THE JURIDICAL CAPACITY OF THE MINOR IN LABOUR LAW AND CRIMINAL LAW

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Abstract:

This paper refers to the juridical capacity of the minor in two branches of law: labour law and criminal law, making a comparison between the legal stipulations regarding the minor in these branches.

According to the Labour Code, the natural person obtains the work capacity when he/she attains the age of 16. By exception, the minor can conclude a work contract as an employee also at the age of 15, with the approval of his/her parents or legal representatives, in order to perform activities which are adequate to his/her physical development, aptitudes and knowledge, if by this his/her health, development and professional preparation are not jeopardized. Hiring a person under the age of 15 is prohibited.

In criminal law, penal liability begins at the age of 16. As an exception, the minor between 14 and 16 can be held liable for penal offence, but only if it is proved that he has committed the deed with discrimination. The minor under the age of 14 is not liable for penal offence.

Key words: juridical capacity, minor, labour law, criminal law.

1. Introduction

The juridical condition of the minor in society is a special one, if we take into account his/her age, his/her specific features, his growing personality, all of these being aspects which determine the particular attention that this category of people benefits by. The necessity to create a social and legal milieu in order to ensure an adequate development of the minor's personality is a topic which remains always current. The people who have not attained yet the age of majority need an improved legislation which refers to them in order to ensure a better protection of their rights.

In common law, one obtains the full capacity of exercise when one attains the age of 18. Starting with this moment of majority, the person has the aptitude of becoming holder of all the rights and obligations stipulated by the law, of exerting them and of assuming them by concluding juridical acts. Exceptionally, in some branches, the law admits the minors' capacity of becoming subjects in juridical relations before turning 18. We will analyse two of these: the labour law and the criminal law to examine the minor's juridical capacity.

2. The minor – subject in work relations

In the art. 13, the Labour Code establishes the employee's juridical capacity, i.e. the aptitude of the natural person of becoming holder of rights and

obligations by concluding an individual work contract. "*The natural person obtains the work capacity when he/she turns 16*" (paragraph 1). Therefore, attaining the age of 16 marks the initial moment of the full juridical capacity in labour law, of the acknowledged possibility that the underage becomes subject in work relations. Starting with the age of 16, the minor can start working by legally signing an individual work contract. This situation is different from what we can find in the common (civil) law, where one obtains the full capacity of exercise only when one attains the age of 18, except the woman who got married before this age[1].

The acknowledgement, in labour law, of the full capacity from the age of 16 is based on the conviction that starting with this age, man has the physical and mental maturity sufficiently shaped to engage himself in a work relation. The physical maturity allows him to perform an activity in exchange of a wage, whereas the mental maturity allows him, owing to a sufficiently developed discrimination, to be on his own from juridical point of view, to conclude alone an individual work contracts, assuming the rights and obligations issued from that contract[2].

It is also at the age of 16 that the minor can become a member of a union, without needing the preliminary approval of his legal representatives (art 3, Law 54/2003 – The Law of the Unions).

We have already mentioned that in labour law, the rule states that one obtains one's juridical capacity when one attains the age of 16. An exception is allowed, though, stipulated by the art. 13, paragraph 2 in Labour Code: *"The natural person may conclude a work contract as an employee also at the age of 15, with the approval of his/her parents or legal representatives, in order to perform activities which are adequate to his/her physical development, aptitudes and knowledge, if by this his/her health, development and professional preparation are not jeopardized."*

Between the age of 15 and 16, the law admits a "limited biological capacity of work"[3]. In this interval, one benefits by a partial capacity of concluding a work contract[4], provided that the following conditions are respected:

a) the parents or the legal representatives have given their approval;
b) the activities for which this approval has been given are adequate with the physical development, aptitudes and knowledge of the underage;
c) his/her health, development and professional preparation are not jeopardized.

The parents' approval must be based on a preliminary analysis of the kind of work which will be performed by the minor, of the working conditions and of the possible consequences that work might have on the development of the minor. The parents' approval must not be considered a formal element, but it must constitute a responsible act on their behalf, based on a real concern about the

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[1] Art. 8 din Decretul nr. 31/1954 privitor la persoanele fizice şi persoanele juridice.
[2] Al. Ţiclea, *Tratat de dreptul muncii*, Editura Rosetti, Bucureşti, 2006, p. 323.
[3] Idem.
[4] Al. Ţiclea (coordonator), *Codul muncii – adnotat şi comentat*, Editura Lumina Lex, Bucureşti, 2004, p. 92.

youth's future and about the repercussions that work will have upon his/her physical appearance and personality.

It is necessary that both parents give their approval and that this happens *preliminary* (or at least simultaneously) with the conclusion of the work contract. Also, the approval must be *specific* (to refer to a certain work contract and to the performance of a certain activity) and *precise* (to have a clear, non-ambiguous form). Thus, a general approval, which allows the minor to conclude work contracts, is not valid[1]. The approval will be registered in the finding certificate of the individual work contract and the parents will sign the contract together with the minor[2]. If the parents do not give their approval, the Office of the Public Guardian and Trustee will decide[3].

The absence of the parents' approval makes the work contract absolutely null and void. This null and void fact has a particular character in labour law: it is remediable[4] i.e. it can be covered later and the contract becomes valid if the approval is given after the conclusion of the contract, while it is carried out by the minor.

If the minor's normal physical or mental development is jeopardized, the approval can be withdrawn any time during the contract execution (but only until the minor turns 16, because starting with this moment, the parents' approval is no longer necessary for concluding and executing a work contract). This represents a case of legal canceling of the work contract, according to the art. 56, letter k of the Labour Code.

It must be underlined that the underage concludes the individual work contract *in person*, on his behalf; his/her representation is not allowed, because of the intuitu personae character of the contract.

The 3rd paragraph of the 13th article mentions the absolute interdiction of hiring people who have not attained the age of 15: *"Hiring a person under the age of 15 is prohibited".* The Labour Code rephrases a principle stipulated in the Romanian Constitution, in art. 49, paragraph 4: *"The minors under the age of 15 cannot be hired as employees."* The age of 15 marks the bottom limit of the juridical capacity in labour law. This is because of the limited maturity level of the underage and of his/her physical and mental development, which are insufficient to make him able to obtain rights and obligations by concluding an individual work contract.

As we have already shown, in labour law, the minor does not have the capacity to conclude contracts until the age of 15, between 15 and 16 he/she has a

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[1] Raluca Dimitriu, *Particularități ale contractului individual de muncă încheiat de către minori*, în Revista română de dreptul muncii, nr. 1/2005, p. 18.

[2] Al. Ţiclea, Andrei Popescu, Constantin Tufan, Marioara Ţichindelean, Ovidiu Ţinca, *Dreptul muncii*, Editura Rosetti, Bucureşti, 2004, p. 339.

[3] Ion Traian Ştefănescu, *Tratat de dreptul muncii*, vol. I, Editura Lumina Lex, Bucureşti, 2003, p. 300.

[4] Idem.

limited capacity, and after the age of 16, he/she obtains the full capacity of concluding contracts[1].

A number of special laws regulate some incompatibilities[2] of concluding work contracts; these incompatibilities are based of various reasons, associated either to the individual interests of the person or to the general one. They constitute derogations from the rule concerning the capacity of the natural person to conclude an individual work contract, limitations or restrictions of the juridical capacity.

3. The minor's capacity in criminal law

In criminal law, the beginning of the juridical capacity of the natural person means the moment starting from which he/she can be liable for penal offence, in the case of committing an offence. In this field of law too it was necessary that a minimal age was established, starting from which the minor can be held liable for penal offence if by his/her conduct, he/she harms any of the values protected by the criminal law.

The establishment of the minimal age from which the criminal liability begins was based of scientific research in the social field, which approximated the moment when the minor's discrimination is formed, considering that there can be no criminal liability if there is no discrimination. One of the main conditions for a person to become active subject of the offence is that he/she has discrimination. The doctrine defines the discrimination as "the biopsyhical capacity of the natural person to realize the nature of the action (non/action) he/she is performing and of its consequences, which might be dangerous from social point of view".[3] In another definition, it represents "the person's capacity of realizing the socially dangerous character of the deed and to manifest in conscious manner his/her will, his/her capacity related to the concrete committed deed".[4] The state which is opposed to discrimination (responsibility) is irresponsibility, i.e. the minor's mental incapacity of realizing his/her actions or of controlling them, committing thus a deed stipulated by the criminal law. The absence of discrimination at the underage is not an abnormal situation, but a normal one, owed to the insufficient physical and intellectual development.

The 99th art. of the Criminal Code stipulates: *"(1) The minor under the age of 14 is not liable for penal offence. (2) The minor between 14 and 16 is liable for penal offence, only if it is proved that he has committed the deed with discrimination. (3) The minor who has attained the age of 16 is liable for penal offence."*

The legislator established three presumptions in order to decide the criminal capacity: an absolute legal presumption of irresponsibility (the absence of criminal capacity) for the minors who have not attained the age of 14, a relative presumption

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[1] Raluca Dimitriu, *Contractul individual de muncă – prezent şi perspective*, Editura Tribuna economică, Bucureşti, 2005, p. 67.

[2] A se vedea pe larg Al. Țiclea,*Tratat...*, p. 326-332.

[3] Valentin Mirişan, *Drept penal – partea generală*, Editura Convex, Oradea, 2002, p. 74.

[4] V. Dongoroz apud Gheorghe Nistoreanu, Alexandru Boroi, *Drept penal. Partea generală*, Editura ALL Beck, Bucureşti, 2002, p. 99-101.

of irresponsibility for the minors between 14 and 16 and a relative presumption of responsibility for the minors between 16 and 18[1].

For the minors under 14, a possible proof of the existence of discrimination would not have any value, as the law stipulates in an absolute manner that they have no discrimination and cannot be punished according to the criminal law. The contrary proof is not admitted in any circumstances.

The minors between 14 and 16 are presumed to be liable for penal offence, if it is proved that they acted with discrimination. As it is a fact, an individual attribute, the discrimination must be established in a concrete way, not in a general one. In each case it is necessary to establish if the minor *who committed a deed stipulated by the criminal law* had discrimination *the moment he/she committed it* (emphasis mine). The existence or the non-existence of the minor's discrimination must be estimated in relation to the moment when the deed was committed, not afterwards, because it is possible that the underage had acted without discrimination and that later is was established that he has it. Or, the criminal law refers precisely to the existence of discrimination at the moment when the deed was committed, not at another moment, subsequent, such as the date when the deed was discovered or at the beginning of the criminal trial.

The existence of the discrimination at the moment when the deed was committed is tested by means of a medico-legal psychiatric examination and of a social inquiry[2].

After the age of 16 the minor is liable for penal offence, on the condition that his irresponsibility is not proved, a cause which removes the criminal character of the deed, according to the art. 48 of the Criminal Code.

According to the criminal law and in relation to the existence or non-existence of the discrimination, the minors can be divided into two categories[3]: minors who are not liable for penal offence and minors who are liable for penal offence. The first category, which the art. 50 of the Criminal Code refers to (minority – a cause which removes the criminal character of the deed), includes the minors under 14 and those between 14 and 16, who lack discrimination (its existence was not proved at the moment the deed was committed).

Towards the minor who is liable for penal offence can be taken either an educational measure, either can be applied a punishment, in conformity with art. 100, paragraph 1 of the Criminal Code. The factors which must be taken into account when the penalty is chosen are: the degree of social danger of the committed deed, the physical state, the intellectual and moral development, the underage's conduct, the conditions in which he/she was raised and in which he has lived and other elements able to characterize his/her person. (art. 100, paragraph 1).

The punishment is applied only if it is estimated that an educational measure would not be enough to straighten the minor (art. 100, paragraph 2).

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[1] Gh. Nistoreanu, Al. Boroi, *op. cit.*, p. 269; V. Mirişan, *op. cit.*, p. 75.

[2] Gh. Nistoreanu, Al. Boroi, *op. cit.*, p. 188; Matei Basarab, *Drept penal – partea generală*, vol. I, Ediţia a II-a, Editura Lumina Lex, Bucureşti, 1996, p. 155.

[3] V. Mirişan, *op. cit.*, p. 179.

According to the Romanian criminal law, the minority lasts until the age of 18, even if the woman obtained, by marriage, the full capacity of exercise[1].

4. Conclusions

If we draw a comparison between what has been stated above, we can notice that both in labour law and in criminal law, one obtains juridical capacity before attaining the age of 18. On principle, the minor obtains the juridical capacity in labour law when he/she attains the age of 16 and, exceptionally, at the age of 15. Under this age, hiring a minor in a work relation with an individual work contract is prohibited. The Criminal Code contains the same principle that the juridical capacity begins at the age of 16, mentioning at the same time that the criminal liability can begin even before this age, starting with 14, but only if it is proved that the criminal deed was committed with discrimination. The minimal limit, under which there is no criminal liability is, therefore, the age of 14.

Thus, the criminal law allows the criminal liability and the punishment of the minor even before the age at which the labour law allows the conclusion of an individual work contract. In criminal law, the existence of discrimination can be established even before the minor is admitted the right to be employed. If, from the point of view of criminal law, the existence of discrimination can be proved at the minor under 14, and he is considered sufficiently mature to be responsible for his deeds, we opine it would rightful that he/she is allowed to conclude legally a work contract. Besides, The International Work Convention no. 138 from 1973 concerning the minimal age for being employed stipulates in art. 7, 2nd point that the national legislation can authorize people under 15 who have not finished their compulsory education to be hired for easy jobs[2], if some conditions are fulfilled. In other European states, the underage can become subjects in work relations even before they attain the age of 15. In Romania, the only legal possibility for the minors under 14 to perform any activities would be to conclude civil conventions (being represented by their parents) of performing services. After attaining the age of 14, they can conclude these conventions on their own, having the parents' preliminary approval[3].

De lege ferenda, it would be advisable to lower the age at which the minors can conclude individual work contracts, especially as regards the artistic domain.

The employment must have as main goal that the minor acquires a sense of responsibility and a certain maturity and that he gets to appreciate the value of money. A particular concern must be given to the kind of activity, to the place where it is performed, to the work milieu, so that these will not have negative consequences upon the minor's personality and that they do not facilitate in any way the committing of offences. A proper education of the minor and the early inoculation of a socio-human set of values constitute essential factors for the harmonious development of the individual and for the decrease of the juvenile delinquency phenomenon.

[1] V. Mirişan, *op. cit.*, p. 203.
[2] Al Țiclea, *op. cit.*, p. 324.
[3] I. T Ştefănescu, *op. cit.*, p. 303-304.