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PASSIVE LEGAL CAPACITY OF NATURAL PERSONS IN MACEDONIAN CIVIL LAW

Abstract:

The legal capacity (active and passive), delictual capacity and attributes all together constitute personhood of natural and juridical person. In civil law systems usually legal capacity is determined as passive and active. Passive legal capacity is a capacity to have rights and duties under civil law, and active legal capacity is capacity to act. According to law personhood of natural persons begins with acquiring passive legal capacity at the moment of birth. As medicine and technology develops the view of legal doctrine, regarding the moment of acquiring personhood and legal capacity, changes with arguments that “the born alive rule” might be outdated. This article examines the moment of acquisition of passive legal capacity in Macedonian and comparative law according to present legal statute, and the possible consequences derived from the abandonment of the “born alive rule”.

Key words: *personhood, legal capacity, natural persons, civil law.*

In civil law personhood is an important legal institute that is considered to be one of the presumptions for creating civil law relations, besides the legal facts and the object of civil law relations. Personhood is defined by civil doctrine as legal category that consists of capacities and

attributes of natural and juridical persons¹. According to the prevailing opinions of civil doctrine personhood must consist of capacities (passive legal capacity, active legal capacity and delictual capacity) and attributes (name, domicile, citizenship) as indivisible unity². The reasoning behind the opinion of civil doctrine that capacities and attributes are symbiotically linked is found in the fact that natural and juridical persons participate in civil law relations not only with their capacities, but also with their attributes. Capacities determine the legal position of a person whether he or she is capable in the eyes of the law to undertake certain legal actions. Attributes, on the other hand, are indispensable regarding the individualization of the person. Therefore a person may enter into civil law relations if he or she possesses the necessary capacities, and if he or she is individualized as subject of rights and duties.

Taking in consideration the legal statutes on personhood and legal capacity the civil doctrine determines that in civil law legal systems there are three types of capacities passive legal capacity, active legal capacity and delictual capacity³. The passive legal capacity is determined as abstract possibility for a person to become subject of rights and duties. Active legal capacity is defined as capacity for a person to act, to undertake legal actions that lead him or her to obtain rights and duties under civil law. Delictual capacity is determined as capacity of a person to comprehend the meaning of his or her own actions, to evaluate if those actions are legal or illegal and

¹ P. Живковска, *Општ дел на граѓанското право*, Европа 92, Скопје (2011), 52.

² Some authors, such as professor Dimitar Pop Georgiev, consider that personhood of natural persons is determined only by the capacities, but not attributes. See: Ibid.

³ See: P. Живковска, *supra* note 1. 50; P. Varul, A. Avi, T. Kivisild, *Restriction on Active Legal Capacity*, *Juridica International* (IX/2004), 100; I. Hoffman, G. Könczei, *Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code*, 33 *Loy. L.A. Int'l & Comp. L. Rev.* (2010), 147-148.

if such actions could cause damages for third parties. Legal capacity (active and passive) is a matter determined by law. In civil law legal systems where civil law is codified, the statutes regulating legal capacity are usually found in the part of the civil code relating to persons (natural and juridical). The German Civil Code (BGB) regulates passive legal capacity of natural persons in Book 1 – General Part in Division 1 relating to persons⁴. Similar to the German Civil Code, the Swiss Civil Code (ZGB) regulates passive legal capacity in the first part of the code – Law of Persons, Title One – Natural Persons, Chapter one – Legal Personality⁵. The same approach is present in the Italian Civil Code (Codice Civile Italiano) it regulates legal capacity in Book one – Of Persons and Family⁶, and the Spanish Civil Code (Codigo Civil) that regulates passive legal capacity in Book I – Persons in Title II - On the birth and extinguishing of civil personality⁷. Unlike the previously mentioned civil codes, the French Civil Code (Code Civil) doesn't contain article regulating specifically passive legal capacity. However, the French Civil Code contains numerous articles in different parts of the code that refer to passive legal capacity⁸. Civil law legal systems that have no civil law codifications regulate the matter relating passive legal capacity in different laws. Republic of Macedonia, as a country that has no civil law codification regulates the passive legal capacity in the Law of Obligations (Закон за облигационите односи⁹). Republic of Croatia also regulates passive legal capacity in the Law of Obligations (Zakon o obveznim odnosima¹⁰). In Republic of Serbia passive legal capacity is

⁴ See: Art. 1,

⁵ See: Art. 11.,

⁶ See: Art. 1.

⁷ See: Art. 29.

⁸ See: Art. 8, 318, 725 and 906.

⁹ Службен весник на РМ, бр. 18/01, 4/02, 84/08 и 161/09.

¹⁰ NN 35/05, 41/08, 125/11, čl. 11, st. 1,2.

regulated in the Constitution of Republic of Serbia (Ustav Republike Srbije¹¹) in the scope of the “*right of legal personality*”.

The distinction between active and passive legal capacity regarding the acquisition of rights and duties in the civil law legal system, as it was mentioned before, is recognized and regulated by law (in civil codes, or special laws). However, in Common Law the term “*legal capacity*” or “*capacity*” usually means that a person is recognized as a party in civil law relations and it may acquire rights and duties if the required legal conditions are met. According to precedent law and legal statutes in common law legal systems, especially in English law, the term “legal capacity” also means that a person may appear in court proceedings as plaintiff or defendant.¹²

This text will examine closely the matter regarding the moment of acquisition of passive legal capacity of natural persons which is also considered to be the moment when natural persons acquire personhood under the law.

1. Acquiring Passive Legal Capacity in Macedonian and Comparative Law

Legal capacity, as it was mentioned, in civil doctrine is usually defined as potential for a person to have rights and duties emerging from civil law relations¹³. According to the opinion of professor D. Popov,

¹¹ Službeni glasnik RS, br. 98/2006, čl. 37.

¹² For legal capacity in Common law see: I. Hoffman and G. Könczei, *supra* note 3, 149-150; *Oxford Dictionary of Law, Fifth Edition*, Oxford University Press, (2003), 63.

¹³ See: Р. Живковска, *supra* note 1; Р. Ковачевић – Куштримовић, М. Лазић, *Увод у грађанско право*, Пунта, Ниш (2008) 64-65.

passive legal capacity is “*personal attribute of a person, and it is linked to that person*”¹⁴. In that regard, the professor D. Popov concludes that “*passive legal capacity can’t be transferred or taken away, and natural persons could not renounce it*”¹⁵. Considering that passive legal capacity is linked to the person professor D. Popov concludes that “*legal capacity is unlimited and equal for all persons*”¹⁶. Professor R. Zivkovska considers that “*passive legal capacity isn’t indivisible category since it can be limited in two directions: first when persons does not fulfill certain conditions determined by law in order to potentially acquire certain rights, and second limitation regarding the scope of potential right that a person could acquire under law*”¹⁷. According to the opinion of professor R. Zivkovska two subtypes of passive legal capacity should be recognized: special passive legal capacity and limited passive legal capacity¹⁸. Unlike passive legal capacity, professor R. Zivkovska points out that “*special passive legal capacity that is obtained by fulfillment of special conditions (education profile, work experience etc.) and permit (license) given by the state*”. Special passive legal capacity is obtained by lawyers, notary publics, doctors and etc. ¹⁹. Limited passive legal capacity professor R. Zivkoska defines as “*limitation of the potential for a person to acquire certain rights and duties in civil law relations (for example according to the Law of*

¹⁴ Д. Попов, *Грађанско право, општи део*, Пето измењено и допуњено издание, Правни факултет у Новом Саду, Нови Сад, (2007) 72-73.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Р. Живковска, *supra* note 1, 55.

¹⁸ Ibid.

¹⁹ Ibid.

Ownership and Other Real Rights foreigners are not allowed to own agricultural land in Republic of Macedonia²⁰)”²¹.

Today, in modern legal systems, passive legal capacity – the capacity for a person to potentially have rights and duties is a capacity that every natural person acquires without exception. In international law natural persons in the moment of their birth acquire unalienable human rights guaranteed by international laws, and also by national laws of countries part of that international community. In this regard article 1 of the Universal Declaration of Human Rights prescribes “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*”. According to article 2 of the Universal Declaration of Human Rights “*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”. Especially important in regard of passive legal capacity is article 6 of the Universal Declaration on Human rights which prescribes that “*Everyone has the right to recognition everywhere as a person before the law*”.

The European Convention on Human Rights from 1950 obligates all high contracting parties to ensure that everyone in their jurisdictions will be able to realize the rights and freedoms defined in the Convention.

The view on passive legal capacity, and on personhood in general, as bestowed on every person from birth without exceptions is considered

²⁰ “*Foreign natural and juridical persons may not own agricultural land in Republic of Macedonia*”, art. 246 (Закон за сопственост и други стварни права, Службен весник на РМ, бр. 18 /01, 92/08, 139/09 и 35/10).

as legal and humanitarian achievement that resulted from various activities on national and international level for abolishment of slavery²² and all forms of discrimination against natural persons²³.

Acquiring personhood, and by that passive legal capacity is usually achieved in the moment of birth. The birth as a moment of acquiring passive legal capacity is determined in most civil law codifications. The German Civil Code determines that “*The legal capacity of a human being begins on the completion of birth.*” (§1). Also, the Swiss Civil Code prescribes that “*Personality rights begin on the birth of the living child and end on death.*” (art. 31). The French Civil Code in article 8 prescribes that “*Every French person enjoys civil rights*”. The enjoyment of such rights naturally begins at birth. However, considering articles 318 (which prescribes that a person may invoke parental rights only if the child is born vital), article 725 (which prescribes that rights of succession may be realized only by a child that is born vital) and article 906 (prescribing that a gift may be received only by child borne vital), it can be concluded that the French Civil Code links passive legal capacity not only with birth, but also with vitality – capacity for life. The Spanish Civil Code determines that the moment of birth is the moment when a natural person acquires passive legal capacity (art. 29).

²¹ Ibid, 63.

²² Besides the national laws, the band of slavery was imposed by article 4 of the Universal Declaration of Human Rights “*No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms*”. Such article is also found in the International Covenant on Civil and Political Rights from 1966 “*No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.*”(art. 8). European Convention on Human Rights prescribes the band on slavery in article 4 “*No one shall be held in slavery or servitude.*”.

²³ Numerous international documents contain articles prohibiting all forms of discrimination: Universal Declaration of Human Rights (art. 2), European Convention on Human Rights (art. 14), International Covenant on Civil and Political Rights (art. 26),

According to article 30 of the Spanish Civil Code “*For civil purposes, only the foetus with human appearance that lives for twenty four hours fully separated from the mother’s womb shall be deemed to have been born.*”. Article 1 of the Italian Civil Code prescribes that “*passive legal capacity is acquired in the moment of birth*”. In civil law countries without civil codes the conditions for acquiring legal capacity are determined by laws. In Republic of Serbia passive legal capacity is determined by article 37 of the Constitution, however it is not precise regarding the moment when such legal capacity is acquired. The Law of Obligations of Republic of Croatia in article 17 regulates passive legal capacity and legal presumption regarding birth, which leads to the conclusion that passive legal capacity is acquired in the moment of birth. The Bulgarian Law on Persons and Family (Закон за лицата и семейството²⁴) in article 1 prescribes that “*every person in the moment of birth acquires capacity to have rights and duties*”.

In Macedonian law passive legal capacity is regulated by the Law of Obligations. According to paragraph 1 of article 24-a of the Law of Obligations from 2011²⁵ passive legal capacity is determined as capacity of natural and juridical persons that “*enables the person to have rights and duties...*”. Paragraph 2 of the same article determines that “*natural person acquires passive legal capacity in the moment of birth, and juridical person*

International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women and other.

²⁴ Обн. ДВ. бр.182 от 9 Август 1949г., попр. ДВ. бр.193 от 22 Август 1949г., изм. ДВ. бр.12 от 9 Февруари 1951г., изм. ДВ. бр.12 от 8 Февруари 1952г., изм. ДВ. бр.92 от 7 Ноември 1952г., изм. ДВ. бр.15 от 20 Февруари 1953г., попр. ДВ. бр.16 от 24 Февруари 1953г., изм. ДВ. бр.89 от 6 Ноември 1953г., изм. ДВ. бр.90 от 8 Ноември 1955г., изм. ДВ. бр.90 от 9 Ноември 1956г., изм. ДВ. бр.50 от 23 Јуни 1961г., изм. ДВ. бр.23 от 22 Март 1968г., изм. ДВ. бр.36 от 8 Май 1979г., изм. ДВ. бр.41 от 28 Май 1985г., изм. ДВ. бр.46 от 16 Јуни 1989г., изм. ДВ. бр.20 от 9 Март 1990г., изм. ДВ. бр.15 от 18 Февруари 1994г., изм. ДВ. бр.67 от 27 Јули 1999г., изм. ДВ. бр.81 от 6 Октомври 2000г., изм. ДВ. бр.120 от 29 Декември 2002г.

²⁵ Службен весник на РМ, бр. 18/01, 4/02, 84/08 и 161/09.

in the moment of its constitution determined by special law”. Analysis of the cited article leads to the conclusion that Macedonian legislator links the acquisition of passive legal capacity with the birth of the child.

As it was shown by comparative analysis of several laws and codes regulating the acquisition of passive legal capacity, the legal capacity is acquired in the moment of birth, and usually no other conditions are imposed. The moment of birth is the sole condition for acquiring legal capacity in the German Civil Code, Swiss Civil Code, Italian Civil Code, the special Law of Persons and Family of Republic of Bulgaria and the Law of Obligations of Republic of Macedonia. In the legal system of Republic of Serbia and Republic of Croatia there is no precise determination regarding the moment of acquisition of passive legal capacity. Other civil codes such as the French Civil Code and the Spanish Civil Code, besides birth, prescribe other supplementary conditions regarding the acquisition of passive legal capacity. The articles on passive legal capacity of the French Civil Code lead to the conclusion that in order for a natural person to acquire passive legal capacity the child should be born vital. In the Spanish Civil Code the supplementary conditions for acquiring legal capacity are: the live birth of the child, to have human form²⁶ and to be able to survive at least 24 hours completely separated from the body of the mother.

The legal fact of birth is determined by the civil doctrine as formal condition for acquiring passive legal capacity. However, the civil doctrine considers that, besides birth, other crucial condition must be met, and that is

²⁶ The conditions “*the child to have human form*” as condition for acquiring passive legal capacity is subject to critics from scholar as inhuman and immoral, and contrary to the principles of international law regarding personhood of natural persons. More on this topic see: A.Finžgar, *Osebe civilnega prava*, Ljubljana (1976), 10.

for the child to be born alive²⁷. This opinion of the civil doctrine is completely justified because the realization of personhood in the fullest sense of the word may be done only under the assumption that the child is born alive, regardless of the fact whether the law prescribes it as a condition for acquiring passive legal capacity. In respect of the birth, the legal regulations are not precise regarding the moment of birth. According to Roman law the birth is completed when the newborn child is separated from the body of the mother, and when it begins to cry, or demonstrates other sign of life²⁸. Most scholars consider that the moment of birth is the moment when the newborn child is separated from the body of the mother²⁹. Professor V. Cambovski considers that the beginning of birth, when the woman feels the first contractions leading to birth, should be considered as the time of birth³⁰.

2. Discussions Regarding the Possibility for Acquiring Personhood and Legal Capacity Before Birth - Legal Capacity of an Unborn Child

The development of medical knowledge in the field of reproductive technologies and monitoring of pregnancy in the modern world motivates legal scholars to impose one crucial question: Should acquisition of passive legal capacity still be conditioned by birth, or should the unborn child obtain rights before birth?

There are opinions that the condition of birth regarding the acquisition of legal capacity is a product of rudimentary medical knowledge

²⁷ Р. Живковска, *supra* note 1, 56-57; Also: V. Vodinelić, *Građansko pravo, Uvodne teme*, Nomos, Beograd (1991), 120.

²⁸ See: М. Митић, *Физичко лице, Енциклопедија имовинског права и права удруженог рада*, том први, Београд (1978), 356.

²⁹ Така: Р. Живковска, *supra* note 1, 57, Исто и Д. Попов, *supra* note 14, 74.

regarding pregnancy and determining of vitality of the child before birth. Some scholars consider that today modern medicine has created conditions that allow the abandonment of the “*born alive rule*”. This opinion is based on the fact that in medicine there are techniques that allow doctors to determine with certainty if the child is vital in the body of the mother³¹. In common law, although there is no precise precedent, judges contemplate the possibility for recognition of rights of the unborn child (one that passed the 38 week of gestation). The reason for this is found in the medical fact that in this period of gestation the unborn child is fully developed and it is expected to be born alive. Recognition of rights in this gestation period, according to opinions of judges, may be done but only in criminal law. Such recognition of rights will lead to criminal responsibility of a third party for homicide of the unborn child. It is pointed out that there were scholars that shared the same opinion even in the past. According to the opinion of scholars if action of a third party results with death of the unborn child, or as a result of premature birth caused by actions of a third party, that should be treated as negligent homicide, if the child has shown sign of life in the body of the mother³². In consideration of the possibility for abandonment of the “*born alive rule*” scholars point out that the legal systems might develop in two different directions. First – determining the vitality of the child with the help of medical science before recognizing any rights of the unborn child. Second – determining a moment between conception and birth when the unborn child acquires personhood and passive legal capacity³³. The scholars who embrace the opinion that there are conditions for recognition of rights

³⁰ *Казнено право, посебен дел*, Просветно дело, Скопје (1997), 25.

³¹See: K. Savell, *Is the ‘Born Alive’ Rule Outdated and Indefensible*, Sydney Law Review, Vol 28 (2006), 626.

³² J. Barry, ‘The Child *en Ventre sa Mere*’ 14 ALJ (1941), 351 - 353.

³³ K. Savell, *supra* note 31, 631-632.

of the unborn child note that the abandonment of the “*born alive rule*” may lead to consequences in other areas of the law, not just in criminal law. It is pointed out that recognition of rights of the unborn child may raise questions about the responsibility of the mother for her actions that caused the death of the unborn child in criminal and in civil law as well³⁴.

The question for recognition of rights of the unborn child in light of article 2 of the European Convention on Human Rights has been raised before the European Court of Human Rights. In particular cases, such as *Vo v France*³⁵, the Court determined that the term “*everyone*” used in the European Convention of Human Rights is not applicable for unborn children. According to the opinion of the court the recognition of rights for the unborn child will mean complete exclusion of the right of abortion that is not considered to be a violation of article 2 of the European Convention of Human Rights. According to the prevailing opinion article 2 of European Convention does not exclude the right of abortion when it is in the interest and well being of the mother, and if it is performed according to national legislation. Also, the Court considered that it is not up to the Court to decide if article 2 of the European Convention of Human Rights is applicable to unborn children, since the high contracting parties are authorized to determine personhood, and the moment of its acquisition in national laws³⁶.

³⁴ Ibid, 626.

³⁵ *Vo v France*, Judgment of 8 July 2004, no. 53924/00.

³⁶ More on the topic see: J. Pichon, *Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment Vo v. France*, German Law Journal, Vol. 07 No. 04 (2006), 436-437.

The civil law in Republic of Macedonia does not recognize rights of the unborn child, therefore doesn't recognize the possibility for acquiring passive legal capacity before birth.

Although there are no precise articles in the Law of Ownership and Other Real Rights³⁷ it is undisputed that the law should be interpreted in sense that real rights may be obtained only by a living person, person with passive legal capacity.

The Macedonian Law of Obligations is precise regarding the matter of passive legal capacity - it is acquired in the moment of birth. Law of Obligations doesn't recognize rights of the unborn child. In case of damages for death of unborn child in light of paragraph 2 of article 190 the right of compensation is recognized in favor of the parents, not in favor of the unborn child. Also, in such cases damages are awarded to the parents for actions of third parties. Thus the conclusion that according to the Law of Obligations there are no rights in favor of the unborn child because that child has no personhood, and no passive legal capacity.

Regarding successions, the Law of Successions determines that only persons who are alive in the moment of death of the deceased could inherit. The Law of successions also recognizes the fiction of the child conceived before the death of the father (*nasciturus*) as a successor, but only if the child is born alive (art. 122, paragraph 2). Since the right to inherit of the unborn child in this case is under the condition that it is born alive, before birth this child has no passive legal capacity³⁸.

Considering the right of succession there is another much debated issue: Does the posthumous conceived children have the right to inherit their

³⁷ Службен весник на РМ, бр. 18 /01, 92/08, 139/09 и 35/10.

father? The Law of Biomedical Assisted Insemination³⁹ in the legal system of Republic of Macedonia created the opportunity for realization of reproductive right by biomedical assisted insemination⁴⁰. According to the Law for Biomedical Assisted Insemination “*A man and a woman who on the bases of medical knowledge and experience are under threat of infertility due to a medical condition may give consent in written form to an authorized medical facility for conservation of their genetic material for personal use*” (art. 33, par. 1).” The use of the deposited genetic material from the man for insemination of the woman is permitted even after his death, if he has given his consent in written form. The woman in this case has one year from the time of death of the man to realize her right to be inseminated by his genetic material. The implementation of the Law for Biomedical Assisted Insemination in Republic of Macedonia immediately raised the question for succession right of the posthumous conceived children. The Law of Successions in its current state doesn’t recognize such possibility. According to paragraph 1 of article 122 of the Law of Successions only a living person in the moment of death of the deceased could inherit, with the exception of the nasciturus⁴¹. It is obvious that the Law of Succession, in its present state, does not recognize succession right of children that are not even conceived in the moment of death of the father. This obvious conclusion leaves the posthumous conceived children without succession right regarding the estate of the father. On this issue the

³⁸ Since the realization of succession rights in this case is linked to the birth of the child, the civil doctrine considers this as conditioned legal capacity or fictitious legal capacity. See: Р.Живковска, supra note 1, 58.

³⁹ Службен весник на РМ, бр. 37/08 и 164/13.

⁴⁰ Biomedical assisted insemination (BAI), as defined in article 5 of the Law, is as a medical procedure that enables for female and male reproductive material to be merged for the purpose of achieving pregnancy in manner different than sexual intercourse.

⁴¹ The child conceived before the death of the father may inherit if the child is later born alive.

prevailing opinion of the civil doctrine is that changes must be made in the Law of Succession so that the posthumous conceived children may obtain succession right regarding the estate of their father. The group working on the Law of Succession as an integral part of the Civil Code of Republic of Macedonia, that is being gradually drafted, has already given a proposal regulating succession rights of posthumous conceived children. Having this in mind we can conclude, with high degree of certainty, that in the future Macedonian law will recognize succession right of posthumous conceived children. However, recognizing the possibility for children conceived before the death of the father (*nasciturus*) and posthumous conceived children to have succession rights cannot be misconstrued as a step in the direction for recognition of any kind of personhood of unborn children. In these cases, the children will become heirs only if they are born alive. This leads to the conclusion that children conceived before the death of the father and the posthumous conceived children have no rights before they are born. The law only recognizes the possibility for such children to acquire right if and when they are actually born. Thus, the possibility for unborn children to become heirs under the condition that they are born alive, does not mean that the “*born alive rule*” will be abandoned to some extent in Macedonian law.

The arguments that medical science has created proper conditions for abandonment of the “*born alive rule*”, meaning that unborn children, after certain period of gestation, could acquire personhood, and by that passive legal capacity, are not sufficiently strong to lead to such crucial changes in civil law. With respect to the fact that medical science can determine if the unborn child is vital in the body of the mother, the uncertainty remains whether that child will be born alive (considering the possibility of complication during birth that are not a result of human

actions). If we accept the assumption that birth is irrelevant regarding personhood and acquiring passive legal, that would mean that after certain period of gestation the unborn child (if vital) is already a person in the eyes of the law regardless whether it will be born alive or not. In legal sense, this would mean that the unborn child even if de facto is still a part of the mother's body, de jure is treated as a separate person. Since, in this hypothetical situation, the unborn child and the mother are treated as separated persons in the eyes of the law, that would mean that they might have opposed interest and one party (in this case the mother) could violate the rights of the other party (the unborn child). As a result of that the mother could be found liable for damages (among other things). From humanitarian point of view this sounds just, since there are numerous cases when the behavior of the mother during pregnancy is detrimental to the health of the child (consumption of alcohol, drugs, etc.). However from legal point of view this means possible collision of human rights (for example: the right of life of the mother weighted against the right of the unborn child, or physical and moral integrity of the mother weighted against the physical and moral integrity of the unborn child). We must agree that such collision of human right is not desirable, nor should be resolved by determining some priorities by law in sense - the life of one person at the expense of the life of another. Clearly the unborn child can't be considered the same way as the child born alive. However, we can't overlook the fact that starting from the moment of conception in the body of the mother a natural biological process is initiated that leads to creation of a human being, a person in the moment of birth. Having this in mind, it is completely justified for certain legal limitations to be imposed regarding scientific research on embryos and fetuses, legal limitations regarding the termination of pregnancy, also criminal

responsibility and civil liability for termination of pregnancy against the will of the mother by actions of third parties.

Regarding the civil liability for damages for death of an unborn child in favor of the parents regulated by the Law of Obligations in Republic of Macedonia, even if the courts can't consider the unborn child as a person regardless of the period of gestation it is in, the fact whether the terminated pregnancy was early or late, should have bearings on the decision for the amount of damages. In this respect the courts should take in account the emotional bond that develops between the unborn child and the parents as the pregnancy progresses. That emotional bond is the strongest when the child becomes vital and starts showing signs of life while in the body of the mother, so the pregnancy that will be terminated in this late stage by action of a third party will cause higher degree of distress and emotional pain on the mother (and the father). The third party undertaking the actions leading to termination of pregnancy is also in position to evaluate the gravity of his or her actions since it can perceive the pregnancy in late stages easier than the pregnancy in early stages. Therefore, in cases of civil law liability for damages due to death of an unborn child the period of gestation should not be overlooked as a relevant fact in determining the state of mind of the party causing the damages, and also in determining the amount of such damages.

In conclusion, personhood and passive legal capacity in Macedonian civil law are acquired in the moment of birth. The law doesn't recognize the possibility for unborn children to be considered as persons and to have passive legal capacity. However, there are laws that prescribe limitation regarding scientific research on embryo and fetuses, limitations regarding the termination of pregnancy and criminal responsibility and civil liability

against actions of third parties that cause the termination of pregnancy against the will of the mother.

SYMMARY

Taking in consideration the legal statutes on personhood and legal capacity, the civil doctrine determines that in civil law legal systems there are three types of capacities passive legal capacity, active legal capacity and delictual capacity.

The passive legal capacity is determined as abstract possibility for a person to become subject of rights and duties.

Active legal capacity is defined as capacity for a person to act, to undertake legal actions that lead him or her to obtain right and duties under civil law.

Delictual capacity is determined as capacity of a person to comprehend the meaning of his or her own actions, to evaluate if those actions are legal or illegal and if such actions could cause damages for third parties.

Legal capacity (active and passive) is a matter determined by law. In civil law legal systems where civil law is codified, the articles regulating legal capacity are usually found in the part of the civil code relating to persons (natural and juridical). Civil law legal systems that have no civil law codifications regulate the matter relating passive legal capacity in different laws.

In modern legal systems passive legal capacity is acquired by every person without exception. Acquiring personhood, and by that passive legal capacity is usually achieved in the moment of birth.

The legal fact of birth is determined by the civil doctrine as formal condition for acquiring passive legal capacity. Besides birth, other crucial condition must be met, and that is for the child to be born alive.

In respect of the birth, the legal regulations are not precise regarding the moment of birth. Most scholars consider that the moment of birth is the moment when the newborn child is separated from the body of the mother.

Macedonian civil law doesn't recognize the possibility for unborn children to be considered as persons and to have passive legal capacity under law. There are however, laws that prescribe limitation regarding scientific research on embryo and fetuses, limitations regarding the termination of pregnancy and criminal responsibility and civil liability against actions of third parties that cause the termination of pregnancy against the will of the mother.

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