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**Legal Capacity of Minors and Validity of Transactions Made by Them:
Peculiarities of Georgian Law with Some Comparative Observations****

Introduction

The new Civil Code in Georgia enacted on 25 November 1997, replacing the previous Code of Civil Law of the Soviet Socialist Republic of Georgia, entered into force in 1964.

The great achievement of civil law reform in Georgia is provision of private autonomy of the parties, enabling the parties of civil relations to implement the action which is not prohibited under the law, including the actions which are not peculiarly prescribed under the law.¹

The transaction is the most common means of implementation of private autonomy. Manifestation of the will is fundamental to the determination of the transaction. Only the manifestation of a will aimed at creating, changing or terminating a legal relation is considered as a transaction. The validity of the manifestation of the will is important, which means its legal suitability for creating, changing or terminating a legal relation.²

One of the most important issues in legal relations is the legal fate of transactions concluded by minors, as the interests of minors need special protection due to their lack of legal awareness. The Civil Code of Georgia imperatively establishes that a minor between the ages of seven and eighteen has limited legal capacity. The institution of limited legal capacity serves to protect this category of minors and bring them to full capacity through their education. At the same time, it serves the interests of the other side as well.³

The Civil Code of Georgia recognizes transactions that are void at the time of conclusion, but can become valid if an authorized person approves them. Such transactions are so called voidable transactions.⁴ The validity of the manifestation of the will of a minor

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¹ See *Zoidze B.*, Reception of European Private Law in Georgia, Tbilisi, 2005, 282 ff. (in Georgian).

² See *Chanturia L.*, General Part of Civil Law, Publishing House “Samartali”, Tbilisi, 2011, 290-292 (in Georgian).

³ See *Chanturia L.*, (Ed.), Commentary on the Civil Code, Book I, General Provisions of the Civil Code, Tbilisi, 2017, 79 (in Georgian).

⁴ See *Chanturia L.*, General Part of Civil Law, Publishing House “Samartali”, Tbilisi, 2011, 386 (in Georgian).

depends on an additional circumstance, such as the consent of legal representatives.⁵ Accordingly, some cases of transactions entered into by a minor without the consent of their legal representative are classic examples of voidable transactions.⁶

This paper discusses an approach of Georgian civil law to legal capacity as a condition for the validity of the transaction made by minors. A special attention should be paid to the following aspects: the peculiarities of the restriction of minors in terms of exercise of their property rights, and limited legal capacity with regard to the realization of freedom of contract.

This paper further examines the essence and the legal consequences of a neutral transaction made by a minor according to German civil law and the perspectives of adopting this approach in Georgian civil law.

All in all, this paper tries to determine some specific characteristics of Georgian civil law regarding limited legal capacity of minors to enter into legal transactions and attempts to point out the possibilities of its further development from a comparative perspective.

I. The Restriction of Minors with Limited Legal Capacity in Exercising Their Property Rights

Against the background of the development of civil turnover, a minor often becomes a participant in proprietary legal relations, which puts the issue of proper protection and realization of their rights on the agenda. Ignoring the mentioned area by the legislation increases the risk of violating the property rights of minors. First of all, the state should oblige the minor's legal representatives – their parents – to properly fulfill the obligation to protect the minor's property rights.⁷

A minor is limited in the exercise of property rights. Transactions concluded by persons with limited legal capacity belong to the category of voidable transactions. The validity of the will expressed by a person with limited legal capacity in relation to the property in their possession depends on the consent (permission) of the legal representative. The legal representative of a minor is considered to be a parent, and in some cases, a guardian/ custodian. Therefore, the parent, as the minor's legal representative, participates in civil legal relations on behalf of the minor without special authority.⁸

It is interesting that according to the Order of Minister of Georgia “on the Approval of the Instruction on the Procedure for Performing Notarial Acts”, a minor under the age of sixteen participates in a notarized transaction only through a legal representative and not

⁵ See *Chanturia L.*, (Ed.), *Commentary on the Civil Code, Book I, General Provisions of the Civil Code*, Tbilisi, 2017, 80 (in Georgian).

⁶ See *Chanturia L.*, *General Part of Civil Law*, Publishing House “Samartali”, Tbilisi, 2011, 386 (in Georgian).

⁷ See *Kerashvili S., Kartskhia G.*, *Protection of Minor's Property Interests by Parents According to Georgian and German law*, in: *Gegenava D.* (Ed.), *Guram Natchkebia 75, Jubilee Edition*, Prince David Institute for Law Publishing, Tbilisi, 2016, 146 (in Georgian).

⁸ See *Ibid*, 147-148.

directly, and a minor between the ages of sixteen and eighteen is entitled to enter into a transaction, which is notarized, in person, with the consent of a legal representative.⁹

The general rule established for representation is that the representative cannot enter into a transaction with themselves on behalf of the represented person. However, in the Order of Minister of Georgia “on the Approval of the Instruction on the Procedure for Performing Notarial Acts”, which defines the formal procedure for the participation of a minor and their representative in a notarial act, there is a norm of a different content. In particular, according to the mentioned order, the legal representative of a minor has the right to act simultaneously on behalf of the minor and on their own behalf when entering into a transaction without any special permission or consent, if there is no restriction registered in the registering authority. Accordingly, the aforementioned regulation gives the legal representative the opportunity to conclude an agreement with themselves on behalf of the minor regarding the disposal of the latter’s property.¹⁰

It should be noted that the Civil Code of Georgia better protects the property rights of minors in relation to guardians and custodians than in the case of parents. According to Article 1294, “Without the prior consent of a guardianship and custodianship authority, a guardian may not enter into transactions on behalf of the ward and a custodian may not agree, on behalf of the ward, to enter into transactions concerning alienation, pledging, renting out for more than ten years, gratuitous lending of property; issuance of other debt instruments or bills of exchange, waiver of rights to which the ward is entitled, entry as a partner into a business entity, borrowing, division of property or transactions that may result in the reduction of property”.¹¹

It is obvious that the legislator took into account a stronger guarantee of protection of property interests of minors in terms of guardianship and custodianship, than when regulating property relations between parents and children. It is assumed that the special personal relationship between parents and children caused a different regulation, but the legislator should not leave such a “loophole” in the law that would allow parents to act arbitrarily. Accordingly, the mentioned differentiated approach is unacceptable, since, according to the legislation, the guardian and custodian are considered as substitutes for the parent. They have the same responsibility for protecting the minor’s property interests as the minor’s parents.¹²

According to the Civil Code of Georgia, both parents are equally entitled to represent and protect the interests of minors. None of them are given any preference. Based on the above, any parent can independently represent a minor in property relations, since, based on the principle of complete equality of parents, the Civil Code of Georgia does not recognize any preference of mother or father.¹³

⁹ See *Ibid*, 150.

¹⁰ See *Ibid*, 151.

¹¹ See *Ibid*, 153-154.

¹² See *Ibid*, 154.

¹³ See *Ibid*, 154-155.

It is noteworthy the relationship of the mentioned principle with the “Procedure for Performing Notarial Acts”, according to which, in order to notarize the transaction regarding the disposal of the thing subject to registration in the possession of a minor, it is enough for only one parent to express their will or, in the case of a person with limited legal capacity, permission (consent), and for the exercise of representative authority by both parents, there needs to be a special, registered agreement.¹⁴

Last but not the least, it is interesting how the principle of parental equality works in relation to representative authority. In particular, such limitation of the representative authority of one of the parents can be evaluated in different ways. In the first case, based on the principle of equality, each parent should be able to dispose and manage the minor’s property in an equal amount and independently, so that the consent of the other parent is not required; or on the contrary, based on the principle of equality, it is necessary to take into account the opinion of both parents. Therefore, by requesting the consent of the other parent, it would not be violated the principle of parental equality, but it can ensure the implementation of this principle.¹⁵

A differentiated approach can be observed in the National Agency of Public Registry regarding the registration of the contract for the disposal of real estate by a minor. In particular, according to one of the decisions of the National Agency of Public Registry, the consent of only one parent was required for the validity of the will of a person with limited legal capacity. The motive for such a decision was the grammatical definition of Article 15 of the Civil Code of Georgia, which states that “In order for the declaration of intent of a person with limited legal capacity to be valid the consent of his/her legal representative shall be required, except when the person with limited legal capacity acquires a benefit from the transaction”. Contrary to the mentioned, in a similar case, according to one of the other decisions, the minor was refused the registration of the real estate gift agreement, since the consent of both parents to the transaction was not submitted to the agency. As the basis for the decision, the National Agency of Public Registry indicates the principle of equality of parents established by Article 1197 of the Civil Code of Georgia.¹⁶

2. Limited Legal Capacity of Minors in the Context of Freedom of Contract

Freedom of contract is not absolute. Restriction of the principle of freedom of contract is inevitable. It is discussed how wide these boundaries are and how they can be expressed.¹⁷

According to Paragraph 1 of Article 63 of the Civil Code of Georgia, which states that: “If a minor makes a bilateral transaction (contract) without the required consent of his/her legal representative, then the validity of the transaction depends on whether the representative subsequently approves it or not, except when the minor acquires a benefit by

¹⁴ See *Ibid*, 155.

¹⁵ See *Ibid*, 155-156.

¹⁶ See *Ibid*, 156.

¹⁷ See *Baesu S., Mițu Gh.*, Application of the Principle of Autonomy of Will in the Civil Code of the Republic of Moldova, in: *Zarandea T., Kurzynsky-Singer E.* (Eds.), *Private Autonomy as a Fundamental Principle of Civil Law*, Tbilisi University Press, 2020, 125 (in Georgian).

the transaction”, two important conditions are regulated: the approval of the contract by the minor’s legal representative and the benefits they receive. The issue of approval of the contract significantly reduces the scope of freedom of contract. In such a case, the validity of the will expressed by the party, the realization of freedom in a separate aspect (content, choice of counterparty, etc.) depends on another person. It can be said that this clause gives more freedom to the legal representative than to the direct contractor who is a minor.¹⁸

The same clause has an interesting exception – receiving benefits by a minor: when they receive a benefit and what can be considered as such is, of course, also a matter of discussion, however, unlike the first case, the minor has more opportunities to prove. In particular, they have more opportunity to prove the authenticity of the will expressed by them, by which they realized the freedom of contract.¹⁹

The legal restriction of freedom of contract is also implemented on the basis of special norms, when the issue concerns the establishment of labour relations with minors. In this case, the employer, among other things, is limited in their right to conclude an employment contract with a minor on any issue, which represents the legal scope of their legal limitation, since the purpose of this norm is to directly protect the minor.²⁰

For example, according to the provision of Article 21, Section 2, Clause (a) of the Civil Code of Moldova, a fourteen-year-old minor has the right to independently dispose of their profit, scholarship and other income from their own activities. At the same time, in accordance with Clause (j) of Article 30 of Law of Moldova on “Production and circulation of ethyl alcohol and alcoholic products”, it is prohibited to sell alcoholic products to persons under 16 years of age.²¹

Thus, the freedom of contract of persons can be expanded or restricted depending on the state’s interest in regulating a certain field of activity. From this point of view, there is talk about the existence of a certain flexibility of freedom of contract when the state has an evaluative role in determining boundaries by increasing or decreasing the possibility of contracting.²²

3. A Neutral Transaction Made by a Minor with Limited Legal Capacity

Paragraph 1 of Article 12 of the Civil Code of Georgia explains the concept of capacity, according to which, “Legal capacity or the ability of a natural person to fully acquire and exercise civil rights and duties of his/her own will and with his/her action shall arise upon

¹⁸ See *Jorbenadze S.*, *Freedom of Contract in Civil Law*, Prince David Institute for Law Publishing, Tbilisi, 2017, 129-130 (in Georgian).

¹⁹ See *Ibid*, 130.

²⁰ See *Jorbenadze S.*, *Relation of Civil Code’s Separate Legal Institutions towards Labor Code*, in: *Law Journal “Sarchevi”*, №1-2(3-4), 2012, 22 (in Georgian).

²¹ See *Baesu S., Mițu Gh.*, *Application of the Principle of Autonomy of Will in the Civil Code of the Republic of Moldova*, in: *Zarandia T., Kurzynsky-Singer E.* (Eds.), *Private Autonomy as a Fundamental Principle of Civil Law*, Tbilisi University Press, 2020, 125 (in Georgian).

²² See *Ibid*.

attainment of the age of majority”. Correspondingly, according to Article 63, Paragraph 1 of the Civil Code of Georgia, “If a minor makes a bilateral transaction (contract) without the required consent of his/her legal representative, then the validity of the transaction depends on whether the representative subsequently approves it or not, except when the minor acquires a benefit by the transaction”.²³

It is true that according to Article 107 of the German Civil Code and Article 15 of the Georgian Civil Code, “In order for the declaration of intent of a person with limited legal capacity to be valid the consent of his/her legal representative shall be required, except when the person with limited legal capacity acquires a benefit from the transaction”, but according to the opinion prevailing in the German scholarship, the subsumption of the mentioned article also includes neutral contracts concluded by minors, from which the minor may not get any benefits, but neither will there be any negative legal consequences. The main reason for the existence of this subsumption is that the interests of the minor do not need to be protected in such a case, as the legal consequences of the concluded transaction have nothing to do with their property at all.²⁴

Actually, as it follows from the literal interpretation of Articles 15 of the Georgian Civil Code and 107 of the German Civil Code that only if there is a legal advantage, the consent of the minor’s legal representative is not necessary, however, according to the opinion prevailing in Germany, neutral agreements also fall within the scope of the mentioned article.²⁵

A neutral contract is considered to be a transaction that brings neither legal benefits nor legally negative consequences to a person with limited legal capacity, because it does not directly affect the minor, but third parties.²⁶

The inclusion of a neutral agreement within the scope of Article 15 of the Georgian Civil Code is mainly justified according to a teleological definition of the norm, which states that the main goal of the mentioned article is to protect the interests of minors. Legally neutral transactions that do not bring benefits or negative consequences to minors, cannot harm their interests and therefore there is no need to protect the minor. Accordingly, the consent of the legal representative should not be mandatory either.²⁷

As mentioned above, a neutral contract is considered to be a transaction that does not bring legal benefits or legal negative consequences to a person with limited legal capacity. There are several types of neutral contract according to the German Civil Code: 1) Alienation of property of another person by a minor to a bona fide purchaser; 2) A minor as

²³ See *Gogiasbvili N.*, The Essence of a Neutral Transaction Made by a Minor and the Legal Consequences Thereof According to the German and Georgian Civil Codes, in: TSU LAW REVIEW, №2, 2017, 58 (in Georgian).

²⁴ See *Ibid*, 57.

²⁵ See *Ibid*, 58.

²⁶ See *Ibid*.

²⁷ See *Ibid*.

a representative; 3) Specification of performance by a third party (Article 317 of the Civil Code).²⁸

Recognizing the existence of a neutral transaction concluded by a minor has important legal consequences. German legal scholarship has long recognized the possibility of using a neutral agreement in relation to a minor. According to this approach, when a minor makes a neutral transaction, they do not need the consent of a legal representative, as the mentioned contract does not bring negative consequences for them.²⁹

Concluding Remarks

To sum up, based on the discussion above, two important points can be raised:

First, it becomes clear that the Georgian legislation cannot fully protect proprietary interests of minors from abuse of authority by their parents. In addition, the legislation does not define the extent of parents' responsibility and the scope of their representative authority. Moreover, in the mentioned field, parents are given quite wide powers individually, which are deprived of state control. By regulating the legislation in the field of property rights of minors, the protection of the basic right to property of minors will be implemented, as well as the fulfillment of obligations undertaken by Georgia in the field of protection of children's rights under international agreements. By improving the legislation in the field of property rights of minors, the protection of the basic right to property of minors will be implemented, as well as the fulfillment of obligations undertaken by Georgia in the field of protection of children's rights under international agreements.

Second, a neutral transaction made by a minor is indeed of great importance as it encompasses the issues which neither legal scholarship, nor the legislation of Georgia has considered in detail. Georgia is most closely connected with German law. The reference to the German legal system has already become an established tradition which provides a credible basis for the Europeanization of Georgian law. If the Georgian law will adopt the German approach, a minor would no longer need the consent of their statutory representative as the transaction would neither benefit, nor harm them. Accordingly, the perspective of recognizing the existence of neutral transactions concluded by a minor and sharing the relevant experience by Georgian legislation is clearly visible.

²⁸ See *Ibid*, 60.

²⁹ See *Ibid*, 68.