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The Concept of Legal Capacity in Private Law and Constitutional Law*

Pojęcie podmiotowości prawnej w prawie prywatnym i prawie konstytucyjnym

ABSTRACT

Legal capacity, i.e. being the holder of rights, is an essential legal term, but it does not necessarily mean the same in all areas of law. The article focuses on the concept and regulation of legal capacity in private law and the area of fundamental rights. These two areas deserve attention because their concepts of legal capacity seem to be closely connected even though they have different purposes in the legal system. The article discusses these connections and controversies from two complementary aspects. On a historical and comparative basis, the authors describe how the concept of legal capacity is rooted and evolved in private law and how other areas of law relate to that. Then, from

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a doctrinal perspective, they point out that the area of fundamental rights often relies on private law doctrines, however, it needs its own concept of legal capacity. The paper concludes with a model to interpret and assess the multifaceted relationship between legal capacity-related norms of the two areas of law.

Keywords: legal capacity; holders of fundamental rights; private law; constitutional law

INTRODUCTION

It happens quite often that legal institutions or expressions despite the common core have different meanings or content in different areas of law. For example, the expression "damage", which is a basic legal expression in private law (especially in tort law and contract law), is also used by criminal law but not exactly with the same content.[1] It is not a disorder in law, but a necessary distinction resulting from the different functions of the two areas of law.[2]

We would like to discuss legal capacity, i.e. being the holder of rights from this aspect. The concept of legal capacity was elaborated by private law, but other areas of law also necessarily apply it. It is also true for constitutional law, though the category of legal capacity to fundamental rights seems to be a doctrinal innovation.[3] Partly due to the latter, in this respect, the area of law dealing with fundamental rights often relies on private law doctrines and norms. However, the nature of the relationship between concepts of legal capacity of both private law and constitutional law is not clear. In this paper, we offer a framework to analyse the relationship between the legal capacity-related norms that belong to, on the one hand, private law and, on the other hand, to the area of fundamental rights, which can even be used as a basis for the assessment of the practice.

[1] According to the Act V of 2013 on the Civil Code (Hungarian Civil Code), damages contain the diminution in the value of the asset, the loss of profit, and the costs necessary to eliminate the pecuniary losses (see Section 6:522 on the scope of the liability for damage). However, the Act C of 2012 on the Criminal Code (Hungarian Criminal Code) distinguishes between damage – which means any diminution in the value of assets caused by a criminal offence – and pecuniary loss – which means any damage caused to assets and any loss of profit (pecuniary loss has a broader content than damage in the Hungarian criminal law).

[2] On the one hand, the concept of damage is wider in private law because it comes from the principle of full compensation. On the other hand, criminal law primarily focuses on the consequences of a crime from the perspective of the offender, and it is therefore appropriate to distinguish between the harms – which can include or exclude the loss of profit – caused by the offender.

[3] For the theoretical background of the doctrinal term of legal capacity to fundamental rights, see B. Somody, F. Gárdos-Orosz, *Conceptualising the Legal Capacity to Fundamental Rights*, "Studia Iuridica Lublinensia" 2023, vol. 32(5).

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METHODS

As a starting point, we describe by using an example – the implementation of the Convention on the Rights of Persons with Disabilities (CRPD) in civil codes – that the concept of private law on legal capacity is not necessarily the same as that in the area of fundamental rights. This recognition leads to the hypothesis that constitutional law may have its own concept of legal capacity to fundamental rights.

The paper approaches the question from two complementary aspects. The first part focuses on private law and its method can be described as a slightly historical approach but mainly a comparison. The private law concept is interpreted with regard to its historical roots to understand its prominent role in connection with legal capacity. After that, it is examined how other areas of law relate to this concept and if they differ, what might be behind it.

The second part of the paper applies a fundamental rights perspective and follows a doctrinal approach. To make the findings more tangible, we use examples to illustrate the connection and controversy between the two – private law and fundamental rights – concepts of legal capacity. The illustrations are about well-known topics, such as the legal status of the unborn, humans with not full decision-making capacity, and legal persons, which are among the most obvious interfaces between private and constitutional law. Besides the Strasbourg Court's practice, we also refer to some related doctrinal theses of the Hungarian Constitutional Court.

Based on the above, the paper concludes with a potential model of the multifaceted relations between the legal capacity norms of the two areas of law.

CONFLICT BETWEEN DIFFERENT CONCEPTS ON LEGAL CAPACITY: THE IMPLEMENTATION OF CRPD

Article 12 CRPD deals with the legal capacity of persons with disabilities. According to point 2, "States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life". Point 3 prescribes that "States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity". According to point 5, "States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property".

The UN Committee on the Rights of Persons with Disabilities, which monitors the implementation of the CRPD, made it clear in its General Comment No. 1 (2014), that Article 12 rejects all forms of substitute decision-making, including guardianship.

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States Parties shall implement CRPD and the implementation affects the private law which will be illustrated by two examples.

The first one is Germany. On 1 January 2023, the reform of the guardianship law came into force in Germany. According to the new rules of the German Civil Code (BGB) amended by the Act on the Reform of Guardianship and Custodianship, "if an adult cannot legally manage his or her affairs in whole or in part and this is due to an illness or disability, the guardianship court appoints a legal guardian for him or her" (§ 1814). The guardian must follow the wishes of the person with a disability, but not if it endangers his property or the guardian cannot reasonably be expected to do so (§ 1821). Moreover, the guardian may represent the person under guardianship within the scope of his or her duties (§ 1823). Substitute decision-making may be still permitted as an *ultima ratio*.

The second example is Spain. After the adaptation of Act 8/2021 on reforms of civil and procedural legislation to support people with disabilities in the exercise of their legal capacity the Spanish Civil Code (*Codigo Civil*) preserved the institution of guardianship. It shall be ordained by the judicial authority if there is no other sufficient support measure for the person with a disability. In exceptional cases in which it is rendered essential due to the circumstances of the person with a disability, the judicial authority shall determine by way of a judicial resolution the specific acts in which the guardian will be required to assume the representation of the person with a disability (§ 269). The new Spanish regulation focuses on the tools and measures which can support the persons with disabilities in expressing their will and realizing their wishes. However, the judges may still entitle the guardians to make decisions in the name of the person with a disability and there are no specific guarantees that may prevent this tool from being used in such cases when it could be avoidable.

These examples show that the concept of legal capacity presented by the CRPD Committee is not compatible with the classical concept of legal capacity in private law because the civil codes typically preserve the institution of guardianship as the form of substitute decision-making which is contrary to the spirit of the CRPD as interpreted by the Committee.

LEGAL CAPACITY IN PRIVATE LAW

If we want to understand the reasons for this opposition, first we have to examine the concept of legal capacity in private law. The roots of this concept can be traced back to Roman law which was based on private law.

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1. The roots of legal capacity in private law

Private law is non-functional without regulating legal capacity because, e.g., it must be decided who is entitled to conclude a contract. The Romans did not explicitly distinguish between the categories of active and passive legal capacity, but in practice they were regulated differently, e.g. a slave had no passive legal capacity, but could have active legal capacity.[4] The concept of legal capacity in private law has changed a lot as the law has evolved. Passive legal capacity is now general, equal and unconditional, and can only cease by death (the institution of *capitis deminutio*,[5] which meant the loss or reduction of legal capacity, is no longer part of modern legal systems, thanks to centuries of development). Although, as the law has evolved, new divisions of law have emerged from private law and become independent areas of law, the regulation of legal capacity has remained part of private law.

2. Legal capacity concept of private law and other divisions of the law

As the original concept of legal capacity was elaborated first for relationships regulated by private law (e.g. who is entitled to conclude a contract), other divisions of law have not developed their own concept of legal capacity, but have started to use the concept of private law, e.g. it is typical that the concept of legal capacity is based on private law in civil procedural law.[6]

However, there are other divisions of law which have their own concept of legal capacity which is independent from the concept of legal capacity in private law. This is the case of, e.g., criminal law and criminal procedure law.[7]

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[4] See R. Gamauf, *Slavery: Social Position and Legal Capacity*, [in:] *The Oxford Handbook of Roman Law and Society*, eds. P.J. du Plessis, C. Ando, K. Tuori, Oxford 2020, pp. 386–401.

[5] B. Abatino, G. Dari-Mattiacci, E.C. Perotti, *Depersonalization of Business in Ancient Rome*, "Oxford Journal of Legal Studies" 2011, vol. 31(2), p. 377.

[6] For example, § 51 (1) of the German Code of Civil Procedure (ZPO) prescribes that "unless stipulated otherwise by the subsections hereinbelow, the ability of a party to appear before a court, the representation of parties having no capacity to sue or be sued by other persons (legal representatives), and the need for a special authorisation for the pursuit of court proceedings are determined pursuant to the stipulations of civil law". Of course, we could mention several other examples.

[7] For example, see Section 19 of the German Criminal Code (StGB) which prescribes that "whoever is under 14 years of age at the time of the commission of the offence is deemed to act without guilt". And this rule does not follow the concept of legal capacity in the BGB because Section 104 prescribes that "a person is incapable of contracting if he is not yet seven years old (…)". However, age is not the only reason for limiting legal capacity. Section 20 StGB prescribes that "whoever, at the time of the commission of the offence, is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound disturbance of consciousness or intellectual disability or any other serious mental disorder is deemed to act without guilt". Section 104 BGB prescribes that "a person is incapable of contracting if (…) he is in a state of pathological mental disturbance, which prevents the free exercise of will, unless the state by its nature is a temporary one".

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Moreover, the concept of legal capacity in private law is not uniform because tort law has a different one than the original concept of contract law (see, e.g., Section 828 BGB).[8]

3. Legal capacity as a rule in private law

There is one more problem with the regulation of legal capacity in private law. Namely that it is an alien body in private law, and it is quite dysfunctional in practice. Private law regulates relationships between individuals with equal rights and courts decide in private law disputes measuring the interests of both parties. On the contrary, if a court decides on the legal capacity of an individual, the court should focus only on one party and there should not be a real dispute in the sense of private law. It is therefore no coincidence that the proceedings related to the restriction of the legal capacity regulated by private law and civil procedure law are formalized and short. The given persons who are the defendants of such cases do not get real protection, the restriction of their rights serves to protect the interest of others (property issues and the protection of the financial interests of family members) in the practice.[9] It means that the logic of private law (measuring the interests of the parties) prevents the achievement of the declared goal of the restriction of legal capacity which is to protect the interests of vulnerable people.

LEGAL CAPACITY FROM A FUNDAMENTAL RIGHTS PERSPECTIVE

1. Questions to be answered

While private law, as mentioned above, developed a concept of legal capacity that significantly influences other parts of the legal system, constitutional law's approach to who can be the holder of fundamental rights is much less elaborated. Neither constitutions nor international human rights declarations define who or what entities are entitled to have and exercise the fundamental rights enshrined in their catalogues. One can think that the reason for the lack of regulation on legal

[8] (1) A person who has not reached the age of seven is not responsible for damage caused to another person. (2) A person who has reached the age of seven but not the age of ten is not responsible for damage that he inflicts on another party in an accident involving a motor vehicle, a railway or a suspension railway. This does not apply if he intentionally caused the injury. (3) A person who has not yet reached the age of eighteen is, to the extent that his responsibility is not excluded under subsection (1) or (2), not responsible for damage he inflicts on another person if, when committing the damaging act, he does not have the insight required to recognise his responsibility.

[9] V. Kiss, A. Maléth, B. Tőkey, I. Hoffman, *An Empirical Study of Actions on Custodianship in Hungary*, "International Journal of Law and Psychiatry" 2021, vol. 78.

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capacity in this field is that it is self-explanatory. As for their substance, fundamental rights are the manifestation of human rights in constitutions. The recognition of human rights in the highest-ranking legal documents transforms moral-based rights into positive legal rights.[10] The substantive definition of fundamental rights seems to make defining the holders of these rights unnecessary: human rights obviously belong to humans; consequently, humans are those who have the legal capacity to fundamental rights. While we unquestionably accept that each and every human being is equally the holder of all fundamental rights, this thesis still leaves many questions open – the beginning and the end of human life, the extent of legal capacity of persons with impaired decision-making capacity as well as the status of non-human persons.

To take the most obvious example, abortion, one of the most difficult fundamental rights dilemmas, is deeply connected to the concept of humans. At least in Europe, one of the key factors determining the legitimate restrictions on abortion is the existence and the extent of the state's constitutional obligation towards unborn life. The relation of unborn life to the legal concept of human life is not explicitly addressed by most international human rights conventions and national constitutions. The UN Convention on the Rights of the Child gives an age-based definition of the child; however, while it provides an upper age limit, the starting point of childhood is not part of the provision.[11] The European Convention on Human Rights is also silent on the beginning of life, and the Strasbourg Court refrains from deciding the question. It holds that "the issue of when the right to life begins comes within the margin of appreciation" of the contracting states that are considerably divergent about the status of unborn life.[12] Until 2018, the Irish Constitution acknowledged the right to life of the unborn, however, due to a referendum, this provision was repealed in 2018.[13] At present, the Hungarian and the Slovak constitutions deal with the status of the foetus, however, both texts declare the protection of life before birth, not the unborn's right to life.[14]

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[10] R. Alexy, *Rights and Liberties as Concepts*, [in:] *Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford 2012, p. 289.

[11] Article 1: "For the purposes of the present Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier". This was intended to secure the universal acceptance of the Convention by avoiding taking a position on abortion. See Z. Vaghri, J. Zermatten, G. Lansdown, R. Ruggiero (eds.), *Monitoring State Compliance with the UN Convention on the Rights of the Child: An Analysis of Attributes*, Cham 2022, p. 408.

[12] W.A. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford 2015, p. 124. Citation from the judgment of the ECtHR (Grand Chamber) of 8 July 2004, *Vo v. France*, application no. 53924/00, § 82.

[13] Article 40.3.3. The previous text was changed by the 36th Amendment of the Constitution Act (Act No. 29 of 2018).

[14] Article II of the Fundamental Law of Hungary (2011); Article 15 (1) of the Constitution of the Slovak Republic.

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One could suppose that the ending point of human life and, this way, that of fundamental rights personality is easier to determine since a deceased person cannot be the holder of rights. However, though the dead obviously cannot exercise rights, they can express their wishes premortem, and even in the lack of this, some of their interests can survive death. This points out that this question is not settled either: exclusion of the dead from legal capacity may seem to be a given, but based on the interest theory of rights, posthumous legal rights can be argued for in order to protect dignity and autonomy.[15]

Also, it is generally acknowledged that legal persons can claim the protection of fundamental rights. This is despite the fact that the fundamental rights of legal persons can be seen as a contradiction since these rights are those of humans, and there is no generally accepted answer as to what justifies their status. The majority of European constitutions do not contain a provision on it.[16] Though the European Convention on Human Rights (Article 34) expressly guarantees non-governmental organisations the right to turn to the Strasbourg Court, it does not explicitly acknowledge the legal persons' entitlement either. While these entities' legal capacity works in courts' practice, without a comprehensive conceptual framework, both the meaning of legal persons or organisations in this context and the scope of their rights raise questions.[17]

While the rights of persons with disabilities are guaranteed as human rights by the CRPD, the main substance of the national regulation on their legal capacity is found in private law. On the one hand, their legal capacity is interpreted within the doctrinal framework of private law that, in civil law systems, sharply distinguishes between passive legal capacity (the capacity to have rights, legal standing) and active legal capacity (the capacity to exercise rights, legal agency), and accepts the latter's limitation based on age and mental state. On the other hand, it is hard to find constitutional norms in this field beyond the restrictions of electoral rights.[18] The constitutional interpretation of active legal capacity is still missing.[19]

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[15] K.R. Smolensky, *Rights of the Dead*, "Hofstra Law Review" 2009, vol. 37(3), pp. 770–772.

[16] Only four EU member states have a general constitutional provision on the legal person's entitlement to fundamental rights. See L. Granyák, *A szervezetek alapjogi jogalanyisága*, PhD thesis, 2022 (unpublished).

[17] Eadem, *Do Human Rights Belong Exclusively to Humans? The Concept of the Organisation from a Human Rights Perspective*, "ELTE Law Journal" 2019, vol. 7(2), pp. 17–33.

[18] I. Hoffman, Gy. Könczei, *Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code*, "Loyola of Los Angeles International and Comparative Law Review" 2010, vol. 33(1), p. 147, 157.

[19] For the FULCAP research project's findings, see Z. Pozsár-Szentmiklósy, *The Role of the Principle of Proportionality in Identifying Legal Capacity to Fundamental Rights*, "Studia Iuridica Lublinensia" 2023, vol. 32(5).

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This article does not aim to answer the above questions and especially does not want to suggest that they should be regulated by codifying constitutional provisions. The examples are here to illustrate the uncertainty of even some of the basic components of a concept of legal capacity to fundamental rights. We argue that this is an issue that cannot be avoided by both the theory and practice of fundamental rights.

From a doctrinal perspective, judicial decision-making on fundamental rights cases essentially follows a two-step pattern.[20] The first question is whether fundamental rights protect the restricted state or actions. Then, if the answer to this question is yes, the second step is to decide whether the interference with a constitutionally protected state or the restriction on actions is justified. The essence of the second step is to assess the proportionality of the restriction. However, this second stage of the analysis can only take place if the answer to the first question is affirmative, i.e. if fundamental rights protect the state or activity subject to the restriction. This question is mostly identified with examining the scope of the fundamental right, which requires deciding whether the state or actions in question fall within the content of the fundamental right. However, whether a fundamental right protects a particular state or action is not only a question of deciding whether they fall within the scope of the fundamental right in objective terms. The question also has a subjective aspect. It also has to be taken into account that a fundamental rights claim can only be brought by a holder of fundamental rights, in other words, only by those who have the legal capacity to fundamental rights. A person who is not a holder of fundamental rights cannot claim protection before the courts.

From a procedural perspective, a preliminary question in procedures aimed to enforce a fundamental right, even in an implicit way, is about legal capacity. The European Convention on Human Rights (Article 34) provides that the applicant has to claim to be the victim of a violation of the rights set forth in the Convention. The victim status includes that the applicant is the holder of the rights, so the legal capacity is the precondition for standing before the Court. Constitutional complaint procedures follow the same logic: if the petitioner has no fundamental rights, they are not entitled to lodge a constitutional complaint either.[21]

One can say that the questions of the beginning and end of human life are particular questions that belong to democratic decision-making, not legal theorists or judges. Knowing that all living humans have full legal capacity is enough to decide the vast majority of fundamental rights cases before courts. Even if we accept this, the above examples also cover so-called everyday questions of fundamental rights

[20] A. Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge 2012, pp. 19–21.

[21] For example, see the status of public bodies in the practice of the Hungarian Constitutional Court: B. Somody, *Constitutional Complaints by State Organs? Changes in the Standing Requirements before the Hungarian Constitutional Court*, "ELTE Law Journal" 2023, no. 1, p. 117.

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litigation, such as the status of organisations and legal persons or the possibility of persons with impaired or developing decision-making capacity to exercise their rights. Also, new challengers are knocking on the door, e.g. artificial intelligence or nature. As mentioned, we do not argue for codifying norms about who or what is a person and who or what is not, but that a comprehensive set of concepts and doctrines supporting deciding legal capacity-related questions is essential for the protection of fundamental rights. Now we turn to the question of whether private law is a proper source when we try to find answers.

2. Answers from private law?

Similarly to the courts, the legislatures face the issue of legal capacity when making fundamental rights-related laws or implementing international human rights conventions. As the previous sections pointed out, decision-makers often turn to private law to approach legal capacity in the area of fundamental rights. It can be explained by the long history of private law dating back to Roman law, which resulted in elaborate and generally accepted doctrines also on legal capacity. Furthermore, while constitutions and international declarations lack explicit provisions or contain only abstract and laconic rules on legal capacity to fundamental rights, in civil law systems, private law offers detailed codified norms on the topic. The role of private law is strengthened by the fact that fundamental rights-related litigation has no own proceedings before ordinary courts.

Constitutional law and fundamental rights courts must face and answer questions related to legal capacity. But is it right to base these answers on private law doctrines and rules? We must consider that the two divisions of law regulate different types of relationships and have different purposes. While private law is about horizontal relations between private entities, constitutional law regulates the conduct of governmental actors in their dealings with private individuals. While private law is mostly about property rights, the purpose of constitutional law is to protect citizens' freedom and dignity by limiting state power.

In harmony with this distinction, the European Court of Human Rights interprets the category of "non-governmental organisation" under the provision on applicants autonomously, i.e. irrespective of whether the applicant qualifies as a legal person under the national private law. The lack of a legally acknowledged status under domestic law does not prevent the applicant from claiming the protection of their rights.[22] This approach can secure legal protection for entities that do not yet have or no longer have legal capacity under national law, but whose rights are violated precisely as a result of being prevented from being set up or dissolved. At the same

[22] L. Dopplinger, *Legal Persons as Bearers of Rights under the ECHR*, "University of Vienna Law Review" 2021, vol. 5(1), p. 21.

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time, a public body cannot claim the protection of fundamental rights only due to the fact that it has a legal personality under private law. The absence of legal capacity under private law cannot make the protection of fundamental rights impossible, and conversely, the fact that an entity has a civil legal personality does not necessarily mean that it is also a holder of fundamental rights.[23] A contrary approach would allow contracting states to prevent the enforcement of rights abusively, and state organs would be entitled to claim fundamental rights protection.

The Hungarian Constitutional Court explained the foetus' different capacity to fundamental and property rights with the different functions of the two divisions of law. In Hungarian constitutional law, human beings' legal capacity to fundamental rights begins with birth. At the same time, the Civil Code states that a person has legal capacity, provided that they are born alive, from conception. The two provisions are compatible because they serve different purposes and relate to different types of rights; the latter is essentially intended to protect the property interests of the unborn child, but does not imply an entitlement to fundamental rights, such as the right to life.[24] This distinction makes it clear that based on the Civil Code, a representative of the unborn cannot claim the enforcement of their right to life against the pregnant woman.

Similarly, the interpretation of a representative who makes decisions on behalf of an individual is essentially different from a private law and a fundamental rights perspective. Both areas of law must face the question of decision-making by persons with impaired or not fully developed decision-making capacities, such as children and persons with mental disabilities. It is unquestionable that all human beings have full and unconditional legal capacity. At the same time, in private law, it is an established solution that in the absence of the necessary decision-making capacity, the state may empower other persons (e.g. a legal guardian) to act on behalf and in the interest of the holder of the rights. Private law distinguishes between rights that can be exercised directly and those that can also be exercised indirectly. You can only marry or make a will in person, however, most property rights can also be exercised through a representative. In contrast, another person cannot exercise fundamental rights on behalf of the holder of these rights. The right to human dignity means that an individual makes decisions that fall within the scope of their autonomy and cannot be subjected to another person's decisions. Accordingly, guardians and other representatives do not exercise the individual's fundamental

[23] Judgment of the ECtHR of 16 December 1997, *Canea Catholic Church v. Greece*, application no. 25528/94; judgment of the ECtHR of 8 December 1999, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, application no. 23885/94; decision of the ECtHR of 31 August 1999, *APEH Üldözötteinek Szövetsége and Others v. Hungary*, application no. 32367/96; judgment of the ECtHR of 2 October 2001, *Stankov and United Macedonian Organisation Ilinden v. Bulgaria*, application no. 29221/95 and 29225/95; L. Granyák, *A szervezetek alapjogi jogalanyisága…*

[24] Decision 48/1998 (XI. 23.) AB of the Hungarian Constitutional Court.

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rights, nor do they substitute for them in the exercise of their rights. The substitute decision-maker's decision is not a manifestation but the restriction of the fundamental rights of the person concerned.

Of course, this does not automatically make representation inadmissible from a fundamental rights perspective either. A restriction of fundamental rights can be justified on two conditions: (1) if it serves a legitimate purpose and (2) if it is proportionate to that purpose. If we accept that the state has positive obligations to protect the rights of vulnerable people, representation can be justified as serving this aim.[25]

Furthermore, even if we can justify the representation with a legitimate aim, the restriction of fundamental rights must be proportionate. Representation is expected to be limited to cases and to the extent that it is unavoidably necessary, constituting a measure of last resort. It follows from the necessity and proportionality requirements for fundamental rights restriction that the guardian should intervene only in cases strictly necessary because of the nature and extent of the lack of decision-making capacity. A decision made on behalf of the person should be preceded by giving support to the person concerned to make their own decision, and substitute decision-making only be allowed in cases where the person clearly requires protection, but it cannot be achieved *via* support measures (e.g. the person lacks a recognisable will).[26]

These examples illustrate well that the failure to distinguish between the different types of legal capacity, in harmony with the different characteristics of private and constitutional law, may be harmful to the protection of fundamental rights.

CONCLUSIONS

The concept of legal capacity rooted in Roman law and its conceptual framework evolved in private law. However, it does not mean that a unified concept of legal capacity would apply in all areas of law. More examples of different concepts were shown in our paper. Despite this, it seems that the concept of legal capacity to fundamental rights has not been elaborated yet.

[25] H.N. Stelma-Roorda, C. Blankman and M.V. Antokolskaia (*A Changing Paradigm of Protection of Vulnerable Adults and Its Implications for the Netherlands*, "Family & Law" 2019, vol. 8) argue that it aligns with CRPD Article 12 since it does not necessarily exclude substitute decision-making.

[26] B. Somody, P. Stánicz, *Mit ér az alapjog, ha nem gyakorolható? Az alapjogi jogképesség és joggyakorlási képesség integrált koncepciója*, [in:] *Bábeli rend: Fogyatékosságtudomány és innováció Magyarországon*, ed. A. Sándor et al., Budapest 2023, pp. 76–84. The ECtHR also interprets substitute decision-making in the framework of the proportionality test. See judgment of the ECtHR of 18 September 2014, *Ivinović v. Croatia*, application no. 13006/13.

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From a historical perspective, one can get the impression that legal capacity to fundamental rights also derives from private law. Moreover, there is still a tight connection between private law and fundamental rights: the lack of their own proceedings in constitutional law results in fundamental rights being usually enforced through civil procedures. It means that only those people can claim the enforcement of their fundamental rights who have legal capacity in civil procedural law, who are the same who have legal capacity in private law.

However, as we pointed out, these two areas of law have different purposes and regulate different relationships. While private law regulates persons' property relations on a horizontal basis, fundamental rights are intended to guarantee the freedom and dignity of individuals against the state. The differences explain that, even if the doctrines of fundamental rights are inspired or supported by well-developed private law dogmatics, the area of fundamental rights requires a concept of legal capacity that serves the purpose of these rights.

As regards their purposes in the legal system, the concept of legal capacity in private law and the field of fundamental rights are autonomous. At the same time, as legal concepts, they are parts of the same legal system. In the legal system, the constitution, which contains fundamental rights,[27] is the supreme law of the country which is enforced by the court.[28] Consequently, private law, including legal capacity norms, must be in line with the constitution and fundamental rights.

In addition, the relationship between private law and fundamental rights can be more complex. At least four categories of legal capacity-related rules can be distinguished in this aspect.

First, we can identify legal capacity-related norms, such as those about the legal capacity to right to vote, that should be separated from private law. These norms, which have no relation to property, show us that fundamental rights should have their own concept of legal capacity. However, there are examples of partial and full separation as well.[29]

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[27] R. Alexy, *op. cit.*, p. 289.

[28] S. Gardbaum, *The Place of Constitutional Law in the Legal System*, [in:] *Oxford Handbook…*, pp. 170–171.

[29] For example, on the one hand, in Hungary Section 13A of Act XXXVI of 2013 on election procedure prescribes that "in its judgment relating to placement under custodianship partially or fully limiting capacity to act or delivered on the basis of a review procedure, the court shall be required to decide on the issue of deprivation of suffrage as well". It is a partial separation, because legal capacity on voting rights is not regulated in the Civil Code, but the judge must decide on it in the same process as on the legal capacity on private legal relationships and the conditions of the deprivation of suffrage is the same as the limitation of legal capacity regulated by the Civil Code. On the other hand, the German Constitutional Court (BVerfG) decided (see to the order of the Second Senate of 29 January 2019, 2 BvC 62/14) that the exclusion from voting rights of persons placed under full guardianship is unconstitutional. It is a full separation, because according to the decision of the BVerfG different

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The second group consists of private law rules that are connected to property issues but, at the same time, limit the exercise of fundamental rights, e.g. civil codes prescribe who may have the legal capacity to make a will, conclude a contract, etc. As explained before, these norms are quite dysfunctional as a private law rule because there is no dispute between two equal parties. These rules typically restrict a fundamental right (right to property, right to self-determination, etc.), so they should be justified against the criteria of the test of proportionality.

In some cases, that belong to the third group, private law provisions can be understood as guarantees of fundamental rights.[30] For example, when private law grants legal capacity to associations and churches, it gives them the possibility to have property. Owning property allows these organisations to manage their affairs independently and to fulfil their missions without interference from the government. So, in this regard, private law guarantees these entities' autonomy, eventually, the freedom of association and religion.

The fourth group contains the "pure" private law rules that do not substantially connect with fundamental rights. These rules, e.g. the limited legal capacity of a condominium in Hungarian law,[31] are clearly part of private law since they are designed to make it easier to handle property relationships without limiting or guaranteeing the exercise of fundamental rights.

Comparing the four theoretical categories of legal capacity-related norms with the examples we cited shows that the purpose and regulation of legal capacity norms are not always in harmony. This framework can help to analyse and assess whether legal systems regulate legal capacity issues in the proper area of law and in line with private law and fundamental rights purposes.

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aspects must be taken into account in case of the deprivation of suffrage and the limitation of legal capacity in private law relationships.

[30] S. Gardbaum, *op. cit.*, pp. 174–175.

[31] According to Section 3 of Act CXXXIII of 2003 on condominiums, the community of co-owners of a condominium may acquire rights and assume obligations, sue and be sued independently, and exercise ownership rights in relation to the common property under the common name of the condominium.

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ABSTRAKT

Podmiotowość prawna, tzn. bycie podmiotem prawa, jest zasadniczym terminem prawnym, ale nie zawsze oznacza to samo we wszystkich dziedzinach prawa. W artykule skoncentrowano się na pojęciu i regulacji podmiotowości prawnej w prawie prywatnym i dziedzinie praw podstawowych. Oba obszary zasługują na uwagę, ponieważ używane w nich pojęcia podmiotowości prawnej wydają się być ściśle połączone, nawet jeśli mają inne przeznaczenie w ramach systemu prawnego. Autorzy omawiają te związki i kontrowersje w dwóch uzupełniających się aspektach. Opisują w sposób historyczno-porównawczy, jak pojęcie podmiotowości prawnej powstało i wyewoluowało w prawie prywatnym oraz jak do tego odnoszą się inne dziedziny prawa. Następnie z perspektywy doktrynalnej wskazują, że obszar praw podstawowych często opiera się na doktrynach prywatnoprawnych, ale wymaga własnego pojęcia podmiotowości prawnej. Artykuł kończy się podaniem modelu interpretacji i oceny wielowymiarowej zależności pomiędzy normami dotyczącymi podmiotowości prawnej wskazanych dwóch dziedzin prawa.

Słowa kluczowe: podmiotowość prawna; podmioty praw podstawowych; prawo prywatne; prawo konstytucyjne