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THE LEGAL-PROCEDURAL STATUS OF THE MINOR IN THE FRAMEWORK OF THE EXAMINATION OF CIVIL DISPUTES

ADELINA BACU,

Doctor in Jurisprudence, Associate Lecturer,
Department Law,
Academy of Economic Studies of Moldova,
Chisinau, Republic of Moldova
e-mail account: bacu.adelina@ase.md

***Abstract.** In Republic of Moldova, the necessity and obligation of the existence of a normative framework, in accordance with international standards, regarding the protection of minors involved in civil processes is a prerogative, considering the commitment of the state authorities to ensure the protection of children, adolescents and young people against any abuse likely to harm their interests or even their health, physical or moral development. However, nowadays there is a number of legislative gaps in the way civil proceedings are filed and conducted, namely in situations where minors are parties to the proceedings. Thus, the actuality of this topic is determined by the urgent need to ensure an effective protection in the process for the minors, so that they have the opportunity to effectively capitalize on their rights and freedoms. The purpose of the study is to reveal the deficiencies of the normative framework, in the chapter of implementation of the procedural status of the minors during the civil case examination and the submission of some legislative proposals to improve the procedural system in force. Research methods - logical, comparative and systemic analysis methods were used in the study process. The materials used are the research in the relevant field developed by researchers from the Republic of Moldova and Romania, as well as the analysis of the legislation in force regarding the legal status of the minors in the civil process. The final conclusion shows that the national procedural legislation does not consider the civil cases specifics with the participation of minors, a fact that requires the establishment by law of the mandatory participation of the ex officio lawyer for trials involving minors, in order to improve the efficiency of their protection.*

Key words: minors; legal capacity, procedural status of minors, legal representatives, protection of rights and interests.

JEL Classification: K41

I. Introduction

In the Republic of Moldova, in accordance with international standards, the necessity and obligation of the existence of a normative framework, regarding the protection of minors involved in civil processes is a prerogative procedure, considering the commitment of the state authorities to ensure the protection of children, adolescents, young people from any abuse likely to harm their personal interests, as well as their health, physical or moral development.

The series of normative acts that enshrine both the fundamental rights of children, and various protection measures, as well as the state authorities meant to oversee the implementation of the legal framework are quite impressive, although some areas of the country still require legislator's intervention. In this case study, we consider the procedural legal status of minors, who for various reasons end up having the capacity of participants in a civil process. Until present, in

the structure of the CPC of the Republic of Moldova (Civil Procedure Code, 2003) there is no chapter or at least one article devoted to the particularities of the procedural position of the plaintiff, the defendant or the intervener who is a minor between the age of 14 and 18, respectively having the right of personal participation in judicial debates. However, both the procedure of submitting the request and the hearing of the minor, or the exertion of his procedural rights, should benefit from a separate legal management, especially since we do not have specialized courts for cases in which minors are involved, nor specialized court panels for such litigation categories. The general and lapidary nature of the procedural rules regarding the procedural exercise capacity, which enshrine the minor's right to be represented or to personally take part at the civil process, during the legal process, do not cover the numerous practical situations, when due to the lack of a well determined normative framework the minor's interests or manifestations of will treated superficially, or worse, the submitted application will be returned, on the grounds that the interested subject has not reached the age of 18, although art. 58 al. 5 CPC (Civil Procedure Code, 2003) also establishes situations when a minor between 14 and 18 years of age can personally submit a request at court in certain types of disputes. All these findings lead us to resort to a more thorough analysis of the civil procedural provisions in this field, in order to identify the gaps and present some optimal solutions, which would allow to avoid the additional traumatization of minors, who are already quite affected by the judicial process in which they are involved.

2. Legislative controversies regarding the procedure in civil cases hearing for minors

2.1 Conceptual boundaries between the terminology "child", "minor", "minor child"

Notions such as "child protection", "defending the minors' interests", "protecting children in difficult situations" have become common in recent years, the literature of specialty being overspread with studies and researches devoted to these subjects. However, there are areas in which the valorization of the rights and interests of minors remains quite difficult, given the fact that the legislator limits himself to a narrow, abstract normative framework, which leaves room for interpretation, more precisely, of negligence or abuse on the part of empowered authorities in the sphere of rights and interests protection for minors. Specifically, we are referring to the legal status of minors in the civil process, but there are quite frequent cases in which children are involved in civil processes, in different capacities - plaintiffs, defendants or interveners - their real protection in the given situations remains ineffective, as it results from the analysis of the judicial practice. From the very beginning, we emphasize that we cannot develop the assigned theme without clarifying the meaning of such notions as: "child", "minor", "minor child" and "adult child". All these terms are found in domestic legislation and require some explanation. Thus, in the specialized literature this notion is approached in two senses. In the broad sense, "child" means a physical person, regardless of their age and ability to exercise, who is related in a direct first-degree descending line to another person. (Bobar, C.-F., 2018). Respectively, in this sense, the quality of the term "child" derives from the kinship relationship with his first-degree ascendant, and the applicability of the notion can be found, for example, in art. 2178 of the Civil Code of the Republic of Moldova, which disposes: "The children of the deceased will inherit in equal shares". (Civil Code, 2002) Also, the broad meaning of this concept can be found in art. 74 of the Family Code, which operates with two notions — minor child and adult child — stipulating: " Parents are

obliged to support their minor children and adult children, who are incapable of work and who require material support." (Family Code, 2000) To analyze the notion of "child" in the narrow sense, we must start from article 1 of the UN Convention on the Rights of the Child, which states that, "for the purposes of this convention, a child means any human being under the age of 18, except for cases when, based on the law applicable to the child, the age majority is established under this age". (UN Convention on the Rights of the Child, 1989) On the same line of thoughts, the Law on the Rights of the Child from the Republic of Moldova, in art.1 paragraph 2 stipulates that, "a person is considered a child from the moment of birth until the age of 18. " (Child Rights Law, 1994) In this context, the question arises whether the concepts "child" and "minor" are synonymous, or if there are certain differences between them? For example, in Romanian doctrine, Prof. T. Bodoasca (2005, p. 54) emphasizes that the notion of a minor person is more comprehensive than that of a child, because the minor who marries still remains a minor, but is no longer a child. It was also mentioned in the national doctrine (Focsa, T., Plamadala, V., 2015, p.176) that "the notions of "child" and "minor" should not be confused, as they denote different legal categories". However, the term "child" is used in any context when considering a person under 18 years of age, and the notion of a "minor" refers to the legal capacity of the person. However, if we analyze the legislation in force, we find that the legislator uses these terms as synonyms. For example, in art. 142 paragraph 2 of the Family Code, it is mentioned that, "guardianship is instituted over children who have not reached the age of 14." (Family Code, 2000).

The same provision can be found in the Civil Code, which in art. 51 paragraph 1 provides: "Guardianship is established over minors aged up to 14." (Civil Code, 2002) As we can see, the same category of subjects is called differently, and, respectively, the legislator treats the term "child" and the term "minor" as synonymous. Such an approach can lead to different interpretations and even non-unitary judicial solutions, (Bobar, C.F., 2018., p.169) because there are minors who do not have full exercise capacity and minors who have full exercise capacity (for example, those who have benefited from the emancipation procedure). As a result, the legislator must resort to some specifications when using the term "minor", at the same time renouncing the notion of "minor child" which is considered a pleonasm, thus the term "minor" is provided expressly and implicitly, by using the term "child". In a correct legal expression, in *stricto sensu*, the term "child" must be used alone, without attaching the appellative "minor". (Bobar. C.-F. 2018., p.170)

2.2 Procedural deficiencies during civil cases hearings for minors

In this context, we emphasize that both civil and procedural civil legislation predominantly use the term "minor", an explainable fact, once the domains in question focus more on the notion of legal capacity of individuals. Thus, in procedural matters, one of the general premises of civil lawsuit filing, is the procedural capacity in use, which, by virtue of art. 57 para. 1 of CPC "is equally recognized by all physical persons". (Civil Procedure Code, 2003) At the same time, in order to fully exercise, personally or through a representative, the procedural rights and obligations in court, the physical person, according to art. 58 paragraph 1 CPC (Civil Procedure Code, 2003) must have the capacity to exercise civil procedural rights, which the legislator recognizes only for subjects who have reached the age of 18, which does not mean that people

who have not reached this age limit, cannot become participants in the judicial process. Of course, the volume of rights and obligations of people who have not reached the age of majority differs substantially from those who have become of majority age, the legislator establishing (art. 58 al. 2-2' CPC) a delimitation of them, even within the group of minors, depending on their age, respectively their physiological and psycho-emotional development, and namely:

- 1) minors up to 14 years old;
- 2) minors aged between 14 and 18 years old.

Minors in the first category, although they can have the capacity of parties to the civil process or interveners, however, they cannot exercise their rights or personally assume procedural obligations, art. 58 al. 6 of the CPC stipulating that, "rights, freedoms and the legitimate interests of minors up to the age of 14 are defended in court by their legal representatives — parents, adoptive parents, guardians." (Civil Procedure Code, 2003) Therefore, the legislator leaves no room for interpretation, in the sense of the possibility of hearing the participants in the trial who are under the age of 14, although such situations appear quite frequently in practice. It is curious that the hearing of minor witnesses is expressly provided for in the legislation, art. 218 paragraph 1 CPC stipulating that, "when hearing the witness aged up to 14 years old, when the court deems appropriate, at the hearing of the witness aged 14 to 16, a pedagogue will be summoned to assist." (Civil Procedure Code, 2003) Thus, in this context, it is allowed to hear a witness under 14 years old, or even more so, when it becomes necessary to hear the minor – who is the party of the judicial process, whose rights and interests will be directly affected by the pronounced court's decision.

The procedure of respecting the minor's right in a judicial process is a fundamental right, established at the international level as well. Thus, according to art. 6 of the European Convention for the exercise of the rights of the child, which regulates the decision-making process by the court in case one of the participants is a minor, "the judicial authority, before making a decision, must allow the child to express his opinion" (European Convention for the exercise of the rights of the child, 1996). The particular importance of the opinion expressed by the minor is also revealed by the practice of the European Court of Human Rights (case of Pini and Bertani, Manera and Atripaldi vs. Romania, 2004) which held that "the interest of the children required that their opinions be taken into account from the moment they have reached the necessary maturity to express their point of view on this matter". In this case, the children rejected the idea of going to Italy with their adoptive parents. It was assessed that upon reaching the age from which it could reasonably be considered that their personality has been sufficiently structured, and they have acquired the necessary maturity to express their opinion regarding the environment in which they want to be raised, the European court giving precedence to their opinion, in taking the decision. [Pini si Bertani, Manera si Atripaldi vs. Romania § 74, 76]

At the same time, at the national material law level, some normative acts regulate the possibility of hearing the minor under 14 years old during the legal process. Moreover, until 2020, some provisions limited the child's right to be heard until the age of 10. However, with the adoption of the Law for the amendment of some normative acts no. 112 of July 9, 2020, this age barrier was removed. For example, art. 63 paragraph 2 of the Family Code before the amendment, provided: "... the minor's domicile is determined by the court, taking into account the child's interests and opinion (if he has reached the age of 10)"; after the legislative amendment, this paragraph has the following content: "

...the domicile of the minor is established by the court, taking into account the child's interests and opinion, in accordance with his age and degree of maturity."

(Family Code, 2000) Also, presently, art. 70 paragraph 3 of the Family Code mentions: "When restoring parental rights, the opinion of the child is taken into account, compulsorily, in accordance with his age and degree of maturity." (Family Code, 2000) In this way, a presumption regarding the age from which the child can be considered to have discernment. Respectively, in each concrete case the court is to evaluate the degree of maturity and discernment of the minor, without imposing a certain age limit. In our view, if such exceptions from the general rule are admitted, then it would be useful for the legislator to enshrine the possibility of hearing minors under 14 years old, and to resort to these provisions within the Code of Civil Procedure, in case of necessity, in other civil cases where minors are involved as participants in the process (for example, on files related to the protection of intellectual property rights, that the minor could acquire, or upon acquired rights of inheritance). In this sense, we propose the completion of art. 58 paragraph 6 of the CPC with the following phrase: "At the request of the minor's legal representative or ex officio, the court may order the hearing of the minor under the age of 14, in the presence of a psychologist, if his rights and interests could be directly and indirectly affected by the court decision". (Civil Procedure Code, 2003) Such a provision is all the more important as, for example, the legislator remains silent regarding the participation in the process of the minor under 14 years of age, whose parents requested the deprivation of parental rights, so in such cases, the minor's opinion should have an overwhelming role in revealing the realities, the judge having the task of "distinguishing between false and true facts, between attitudes that facilitate dialogue and those that close evident options, or moreover block or divert the answers that can be given by the child" (Pivniceru , M., Luca, C., 2009., p.14).

In this context, the findings made by the People's Advocate Office from the Republic of Moldova, which, in one of the analyzes dedicated to the hearing of minors in criminal cases, mentioned: "It should be given due importance to the child's opinion according to his age and level of maturity. The right to be heard cannot be considered as an obligation of the child. A child should not be prevented from being heard only for reasons related to age. Whenever a child wishes to be heard in a case that directly affects him, the judge should not refuse, unless it is in the child's best interest, to objectively hear him and listen to his opinion." (Crestenco, T., 2015) These observations are also valid for civil cases, thus the judge should grant to the minor the right to be heard in all matters that concern him or, at least on the matters, where he is considered to have the necessary discernment regarding the discussed aspects. Judicial practice, however, sometimes presents a different situation. For example, through a decision of the Supreme Court of Justice of the Republic of Moldova dated 09/07/2016, which is based on a request by which the domicile of the minor child was to be determined, finds that the minor XXXX, whose interests are concerned in the file, born on October 11, 2005, and the appeal court examined the case between January 5, 2016, time when the decision was pronounced, March 10, 2016, and respectively, contrary to the legal provisions, the court of appeal did not examine the child's opinion in this regard, which according to the present law it is mandatory." (Supreme Court of Justice of the Republic of Moldova, decision of September 7, 2016).

As for the second category of minors, aged between 14 and 18 years, art. 58 paragraph 4 of CPC, which provides: "The rights, freedoms and legitimate interests of minors between the age of

14 and 18 are defended in court by their parents, adoptive parents or guardians, and the court being obliged to admit the respective minors in such legal cases." (Civil Procedure Code. 2003) A problem that can be identified from these provisions is related to the hearing procedure for these minors, thus the legislator does not expressly regulate whether they will give statements in the presence of the legal representatives or in their absence, not even specifying the possibility of appeal to the guardianship authority or to a psychologist in the event that certain hostilities, pressures or conflicting interests that emerge between the minor and his representative. Considering the concrete circumstances of the case, the court should have the power to order the hearing of the minor in the presence of subjects who would effectively protect his rights. In our opinion, the reasonable solution in this case would be to turn to legal assistance guaranteed by the state. For this reason, we propose to complete article 58 of the CPC with paragraph 4(1), which will have the following content: "If, during the judicial debates, it is found that the minor between the age of 14-18 is in a conflict of interests with his legal representative, or the legal representative exerts pressure or intimidation on the minor, the judge will request the coordinator of the territorial office of the National Council for Guaranteed State Legal Assistance, by appointing a lawyer to defend his interests."

Violation or disregard of the rights of minors between the age of 14 and 18 cannot always be considered by their legal representatives. For this reason, the legislator in art. 58, paragraph 5 of CPC orders: "in cases provided by law, in such cases that arise from civil, matrimonial, family, work and other legal relationships, minors should independently defend their rights, freedoms and legitimate interests in the courts. The court finds the need to introduce a legal representative in the process involving minors." (Civil Procedure Code, 2003) Thus, we can mention that in a series of civil files, the minor himself can file the request in court, representing his interest personally. For example, according to art. 53 paragraph 5 of the Family Code, "in case of violation of the rights and legitimate interests of the child, including through the non-fulfillment or improper fulfillment by the parents (of by one of the parents) of duties related to maintenance, education and training obligations, or in case of parental abuse of legitimate rights, the child can independently apply to the local/territorial guardianship authority for the defense of his rights and legitimate interests, and also from the age of 14 – address these pledges to the court." (Family Code, 2000) These provisions allow the minor to obtain the status of a plaintiff in a process in which irregularities regarding his fundamental rights, enshrined both in The Law on the rights of the child, as well as in the Family Code. Also, in accordance with art. 2009 al. 1 of the Civil Code, "the minor between 14 and 18 years of age is personally responsible for the damages caused, according to the general rules." (Civil Code, 2002) It follows that, in the situation when the minor is guilty of committing an illegal act, committed with guilt, by which he caused damage to another person, he will be given the possibility to be involved in the process as a defendant, bearing personal liability, to the extent that his material situation allows him to pay the caused damages.

Continuing with the exemplification of this topic, we also refer to the Labor Code, which in art. 46 paragraph 2 provides: "The physical person acquires the capacity to work upon reaching the age of 16." (Labor Code, 2003) This norm denotes that the minor being part of an individual employment contract from the age of 16, can become a plaintiff or defendant in court in the labor disputes, determined by the violation of the provisions of this contract by one of the parties, and

he will personally exercise his procedural rights and obligations. At the same time, the situation regulated by art. 57(1) of the Family Code, the paragraph 1 of which stipulates: “The child has the right to reparation of material and moral damage caused by injury to bodily integrity or health, by violation of non-patrimonial personal rights as a result of violence, neglect, exploitation, or evasion in any ways by the parents to exercise their parental rights and obligations, which as a result may harm the life and health of the child, as well as by the non-fulfilment or improper fulfillment of the obligation established by the normative acts for the purpose of protection against the risk of causing a certain injury by a public authority or institution.” (Family Code, 2000) Since the legislator uses the term “child”, it is not clear who will be able to submit the claim for damages — only the legal representative (for example, the guardianship authority) or the minor who has already reached the age of 14. For the insurance certainty and preventing the restitution of requests from judges who are tempted not to admit such requests from minors between 14 and 18 years old, we propose to complete article 571 of the Family Code which in paragraph 2 mentions that the reparation of material and moral damages takes place in the manner provided by the civil legislation, with the following sentence: “Minors between the age of 14 and 18 can personally request in court the reparation of material and moral damages”. We note that, although the possibility for the minor to personally defend his rights is regulated, the court is still entitled to also include in the process a representative for its legal purpose. In the specialized literature, in such situations, many debates result from the subject of the procedural quality of the legal representative. We rely on the authors (Gadjimenov, R.B., 2019, p.237) who claims that the involvement of representatives in the court procedures does not affect the minor's capacity as plaintiff or defendant, as well as his personal right to dispose of certain procedural instruments (renunciation of the action, transaction, recognition of the action). Respectively, the legal representative in the cases provided for by art. 58 paragraph 5 of CPC (Civil Procedure Code, 2003) cannot influence the procedural actions, requests or actions from the part of the minor.

A final aspect, which cannot be overlooked, is the jurisdiction of the courts in the civil cases involving minors. Thus, unlike the legislation of other states, our legislator does not expressly regulate territorial jurisdiction in lawsuits filed by minors between 14 and 18 years old, the fact that often places the minor in a difficult situation, who has to travel to the court within the radius of his domicile or the defendant's premises. From this consideration and guided by the principle of respecting the best interests of the child, we propose to complete art. 39 paragraph 7 of CPC, called *Competence at plaintiff's choice* as follows: “Actions related to the restoration of the right to work, to pension, to housing, to claim assets or their value, to repair the damages caused by illegal conviction, illegal prosecution, by illegal application of the preventive measure in the form of preventive arrest or in the form of imposing a written commitment not to leave the locality, or by applying the illegal administrative sanction of arrest, submitted by a minor between the ages of 14 and 18, can be filed in any of the courts according to the applicant's domicile.”

3. Conclusions

- The carried-out research confirms the assertion that the legal status of minors represents an institution with an interbranch and transdisciplinary character, including a system of legal norms that enshrine the rights, freedoms and obligations of the child, starting from the birth until the age of 18. The domain of the civil process remains that legal sphere in which the legal status of

the minor does not benefit from sufficient protection, there are deficiencies in the chapter of the hearing procedure of the minors during the legal proceedings, thus the right of the discerning child to express his free opinion in any matter of his concern not being fully realized. In conclusion, the analysis of the internal procedural legislation shows the non-existence of a concrete, detailed regulation of the hearing procedure for the minor, and despite the international recommendations in this regard, the rights are reduced to some disparate procedural norms, circumscribed to certain special hearing procedures, as for example in the case of the minor witness.

- At the same time, the national procedural legislation does not consider the specifics of civil cases with the participation of minors. Minors are subjects of the civil procedural legal relationship, with a specific character, and the same legislation is applied to them that applies to adult participants in the process. This fact leads us to affirm that, due to the intellectual immaturity of the minors, and due to some particularities, that limit their legal competence in various decisions, it is necessary to establish and regulate some measures of assistance, protection and security, through which the minor can capitalize on his rights, without being injured or prejudiced in any way.

Based on the conclusions formulated and the need for the practical transposition of the principle of the best interests for the child, which is intrinsically linked to that of respecting and consulting the child's opinions, we submit the following proposals:

1) To supplement art. 58 of the CPC with the following sentence: "At the request of the minor's legal representative or ex officio, the court may order the hearing of the minor under the age of 14, in the presence of a psychologist, if the court decision could directly and indirectly affect his rights and interests".

2) Article 571 paragraph 2 of the Family Code should be supplemented with the following sentence: "Minors between the ages of 14 and 18 can independently request the reparation of material and moral damage in the court".

3) To complete art. 58 of the CPC with paragraph 41 which will have the following content: "If during the judicial debates it is established that the minor between the ages of 14-18 has found himself in a conflict of interests with his legal representative, or his legal representative exercises pressure or intimidation, the judge should request the coordinator of the territorial office of the National Council for State-Guaranteed Legal Assistance, in order to appoint a lawyer to defend his interests."

4) At the same time, the fragility of age and possible financial difficulties should determine the legislator to supplement art. 39 of CPC in the sense of enshrining the minor's right to file the action in the court with its headquarters in the area of his domicile.

5) Within the framework of Chapter XV of the CPC dedicated to the stage of judicial debates, it is necessary to introduce a new article that would refer to the procedure for notifying and hearing the minor participants at the trial, with the specification of the following aspects:

- a) directly notifying the minors about the date and place of the court hearing;
- b) outlining the situations in which the minor is to be heard alone, in private interview spaces, specially designed to protect him from pressure and intimidation;
- c) the consecration of the minor's right to choose the person who will accompany him as the legal representative at the legal proceedings, when the court deems his presence necessary;

d) the evaluation of the minor's opinion by the judge will be carried out, based on his age and degree of maturity, and based on the consultation of an expert psychologist in qualified assistance for children or adolescents.

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