THE LIMITS OF USAGE CAPACITY REGULATED BY THE NEW CIVIL CODE

Prof. univ. dr. Eugen Chelaru
University of Pitesti, Faculty of Law and Administration

Abstract*. The juridical personality is inherent to humans and it represents the fitness to be subject of legal relations. It is the fundament of civil equality in the sense that any natural person has the capacity of acquiring any right and undertake any obligation, capacity which can be differently fulfilled from one individual to another.*
The civil equality is not altered by the fact that through law, some categories of persons may be disqualified to conclude juridical documents. The fundament of instituting this incapacity is either the necessity to protect the very person disqualified of the bad consequences of the juridical documents concluded or the general juridical interests. As a consequence, the civil incapacities are subdivided into incapacities of protection and incapacities of punishment.
In this paper we shal deal with the legal usage incapacities consisting in depriving an individual of a right, namely the right of concluding a certain juridical document both in person and through a legal delegate.

Keywords*: juridical personality, civil equality, usage capacity, exercise capacity, civil incapacity, absolute nullity, relative nullity.*

1. Preamble. The law ensures juridical personality to all human beings. In other words, according to the law, any human has the quality of subject of law.

Juridical personality is the general abstract qualification of having rights and obligations. A series of inherent rights, called personality rights, are attached to juridical personality of the human beings.

The juridical personality is the fundament of the civil equality. (*G. Cornu,* op. cit., p. 203) that is any individual person has the capacity of acquiring rights and obligations, capacity which is different from one individual to another. This differentiation comes out of the fact that even if people are equal they are not identical as they are different from biological, intellectual, educational, opportunities, social status, etc. point of view.

Having civil rights and obligations, a natural person may act with other persons creating thus, juridical relations whose subject he is.

The subjects of the civil juridical relatio are the most important elements as opposed to the object.

In nowadays law it is sufficient for a natural person to exist for acquiring automatically the quality of subject of law. Thus, according to the Art. 6 of the Universal Declaration of Human Rights adopted in 1948, „Everyone has the right to recognition everywhere as a person before the law". After the abolishment of the slavery it became unconceivable to consider human beings as simple things to dispose of as with any other element of patrimonial asset.

The quality of subject of law of a natural person is not conditioned by the

existence of discernment. The minor or the person with a mental disorder, under interdiction or not, also have juridical personality, that is they are subjects of law and this is a feature of juridical equality of human beings. (see *B. Starck, H. Roland, L. Boyer,* op. cit., p. 387).

The civil capacity is a component of juridical personality this implying the general capacity of having rights and obligations. It allows to various entities, natural and juridical persons to have the quality of subjects of civil law, that is, being persons.

The similar definitions of the two juridical notions may create confusions. In the doctrine thus, there has been demonstrated that the two notions *civil capacity* and *juridical personality* (understood as the capacity that any person has to be subject of law) are not identitical in all cases, but there is only a partial superposition. The civil capacity is divided into usage capacity and exercise capacity and juridical personality does not compulsory have connections with these two aspects (for further details see *G. Cornu,* op. cit., p. 214-215; *F. Zenati-Castaing, Th. Revet,* op. cit., p. 16-17; *O. Ungureanu, C. Jugastru,* op. cit., p. 11-12). Thus, the existence of usage capacity is enough for a person to become subject of civil law, that is to have juridical personality even if it lacks the exercise capacity.

On the other hand, the notion „juridical personality" of a natural person is a term belonging to the doctrine that did not fiind its place in our civil legislation. As a matter of fact, even if the juridical notion of „ civil capacity" does not enjoy a legal definition although in usage, the legislator preferred to define its component elements and regulate incapacities.

Both natural and juridical persons have civil capacity.

Art.28, par. 1 of the NCC, according to which „The civil capacity is recognized for all persons", recognizes the quality of the subject of civil law to all natural persons. The structure of the civil capacity is made of two elements: the usage capacity and the exersise capacity.

The usage capacity is the general and abstract capacity of a person to hold rights and obligations. The legal definition of the usage capacity is given by art.34 NCC according to which "The usage capacity is the capacity of a person to have civil rights and obligations."

The exercise capacity is the capacity of a person to exercise the rights and assume civil obligations by concluding civil juridical deeds.

The legislator in art 37 of NCC expressly stipulates that the person having been recognized the exercise capacity has the capacity to conclude by oneself civil juridical deeds."

2. The notion and the classification of civil incapacities. The incapacities are limitations brought to the usage capacity or to exercise capacity of a natural person, including depriving of exercise capacity. These do not have the purpose of depriving the person of his quality of subject of law (the civil incapacity is never total), but they have different functions: to forbid the powerful people to use their social status in order to achieve patrimonial advantages. To protect frail categories of natural persons against the cupidity of the powerful people, to protect the natural person against his own weaknesses that may conduct to juridical deeds contrary to his/her interests, to protect society against dangerous mentally disordered people, to punish those who had the obligation to protect the others for not accomplishing their duties, etc.

The capacity being the rule, the incapacities represent the exception from the rule, therefore, the legal provisions rely on their interpretation.

The field of incapacities concerns the concluding of juridical deeds,thus, in the general rule, the incapacitated cannot substract to the extracontractual obligations imposed by the

law to all persons, to obligations having their roots in his criminal acts or quasicontracts (see *Ph. Malaurie, L. Aynes,* op. cit., p. 241).

On the other hand, the juridical deeds concluded by the incapacitated having abolute or relative nullity, the matter of civil incapacities should be harmonized with that of insuring the civil circuit security, the achievement of such a balance proving sometimes difficult enough.

The limitations brought by the law to the usage capacity are also designed through the term 'incapacity'.

Usage incapacity is when the individual is deprived of a right, mainly the right of concluding a certain juridical deed, both personally or through a delegate. (see *J. Flour, J.L. Aubert, E. Savaux*, p. 179; *B. Starck, H. Roland, L. Boyer*, op. cit., p. 405).

The usage incapacity cannot be general because the contrary solution would deprive the natural person of his civil capacity, that is, would deprive him of his status of subject of law. The total civil incapacity would prevent the respective person to achieve and become the holder of a subjective right, which would conduct to a genuine civil death, unknown by our law. That is why, the usage incapacities are always special.

In applying the European Convention of Human Rights it was emphasized that any limitation brought to a right must observe the requirement of a resonable proportional report between means and purposes (see *C. Bîrsan,*op. cit., p. 1696). We think that this requirement should be observed in the case of limitations imposed to usage capacity of the natural person.

Though, is it possible to have usage incapacity achieved through agreement of the parties? The problem arose in the analysis of the validity of clauses of unalienability stipulated in a contract.

The declaration of a good as unalienable on behalf of an individual has been a controversial matter (see *C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu*, op. cit., p. 95.). In some circumstances, the doctrine and judicial practice have recognized the validity of such clauses stipulated in translative property deed, on condition that the unalienability should be temporary and its application should be justified by a serious reason such as the guarantee of a right (see *J. Carbonier,* op. cit., p. 128-129; *Fr. Deak*, op. cit. p. 52). In juducial practice the validity of such a clause was recognized in the case of preserving the uzufruct in favour of the donor over the respective good that was the object of the donation (*J. Carbonier,* op. cit., p. 128-129; *Fr. Deak*, op. cit. p. 52).

When the unalienability is perpetuous, in which case the clause on interdicting for the good to be alienated is imposed on the proprietor's life duration, the respective clause is null because it damages the usage capacity of the respective person on conventional way (see *E. Chelaru*, op. cit., p. 24 şi jurisprudenţa analizată de autor).

The NCC valued these opinions and regulated the unalienability in art. 627/629. According to art. 627, par. 1 NCC „Through convention or will the alienation of a good may be forbidden but only for a duration of 49 years and on condition that there should be a serious and legitimate interest. The term begins on the date of obtaining the good."

We can notice that the possibility of limitating the usage capaciy of the natural person is not accepted through convention of the parties but the conditions to be met for interdicting the alienation of a good are stipulated (the justification for a legitimate interest and temporary period) in order not to be considered damaging for this capacity. The usage capacity may be restricted only by law, as the provisions of art. 29 NCC stipulate, dealing with the principle of intangibility (the text has the following content:"No one can be

restricted in his usage capacity or deprived wholly or partially of exercise capacity, but in the cases and conditions stipulated by the law.")

According to their sources the usage incapacities are civil incapacities and criminal incapacities.

According to the purpose envisaged they may be subsidived into penalty incapacities and protection incapacities.

In juridical literature the usage capacities were suggested to be divided into suspicion incapacities and penalty incapacities. The suspicion incapacities would prevent the abuses that some categories of influential people could make and the attempts of capturing, as it is the interdiction for the people working in justice system to buy litigatious rights judged in their courts, the impossibility that the trustees entrusted with the selling of a good (tutors, civil administrators, etc.) to buy the respective good (see *B. Starck, H. Roland, L. Boyer*, op. cit., p. 405). We can see that these „suspicion incapacities" are approached in Romanian doctrine as part of the protection incapacities, a preferable solution. The above-mentioned situations also imply the protection of some general interests (for example the interdiction for the people working in justice system to buy litigatious rights judged in their courts, has the role of protecting justice system) but this is not enough to create a distinct usage incapacity juridical category.

According to the manner in which they operate we can distinguish between incapacities operating through power of law (ope legis) and incapacities operation on the ground of a court decision.

According to their opposability the incapacities are absolute and relative. The absolute incapacities prevent the valid conclusion of the juridical deed by the incapacitated with any other person and the relative incapacities prevent the conclusion of a juridical deed by the incapacitated with a certain person or persons (*G. Boroi*, Drept civil. Partea generală. Persoanele, Ed. Hamangiu, Bucureşti, 2008, p. 478).

3. Civil punishment incapacities. Civil penalty incapacities may be divided into two categories: civil penalty limitations and criminal penalty limitations.

The category of civil penalty limitations include depriving another of parental rights, regulated in the art. 508-512 NCC, the civil penalty regulated by the NCC regarding succession and indignity succession regulated by art 958-960 and forced acceptance of the inheritance of the heir who, badly intended substracted or put away goods belonging to the succession patrimony or put away a donation regulated by art. 1119.

We may add the case regulated by art. 5, par.3 of Law No.137 of 28 March 2002 regarding some measures taken for privatization. Accordingly, through power of law Romanian or foreign natural and juridical persons who had shares selling-purchase contracts with a public institution implied in privatization of trade companies and were suspended for imputable causes through a complete and irrevocable court or arbitrary court as an effect of conditions stipulated in the shares selling-purchase contract, as well as those who have unpaid taxes to the budget, are forbidden to take part in the privatization.

The criminal penalty incapacities includ the complimentary punishment of forbidding some rights (civil rights that may be thus, forbidden are parents'tutors and curators' rights –art. 64,lt.d) and e) of the Criminal Code) and the additional punishment of forbidding rights (ar.71, and 64 of the Criminal Code).

4. Protection incapacities. Protection incapacities are stipulated by the Civil Code and other legal deeds. They are subdivided into absolute and relative incapacities.

Absolute incapacities are those incapacities that prevent the incapacitated from concluding a juridical civil deed with any other person.

Relative incapacities do not allow the incapacitated to conclude the juridical civil deed with certain persons.

4.1. Incapacities protecting the human body. A series of incapacities has the purpose to protect the human body, which is not a thing, but the person itself. In this concern the principle of human body inviolability (stipulated in ar. 64 NCC, according to which (1) The human body is inviolable. (2) Any person has the right to physical and mintal integrity. The integrity of a human being may not be violated but in the express and limitate conditions stipulated by the law".).

This principle is the fundament for stating as illicite the agreements concerning the prostitution or other such activities, as striptease, such agreements being also null for an imoral cause.

Legal stipulations referring to prelevation of human cells, tissues and organs for transplants (we consider the provisions of art 68 of the NCCand the Title VI Prelevation and transplant of human organs, tissues and cells for therapeutical purposes of Law No.95/2006) have the following consequences upon the usage capacity of natural person:

- majors without discernment due to a mental disability, serious mintal disease or other similar reasons, irrespective they were put under interdiction or not, as well as the minors have a limited usage capacity, that is, they cannot conset to the prelevation of human tissues and organs. By exception, the prelevation of medular or peripherical hematopoetic stem cells from a minor is allowed.

- majors who have discernment may consent to prelevation of human tissues and organs for therapeutic purpose on condition that there is no danger for their lives.

- the consent for the prelevation of human tissues and organs may reach the form of the one party binding juridical writ in exchange of which there is no profit.

The legal norms that regulate the organisation of blood transfusion, blood and human blood components donation and the ensurance of sanitary safety and quality, for the therapeutic usage, stipulated in the Law No. 282/2005 have provisions that limitate the usage capacity of the natural being for the purpose of protecting the human body.

Thus, according to the Annex No.4 lt. c) in the Law, blood donation is a voluntary, anonimous, and unpaid action. On the contrary, it is forbidden to conclude a juridical deed in order to be paid after donating blood. It is true that on the ground of art.16 in the Law, the blood donors have the right to receive for each donation an allowence for food, as meal tickets or a post-donation meal provided by the blood transfusion centre as equivalent of the overall sum of the meal tickets; in such conditions this practice is not a payment but it is targeted to contribute to the recovery of the donor's organism and bood.

4.2. Other protection incapacities. Besides the cases already analysed the law stipulates a series of incapacities either for protecting the incapable persons or other interests. The following protection incapacities belong to this category:

- the person lacking the exercise capacity or having a limitate exercise capacity cannot dispose of his own goods through liberalities, except the cases stipulated by the law (ar.988, par.1 NCC).
- according to art. 146 par.3 NCC, the minor who reached the aged of 14 cannot make donations other than the gifts received according to his material status and to guarantee other's obligation.
- Not even after acquiring the final exercise capacity the person cannot dispose through liberalities to the benefit of the person who had the quality of his legal representative or trustee, before he had received on behalf of the court the decision for signing off the

accounts. The exception is when the representative or the legal trustee is the ascendent of the disposer (art.988, par.2 NCC).
- the provisions in the art. 990, par.1 NCC forbid the liberalities made to doctors, chemists or other persons, in the period when they provided, directly or indirectly, the disposer with specialised care services for the disease that caused the death.
The following categories do not fall under provisions of the incapacity:

a) the liberalities made to the husband, first remote relatives or privileged collaterals;
b) the liberalities made to other relatives up to the fourth remote degree included, if at the date of liberality, the disposer has neither a husband/wife nor privileged collaterals.

- the incapacity stipulated in the art.990 par.1NCC also concerns the priests or other persons who provided the disposer with religious assistance during the disease that caused the death. In this case, as well, the exceptions presented above are applicable (art.990, par.3 NCC).
- Art.991 NCC stipulates that the following categories of persons are not qualified to be the beneficiaries of will provisions: the public notary who authenticated the will containing the respective provisions; the interpreter who took part in the will authentication procedure; the witnesses that assisted the testator to authenticate the will or conclude the priviliged will according to the conditions stipulated in art. 1043, par.2 and art.1047, par.3 NCC; the agents in front of whom the privileged will was drafted, in conformity with the stipulations of art.1047 NCC; the persons who provided leggaly juridical assistance for the drafting of the contract."
- the judges, the prosecutors, the registrars, the executors, the lawyers, the public notaries, the solicitors and practitioners in insolvency cannot buy, directly or through agents, litigatious rights judged in the courts they are assigned to (art.1653, par.1 NCC).

The following categories do not fall under this interdiction: buying the inheritance rights or quotas of the property rights from heirs or co-proprietors; buying a litigatious right for paying a debt that occured before the right to have become litigated; the purchase that was made to defend the rights of the person who owns the litigated good (art.1653, par.2 NCC)

The right is litigatious if there is a trial started and unfinshed with a view to its existence and lenght.
- According to art. 1654, par.1 NCC the following categories are unqualified to buy directly or though an agent, even to a public tender:

a) the mandataries for the goods they undertake to sell; the exception stipulated in art.1304, par.(1) is applicable;
b) the parents, the tutor, the curator, the administrator of the goods belonging to the persons they represent;
c) the public servants, the justice of peace, the practitioners in insolvency, the executors as well as other persons that may influence the conditions of the selling made through them or which have as an object the goods they administer or whose administration they supervise."

The art.1304, par.1 NCC referred to by art.1654, par.1,lt, a) NCC above mentioned takes off the relative nullity the contract with oneself concluded by a representative, if there was an express mandate for that given by the representative or if the content of the contract was drafted so that it excluded the possibility of a conflict of interests. As a consequence, such cases are also exceptions from the incapacity of mandataries to buy goods they were empowered to sell.

- According to art.144 par.1 NCC the tutor, is not qualified to make donations or guarantee other's obligation on behalf of the minor. Exceptions are the regular gifts in accordance with the material status of the minor, that the tutor is qualified to make on behalf of the minor.
- According to art.144, par.2 NCC „The tutor is not qualified, without the family's consent and the authorization from the Children's Court, to estrange, divide, mortgage or alienate other goods of the minor, to give up his patrimonial rights or conclude validly deeds that infringe the right of administration." The deeds recording the goods subject to loss, degradation, alteration or depreciation as well as those that became obsolete for the minor are subject to agreement or authorization (art.144, par.4 NCC).
- The provisions of art. 147, par.1 NCC forbid the conclusion of juridical deeds between the tutor or tutor's husband/wife, a direct relative or tutor's brothers or sisters, on the one hand, and the minor, on the other. The next paragraph of the article stipulates the exception: the purchase at a public tender of one of minor's goods if the respective buyer has a real guarantee over this good or owns it in co-proprietorship with the minor, accordingly.

All limitations of usage capacity that concerns the minor's tutor are applicable, as well, to his parents, as long as art.502, par.1NCC stipulates that parents' rights and obligations regarding the child's goods are the same with the tutor's.

- according to art.17 in Law No.85/1992 regarding the selling of dwellings and spaces with other destination build with state money and business or state companies' money, republished, the dwellings and other buildings stipulated within the law, cannot be bought by foreign citizens or stateless people.
- In the case of selling assets belonging to business companies have as shareholder the state or a public local authority, regulated by art.24-30 in Government's ordinance No.88/1997 regarding the privatization of commercial societies art.63-96 of the Methodological Norms regarding the privatization of commercial societies and selling of assets, approved by the Government's Decision No.55/1998, the representatives of the public institutions involved in the shareholders general meetings, members of the board of directors of the selling companies are not qualified to be buyers. This is an application of the rule stipulated by art. 1654 NCC, according to which the mandataries in charge of the selling of a good cannot buy it, being acknowledged that according to art, 72 of Law No.31/1990 regarding the commercial companies, republished, mandataries' obligations and liabilities are regulated by the provisions concerning the mandate.

The interdiction also applies to the selling of assets belonging to independent monopoly.

- The provisions of art. 41 par.2 of the Constitution, in primary drafting, forbade the foreign citizens and stateless people to acquire the proprietorship over lands.

After the revision of the Constitution the regulation in view was substantially modified according to art.44 par.2 Thesis II with the following content: "Foreign and stateless citizens may acquire the right of private proprietorship over lands only in accordance with the conditions imposed by Romania's adhesion to the European Union and other international treaties whose part Romania is as mutual party, in conformity with conditions stipulated by the organic law as well as the legal inheritance."

The constitutional provision quoted is drafted in a positive manner, emphasizing not the interdiction for the right of proprietorship over lands against the foreign and

stateless citizens, but the cases and conditions in which they may acquire such a right. This is the reason for which the juridical literature stated that foreign and stateless citizens' incapacity of becoming proprietors over lands in Romania became a relative and partial one.

The application of the final part of the text quoted should be considered for application according to which the foreign and stateless citizens may acquire the right to proprietorship over lands through legal inheritance.

The conditions in which the citizens of the member states of the European Union and stateless people coming from these states may acquire the right to proprietorship over the lands in Romania are stipulated in the Law No.312/2005 regarding the right of acquiring lands by the foreign and stateless citizens as well as foreign legal person. For certain categories of lands, such as residential lands, agriculture lands or forests and forest lands, the law stipulates a transitory period up to 7 years till such persons will be qualified to receive the right to proprietorship in writing (see *E. Chelaru*, Drept civil. Drepturile reale principale, op. cit., p. 154-157).

Till the end of the trasitory periods the foreign and stateless people's usage capacity is limited that is they will not be qualified to conclude juridical deeds having as object the right to proprietorship over the categories of lands above mentioned and will not have benefits derived from them.

5. The penalty for the non-observance of legal stipulations for the protection usage incapacity. The capacity to conclude juridical deeds is a general condition of validity for the juridical deed so that the conclusion of such a deed with non-observance of the usage incapacity is penalised by nullity.

As to the nature of nullity this is expressly stipulated by the legislator in some cases.

For example, art.144, par.3 NCC stipulates expressly that relative nullity governs the donations and deeds that guarantee other's obligation, concluded by a tutor on behalf of the minor. The same punishment is applied in the case of estrange, division, mortgage deeds or other deeds concerning real goods belonging to the minor, allienating his patrimonial rights as well as any other deeds that infringe the right of administration., if they were concluded by the tutor without the agreement of the family council or Child's Court authorization.

According to art.146, par.4 NCC the following juridical deeds are penalised by relative nullity;

- the donations made by the 14 years old minor and the deeds through which he engages himself to guarantee other's obligation;
- juridical deeds that the tutor may conclude only with the agreement of the family council and the Child's Court authorization if they were personally concluded by the 14 years old minor, by lacking of the agreement or authorization.

The art. 147, par.1 NCC penalises with relative nulity the juridical deeds concluded between the tutor or tutor's husband/wife and a direct relative or tutor's brothers or sisters, on the one hand and the minor on the other hand.

According to the former Civil Code the liberalities made in favour of doctors or chemists that treated the disposer of the disease that caused the death are subject to absolute nullity, grounded on art. 810 (see *Fr. Deak*, op. cit., p. 132; *G. Boroi*, op. cit., p. 361). Other authors considered that the punishment is the relative nullity (see *C. Hamangiu, I. Rosetti Bălănescu, A. Băicoianu*, Tratat de drept civil român, vol.III, op. cit., p. 747; *Gh. Beleiu*, op. cit., p. 328 şi 331).

The last opinion was adopted by the legislator, the juridical deeds with free title stipulated in art.990, par.3 and art.991 NCC

The purchase made by the incapacitated stipulated by art.1654, par.1, lt. a) and b) is penalised by relative nullity (art.1654, par.2, thesis I NCC).

The purchase of litigatious rights by the incapacitated stipulated by art. 1653 NCC is expressly penalised by absolute nullity. There was a controverse upon this subject generated by the former Civil Code which in art. 1309 forbade the persons working in the justice system to be buyers of litigatious rights, the legislator considering the opinion of prof. Gh. Beleiu according to which the penalty for such acts is absolute nullity. (see *Gh. Beleiu*, op. cit., p. 331).

In the same way, the absolute nullity penalises the purchase made directly or through intermediaries, even if the selling was public, by public servants, justice of peace, insolvency practitioners, executors as well as other persons of the kind, that may influence the selling conditions made through them or the objects they administer or supervise (art. 1654, par.2, thesis II NCC).

When the legislator does not stipulate expressly the kind of nullity, in order to determine it, the criterium of the nature of the interest will be applied by instituting the respective incapacity. Thus, the absolute nullity will penalise the infringement of a capacity that protects a general, common interest and the relative nullity will penalise an incapacity that protects an individual interest.

As a consequence, the absolute nullity governs the non-observance of incapacities stipulated by art.988, par.1 NCC (except the donations made by the 14 years old minor, as we have already shown above), art. 44, par.2 thesis II of Constitution together with art.4, par.5 of Law No.321/2005; art.17 of LawNo.85/1992; art.24-30 of Governent's Urgent Ordinance No.88/1997. In the other situations, in principle the penalty is that of relative nullity.

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