

LEGAL CAPACITY OF THE CHILD IN SERBIAN LEGISLATION

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Abstract. *In this paper the author provides a critical analysis of the statutory solutions of the Serbian Family Act 2005 and the Preliminary Draft of the Civil Code regarding the legal capacity of the child. The first part of the paper is devoted to childhood and the concept of the evolving capacities of the child in light of the UN Convention on the Rights of the Child. In the second part of the paper, the author critically analyzes the regulations which define the limits of the legal capacity of the child in Serbian legislation in the context of modern trends in the field of the rights of the child.*

Key words: *rights of the child, evolving capacities of the child, legal capacity of the child.*

1. INTRODUCTION

Since 2006, there have been ongoing works on the Serbian Civil Code which is, inter alia, expected to comprehensively regulate family law relations as well. In the Preliminary Draft of the Civil Code¹, which is currently subject to public discussion, the Family Law provisions are contained in Volume III.

Among other issues, the provisions contained in this part of the Draft Civil Code regulate the legal capacity of the child. The comparison of the proposed legal solutions with solutions contained in the Family Act (2005) indicates that the drafters of the Civil Code legal text preserved the existing legal solutions in all aspects. Whereas the civil law codification is an opportunity to improve the legislation pertaining to the right of the child, this paper provides a critical analysis of the rules governing the legal capacity of the child, in order to draw attention to the conceptual shortcomings and limitations. The first part of the paper considers the key determinants of the contemporary concept of the right

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¹ The text is available at: http://www.propisi.com/assets/files/gradjanski_zakonik_RS-prednact.pdf (accessed on 26. 10. 2015).

of the child, while the second part of the paper focuses on the analysis of provisions defining the limits of the legal capacity of the child in Serbian legislation.

2. CHILDHOOD, RIGHTS OF THE CHILD AND EVOLVING CAPACITY OF THE CHILD

Childhood is a variable moral and social category, the contents of which are different in different cultures and époques,² conditioned by the social structure, economic conditions, the way of life, the system of values applicable in a given social milieu, and other social factors.³ In the last quarter of the 20th century, paternalistic attitude of the society towards children and over-protective model of family relations, in the focus of which is the child as a “passive object” of protection, has been gradually transformed by developing a new “right of the child” concept. This modern concept is based on the idea that the child is an autonomous human being, individual titleholder of rights and freedoms, exercised in accordance with his/her maturity and evolving capacities, and that the right to self-determination, which opens and expands the space for development and realization of human rights and freedoms, is essentially important for the child's status in the family and the society.⁴ Particularly important are, so-called, participatory rights,⁵ ensuring that the child is an active factor of life in a social community and of his/her own life and development as well.

The idea about the child as an autonomous legal subject has been normatively encoded and powerfully supported by the *UN Convention on the Rights of the Child*.⁶ This basic innovative international document in the field of children's rights guaranties to the children, for the first time, a wide range of the civic, political, economic and cultural rights. For practical exercise of the rights of the child recognized under the Convention, it is of the key importance, in the first place, to have the principal readiness of the states to accept the lower age limit for independent exercising of certain rights, particularly those of personal nature. On the other hand, it is necessary to properly understand, interpret and apply the concept of “*evolving capacities*” of the child, which was for the first time introduced in the international law by Article 5 of the Convention. Thus, when providing guidance and advise to children on the exercise of their rights recognized by the Convention, parents, legal guardians and other persons legally responsible for child care *should take into consideration their capacity to realize their rights independently in a manner consistent with the evolving capacities of the child*.

The Concept of the evolving capacities of the child, bringing to the fore individual capacities of the child and not their age, is based on several key facts: a) faced with diverse life experiences, children in various environments and cultures acquire certain physical and cognitive capacities at different ages, whereby the acquisition of such capacities depends on a series of different circumstances; b) the level of individual capacity of the child is different, depending on the level of attained maturity and the nature of the right exercised; c) in various

² It is also confirmed by one of the rare anthropological studies dealing with the understanding of the child in the Serbian society. Trebješanin, 2000.

³ For more, see: Super, Harkness, 1982.

⁴ On theory approaches in constituting the rights of children, see: Freeman, 1983, Janjić Komar, 1987, Obretković, 1997, Janjić Komar, Obretković, 1996.

⁵ About participatory rights, in detail: Van Bueren, (1995:15).

⁶ *Convention on the Rights of the Child* (hereinafter: Convention), Act on UN Convention on the Rights of the Child, “Official Journal of SFR Yugoslavia, International Agreements“, nos. 15/90 and 2/97.

contexts, life situations and in different fields of social life, the child needs different levels of protection, participation and autonomy.

The Convention rule on evolving capacities of the child establishes the basic principle in the interpretation of the Convention, according to which the increased level of the child capacities reduces their need for instructions and advice, and increases their capacity to take responsibility for the decisions concerning their life (Lansdown, 2005:5). The very concept of evolving capacities of the child is a successful formula for striking the right balance between the need to enable the child be an “active” player and not to be “the ball in the game of life” (Ross, 1996), to increase children autonomy in the exercise of their rights but concurrently to ensure their protection, given that they are relatively immature. According to that, this concept is a key precondition for exercising the principle of the best interest of the child and the right of the child to express their opinions and to be heard on all the matters concerning their interests, as one of the fundamental rights of the child.⁷ Thereby, it is necessary to bear in mind that the concept of evolving capacities of the child may impact the realization of the rights of the child, including the right of the child to participate in decision-making on the issues concerning their best interest, only if *evolving, participatory (emancipatory) and protective roles* of this concept are recognized, because only such an approach would ensure fulfilment of obligations by the states pertaining to the realization, recognition and protection of the rights of the child (Lansdown, 2005).

3. LEGAL CAPACITY OF THE CHILD

Participation of the child in the world of legal affairs (transactions) implies their *active legal capacity to exercise their rights*. Legal capacity is defined as the capacity to undertake legal transactions⁸ independently, i.e., the capacity of a legal subject to produce legal effects by their acts of will. Legal capacity falls into variable normative structures, both in view of the moment of acquisition and in view of its scope.

In all legal systems, the rules on active legal capacity of the child are the result of efforts made in order to establish the balance between the need to protect younger children and to recognize that measure of freedom for children of the older age, providing for their autonomous development. At the same time, these rules indicate whether and how the legislator succeeded in reconciling a series of legitimate and mutually conflicting individual and general interests: to recognize the legal creative will of the child; to enable the child to participate in legal affairs in order to acquire experience, develop their capacities and prepare themselves for equal participation in the business life of the community; to protect the child from possible risk, considering that they are not capable of making reasonable decisions due to their lack of life

⁷ On the right of the child to freely express their opinion, see in detail: Petrušić, 2006 and the literature indicated therein.

⁸ In civil law, there are various definitions of legal (business) capacities. So, in Article 21 of the Civil Code of the Russian Federation, legal capacity (*дееспособность*) is defined as “*capacity of citizens to acquire and exercise citizens rights by their own acting, undertake and fulfill civil law obligations*”. In civil law textbooks, legal capacity is defined as “*capacity of persons to make legal transactions and undertake other legal actions by their act of will*.” (Kovačević Kuštrmović, Lazić, 2008:115). Some authors underline that legal capacity implies the capacity of a legal subject to establish, transfer, change and terminate rights and liabilities by their act of will, as well as to produce such legal effects by their act of will, compared to others (Vodinić, 1999: 31). On the activistic, voluntaristic, personalistic and other theories of legal capacity, see in detail: Mitić, 1980: 300-301.

experience and insufficient maturity; to protect the interests of parents, guardians and other persons in charge of child care, and provide for the performance of their parental (or advocacy) duties in the best possible way; to protect the interests of third persons, i.e. potential contractual parties; to prevent possible threats to legal certainty and preclude initiation of disputes, etc.⁹

3.1. Review of solutions in the comparative law

In the Comparative Law, there are huge differences in views on the extent of legal capacity of the child, which is the result of differences in the legal heritage, social and moral status of children and other factors related to the national legal contexts. Due to different approaches in regulating legal capacity of the child, the normative solutions in some states are quite different, even among those state that have a similar legal culture and tradition. Generally speaking, in the contemporary law, the legal capacity of the child has been regulated in four different ways: a) the scope of legal capacity of the child is related to the age of the child; b) the scope of legal capacity of the child is related to the reasoning capacity of the child, which is assessed in each particular case; c) every child, regardless of the age and/or personal characteristics, has been recognized the capacity to undertake legal transactions, but only with the approval of the parents; d) every child has been fully recognized the legal capacity. Applying the same approach, however, does not lead to the same legal solutions. On the contrary, Comparative Law offers a wide range of diverse normative modalities and varieties. Anyway, according to eventual effects, the difference in legal solutions is not as big as it may seem at first sight.

As a rule, the states which have chosen to regulate the scope of legal capacity by taking into account the age of the child, set general rules on legal (in)capacity of the child and several special rules, providing for the child to make certain legal transactions independently. For example, such an approach has been applied in German, Russian and Scottish legislations.

In German legislation, the child has no legal capacity until the age of seven (par. 104. BGB); after reaching that age and all the way to maturity, they have been recognized a limited legal capacity: they are allowed to make all legal transactions, but only with the approval of their legal representative (par. 106. BGB); however, they may independently make legal transactions pertaining only to the acquisition of rights (par. 107. BGB). Minors are also authorized to independently make legal transactions in the field of trade or other business they started practicing independently, with the approval of the legal representative, as confirmed by the Guardianship Court (par. 112. BGB). A minor may be employed upon the approval of the legal representative or the Guardianship Court¹⁰; in such a case, the minor would be recognized unlimited capacity, in terms of exercising the rights and liabilities stemming from employment relationship (par. 113. st. 1. BGB). Similar solutions have been envisaged in Austrian and Greek legislations.

⁹ Vodinelić differentiates five functions of legal capacity of the child: the institutional i.e. volitive function; the protection of minors; minors' development; the protection of the interests of legal representatives, i.e., providing for the exercise of parental rights; and, eventually, the function of protecting the interests of third persons, i.e., the certainty of legal transactions (Vodinelić, 1999: 31-45).

¹⁰ In case the legal representative would not approve employment of the minor, the Guardianship Court shall make the approval upon the request of the minor (par. 113. pp. 3. BGB).

In the Civil Code of the Russian Federation (CCRF),¹¹ the scope of the legal capacity of the child also depends on their age. The CCRF envisages two age categories of children: young minors (children under the age of 14) and adolescents (children from 14 to 18 years of age). According to an explicit legal provision, children under the age of 6 have no legal capacity so that their parents, adoptive parents or guardians make legal transactions on their behalf (Art. 28. para. 1. CCRF). Legal incapacity also applies to children from 6 to 14 years of age, but the Code allows them to independently conclude some legal transactions: small value transactions which serve to satisfy everyday living needs of the child and their family members,¹² transactions by which they acquire benefit free of charge and which do not need to be certified by the Notary Public or registered before the state authorities, as well as transactions related to funds made available to the child by their legal representative or a third person (Art. 28. para. 2. items 1, 2 and 3 of CCRF), upon consent of the legal representative. The liability for failure to fulfil the obligations stemming from this category of transactions rests on the parents, adoptive parents or guardians, unless they prove that they are not to blame for non-performance of the obligation (Art. 28. para. 3. CCRF). The rule that applies in view of the legal capacity of adolescents (children over the age of 14) envisages that they may enter into legal transactions only upon obtaining written consent from their legal representative (parent, adoptive parent or guardian); the legal transaction is also valid and produces effect if it is subsequently approved in written form by the legal representative (Art. 26 item 1. CCRF). Exempt from this rule are the legal transactions which the child of this age may conclude independently, without obtaining a written approval of the legal representative: transactions to dispose of their wages, scholarship and other incomes; transactions by which they exercise their intellectual property rights pertaining to copyright of scientific, literary and artistic works of authorship, inventions and other intellectual property assets; transactions based on which they invest and dispose of deposits in credit institutions; and all other transactions that may be independently undertaken by minors from 6 to 14 years of age (Art. 26. para. 2 items 1, 2, 3 and 4. CCRF). Upon reaching the age of 16, a minor may become a member of cooperative, in accordance with the Law on Cooperatives. The minors from the age of 14 to 18 shall bear the proprietary responsibility for transactions they may undertake independently, and the minors shall also be responsible for the inflicted damage (Art. 26. para. 3. CCRF). One of the particularities of the Russian law is reflected in the fact that, upon the request of the parents, adoptive parents, guardians or guardianship body, the court may restrict the right of minors aged 14 to 18 to independently dispose of their wages, scholarship or other incomes; a minor may be fully or partially deprived of this right if there are “sufficient grounds” for that (Art. 26. para. 4. CCRF), except in cases when such a minor has acquired the full active legal capacity by emancipation (Art. 27. CCRF)

In the Scottish legislation, the child’s age is an exclusive criterion for determining the scope of legal capacity. Thus, the *Age of Legal Capacity (Scotland) Act* of 1991¹³ provides a

¹¹ Legal capacity of the child was regulated by the Civil Code of the Russian Federation (CCRF), dated 30.11.1994; Second Volume of the First Part, Chapter III, titled „Citizens (Natural Persons)“. Гражданский кодекс РФ, N 51-ФЗ. <http://www.gk-rf.ru>. Accessed 30.05.2008 (hereinafter: CCRF).

¹² So-called *мелкие бытовые сделки*. More about the criteria on which it was established, if the legal transaction belongs to this transactions category, in detail: Сергеева, Толстой, 1997:18.

¹³ Para.1. Before this Act came into force, the Scottish legislation (based on the Roman law) applied a two-level system in regard to legal capacity of the child, including a “pupils” category (girls under 12 years of age and

general rule that a person under the age of 16 has no capacity to conclude any legal transaction, but young people over the age of 16 may make valid legal transactions without obtaining any approvals.¹⁴ Scottish legislation also provides a series of special legal capacities of children under the age of 16 years in the sphere of personal rights, family relations, status-related issues, inheritance and other relations.¹⁵

The second approach in regulating the legal capacity of the child implies that the legal capacity of the child seems to depend on their reasoning capacity.¹⁶ This approach is more extensively accepted in the Comparative Law and, in that respect, we will explore the provisions on regulating the legal capacity of the child in Switzerland. In Swiss legislation, legal capacity of the child exclusively depends on their reasoning capacity (*capables de discernement*), which is established in each particular case. Children without the reasoning capacity have no legal capacity, so they cannot make legal transactions at all, while the child with reasoning capacity may conclude legal transactions upon prior or simultaneous consent or subsequent permission of the legal representative (paras.17 and 18 ZGB).¹⁷

A number of countries have chosen to regulate the legal capacity of the child in the way that every child, without any conditioning, is recognized a limited legal capacity, i.e., the capacity to conclude all kinds of legal transactions, but only upon obtaining a prior or subsequent consent (or permission) of the legal representative for the legal transaction to be valid, except for certain legal transactions which produce legal effect even when there is no consent of the legal representative. The law anticipates a corresponding range of transactions that the child may conclude independently, without obtaining a prior consent of the legal representative. Such solutions have been provided in Denmark, Norway and Finland.¹⁸

The fourth approach in regulating the legal capacity of the child implies that the legal capacity is to be recognized to every child, regardless of the age or any other characteristic, so that they can independently conclude any legal transaction. If the legal transaction is made between a child and an adult person, the adult person is bound to the legal transaction and cannot ask for its cancelation, even when the child made an error in stating his/her age. However, in accordance with the infancy doctrine, the child was recognized the right to personally withdraw the given act of will or abandon the legal transaction in its entirety, at any moment until he/she reached the age of maturity and within a reasonable time after attaining the age of maturity, which can be done by verbal or written statement or corresponding actions. In such case, the child is obliged to give the received item back to the contractor, and to do so in the actual state at time of disaffirming the legal transaction. There is the duty of restitution if the child, deliberately or by gross negligence, diminished the value of items or if, on the occasion of agreement making, the child provided to the

boys under 14) who were not considered to have legal capacity, and a “minors“ category (girls from 12 to 17 and boys from 14 to 17) who had limited legal capacity, so that the validity of their legal transactions depended on consent of their legal representatives. (See: Legal Capacity, <http://www.ros.gov.uk/foi/legal/text/ch13~1.htm>, Accessed, 20. 06. 2008.

¹⁴ Before the *Children (Scotland) Act of 1995* came into force, parents (as guardians and legal representatives of the child) concluded legal transactions on behalf of the children under the age of 16.

¹⁵ *Children (Scotland) Act of 1995*.

¹⁶ In French legislation, the reasoning capacity of the child is not a constitutive element of legal capacity, but it has impact on the validity of the legal transaction made by the child. See: Vodinelic, 1999: 37.

¹⁷ *Code Civil Suisse* (1907). Such a solution was also anticipated in the Swiss Law on Obligations of 1881. (See: Vodinelic, 1999, Note No. 5).

¹⁸ See: Kordisch, 1977: 31 and further; cited after: Vodinelic, V., 1999:39 (Note No. 17).

contractor wrong information about their age.¹⁹ In view of contracts by which the child acquires goods and services necessary for daily subsistence (*necessities of life*)²⁰, such as: food, clothing, medical services, accommodation, etc.), it is the rule that the child is obliged to pay a reasonable price, appropriate for the proprietary circumstances of the child.²¹ Such an approach has been implemented in Anglo-American and Canadian legislations.

3.2. Legal capacity of the child in the domestic legislation

Legal capacity of the child in the domestic legislation has been regulated by the new Family Act (2005),²² enacted with the aim to establish the family law system compatible with contemporary European legislation and practice, with full recognition of the new character of family relations and modern concept of human rights, particularly the rights of the child.²³ The Family Act (FA) has introduced essential changes in the field of the rights of the child. In particular, for the first time in our legislation, it has normatively regulated the corpus of the rights of the child under parental custody;²⁴ the rights of the child have been explicitly prescribed as special and independent personal rights and not as rights derived from the duty of parents. Some of the novelties in this Act are reflected in expanding the scope of the general legal capacity of the child, introducing a better gradation in acquiring legal capacity, and increasing the circle of legal acts (acts of will) a minor may exclusively undertake personally. The legislator has not departed from the traditional approach in regulating the legal capacity of the child, linking it to the objective criteria: age of the child and type of the legal transaction.

Legal capacity of the child is regulated in Article 64 of the Family Act, Section II titled "Child under Parental Care", subheading 1 titled "Rights of the Child". The legislator has regulated the general legal capacity of the child by classifying children into two categories: *younger minors* (children under the age of 14) and *older minors* (children over the age of 14).

The legislator allows a younger minor (under the age of 14) to independently undertake relevant and explicitly enumerated legal transactions, estimated not to be harmful for the child: 1) transactions aimed at ensuring the acquisitions of exclusive rights; 2) transactions where the child does not acquire either rights or obligations,²⁵ and 3) transactions of minor scope and significance (Art. 64, para.1 FA). By enacting such legal provisions, the legislator

¹⁹ In the United States, various rules apply in view of the validity of contract concluded between a child and an adult who has been misinformed by the child about his/her age. Some states deprive the child of the right to disaffirm the contract; some of them relate the deprivation of this right to the case when the child is involved in business; in some states, the child is deprived the right to disaffirm the contract only in case the contract shall have been completely fulfilled; in some states, the child is allowed to disaffirm the contract but the child is responsible for the harm made due to wrong data provided in terms of their age. See: Davidson, Knowles, and Forsythe, 2004: 78.

²⁰ It implies goods or services "necessary for life", estimated according to the living conditions of the child, having in mind their needs at the time of goods or service procurement, (par. 3, para. 3. Sale of Goods Act, as of 1979).

²¹ See: e.g. par.3. para. 2. UK *Sale of Goods Act*, 1979. This obligation is based on quasi-contract doctrine.

²² The Family Act, "Official Gazette of R.Serbia", 18/2005, dated 17.02.2005, (hereinafter „FA“). Before the Family Act came into effect, the applicable law was the Marriage and Family Relations Act, („Official Gazette of R.Serbia“, nos. 22/80, 24/84, 11/88, 22/93, 25/93, 35/94), hereinafter MFRA.

²³ See the Rationale of the Draft Family Act.

²⁴ Articles 59-66 of the Family Act (FA)

²⁵ This is the only provision which has been omitted in the Preliminary Draft of the Civil Code, probably because there are no legal transactions without acquiring the rights and liabilities.

recognized special limited legal capacity²⁶ to a younger minor, but the scope of transactions the younger minor may conclude is so small that the younger minor must be considered as legally incompetent, and not as a person with a limited legal capacity.²⁷ In case a younger minor engages in a legal transaction which he/he is not entitled to undertake, such a legal transaction is deemed to be null and void; as such, it shall not produce legal effect even in case the child's legal representative has agreed on undertaking such a transaction.²⁸

Older minors (over the age of 14) have a limited (general) legal capacity. They may independently undertake all legal transactions that may be undertaken by the younger minor. In addition, the older minor may also undertake all other legal transactions, subject to obtaining a prior or subsequent consent of the parent, guardian or guardianship authority. In cases when the child is involved in a legal transaction concerning the disposal of real estates and movables of considerably high value,²⁹ in order to ensure the validity of this legal transaction, it is necessary to obtain a prior or subsequent consent of the guardianship authority.³⁰ In regard to the validity of contracts concluded by an older minor without a prior consent of the parents, legal guardian or guardianship authority, there applicable rule is envisaged in Article 56. para.3 of the Obligation Relations Act (ORA).³¹ This Article explicitly provides that such contracts are voidable, which implies that they may be subsequently confirmed as valid. The ORA also recognizes the right of the contractor (who contracts with a minor) to disaffirm the contract within the specified period of time, as well as the possibility to invite the legal representative of the contractor to state if the concluded contract has been approved. Moreover, according to the Article 59 of the Civil Procedure Act (CPA), older minors who have made a legal transaction without the consent of their legal representative are entitled to seek cancellation of such legal transaction, within a three-month period from the date of acquiring the full legal capacity.

The Family Act and other laws provide a series of special legal capacities of the child, anticipating that the child, irrespective of the level of general legal capacity, may independently undertake certain legal transactions and activities which may be done only personally, thus excluding the possibility to be represented in this legal sphere. Special legal capacities largely depend on the respective age of the child and/or his/her reasoning capacity. Thus, for example, a 15-year-old child may undertake legal transactions whereby he/she can manage and dispose of his/her earnings, income or property acquired by their own work,³²

²⁶ On special limited legal capacity and general limited legal capacity of minors, see: Stanković, 1982: 1216-1217).

²⁷ According to new regulations, the attitude that a younger minor is legally incompetent has prevailed both in the civil law theory and in the family law theory. See: Kovačević Kuštrmović, Lazić, 2008: 117; Ponjavić, 2005:241).

²⁸ Also: Draškić 2005: 273. Ponjavić asserts that it would be rational to make such contract null but, practically, it is absolutely void. See: Ponjavić, 2005: 241.

²⁹ Art. 193. para. 3. FA.

³⁰ The parents agreement is not necessary for the validity of these legal transactions. The transaction shall be valid even when the parents explicitly oppose it. Parents are recognized the right to dispose of the property not acquired by the child's work; parents may dispose of immovable and movable property of considerable value, but the full validity of this legal transaction is subject to obtaining a prior or subsequent agreement of the guardianship (Art. 193. para.2 and 3 FA). The provision according to which the child needs to obtain the agreement of the guardianship authority for disposing high-value real estate or movables, has been criticised as negative and superfluous in the situation when there is a full agreement on property disposition between the child and parents (Petrović, Vučković Šahović, Stevanović, 2006:16).

³¹ The Obligation Relations Act („Official Journal of SFRJ", nos. 29/78, 39/85, 45/89 – USJ decision & 57/89, "Official Journal of FR Yugoslavia", No. 31/93 and" Official Journal of SCG", No. 1/2003 – Constitutional Charter).

³² Art. 64. para.3. FA

including the goods stemming from their own work.³³ The child who has reached the age of 15 and is capable of reasoning has the testamentary capacity.³⁴ Moreover, girls at the age of 16 are entitled to independently exercise the right to abortion,³⁵ and 16-year-old young man capable of reasoning may acknowledge paternity, given that the statement can be given only personally and not through a legal representative.³⁶ A child at the age of 15 is recognized the capacity to decide on his education and choose which secondary school to attend.³⁷ The child of the same age, capable of reasoning, may independently decide about maintenance of personal relations with a parent,³⁸ as well as about the parent they wish to live with.³⁹ The capacity to marry applies to persons who have reached the age of 16 and acquired physical and mental maturity necessary to exercise the marital rights and duties.⁴⁰ The Family Act and other laws provide participatory rights of the child capable of reasoning in corresponding age, in regard to a whole set of legal actions: giving approval for admitting paternity,⁴¹ change of the personal name,⁴² establishment of adoption and foster care,⁴³ consent for acquiring and termination of citizenship,⁴⁴ approval or consent to proposed medical care, etc.

3.3. Critical analysis of legal solutions in the domestic legislation

There is no doubt that the new Family Act represents a significant step forward in the improvement of the legal position of children. When it comes to the legal capacity of the child, the positive development introduced by this Act is reflected in the fact that it has extended the limits of legal capacity of the child, by recognizing the right to children under the age of 14 to independently undertake some legal transactions, and by anticipating a series of special legal capacities of the child which were not recognized by the previous legislation. However, the applicable solutions chosen by the legislator are quite disputable if the Family Act rules on legal capacity of the child are analyzed in the context of modern trends in the field of the rights of the child and, particularly, taking into account the contemporary knowledge on the evolving capacities of the child.

In the first place, the question is whether there have been the essential reasons for the legislator to categorize the children into the groups of younger and older minors, and thus deprive the younger minors of the possibility to undertake legal transactions with a prior consent of their parents. There is no doubt that the starting point of the legislator's decision on such categorization lies in the traditional concept of the universal, customary and determining linear development of the child (*conventional stage theories*), applicable to all

³³ Also: Draškić, 2005:274.

³⁴ Art. 79 of the Inheritance Act ("Official Gazette of R. Serbia", nos. 46/95 and 101/2003 - USRS Decision and 6/2015).

³⁵ Art. 2 para.2 of the Act on Abortion Procedure in Health Institutions ("Official Gazette of R.Serbia", nos. 16/95 and 101/2005 - other law).

³⁶ Article 46. and 305 para.3 FA.

³⁷ Art. 63 para.2 FA

³⁸ Art. 61 para.4. FA.

³⁹ Art. 60 para.4. FA.

⁴⁰ Art. 23 para.2 FA.

⁴¹ Art. 49 para.1 FA

⁴² Art. 346 para.2. FA.

⁴³ Art. 98 FA.

⁴⁴ Art. 9 para.3., Art. 13. para.4., Art. 20 para.4. Art. 21 para.2. and Art. 22. para.5 of the Citizenship Act of the Republic of Serbia ("Official Gazette of R. Serbia", nos. 135/2004 and 90/2007).

children, which has been completely surpassed as inadequate given the fact that it does not reflect the complexity in view of the actual capacities and competencies of the child (*cultural theories*), customary by the end of XX century; moreover, it does not take into account the knowledge from the developmental psychology, clearly confirming that the process of child development is much more a social than a biological construct. The development of the child is a cultural process, and childhood is the product of specific economic, social and cultural processes. The level of capacities acquired and exhibited by the child is influenced by the parental desires and expectations, requirements the parents put before their children, cultural, economic and social environments, as well as the unique living experience of each individual child (Lansdown, 2005:12). Moreover, there is an increasing number of studies⁴⁵ which confirm the active role the children have in their skills development, in responding to the challenges of everyday life and the level of responsibilities they accept. In other words, the process of individual development of the child is very specific, dynamic and conditioned by multiple and diverse factors. Bearing in mind the children's actual cognitive capacities, all this imposes the need to assess the legal actions of the child.⁴⁶

Taking into consideration the modern scientific knowledge about the process of child development, the 14-year age limit specified by the Family Act as an objective criterion for categorization of children into younger and older minors seems to be discretionary in nature; as such, this age limit does not seem to refer to any child whose individual level of cognitive capacities and skills, given the specific features of their individual development, do not match the level that most of the children have in the corresponding age (irrespective of whether it is higher or lower than the "majority" level). Thereby, it should be noted that the general presumption about the capacities of children in corresponding age introduces a static assessment of "normal" stages in child development, as defined by the standard of western countries, and leads to "pathologization" of children not matching the "normal" parameters.

On the other hand, from the aspect of protection of the interests of the child, there is the question whether it was necessary to put the dividing line at the age of 14, which generates a gap between children that is impossible to bridge. It does not seem so. It is absolutely unimportant for very small children whether they have the limited legal capacity or they do not have it at all. If a child under the age of 14 had limited (general) legal capacity since birth, it does not mean that the risk from violation of his/her interests would be higher, or that the interests of a child under the age of 14 would be better protected if they had no legal capacity. In other words, in case children under the age of 14 were recognized the limited (general) legal capacity, the level of their rights and interests' protection would not be reduced because they may undertake legal transactions with the approval of their legal representative. The problem does not rest in the fact that younger minors (under the age of 14) should be more protected as compared to older minors (above the age of 14) because the institution of the limited (general) legal capacity offers sufficient protection to both categories of children. Rather, there is the question how to provide the "additional" legal capacity for older minors, particularly for those who will soon reach the age of maturity.

In order to ensure the necessary level of security in legal transactions, it is indisputable that the rules on the legal capacity of the child must be devised so as to provide for the

⁴⁵ For more, see in: James, and Prout, 1997, and the literature indicated there.

⁴⁶ This knowledge was the basis for the concept of "*evolving capacities of the child*", promoted by the Convention on the Rights of the Children in the International Law. See the exposure under the item 2.

protection of the parents' interests as well as the interests of third persons with whom the children conclude legal transactions. For that reason, it is also necessary to assess the legal solution according to which only older minors have limited (general) legal capacity, from the aspect of the interests of parents and third persons (who contract with minors). Would the interests of parents and third persons be endangered if younger minors were recognized the limited legal capacity and thus enabled to undertake legal transactions with approval of their parents?

As far as parents are concerned, it seems that such solution would not substantially endanger the parents' exercise of their parental duties because the validity of the legal transaction primarily depends on their will and decisions. Moreover, given the the multitude and diversity of life situations and circumstances, it seems to be in the interest of parents to be able to assess the level of maturity of their children (under the age of 14) on their own and, by giving their consent, to ensure the full validity of legal transactions to be undertaken by their children (such as: financially beneficial transactions, transactions preventing some damage, harm or loss of rights, routine transactions in the area of family affairs, etc.).

There is a question if the security of a legal transaction would be endangered if younger minors were recognized the limited legal capacity. Comparative experiences indicate that the security of legal transactions may be provided in a number of ways and that the security level of a legal transaction (i.e. protection of interests of third persons) is not lesser even in those systems which relate the legal capacity of the child to the reasoning capacity.⁴⁷ As far as children under the age of 14 are concerned, the risk of endangering the interests of a third person is lesser than the risk which exists when the contractor is an adolescent. Namely, when concluding a legal transaction with a younger minor, a third person (contractor) is fully aware that the child (given his/her young age) does not have the capacity to independently conclude the legal transaction; so, there is no doubt that the contractor would be motivated to reliably establish if the parents approved the legal transaction to be concluded.

Taking into account the above arguments, the concepts of the evolving capacities of the child envisaged in the Convention as well as the social and educational significance of the legal activities of the child, it is essential that children under the age of 14 should be granted the limited (general) legal capacity. Thus, bearing in mind the kind of legal transaction, the accompanying risks and the best interest of their children, parents will be able to assess the level of their children's capacity, and gradually expand the scope of business activities of their children by progressively including them in more complex activities; consequently, it will give children the opportunity to acquire new experiences, expand their knowledge and skills, and ultimately develop their personal autonomy. At the same time, such a legal solution would contribute to overcoming traditional, patriarchal and over-protective patterns of behaviour towards the child, as characteristic features of our socio-cultural setting, the result of which is *inter alia* the inappropriately long period of children's dependence on their parents.

Having in mind the need to protect the interests of the child and their development, it is necessary to critically consider the range of legal capacities of older minors. According to applicable law, this category of children are recognized the limited (general) legal capacity, whereby they are required to ask for the parents' consent for every legal transaction, except the one(s) that can be independently undertaken by a younger minor as well. The only exclusion to this rule refers to those legal transactions where the child is provided the special legal capacity.

⁴⁷ For more on the ways of ensuring security of legal transactions in Comparative Law, see: Vodinić, 1999: 43-44.

Such a solution has been undoubtedly inspired by the need to protect the child from risks which the child is unable to consider due to his/her immaturity and inexperience. Yet, such a solution is too rigid and inflexible because it does not recognize to an adequate extent the evolving function of the legal capacity of the child. Practical effects of over-protectiveness are inconsistent with the wellbeing of the child principle because they make children excessively bound to their parents and prevent their autonomous development, hinder the development of their capacity for rational decision making and the acquisition of indispensable living experience. On the other hand, such a solution disregards the fact that the child's interests might remain unprotected if they would not be allowed to independently undertake legal transactions by means of which they provide goods and services necessary for securing their livelihood. Therefore, it seems that the legislator should provide a certain range of legal transactions that the child might undertake independently, without asking for the parents' approval.

Some comparative law solutions may be used as a model, such as the legal solution envisaged in the Russian legislation, where children are given the opportunity to independently dispose not only of their earnings but also of their scholarship grants and other incomes, to independently undertake transactions by which they exercise their intellectual property rights of copyright over the scientific, literary and artistic works or inventions, or to independently undertake transactions pertaining to investments or disposal of the deposit in credit institutions (Art. 26. para. 2 item 1, 2, 3, and 4. CCRF). The Anglo-American legal system has developed the institute of "*necessities*", under which children are enabled to conclude legal transactions by means of which they satisfy their everyday needs, including procurement of clothing, footwear, accommodation, medical services, education, etc. From the aspect of protecting the interests of the child, some useful effects may be obtained from the institute of discretionary judicial expansion of the limited legal capacity of the child, which is recognized in the new Estonian legislation (Varul, Avi, Kivisild, 2004: 100). According to para. 9 of the Estonian Civil Act of 2002, the Court may expand the limited legal capacity of a minor above 15 years of age, if it is considered to be in his/her interest and if it is in compliance with the accomplished level of the minor's development, and specify the range of legal transactions that the minor is entitled to independently conclude. This form of extension of legal capacity of minors is necessarily accompanied by the requirement to obtain a prior approval of the child's legal representative, but the Court has the authority to approve the expansion of the legal capacity even without the consent of the legal representative, if it is in the interest of the minor (Varul, Avi, Kivisild, 2004: 100).

Finally, it is necessary to consider if the Family Act provides relevant solutions to protect the employed children without adequate reasoning capacity, who are unable to look after their own rights and interests properly, the result of which they may be the unreasonable management and/or disposition of goods and earning acquired by their work. Having in mind that the child does not acquire the general legal capacity by employment, in such a case there is no room to apply the institute of depriving legal capacity deprivation, as regulated by the Non-contentious Procedure Act,⁴⁸ because only the person with full legal capacity may be (fully or partially) deprived of legal capacity. On the other hand, the right of the child to independently manage and dispose of their earnings is one of their exclusive rights, which

⁴⁸ Art. 31-44, Non-contentious Procedure Act, "Official Gazette of R. Serbia" nos.25/82 i 48/88, and "Official Gazette of R. Serbia", nos. 46/95, 18/2005, 85/2012, 45/2013, 55/2014 and 6/2015).

is part of the legal capacity of the child; so, in this legal transaction, children cannot be replaced by their parents as their legal representatives but, more likely, as their proxies (Art. 72. FA), which further implies obtaining the power of attorney from the child to undertake this kind of legal transactions on their behalf.⁴⁹ However, it is not to expect that the children, who are incapable of estimating their interests and who unreasonably spend the earned assets, would willingly authorize their parents to manage and dispose of the earnings and goods acquired by employment on their behalf. It is obvious, therefore, that the Family Act does not offer a solution for such situations, which are not so rare in practice. It seems that an adequate mechanism for the protection of children's rights in such situations is the institute of full or partial deprivation of the special legal capacity of the child to independently dispose of their earnings, as recognized in the Russian legislation (Art. 26. para.4. CCRF).

4. Instead of conclusion

The analysis of the statutory solutions on the legal capacity of the child envisaged in the the Serbian Family Act 2005 and the Preliminary Draft of the Civil Code 2015 indicates that the legislator has not succeeded in making a favourable and balanced normative framework. The provided legal solutions are largely based on the attitude that children are immature, incomplete and incompetent persons, who must be constantly supervised, protected and controlled by the adults. Such a perception of the child, which largely governs the child's treatment and the adults' expectations from children, is still predominantly based on paternalism, stereotypes and prejudices towards children and their capacities. This perception is a key obstacle to the fundamental understanding and acceptance of the modern concept of the right of the child. In that context, the current process of civil law codification is an opportunity to revise and upgrade the existing legal solutions. The comparative law offers a wealth of diverse models and legal solutions for upgrading this important field of the right of the child, in full observance of international standards and new scientific information on the evolving capacities of the child. The starting point and the guiding principles of every normative activity must be the developmental (evolving) needs and the wellbeing of the child, as principal social values.

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⁴⁹ The Family Act does not explicitly regulate the rules on parents as proxies, willing to act on behalf of the child; these rules they are conceptually inconsistent and not in compliance with some of the universal principles governing the power of attorney. See: Petrušić, 2006:732-755, and literature indicated therein.

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POSLOVNA SPOSOBNOST DETETA U SRPSKOM ZAKONODAVSTVU

Krajem XX veka paternalistički i protektivistički odnos društva prema deci transformisan je razvijanjem novog koncepta „prava deteta“, koji je promovisala Konvencija UN o pravima deteta. Dete je titular individualnih prava i sloboda, nezavisnih od prava roditelja, pri čemu je status deteta primarno određen pravom na samoopredeljenje, koje otvara širi prostor za njegov autonomni razvoj. Za ostvarivanje prava deteta priznatih Konvencijom, od ključne važnosti je koncept razvojnih/evolutivnih mogućnosti deteta (evolving capacities of the child). Njegova suština ogleda se u dužnosti roditelja i drugih lica koja se o detetu staraju da prilikom usmeravanja i savetovanja deteta u pogledu njegovih prava priznatih Konvencijom, treba da uzmu u obzir sposobnost deteta da samo ostvari svoja prava. To, zapravo, znači da se povećanjem nivoa sposobnosti deteta smanjuje potreba za davanjem uputstava i povećava njegova sposobnost da preuzme odgovornost za odluke koje se tiču njegovog života.

Poslovna sposobnost deteta, koja omogućava njegovo učešće u svetu pravnih poslova, promenljiva je pravna konstrukcija. Pravila o poslovnoj sposobnosti deteta pokazuju da li je i kako zakonodavac uspeo da pomiri niz legitimnih i međusobno suprotstavljenih interesa: da se detetu omogući sklapanje pravnih poslova kako bi sticalo iskustva i pripremalo se za ravnopravno učešće u pravnom i poslovnom životu zajednice, da se dete zaštiti od rizika jer zbog nedovoljne zrelosti nije uvek u stanju da donosi racionalne odluke, da se zaštite roditelji, odnosno lica koja se o detetu staraju, kao i da se zaštite treća lica, potencijalne strane ugovornice.

U ovom radu autor daje kritičku analizu zakonskih rešenja srpskog Porodičnog zakona iz 2005. godine i Prednacrta Građanskog zakonika koja se odnose na poslovnu sposobnost deteta. Prvi deo rada razmatra prava i položaj deteta u detinjstvu i koncept razvojnih (evolutivnih) mogućnosti deteta u svetlu Konvencije UN o pravima deteta. U drugom delu rada, autor kritički analizira propise kojima se definišu granice poslovne sposobnosti deteta u srpskom zakonodavstvu u kontekstu savremenih trendova u oblasti prava deteta.

Ključne reči: prava deteta, razvojne/evolutivne mogućnosti deteta, poslovna sposobnost deteta.