment a new subject, that is, another natural person, is created. This is completely understandable because civilizes consider subjectivity the basic and broadest institution of civil law, so they advocate the separation of the child from the mother as a decisive moment in the emergence of the general legal capacity.

Different from civilians, criminologists, for whom the basic institution of criminal law is guilt, which can appear in the form of intent (*dolus*) or negligence (*culpa*), start from the circumstance of whether a certain criminal relationship occurred at birth.

Professors of criminal law academician В. Камбовски and Н. Тупанчевски point out that when determining the moment of birth, a distinction should be made between two criminal acts, one of which is deprivation of life and the second, which is illegal, is termination of pregnancy. At the same time, all criminals consider that in the case of negligence, that is, negligent endangerment of the fruit, there is no criminal liability because there is no intention. According to the mentioned professors, the criminality of the mother in terms of harming the fetus or terminating the pregnancy (abortion) is a complex issue that should be started from the beginning of the birth process, i.e. from the first contractions and labor pains (the so-called "internal phase"), which lead to the birth⁶⁶. This means, according to them, the first contractions of the woman in labor mark the beginning of birth even though "the child has not yet come out of the mother's womb." Proceeding from the circumstances that the woman in labor can deliberately harm the child she is carrying, The Criminal Code prescribed in Article 27 the crime "murder of a child during childbirth": *a mother who takes the life of her child during childbirth or immediately after birth in a state of disorder caused by childbirth will be punished with imprisonment for three months to three years*⁶⁷. It should be understood that this provision according to professors В. Камбовски and Н. Тупанчевски also refers to the duration of the mother's contractions, which, as said, represent the beginning of the birthing process.

⁶⁵ See: С. Георгиевски, *op. cit.*, p. 6-8.

⁶⁶ В. Камбовски, Н. Тупанчевски, *Kazнено parvo, Посебен дел, Петто изменето и дополнето издание*, Скопје, 2011, p. 24-25.

⁶⁷ Кривичен законик, Сл. весник на Р Македонија, бр. 37/1996, 80/1999, 48/2001, 4/2002, 16/2002, 43/2003, 19/2004, 40/2004, 81/2005, 50/2006, 60/2006, 73/2006, 87/2007, 7/2008, 139/2008, 114/2009, 51/2011, 51/2011, 135/2011, 185/2011, 142/2012, 143/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015, 226/2015, 97/2017, 170/2017, 248/2018, и Сл. весник на РС Македонија, бр. 36/2023, 188/2023, available at: <https://jorm.gov.mk>.

In this context, it is of particular importance to indicate the modern understanding accepted by Macedonian criminals, according to which the condition for acquiring general legal capacity, and thus for the successful completion of the birth, is that the child be born alive, and the condition that the child be born of a woman⁶⁸.

III. Conclusion

Based on all the above-presented international sources, civil codes and laws, and scientific opinions that talk about the conceptual determination - definition of legal capacity, it can be concluded that mostly they all stand on the opinion that the institution of general legal capacity is the possibility for a natural person to be the bearer of rights and obligations. That possibility is true that it is abstract because for it to exist the natural person doesn't need to take any actions, but those actions should only represent an opportunity guaranteed by the legal acts. It was pointed out that the abstract possibility of being the bearer of rights and obligations can only be had by a natural person if he has the right to life and if he was born of a woman.

As for the right to life as a presumption for the emergence of legal capacity, it has been shown in this paper that it is guaranteed by the highest international acts and the constitutions of the states, so there is no doubt whether a natural person has or does not have the right to life in today's modern living conditions, as an abstract possibility for the acquisition of rights and obligations is the birth of a newborn who must be alive at the same time and all authors believe that to acquire general legal capacity the child should be born of a woman. However, it has been shown that certain civilians, and especially those from the time of the socialist social economic system, in addition to this basic condition - birth, advocate additional conditions such as: that the newborn is not a monster, that it is viable, that it is human-like, and others. These additional conditions are not desirable to accept today in the global society because they can lead to various cases of abuse such as taking organs from the body of the newborn (stealing ie, "disappearing" of the newborn, etc.) which modern society brings.

However, the author of this paper joins that group of civilians who, in addition to the general requirement that the newborn be born alive, advocate that it be born of a woman at the same time. We believe that the presence of this condition will make it possible to prevent the abuse of humans, that is, not to carry out experiments with the human race.

At the end of the point about the acquisition of the general legal capacity, a review was made of its acquisition according to the criminal law doctrine. Based on the works of the criminals, it is concluded that they, unlike the civilians, consider that the general legal capacity of the newborn arises at the beginning of the birth process, i.e. with the beginning of the first contractions of the mother in labor.

⁶⁸ В. Камбовски, Н. Тупанчевски, *op. cit.*, p. 24-25.

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