INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW

UNDER THE AUSPICES OF THE
INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE

VOLUME IV

PERSONS AND FAMILY

MARY ANN GLENDON · *CHIEF EDITOR*

Chapter 2

Persons

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Survey of Contents

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Chapter 2

PERSONS

A. Heldrich and A. F. Steiner
W. Pintens and M. R. Will
W. Zeyringer

I. LEGAL PERSONALITY

Andreas Heldrich and Anton F. Steiner*

A. GENERAL[1]

1. – The concept of legal personality was developed in GERMAN legal scholarship of the 18th and 19th centuries.[2] It indicates the capability of human beings to be the subject of rights and duties.[3] Legal personality constitutes the logical first step[4] to capacity to act[5], *i.e.* the ability to establish, exercise, transfer or renounce rights.

This splitting of the legal personality[6] of a person into, on the one hand, the ability to hold rights and, on the other hand, the exercise of rights, has also entered into the legal thinking of the ROMANIC countries.[7] The linguistic equivalent of legal personality is *Rechtsfähigkeit, capacité de jouissance* or *capacità giuridica*. The distinction is a fundamental hallmark of present-day CIVIL LAW.

In contrast to this, capacity to act has primary importance in the COMMON LAW. Legal personality is defined thereby. There exists hardly any independent concept of legal personality. One source of these divergent approaches is due to basic methodological differences, such as the case law character of ENGLISH law and the inclination of GERMAN legal scholarship towards systematic organization.

The divergence is based above all, however, on the differing ways which both these systems have developed in dealing with legal entities and the protection of incapable individuals.[8] These are the two areas in which, in a CIVIL LAW system, the holder of the right and the one who exercises the right are different persons, so that legal personality and capacity are separated. The CIVIL LAW overcomes this split by way of the institution of "legal representation" by which a person capable of acting will be appointed as general legal representative of the incapable person (such as a minor or an incapacitated adult) who is a legal subject but unable to act with legal effect. By contrast, the COMMON LAW solves these problems mainly by way of trust arrangements. Such arrangements preserve the unity of the holding of a right and its exercise by one person, but make the benefits available to the protected person. Against this background, the introduction of a legal subject with legal personality, but no capacity to act, is unnecessary and meaningless.

The procedural counterpart of legal personality is the ability to be a party to proceedings (standing to sue or be sued; *Parteifähigkeit*). Legal personality will usually encompass that procedural qualification[9] but occasionally the latter may be broader than the former.[10]

B. COMMENCEMENT OF LEGAL PERSONALITY

1. *Birth*

2. – Everyone has legal personality.[11] Restrictions on legal personality (such as those for slaves or aliens[12]) which could be found previously are obsolete these days.

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[1] Legal entities are not covered in this contribution; see this Encyclopedia vol. XIII.

[2] *Staudinger (-Coing and Habermann)*, Introd.rem. to § 1 no. 2; *Fabricius* 37–43; *Müller-Freienfels* 188 n. 116.

[3] As to other concepts in GERMAN jurisprudence, *cf.* Münch.Komm. *(-Gitter)* § 1 no. 5–8 (with further references in n. 1).

[4] *Capotorti* 158.

[5] *Cf.* SWISS CC art. 12.

[6] The strictness with which this distinction is pursued is demonstrated even in the systematic structure of the GERMAN Civil Code which regulates legal personality already in § 1, capacity in § 104ss. and the statutory representation which is closely connected with it only in title 4.

[7] *Schnitzer* II 478.

[8] *Müller-Freienfels* 185ss.

[9] See *e.g.* GERMAN CCProc. § 50 par. 1; see *Cohn*, Parties: this Encyclopedia vol. XVI ch. 5 (1976) s. 15–41; see also *Riezler*, Internationales Zivilprozeßrecht (Berlin and Tübingen 1949) 413–419; *Szászy*, International Civil Procedure (Budapest 1967) 232–235.

[10] For instance, associations without legal personality may nevertheless be able to be a party to proceedings (ITALIAN CCProc. art. 75 par. 4) or have at least standing to be sued (GERMAN CCProc. § 50 par. 2).

[11] *Cf.* SWISS CC art. 11.

[12] Provisions, such as *e.g.* CHILEAN CC art. 57, which expressly make clear that nationals and aliens equally enjoy legal personality, are to be understood against this historical background.

People everywhere acquire general legal personality at birth.[13] Some statutes define this moment more precisely by providing that the birth process must be complete.[14] Even if it is not always expressly laid down,[15] all laws establish the self-evident prerequisite that a child must come into the world alive in order to attain legal personality.[16] AUSTRIAN CC § 23 establishes a presumption of live birth for cases where there may be doubt. In most other legal systems this issue must be settled according to general principles of proof;[17] some countries demand, in addition, that the child must be capable of staying alive and be of human form.[18] The latter requirement is of no practical relevance since medical experience excludes the live birth of a monster.[19]

On the other hand, the requirement of being capable of staying alive can be of importance, particularly in the context of succession law. Many legal systems requiring a capability of staying alive set down formal criteria of this capability, or establish presumptions, in order to minimize the difficulties of proof which regularly occur in this regard. So *e.g.* SPANISH CC art. 30 maintains that a child has legal personal ity if it has lived for 24 hours following separation from the womb.[20] BULGARIAN Law on succession art. 2 works with a rebuttable presumption which infers a capability of staying alive from the fact of live birth.[21]

There are also provisions here and there which govern the relationship of the children of a multiple birth. COSTA RICAN CC art. 14 and GUATEMALAN CC art. 2 lay down that all children of a multiple birth should be treated equally as regards the rights of a firstborn. In contrast, SPANISH CC art. 31 has the order of birth decide this matter.

Besides presumptions which can arise from entry in the register of births[22] there is, in ISRAEL[23] and THAI law (CC § 16), a presumption in favour of a particular birth date if only the year of birth is known.

ii. *Advancing Legal Personality to the Moment of Conception*

a. General

3. – The ROMAN law maxim, *nasciturus pro jam nato habetur, quotiens de commodis ejus agitur*,[24] has left its traces in all countries. This has partly taken the form that the foetus has generally been given the same status as the born child in its capability of acquiring rights, as *e.g.* in ITALIAN CC art. 1 par. 2 or SWISS CC art. 31 par. 2.[25] Some legal systems, such as the GERMAN[26] and the FRENCH (CC art. 725, 906) have adopted the rule only for important topics, by providing that the acquisition of a gift, a share in an estate or a legacy will not fail merely because the receiver was still a child "*en ventre sa mère*" (in the womb) at the time of the disposition.[27] Both methods differ little in their practical outcome since, in the latter-mentioned countries, the

[13] *Cf.*, *e.g.* ALBANIAN CC art. 9; BOLIVIAN CC art. 1; BRAZILIAN CC art. 4; ETHIOPIAN CC art. 1; GREEK CC art. 35; GUATEMALAN CC art. 1; ITALIAN CC art. 1 par. 1; JAPANESE CC art. 1 b; POLISH CC art. 8; VENEZUELAN CC art. 17.

[14] *Cf.*, *e.g.* ALGERIAN CC art. 25; CHILEAN CC art. 74; EGYPTIAN CC art. 29 par. 1; GERMAN CC § 1; PORTUGUESE CC art. 66 par. 1; SWISS CC art. 31 par. 1; THAI CC § 15.

[15] See, however, *e.g.* BRAZILIAN CC art. 4; GREEK CC art. 35.

[16] For the COMMON LAW see *e.g.*, *Boberg* 8.

[17] Examples in *Deynet* 48.

[18] *E.g.* SPANISH CC art. 30.

[19] *Cf.*, *Deynet* 40 ss.

[20] The same in ECUADORIAN CC art. 60; similar, MEXICAN FED.DIST. CC art. 337. ETHIOPIAN CC art. 4 irrebuttably presumes a child is capable of staying alive, if it has remained alive for 48 hours. The other SOUTH AMERICAN legal systems have abandoned the requirement of the capability of staying alive which was taken over from SPANISH law.

[21] Although this is not expressly laid down by statute, there is also a corresponding presumption in FRENCH law: *Donnier*, Successions: J.Cl.Civ. (Paris, loose-leaf) art. 725–726, Fasc. E (11, 1982) no. 41 and 44.

[22] See *Zeyringer*, *infra* s. 404–407.

[23] Legal Personality and Guardianship Law s. 12.

[24] *Cf.*, *e.g.* Dig. 1.5.7, 1.5.26; further references in *Boberg* 10 n. 3.

[25] See also ALBANIAN CC art. 9; ALGERIAN CC art. 25; AUSTRIAN CC § 22 par. 2; BOLIVIAN CC art. 1 par. 2; CHILEAN CC art. 77; CZECHOSLOVAKIAN CC § 7 par. 1; ECUADORIAN CC art. 63; EGYPTIAN CC art. 29 par. 3; ETHIOPIAN CC art. 2; GREEK CC art. 36; HUNGARIAN CC art. 9; INDONESIAN CC art. 2; PHILIPPINE CC art. 40; SPANISH CC art. 29; VENEZUELAN CC art. 17.

[26] *Cf.* GERMANY: CC § 331 par. 2, 844 par. 2 sent. 2, 1600 b par. 2, 1777 par. 2, 1912, 1923 par. 2, 2043 par. 1, 2108 par. 1; see further *Staudinger (-Coing and Habermann)* § 1 no. 11–20.

[27] Further examples are offered by BRAZIL (CC art. 562, 1169), former EAST GERMANY (CC § 339 par. 2, 363 par. 2; Fam.C § 104 par. 2) and JAPAN (CC art. 886).

courts tend to apply the individual provisions in favour of the *nasciturus* by analogy.[28]

It is common to all legal systems that the *nasciturus* can acquire legal rights only if it is later born alive, and, where additionally required, capable of staying alive.[29]

The rule usually applies only for the benefit of the *nasciturus*. Duties, on the other hand, cannot yet be imposed on it.[30]

The moment of conception can seldom be exactly determined. For example, GERMAN[31] and ENGLISH[32] judges must decide the issue by way of free evaluation of the evidence. In contrast, other legal systems equip the courts with rebuttable or irrebuttable presumptions as to the period of time (usually 300 days retrospective from the birth) within which the child is to be considered to have been conceived.[33] Developments in medical science are bound to create new difficulties. *E.g.*, when is a child conceived by in-vitro-fertilization to be regarded by the law as a *nasciturus*? The courts might also be confronted by the question of whether the *nasciturus* rule is applicable to a frozen embryo which possibly may be carried for full term only after a delay of years.[34]

Many legal systems provide expressly for the appointment of a guardian if the protection of rights belonging to the *nasciturus* so requires.[35]

b. Particular Cases

4. *Succession law.* – As far as one can determine, the *nasciturus* is regarded everywhere as capable of inheriting.[36] The fact that a child can succeed its parents even if born only after their death seems to accord with a firmly rooted sense of justice.

5. *Tort law.* – While the question of the legal status of the *nasciturus* formerly focussed fundamentally on the area of succession law, today tort law questions have edged into the picture due to modern developments. Key illustrations are provided by injuries to the foetus due to motor accidents, medical errors, side effects of drugs and drug abuse by the mother. It is particularly prenatal injuries to the *nasciturus* caused by third parties which are of interest from the point of view of legal personality.[37] As an example, virtually all AMERICAN decisions in these cases lying on the periphery between questions of legal personality and of tort law, originally denied compensation to a child born injured. This outcome was based on the view that the injuring party could not owe a duty of care to a person who did not yet exist.[38] However, the courts accomplished a "rather spectacular reversal of the no-duty-rule"[39] in 1946, awarding compensation to a child born injured.

[28] *Cf.* for GERMANY: Münch.Komm. *(-Gitter)* § 1 no. 26.

[29] See *e.g.* ARGENTINE CC art. 3290; BOLIVIAN CC art. 1 par. 2; CHILEAN CC art. 77; DANISH Law on succession § 5; ITALIAN CC art. 1 par. 2; JAPANESE CC art. 886; NETHERLANDS New CC art. 1:2.

An exception, obviously based on considerations of prevention and sanction, is constituted by tort decisions in most states of the UNITED STATES, which permit a damages claim for "wrongful death" even for the benefit of a still-born foetus: *Prosser and Keeton* 369 ss. with references to case law in n. 32.

[30] SPANISH CC art. 29 says so expressly. *Contra* ARGENTINE CC art. 56, since the representative of the unborn child can already incur obligations for it. In GERMANY, OLG Celle 15 Dec. 1954, VersR 1955, 408, allowed parents to conclude a contract which was legally effective to create mutual duties for the *nasciturus*, on the basis of analogy with various statutory provisions for the benefit of the *nasciturus*; for critical comment, see Münch.Komm. *(-Gitter)* § 1 no. 31.

[31] *Staudinger (-Coing and Habermann)* § 1 no. 21.

[32] *Deynet* 65 ss.

[33] BOLIVIAN CC art. 1008 par. 2; CHILEAN CC art. 76; COSTA RICAN CC art. 13; ECUADORIAN CC art. 62; ETHIOPIAN CC art. 3; ISRAELI Law on succession s. 3 (b); ITALIAN CC art. 462.

[34] As regards these issues, but from the point of view of the COMMON LAW "rule against perpetuities", *cf.*, *Halsbury* XXXV (1981) no. 913.

[35] ARGENTINE CC art. 56; BRAZILIAN CC art. 462. In the UNITED STATES the appointment of a "guardian" is possible if a corresponding statutory provision exists, *cf.* 39 Am.Jur.2d *sub* Guardian and Ward § 17 (1968).

[36] *Cf.*, *e.g.* FINNISH Law on succession ch. 1 § 1; FRENCH CC art. 725, 906; GERMAN CC § 1923 par. 2; ITALIAN CC art. 462 par. 1; JAPANESE CC art. 886; NORWEGIAN Law on succession § 71; SWISS CC art. 544; former SOVIET UNION: *cf.* RSFSR CC art. 530. For COMMON LAW countries see: UNITED KINGDOM Administration of Estates Act, 1925 s. 55 (2); IRELAND Succession Act s. 3 (2); for CANADA *cf.*, *Feeney* II 74; for SOUTH AFRICA: *Boberg* 9 ss.; and for the UNITED STATES: 42 Am.Jur.2d *sub* Infants § 2 (1969).

[37] See also *McGregor*, Personal Injury and Death: this Encyclopedia vol. XI ch. 9 (1983) s. 105 and *Deynet* 142 ss.; regarding indirect injuries to the *nasciturus* due to the killing of those with a duty to maintain it, *cf.*, *McGregor*, *ibidem* s. 51.

[38] *Prosser and Keeton* 367 ss.

[39] *Idem* 368.

GERMAN courts, like those of the UNITED STATES, saw themselves initially prevented by dogmatic concerns about the lack of legal personality in the *nasciturus*[40] from awarding compensation for prenatal injuries. This changed in 1952 with a landmark decision of the Federal Supreme Court;[41] however, the court avoided expressing a view on the question of the legal personality of the *nasciturus*.

6. *Termination of pregnancy.* – Due to the partial legalization of abortion, several courts saw themselves confronted by interesting problems of harmonizing civil and criminal law, when called upon by a father to forbid a deliberate termination of pregnancy by a mother.[42]

The question was whether an expected child already before its birth could hold a right – specifically that to life. The issue was very similar to the discussion in the 1970's concerning the constitutionality of abortion.[43]

Both a CANADIAN[44] and a GERMAN[45] decision had to deal with the issue only provisionally, both affirming the abstract possibility of a right of this kind. On the other hand, an ENGLISH decision held that, at common law, the child had no such right as long as it was not separated from its mother.[46]

iii. *Prior to Conception – The Legal Status of the Nondum Conceptus*[47]

7. – Before conception, legal personality is unthinkable. The fundamental prerequisite of recognition as a legal subject, a particular human being, is absent if it has not yet been even created.

Nevertheless, most legal systems provide limited opportunities for letting future persons have rights; the acquisition of rights is not denied merely because the person concerned did not exist at the time of the grant. This particularly applies to dispositions *mortis causa* by which a share of an estate, a bequest,[48] or a beneficial interest in a trust[49] can be bestowed on a child not yet created.[50] Nevertheless, narrow limits, particularly as to time, are laid down for such arrangements, because of the tendency, noticeable in the succession laws of most countries, to restrict entailed obligations.[51]

As in the case of the *nasciturus*, many CIVIL LAW systems provide for the appointment of a guardian for the safeguarding and securing of the rights of the *nondum conceptus*.[52]

[40] The development of the GERMAN case law is presented in *Staudinger (-Schäfer)* § 323 no. 32–38.

[41] BGH 20 Dec. 1952, BGHZ 8, 243. Regarding parallel tendencies in the development of GERMAN and AMERICAN case law, see *Heldrich*, Der Deliktsschutz des Ungeborenen: JZ 1965, 593–599.

[42] In this connection CHILEAN CC art. 75 and COLOMBIAN CC art. 91 make it possible for the judges to prescribe measures for the protection of the foetus.

[43] *Cf.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). AUSTRIAN VerfGH 11 Oct. 1974, VerfGHSlg. 7400/1974, 221; GERMANY: BVerfG. 25 Feb. 1975, BVerfGE 39, 1.

[44] Temporary order of the Supreme Court of ONTARIO (reported in *Hahlo*).

[45] AG Köln 15 March 1984, FamRZ 1985, 519; for comment *cf.*, *Bienwald*, Zur Beteiligung des Mannes bei der Entscheidung über den straffreien Schwangerschaftsabbruch seiner Ehefrau: FamRZ 1985, 1096–1102, and *Coester-Waltjen*, Der Schwangerschaftsabbruch und die Rolle des künftigen Vaters: NJW 1985, 2175–2177.

[46] *Paton v. Trustees of British Pregnancy Advisory Service*, [1978] 2 All E.R. 987 (Q.B.); on the same matter, EuComm. Human Rights 13 May 1980, NJW 1981, 1141.

[47] On this, see *Deynet* 67–109.

[48] AUSTRIAN CC § 612; BOLIVIAN CC art. 1008 par. 3; BRAZILIAN CC art. 1718; CHILEAN CC art. 962; DANISH Law on succession § 6; FINNISH Law on succession ch. 9 § 2; FRENCH CC art. 1048 ss., 1081, 1082, 1084; GERMAN CC § 2101 par. 1, 2106 par. 2, 2109 par. 1 no. 2, 2162 par. 2; GREEK CC art. 1924; ISRAELI Law on succession s. 42; ITALIAN CC art. 462 par. 1; JAPANESE CC art. 887, 889; NORWEGIAN Law on succession § 71; PORTUGUESE CC art. 2033 par. 2; SPANISH CC art. 774 ss.; SWISS CC art. 545.

[49] UNITED STATES: *cf.* 76 Am.Jur.2d *sub* Trusts § 138 (1975); for INDIA: Succession Act s. 112–114.

[50] Contracts for the benefit of third parties offer a further example, *e.g.* life insurance; *cf.* GERMAN CC § 331 par. 2. The GERMAN *Reichsgericht* in fact permitted the execution of a mortgage for the benefit of a *nondum conceptus* (RG 14 Oct. 1905, RGZ 61, 355 and RG 9 March 1907, RGZ 65, 277).

[51] In the CIVIL LAW countries this restriction is achieved mostly by means of provisions according to which only the children of a person who already exists can have been intended; *cf.*, *e.g.* BOLIVIAN CC art. 1008 par. 2; BRAZILIAN CC art. 1718; DANISH Law on succession § 6; FINNISH Law on succession ch. 9 § 2; ITALIAN CC art. 462 par. 3; NORWEGIAN Law on succession § 71.

GERMAN CC § 2109 prescribes a 30-year period for the vesting of the future estate. A similar outcome is achieved in COMMON LAW countries by the "rule against perpetuities" (*cf.* for the UNITED STATES: 61 Am.Jur.2d *sub* Perpetuities and Restraints on Alienation § 36 (1967); for CANADA: *Feeney* I 234 ss.; for ENGLAND: *Halsbury* XXXV (1981) no. 901–1049).

[52] AUSTRIAN CC § 274; FRENCH CC art. 1055; GERMAN CC § 1913.

C. TERMINATION OF LEGAL PERSONALITY

i. *Death*

8. – Legal personality comes to an end everywhere on death. This seems so obvious to many legal systems that they waste no words on the topic[53] but other countries have express provisions.[54]

Most legal systems do not regulate the point in time at which death is to be regarded as having occurred. While this was no problem in earlier times, developments in medical science have shown that death (just as birth) presents itself as no single event which can be fixed at a precise point in time, but rather as an on-going process. To the extent that medical science has *e.g.* developed methods of reanimation in the case of halted circulation or breath, the traditional concept of death has become questionable. The law must meet this development in medical expertise. However, it faces the difficulty as to which of the medically discussed criteria it ought to adopt. GERMAN legal scholars have even considered a splitting of the concept of death;[55] *e.g.* the moment of death identified for issues of succession law could be different from that for the purpose of undertaking an organ transplant.[56]

In GERMANY, as in most other countries, the precise determination of when death occurs has been left to medico-legal consideration. In the UNITED STATES, however, many states have regulated this matter since the early 1970's by statute. These statutes use as criteria either the irreversible cessation of circulation and breathing or the irrecoverable loss of brain function.[57]

ii. *Deprivation of Legal Personality by Law or Judicial Decree*

9. – Although it has been generally acknowledged, since the abolition of slavery, that everyone enjoys legal personality, this does not exclude exceptions. In particular, certain persons or groups can be deprived of legal personality or of the capacity of claiming the protection of the law or the courts by way of statute or judicial decree. However, this is hardly compatible with a contemporary understanding of human dignity. Consequently, the best known examples, monastic death[58] and civil death as a result of conviction for a serious crime (felony),[59] play hardly any practical role these days.[60]

All the same, civil death, whose antecedent was the declaration of outlawry, has left some traces. Most states provide for collateral criminal sanction involving the deprivation of certain civil rights of convicted persons and limits on their powers of disposition.[61] Several AMERICAN states lay down legal consequences of sentences of life imprisonment which come close to civil death.[62] According to the old common law, sentences of life imprisonment automatically implied civil death which meant an "extinction of all civil rights."[63] This led necessarily to the forfeiture of the convicted person's property and the commencement of proceedings for the administration of his or her estate.[64] These consequences are no longer strictly enforced. However, there are laws which *e.g.* determine that a convicted person is incompetent to inherit,[65] that he or she can no longer dispose of property,[66] and even that the marriage of a person

[53] For instance, in GERMANY the Commission on the Civil Code struck out § 3 of the first draft of the Code, *cf.*, *Achilles, Gebhard and Spahn*, Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs VI (Berlin 1899) 106ss.

[54] ALBANIAN CC art. 9; ALGERIAN CC art. 25; BOLIVIAN CC art. 2; BRAZILIAN CC art. 10; CHILEAN CC art. 78; ETHIOPIAN CC art. 1;EGYPTIAN CC art. 29 par. 1; GREEK CC art. 35; GUATEMALAN CC art. 1; ISRAELI Legal Personality and Guardianship Law s. 1; REPUBLIC OF KOREAN CC art. 3; SPANISH CC art. 32; SWISS CC art. 31 par. 1.

[55] References in *Staudinger (-Coing and Habermann)* I Verschollenheitsgesetz § 1 introd.rem. no. 5.

[56] This would not be unusual for GERMAN law where also the commencement of legal personality (CC § 1) and the commencement of the criminal law's protection of a person (Crim.C § 217) are different.

[57] *Cf.* the Uniform Brain Death Act (1978) as well as the Uniform Determination of Death Act (1980), printed with a list of the states which have adopted these Acts: 12 ULA 17 and 338 (Cum.Ann.Pocket Pt. 1991).

[58] *I.e.* the loss of capacity to inherit by a cloistered person by taking a vow of poverty. *Cf.* still AUSTRIAN CC § 538.

[59] Formerly FRENCH CC art. 22–33, repealed by a Law of 31 May 1854; CHILEAN CC art. 95–97, repealed by Law no. 7612 of 21 Oct. 1943. ARGENTINE CC art. 103 sent. 2 and INDONESIAN CC art. 3 expressly declare that civil death does not take place in these countries.

[60] See, for a relatively recent AUSTRALIAN example to the contrary: *Dugan v. Mirror Newspapers Ltd* (1978), 22 Aust.L.Rep. 439–464 (H.C. of A.).

[61] *E.g.* FRENCH PC art. 34, 36.

[62] References in *Kegel* 316.

[63] 16 Am.Jur. *sub* Death § 6 (1962).

[64] 16 Am.Jur. *sub* Death § 7ss. (1962).

[65] 21 A Am.Jur.2d *sub* Criminal Law § 1034 (1981).

[66] 63 A Am.Jur.2d *sub* Property § 46 (1984).

sentenced to life imprisonment is automatically dissolved.[67] All of these consequences show similarities to a partial deprivation of legal personality.

The loss of the right to bring an action in court which ANGLO-AMERICAN law imposes under certain circumstances on enemy aliens[68] comes close to a temporary deprivation of legal personality.

iii. *Consequences of Legal Personality After Death*

10. – As distinct from the case of the unborn person, it is clear that the dead can no longer have a share in earthly justice. Nevertheless, there are court decisions, *e.g.* in GERMANY and the UNITED STATES, in which there has been discussion of how far even a deceased person's reputation can be protected against defilement and interferences in private matters.[69] In other words, can rights attached to legal personality also be due to a deceased?

This issue should above all not be confused with the criminal law protection of the peace of the dead, nor with the cases in which a relative demonstrates that he or she has been affected in rights flowing from legal personality through a defilement of the deceased.

The courts are, however, extremely cautious as regards claims for the protection of a dead person's rights of personality. There is likely the fear that relatives wish to profit from the deceased's personal rights. Moreover, since money payments can, of course, achieve no compensation in such cases, these actions are basically for injunctive relief.[70] The GERMAN Federal Supreme Court *e.g.* has allowed such a claim. In so doing it has, at least in the result, affirmed a "partial legal personality after death".[71]

In contrast to this, AMERICAN courts tend to allow such claims only on the basis of a violation of the personal rights of the relatives themselves. The right of privacy of the deceased, on the other hand, is deemed extinguished.[72]

[67] 21 A Am.Jur.2d *sub* Criminal Law § 1035 (1981).

[68] *Cf.*, *Dicey and Morris* I 153; 3 A Am.Jur.2d *sub* Aliens and Citizens § 2023 (1986); *Schlink* 741.

[69] GERMANY: *cf.* BGH 20 March 1968, BGHZ 50, 133 (Mephisto) and *Staudinger (-Schäfer)* § 823 no. 109, 115, 259–272 with further references. For the position in the UNITED STATES see the overview in 62 A Am.Jur.2d *sub* Privacy § 21 (1990) and Annotation, Right to publicize or commercially exploit deceased person's name or likeness as inheritable: 10 A.L.R. 4th 1193–1200 (1981).

[70] The question as to who may lodge the claim on behalf of the deceased (relatives, "next friend") poses a special difficulty which is not treated here.

[71] *Postmortale Teilrechtsfähigkeit*, *cf.*, Münch. Komm. *(-Gitter)* § 1 no. 61.

[72] *Flynn v. Higham*, 149 Cal.App.3d 677, 197 Cal.Rptr. 145 (1983) ("dies with the person").

II. CAPACITY

Andreas Heldrich und Anton F. Steiner*

A. INTRODUCTION

i. *Subject Matter and Definition*

11. *Legal personality and capacity.* – It has already been mentioned in the preceding subchapter on legal personality that the strict distinction, which is made in legal systems of GERMAN origin, between the ability of a person to hold rights and duties (legal personality, *Rechtsfähigkeit, capacité de jouissance*) and the competence to exercise rights or to assume duties (capacity, *Handlungsfähigkeit, capacité d'exercice*)[73] is not familiar to many other legal systems. Lawyers particularly in COMMON LAW countries focus their attention on a person's capacity,[74] this being the practically more important aspect. One may identify it as "active legal capacity".[75] This understanding of the "capacity to perform juristic acts" (*Handlungsfähigkeit*[76]) forms the basis of the following discussion.[77]

12. *Transactional capacity and delictual capacity.* – The scope of discussion requires delimitation since all legal systems split up the concept of capacity into transactional capacity and delictual capacity.[78] The latter deals with the capacity to generate legal consequences through unlawful behaviour, *i.e.* the responsibility and liability for one's own delictual actions. Delictual capacity is regulated differently from the capacity to perform legal acts, which includes *e.g.* the capacity to bind oneself contractually.

It is true that both areas are closely related, since usually the same groups of persons (children, mentally ill) are involved. Nevertheless, there exists no necessary connection. Not every transactionally incapable person need be delictually incapable, but the reverse is equally true.

There exist further points of contact between contract and tort law which need to be considered. *E.g.* if a minor deceives a contractual partner about his or her own transactional capacity, the protection afforded to minors by contract law must also be taken into account in tort law.

13. *Special capacities.* – The concept of "transactional capacity" requires more precise delimitation because it includes both general and special capacities.[79] Special personal prerequisites for the effectiveness of legal acts can be found in family law and succession law in particular.[80] On account of their usually highly personal character, the exercise of legal rights in these fields of law is not adequately covered by the general rules on legal capacity.

Therefore, *e.g.* the question of whether a person may become engaged or married, or become an adoptive parent, or make a testamentary disposition, is, in most legal systems, regulated in the context of the corresponding legal institution, independently of general transactional capacity. These special capacities are discussed in the relevant chapters of this Encyclopedia. The following discussion deals only with a person's general transactional capacity, which fundamentally comprises the capacity to bind oneself contractually (contractual capacity).[81]

Its procedural counterpart is to be found in that procedural capacity which enables a person to act independently before a court (capacity to

* See *supra* subch. I note*.

73 *Cf.* also ITALIAN CC art. 2 (*capacità di agire*).

74 See *e.g.*, *Chitty* I § 531–606; *Treitel*, Contract 409–436; *Calamari and Perillo* ch. 8, who all consider the concept of "capacity" self-evidently only from its active aspect.

75 This terminology is used by *e.g.*, *Boberg* 35 ss., 529 ss., who offers a comprehensive juxtaposition of ENGLISH and CONTINENTAL EUROPEAN terminology.

76 *Cf.* the definition of the "capacity to act" in *von Overbeck* s. 22, as well as in *Capotorti* 159 ss., 203 ss.; *Schnitzer* II 478; as regards the kaleidoscopic concept of "capacity" see also, briefly, *Rabel (-Drobnig)* 194–197. A statutory definition of the capacity to act (as the capacity to found rights and duties by way of one's own actions) is contained in SWISS CC art. 12 (similarly, former EAST GERMAN CC § 49); *cf.* further PHILIPPINE CC art. 37 par. 2 ("capacity to act is the power to do acts with legal effect").

77 The field of public law is not considered in this discussion.

78 *Cf.*, *Limpens, Kruithof and Meinertzhagen-Limpens* s. 193–229 for discussion of delictual capacity.

79 *Capotorti* 160 ss., 244 ss.

80 Discussed comparatively in *Jentsch* 130 ss., *Vial* 365 ss.; *cf.* also *Graf Lambsdorff* 337 ss. (capacity to marry); *Becker* 520 ss. (testamentary capacity).

81 In GERMAN: *Geschäftsfähigkeit*. On the close connection between capacity, contractual capacity and personal autonomy, see *Schwimann* 37 ss., 97 ss.

sue and to be sued).[82] Both institutions are closely related but not completely overlapping.[83]

14. *Capacity and the power of disposition.* – Finally, it is necessary to refer to a further difficult delineation, that between (transactional) capacity and the power of disposition.[84] Both are necessary prerequisites for realizing a transaction. However, they are to be found on different rungs of the ladder which connects transactional intent with its attainment.

Transactional capacity governs the question which logically comes first, *viz.* whether a person can form the legally relevant intention at all. Such an intention is usually directed at exercising a certain right. Whether the intended exercise of the right can, however, be realized depends, among other things, on whether the person is authorized to deal with the right concerned, *i.e.* has the power of disposition.

Put in a simplified form, transactional capacity is a characteristic of the person, while the power of disposition expresses the relationship of the person to some concrete right. As an example, the owner of a thing is normally entitled to dispose of it. Nevertheless, according to many legal systems, the owner lacks the power of disposition if bankruptcy proceedings have commenced over his or her assets.[85] Similar limitations on a person's power of disposition commonly arise out of matrimonial property law (*e.g.* in respect of jointly owned assets); however, this does not have anything to do with the personal aspect of the disposing spouse's transactional capacity.[86]

This distinction is frequently not adopted in COMMON LAW countries or in ROMANIC legal systems. In these countries, issues of the power of disposition are frequently dealt with under the label of capacity (*capacité*).

ii. *Persons Concerned*

15. – In all countries a person normally has capacity. Usually it will be different only if the person concerned lacks that minimum degree of judgment which is necessary in order to be able to participate in legal transactions.

Two main groups of incapable persons can be distinguished: children, who lack the necessary degree of judgment due to age, and adults, who lack it due to anomalies of an intellectual, physical or behavioural kind (*e.g.* mental illness, squandering or drug addiction). These persons must be protected both against being taken advantage of and against themselves. As well, other interests also come into play, *e.g.* those of the family whose financial base would be undermined by the squandering of the primary earner[87] or those of parents whose exercise of authority would be undermined if their child were (fully) capable.

While protection of the person concerned is the main aim of regulation of these types of cases, one can still find isolated limitations on the capacity of other groups of persons (*e.g.* wives[88] or imprisoned criminals); these are obviously based upon different legislative motives.

iii. *Divergent Interests*

16. *General.* – The striving of incapable persons for autonomy in the shaping of their lives, particularly among minors where it becomes increasingly strong with age, stands opposed to the limitations which result from their protection.[89] There is a strong interest, for the sake of facilitating legal transactions, in clear rules which are easily recognizable by third parties. This interest corresponds with the striving of the incapable for even limited participation in

[82] In GERMAN: *Prozessfähigkeit*. This should not be confused with the issue, dealt with in GERMANY under the heading of *Postulationsfähigkeit* (capacity of appearance), of whether the person can conduct the proceedings in an action alone or only by way of an attorney (*cf.* CCProc. § 78).

[83] Rules of procedure often refer wholly or partly to the substantive law regulating legal personality and capacity (*e.g.* GERMAN CCProc. § 51 ss. and ITALIAN CCProc. art. 75).

[84] On this question, see *Schwimann* 58 ss.

[85] See *e.g.* GERMAN Law on bankruptcy § 6.

[86] On the question of the boundary between capacity and the power of disposition in regard to the legal status of married women, see also *Kaden* 714 ss. (matrimonial property law); *cf.* also *von Overbeck* s. 31.

[87] Nevertheless, this basis for depriving a person of capacity can hardly play a role in practice: *cf.* for GERMANY the statistical data in *Mende*, Psychiatrische Implikationen zur Vorbereitung einer Neuordnung des Rechts der Entmündigung, der Vormundschaft und Pflegschaft für geistig Behinderte sowie der Unterbringung nach Bürgerlichem Recht: Gutachten 16.

[88] Such restrictions on the capacity of married women should not be confused with restrictions on the disposition of matrimonial property, see already *supra* at n. 86.

[89] *Knothe* 2.

legal relations, as third parties would hardly be prepared to contract with the incapable when faced with an exaggerated notion of protection.[90] All modern legal systems acknowledge this need for legal certainty to a considerable extent by fixing a general age limit (the so-called age of majority)[91] in respect of the most frequently occurring case of lack of judgment, namely that caused by age.

Other generalized rules also serve legal certainty. One illustration are the commonly encountered age limits at which minors qualify as capable in certain special areas. As well, there is the institution of declaring a person incompetent (*infra* s. 30 ss.). This makes it clear that an adult lacks capacity; it is then irrelevant whether, at the particular time of entering into the legal transaction, the person was actually able to perceive the consequences, *i.e.* whether he or she at that moment had the necessary judgment or not.

17. *Protection of the incapable.* – The protection of incapable persons is regarded everywhere as pre-eminent. That is demonstrated by the fact that a *bona fide* belief as to the capacity of a person is rarely afforded protection.[92] Moreover, the already mentioned general elements for the benefit of incapable persons are corrected by adding further factors which focus on the individual case.[93] Thus, the fact that the person was of full age at the time the legal act was undertaken (a general element) is nowhere sufficient to grant capacity if, at that time, his or her intellectual activity was temporarily or permanently disturbed (a corrective or particular element). This is expressed especially plainly in SWISS CC art. 13 which requires both full age and sufficient judgment as prerequisites of capacity.

18. *Limited capacity.* – All legal systems honour the striving of the incapable for the independent shaping of their lives by opening up areas for particular groups of minors and adults in which they can undertake legal acts, either alone, or together with their legal representative or guardian. It is primarily in this area of limited capacity that the solutions offered by the various legal systems noticeably vary, whereas the incapacity of small children and of the severely mentally ill is normally admitted by all legal systems.

The admission of a limited capacity, *i.e.* of a limited field of legal transactional activities, enables the minor, with increased judgment, gradually to obtain the status of a fully capable adult. In this way, the rigidity of the strict age threshold for the onset of majority is softened. With respect to incompetent adults, limited capacity makes it possible to restrict the limitations imposed upon them merely to those which are absolutely necessary. This is also demanded from the point of view of basic human rights.

In allowing certain transactional activities to otherwise incapable persons in the various legal systems, one must also consider the legal consequences which follow if those persons contract beyond the limit imposed upon them. *E.g.* in FRENCH law, the sanctions are weak if a minor transacts despite his or her incapacity; as a rule the legal act which has been undertaken remains valid if it is of little importance. The transactional possibilities for the incapable are in this way considerably extended, since the contractual risk for third parties remains calculable. For this reason the FRENCH system belongs to those which place their regulatory emphasis on the legal consequences of incapacity. By contrast, GERMAN law emphasizes the conditions of incapacity, whereas the legal consequence is strict and inflexible, namely nullity.[94]

For the comparison of CIVIL LAW systems with those of the COMMON LAW it should be noted that a comprehensive statutory representation of minors is unknown in ANGLO-AMERICAN law.[95] Insofar as there are no other special measures (such as *e.g.* the establishment of a trust[96]), there is a special need to provide minors with widened transactional opportunities (as *e.g.* found in the "rule of necessaries").

[90] *Cf.*, *Zweigert and Kötz* II 31.

[91] This need not be so; archaic law often relied on the attainment of puberty (*Schnitzer* II 478), a procedure which was well suited to the lack of exact birth registration and establishment of age. For old ISLAMIC law, see also *Safaï* 29 ss.

[92] *Zweigert and Kötz* II 31; see, however, for a rare exception, ISRAELI Legal Personality and Guardianship Law s. 6; further on this, *infra* n. 172.

[93] On general and specific elements in the law of capacity, see *Schwimann* 65 ss.; *cf.* also *Tuor and Schnyder* 68 ss. who speak of the "natural element" of necessary judgment and the "formal juridical element" of majority or, as the case may be, non-deprivation of legal capacity.

[94] See in more detail *infra* s. 24 ss.

[95] Regarding this and the consequences of minors' contracts in ANGLO-AMERICAN law, see *Wilhelm* 161–173.

[96] *Cf.*, *Müller-Freienfels* 170.

B. INCAPACITY OF MINORS

i. *Capacity*

19. *Age limits.* – The age of majority is set in the various countries at between 18 and 21 years.[97] While the age limit of 21 was dominant at the beginning of the 1970's,[98] today (1992) most legal systems have minority come to an end with 18. As far as can be seen, age limits higher than 21 do not exist any more.[99]

The age limit in former SOCIALIST states was always 18.[100] This limit has established itself in the rest of CONTINENTAL EUROPE,[101] while very few countries use the ages of 19[102] or 20 years.[103]

Although, according to common law, majority commenced with 21,[104] ENGLAND,[105] and most states of the UNITED STATES[106] now regard 18 as sufficient.[107] All of the SCANDINAVIAN countries also have now set the relevant age at 18.[108] On the other hand, in the ASIAN countries of JAPAN, SOUTH KOREA and THAILAND one is of full age only on attaining 20.[109] On the SOUTH AMERICAN continent the age of majority is often still 21,[110] as is the case in EGYPT and MOROCCO.[111]

The unambiguous trend towards lowering the age of majority to 18 is usually justified by the heightened independence of young people.[112] Another factor may be that consumer protection has been greatly widened in many legal systems,[113] with the result that the need for special protection of those growing up against being taken advantage of through exploitation of their transactional inexperience has significantly declined.

20. *Special cases.* – In view of the rigidity of age limits many legal systems provide opportunities for adjustment in individual cases. As examples, in BELGIUM and AUSTRIA it is possible to postpone the onset of majority for persons not developed in accordance with their years.[114] Much more frequent, however, are rules which adjust the boundary of majority in the other direction, by emancipating minors early, *i.e.* by wholly or partly equating their legal status with that of a person of full age.[115] However, the practical significance of such provisions has greatly declined in the course of the general reduction in the age of majority.[116]

In many legal systems an emancipation *ex lege* takes place upon marriage: SWISS CC art. 14

[97] A summary of the historical development of the age of majority can be found in *Stoljar* s. 68 ss., 77 ss.; *cf.* also *Knothe* 102 ss. as well as *Hommers* 9 ss. For ROMAN law, see also *Staudinger (-Dilcher)* § 104 no. 16. On classical ISLAMIC law, see *Safaï* 29 ss.

[98] *Cf.*, *Stoljar* s. 86, as well as the overview in *Luther*, Übersicht 26 ss.

[99] See also the legal comparative treatment in *Mahillon and Lox* 145–147.

[100] See *e.g.* BULGARIAN Law on persons and family art. 2; former CZECHOSLOVAKIA: CC art. 8 par. 2 subpar. 1; former EAST GERMAN CC § 49; HUNGARIAN CC § 12 par. 2; POLISH CC art. 10 par. 1; RUMANIAN Decree no. 31/1954 art. 8; former SOVIET UNION: *cf.* RSFSR CC art. 11.

[101] FRENCH CC art. 388, 488 par. 1; GERMAN CC § 2; GREEK CC art. 127; ITALIAN CC art. 2; PORTUGUESE CC art. 122; SPANISH CC art. 315.

[102] AUSTRIAN CC § 21.

[103] SWISS CC art. 14.

[104] *Chitty* I § 552.

[105] Family Law Reform Act 1969 s. 1; *The English Law Commission*, Working Paper no. 81 (London 1982), proposes in fact that the contracts of 16-year-olds should always be effective.

[106] See 42 Am.Jur.2d *sub* Infants § 3 ss. (1969); a law of the state of UTAH which allowed men to achieve majority at 21 years of age but women already at 18 was declared unconstitutional by the UNITED STATES Supreme Court: *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373 (1975).

[107] A further example from ANGLO-AMERICAN law is INDIAN Majority Act 1875 s. 3.

[108] DANISH Law on minority and guardianship § 1; FINNISH Law on guardianship § 16 par. 1; NORWEGIAN Law on guardianship for minors § 1 par. 2; SWEDISH Law on parents ch. 9 § 1.

[109] JAPANESE CC art. 3; SOUTH KOREAN CC art. 4; THAI CC art. 19.

[110] *E.g.* in the Civil Codes of ARGENTINA (art. 126), BOLIVIA (art. 4), BRAZIL (art. 9), CHILE (art. 26, 266 no. 5) and URUGUAY (art. 280); also in SOUTH AMERICA, however, the limit of 18 years has its way, *cf.* ECUADOR (art. 21, 328 no. 4); COLOMBIA (art. 34); GUATEMALA (art. 8 par. 2); PERU (art. 42) and VENEZUELA (art. 18).

[111] EGYPTIAN CC art. 44 par. 2; MOROCCAN Law on personal status and successions art. 137.

[112] See *e.g.* for GERMANY: *Kindred* 524; *Schwab*, Gedanken zur Reform des Minderjährigenrechts und des Mündigkeitsalters: JZ 1970, 745–753, 748 ss.; *Staudinger (-Habermann)* (ed. 12) § 2 no. 1; for highly critical comment see *Bosch*, Volljährigkeit – Ehemündigkeit – Elterliche Sorge: FamRZ 1973, 489–508.

[113] On this, *cf.*, *Reich and Micklitz*.

[114] BELGIAN CC art. 487*bis*–487*octies*; AUSTRIAN CC § 173. The relation between this measure and the deprivation of capacity, of which this often constitutes the first step, is obvious.

[115] Regarding the declaration of age and emancipation, see also *Stoljar* s. 151 (partly superseded).

[116] Therefore, *e.g.* GERMAN CC § 3–5 were repealed when the age of majority was reduced, as was also the possibility of a declaration of majority under ITALIAN CC art. 391.

sent. 2 says proverbially *Heirat macht mündig* (marriage confers capacity).[117] An emancipation *ex lege* occasionally also occurs for other reasons.[118]

A different route to achieve emancipation is by decreeing majority upon application.[119] This procedure is used for appropriate adolescents who usually must have attained a certain minimum age. The decision is made by a court[120] or a public authority[121] on application by the parents or the minor and has the consequence that the adolescent becomes capable in all or certain matters.

In some legal systems a simple declaration by the parents or, as the case may be, by the legal representative, suffices, but then usually it must be in a strict form[122] or requires judicial approval.[123] This declaration of majority by parental decision should not be confused with another institution which is often identified as a form of emancipation and which can be found in many states of the UNITED STATES[124] and SOUTH AMERICA.[125] This form of emancipation – often tacit[126] – only extinguishes certain parental rights and duties and thus concerns only the parent – child relationship without affecting the minor's incapacity.

ii. *Incapacity*

21. – Independently of the age of majority and of any opportunities for emancipation, all systems grade the capacity of minors. Obviously there are both certain groups of minors and certain types of legal acts for which the protection and the limitations which arise from incapacity are unnecessary and inappropriate. *E.g.* it is evident that a 3-year-old is to be considered differently from a 17-year-old, the buying of a rail ticket from that of a house, and going into debt from the receipt of a gift.

Although very different rules for dealing with these factual patterns can be encountered, one can nevertheless observe basic notions which are widely shared. *E.g.* virtually all legal systems make it possible for minors to engage in mundane or purely beneficial legal acts.

If the capacity of minors is to be extended beyond this, all legal systems employ the criterion of whether the minor possesses a minimum degree of judgment. According to this, the boundaries between – using frequently encountered terminology[127] – the total incapacity[128] and the limited capacity of minors are set. For even more exact delimitation there are two different approaches.

On the one hand, there are legal systems which, concerned for legal certainty (as in the case of majority), lay down a general age limit. If that age is attained, the minor is regarded as having acquired that degree of judgment sufficient to allow it to engage in a limited number of legal relations. An ideal example of this is GERMAN law which rigorously declares that children under the age of seven are incapable in every respect. It does not let them conclude even the smallest or most beneficial of legal acts.[129] One can find comparable age limits else-

[117] See also FRENCH CC art. 476; ITALIAN CC art. 390 and former SOVIET UNION: *cf.* RSFSR CC art. 11; *cf.* also *Stoljar* s. 154.

[118] *Cf.* BRAZILIAN CC art. 9 par. 2 as regards the commencement of military duty.

[119] As regards the roots of this legal institution in the *venia aetatis* of ROMAN law (which was applicable law in SOUTH AFRICA until the Age of Majority Act 1972), *cf.*, *Boberg* 378 ss.

[120] ALGERIAN CC art. 84; AUSTRIAN CC § 174; ETHIOPIAN CC art. 330; FRENCH CC art. 477; NETHERLANDS New CC art. 1:235 ss.

[121] SWISS CC art. 15; INDONESIAN CC art. 419 ss.

[122] SPANISH CC art. 317 ss.

[123] CHILEAN CC art. 265.

[124] *Cf.* 59 Am.Jur.2d *sub* Parent and Child § 93 ss. (1987).

[125] The difference between *emancipación* and *habilitación de edad* becomes clear in comparing COLOMBIAN CC art. 312 ss. with art. 343–345 which have been repealed.

[126] 59 Am.Jur.2d *sub* Parent and Child § 95 (1987); regarding a genuine tacit emancipation under SOUTH AFRICAN law see, however, *Boberg* 383 ss.

[127] *Cf.*, *e.g.* the language of GERMAN CC § 104, 106.

[128] However, as regards the so-called completely incapable, there exist in most legal systems exceptions for mundane transactions (but not in GERMANY, see CC § 104 ss.).

[129] CC § 104 no. 1, 105 par. 1; on the justification of the age boundary in developmental psychology, see *Hommers* 187 ss. AUSTRIAN law contains a similar rule (CC § 865) as did the law of former EAST GERMANY (a limit of six years, CC § 52 par. 1), both of which, however, permit smaller mundane transactions even below these age limits (AUSTRIAN CC § 151 par. 3; former EAST GERMAN CC § 52 par. 3). (In GERMANY the statutory position takes second place to legal reality: five-year-olds buy their sweets in shops even there.) Those below seven years of age are regarded as lacking the necessary judgment also according to EGYPTIAN CC art. 25 par. 2, REPUBLIC OF CHINA CC § 13 and SYRIAN CC art. 47 par. 2 as well as SOUTH AFRICAN law (*Boberg* 534).

where in EUROPE[130] and in SOUTH AMERICA[131] but they are frequently set at higher ages (between 10 and 16 years).

The alternative approach is followed *e.g.* by SWISS and FRENCH law. Each individual case is examined to see whether the minor was, in accordance with his or her intellectual maturity, equal to the complexity of the particular legal act and therefore had the necessary judgment for that concrete matter.[132]

In contrast to CONTINENTAL legal systems, the COMMON LAW does not distinguish between incapable minors and those with restricted capacity. This may well result from the fact that the COMMON LAW is not familiar with a system of comprehensive legal representation whereas, in many other legal systems, many aspects of the concept of limited capacity can be explained by the fact that minors can act within the range of matters approved by their legal representatives. As a further explanation, cases in which a small child is held bound by a legal transaction which he or she has carried out are extremely rare so that relevant decisions are lacking.[133]

iii. *Limited Capacity*

22. *The concept.* – The term limited capacity is not free from difficulty since it covers two fundamentally different classes of case.[134]

On the one hand, it covers those widely spread rules in CIVIL LAW countries[135] which allow minors considered to have sufficient judgment to conclude legal acts of all kinds with the prospective or retrospective approval of their legal representative. In these legal systems the limitation on minors arises, then, out of the need for cooperation from the legal representative. For the COMMON LAW countries, this class of cases does not come into consideration at all, given the lack of comprehensive statutory representation.[136]

On the other hand, in virtually all legal systems there are limited substantive areas in which minors can engage in binding legal acts alone. The basic idea is mostly that such acts are either beneficial or necessary for the minor, or are insignificant and mundane, so that nothing very serious can occur in respect of them.[137] In CIVIL LAW countries, there are frequently special age limits for these classes of case.[138]

23. *Types of cases.* – The ANGLO-AMERICAN "rule of necessaries" has a very flexible application.[139] According to it, a minor must pay an appropriate price for things which he or she requires, since upon delivery to the minor a quasi-contractual liability for the value of the performance arises. In the majority of cases this presents no decisive difference from a fully effective contract since the appropriate price usually conforms with the market price.

A similar basic idea arose out of the FRENCH decisions on acts of preservation (*actes conservatoires*). However, this notion is distinctly narrower than the ENGLISH "rule of necessaries" since it covers only measures that are indispensable for preventing a threatened diminution of assets and which, in proportion to the value of the protected assets, carry with them no significant burden for the minor. Textbook examples are the interruption of a period of limitation or the entry into a construction contract in order to save a building from collapse.[140] Within these boundaries, a minor having the necessary degree of judgment can effectively enter into contracts, even those containing obligations.

[130] ALBANIAN CC art. 12 ss. (limit of 12 years); BULGARIAN Law on persons and family art. 3 ss. (14 years); GREEK CC art. 128 no. 1 (10 years); HUNGARIAN CC § 12 par. 1 (14 years); POLISH CC art. 12 (13 years); former SOVIET UNION: *cf.* RSFSR CC art. 13 (15 years); see also ALGERIAN CC art. 42 par. 2, 43 (16 years) and MOROCCAN Law on personal status and successions art. 138 (12 years).

[131] See *e.g.* BRAZILIAN CC art. 5 and PERUVIAN CC art. 43 (16 years); further details on SPANISH-SOUTH AMERICAN law: *Stoljar* s. 90.

[132] FRENCH CC art. 1124 par. 1 and SWISS CC art. 16 and 19 are applied only to minors who lack necessary judgment, *Mazeaud and Mazeaud (-Chabas)* I/3 no. 1254.

[133] *Jentsch* 40 ss.; *Hartwig* 787 ss.; *Vial* 301 ss.

[134] Regarding conceptual problems, see *Schwimann* 72–78.

[135] *Cf.*, *e.g.* AUSTRIAN CC § 151, 865; HUNGARIAN CC § 14 par. 1; JAPANESE CC art. 4 par. 1; PERUVIAN CC art. 456; POLISH CC art. 17; former SOVIET UNION: *cf.* RSFSR CC art. 13; SWISS CC art. 19 par. 1, 305, 410; THAI CC art. 21. FRANCE constitutes an exception: the statutory representative must undertake the legal transaction for the minor and mere approval does not suffice, *Mazeaud and Mazeaud (-Chabas)* I/3 no. 1254.

[136] See, however, regarding "guardian of the estate" in the UNITED STATES, *Stoljar* s. 207, 290.

[137] *Idem* s. 285 ss.

[138] AUSTRIAN CC § 151 par. 3 constitutes an example.

[139] UNITED KINGDOM Sale of Goods Act 1979 s. 3; see also AMERICAN Restatement of Contracts 2d § 12 comment f, as well as *Zweigert and Kötz* II 35 ss. and *Treitel*, Contract 409–413.

[140] *Mazeaud and Mazeaud (-Chabas)* I/3 no. 1254.