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The Role of the Principle of Proportionality in Identifying Legal Capacity to Fundamental Rights*

Rola zasady proporcjonalności przy określaniu podmiotowości prawnej w zakresie praw podstawowych

ABSTRACT

The legal capacity to fundamental rights gives the right-holder the ability to exercise and enforce fundamental rights. In the absence or questionable status of the legal capacity of a right-holder, there is a need to justify such a position. In this regard, no general standards based on legal doctrine and jurisprudence can be identified. The paper focuses on the question of whether the principle of proportionality could play a role in identifying and justifying the legal capacity to fundamental rights. Based on a review of the literature, two functions of the proportionality analysis can be identified as relevant in this regard: it supports the justification of the decision to restrict fundamental rights

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and it precludes arbitrary decisions in relation to the limitation. The author argues that, based on its justificatory function, proportionality can play a role in identifying the legal capacity to fundamental rights in the case of human persons. In the case of autonomous organizations, in addition to its justificatory function, its function related to the exclusion of arbitrary decisions can be taken into account when using it as a standard for identifying legal capacity. In the case of human persons and autonomous organizations, there is a need for a negative justification of the limitation of legal capacity, based on proportionality. In the case of new challengers in fundamental rights disputes (such as future generations), a positive justification is required to determine legal capacity. The proportionality analysis does not play a role here, but rather other standards that require a rationality-based justification.

Keywords: function of the principle of proportionality; justification; precluding arbitrary decision-making; legal capacity to fundamental rights; negative and positive justification of legal capacity

INTRODUCTION

As a legal doctrine, the principle of proportionality has enjoyed unprecedented success in judicial practice, legislation, and legal theory around the world. Since the early decisions of the Federal Constitutional Court of Germany (Bundesverfassungsgericht) in the 1950s,[1] the doctrine has rapidly migrated and been transplanted by the European Court of Justice, the European Court of Human Rights, and national constitutional courts and supreme courts around the world in legal disputes related to limitation of fundamental rights.[2] Subsequently, national and international legal instruments codified the doctrine in general terms,[3] while the proportionality principle became a standard in other areas of law as well.[4] Various theoretical and methodological issues related to the doctrine have been extensively reflected upon in academic works,[5]

[1] See judgment of the Federal Constitutional Court of Germany [*Lüth*, BverfGE 7, 198] (1958); judgment of the Federal Constitutional Court of Germany [*Apotheken-Urteil*, BverfGe 7, 377] (1958).

[2] A. Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge 2012, pp. 181–202.

[3] See Article 36 of the Constitution of the Republic of South Africa (1996), Article 5 (4) of the Treaty on the European Union (2007).

[4] International humanitarian law, international human rights law, international trade law, maritime law, international criminal law, and EU law. The proportionality standard was part of national administrative law and national criminal law even previously, with a slightly different structure. See I. Rodopoulos, *The Dialectical Function of the Principle of Proportionality: A European Perspective*, "Critical Quarterly for Legislation and Law" 2017, no. 3, p. 205.

[5] R. Alexy, *Theorie der Grundrechte*, Baden-Baden 1985; A. Aleinikoff, *Constitutional Law in the Age of Balancing*, "The Yale Law Journal" 1987, vol. 96(5); E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*, Portland 1999; D.M. Beatty, *The Ultimate Rule of Law*, Oxford 2004; J. Rivers, *Proportionality and Variable Intensity of Review*, "Cambridge Law Journal" 2006, vol. 65(1); S. Gardbaum, *Limiting Constitutional Rights*, "UCLA Law Review" 2007, vol. 54(4);

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and the academic discussion of the doctrine continues to be lively,[6] even in fields other than law.[7]

In the literature on proportionality, less attention has been paid to the function of the doctrine. Those works that have considered this question, unanimously emphasize the role of proportionality in justifying the limitation of fundamental rights.[8] Justification is undoubtedly the key function of the doctrine, but a more detailed analysis may be useful in this regard, and other functions may also be ascribed to the principle of proportionality. In the first part, I examine this question on the basis of an analysis of the relevant literature. Once the functions of proportionality have been clarified, it will be possible to consider whether certain functions could link proportionality as a method of testing legal capacity to fundamental rights.

By their very nature, human rights belong to human beings.[9] However, in the context of a given constitutional system or a supranational legal order, where the exercise of human rights (in the context of the given system: fundamental rights) actually takes place, important practical questions arise. One might ask, whether every human being can exercise fundamental rights through his or her personal actions, or whether exceptions can be made in this respect. In the case of organizations

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D. Grimm, *Proportionality in Canadian and German Constitutional Law Jurisprudence*, "University of Toronto Law Journal" 2007, vol. 57(2); E. Brems (ed.), *Conflicts between Fundamental Rights*, Antwerp–Oxford–Portland 2008; A. Stone Sweet, J. Matthews, *Proportionality Balancing and Global Constitutionalism*, "Columbia Journal of Transnational Law" 2008, vol. 47; A. Barak, *op. cit.*; M. Klatt, M. Meister, *The Constitutional Structure of Proportionality*, Oxford 2012; V.C. Jackson, *Constitutional Law in the Age of Proportionality*, "The Yale Law Journal" 2015, vol. 124(8).

[6] S. Tsakyrakis, *Proportionality: An Assult on Human Rights?*, "International Journal of Constitutional Law" 2009, vol. 7(3); G. Webber, *The Negotiable Constitution: On the Limitation of Rights*, Cambridge 2010; K. Möller, *The Global Model of Constitutional Rights*, Oxford 2012; B. Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, "Duke Journal of Comparative and International Law" 2012, no. 2; F.J. Urbina, *A Critique of Proportionality*, "The American Journal of Jurisprudence" 2012, vol. 57(1); N. Petersen, *Alexy and the "German" Model of Proportionality: Why the Theory of Constitutional Rights Does Not Provide a Representative Reconstruction of the Proportionality Test*, "German Law Journal" 2020, vol. 21(2).

[7] D. Bilchitz, L. Ausserladscheider Jonas, *Proportionality, Fundamental Rights and the Duties of Directors*, "Oxford Journal of Legal Studies" 2016, vol. 36(4) – arguing that the proportionality principle might be taken into consideration in corporate decision-making; N. Lacey, *The Metaphor of Proportionality*, "Journal of Law and Society" 2016, vol. 43(1) – focusing on the capacity of proportionality to coordinate social expectations.

[8] A. Barak, *op. cit.*, pp. 131–174; D. Grimm, *op. cit.*, p. 391; M. Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Right-Based Proportionality Review*, "Law and Ethics of Human Rights" 2010, vol. 4(2); D. Kyritsis, *Whatever Works: Proportionality as a Constitutional Doctrine*, "Oxford Journal of Legal Studies" 2014, vol. 34(2), p. 391; M. Cohen-Eliya, I. Porat, *Proportionality and Constitutional Culture*, Cambridge 2013, p. 111.

[9] J. Matějková, O. Pavelek, B. Vítek, *The Influence of the Ius-naturale Conception of ABGB on the Regulation of Personality Protection and Compensation for Non-Proprietary Damage in the Czech Civil Code*, "Hungarian Journal of Legal Studies" 2021, vol. 62(3), pp. 185–197.

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and certain groups of people, the question is twofold: whether certain fundamental rights belong to the group in question, and how the group as an autonomous entity can exercise these rights. Moreover, in the case of new challengers in fundamental rights disputes, such as elements of nature,[10] the questions relating to the status of the right-holder and those relating to the possibility of exercising the rights, are more complex. As part of an institutional research project,[11] in this article I consider the above questions under the umbrella concept of "legal capacity to fundamental rights", which focuses on the question of whether a right-holder is in a position to enforce his, her, or its fundamental rights before the courts. The peculiarities of these questions will be examined in detail in the second part, on the basis of the relevant literature and with reference to recent case law.

In the absence of clear general and specific standards relating to the identification of legal capacity to fundamental rights, it is plausible to consider all cases in which a particular entity is deprived of the enforcement of his, her or its fundamental rights as limitations of fundamental rights. The approach is based on the assumption that fundamental rights are indispensable for their enforcement before judicial bodies.[12] The principle of proportionality, as a general standard related to the justification of the limitation of fundamental rights, may play a key role in assessing the actual legal capacity to fundamental rights in the case of various entities. Based on the particularities of the mentioned groups of right holders and the functions of proportionality, the possibility of applying the doctrine in determining the legal capacity to fundamental rights, as well as its limits, also is examined.

THE FUNCTION OF THE PRINCIPLE OF PROPORTIONALITY

Scholarly works rarely focus explicitly on the function of the principle of proportionality. In legal disputes related to fundamental rights, the proportionality test serves as a method of examination of the question, whether the limitation of the fundamental right is acceptable in the given context. Therefore, much attention has been paid in the literature to the particularities of the method itself,[13] as well as to the outcome of the examination, namely, the level of protection of fundamental

[10] J. Kersten, *Who Needs Rights of Nature?*, [in:] *Can Nature Have Rights? Legal and Political Insights*, eds. A.L. Tabios Hillebrecht, M.V. Berros, "RCC Perspectives: Transformations in Environment and Society" 2017, no. 6.

[11] #FULCAP "The fundamental rights concept of legal capacity", ELTE Faculty of Law (Budapest, 2019–2023).

[12] B. Somody, *Constitutional Complaints by State Organs? Changes in the Standing Requirements before the Hungarian Constitutional Court*, "ELTE Law Journal" 2023, no. 1, p. 116.

[13] N. Petersen, *How to Compare the Length of Lines with the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, "German Law Journal" 2013, vol. 14(8);

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rights that proportionality can offer.[14] As mentioned above, when referring to the function of the method, the majority of the authors mention the justification of the limitation of fundamental rights.[15] This function is not challenged even by those authors who take a critical stance in relation with proportionality,[16] rather question the appropriateness of the method for the genuine justification of the decision made in a fundamental right dispute.[17]

In the following subsections, I examine in detail the most important functions of the principle of proportionality, based on international discourse.

1. Justification

The justification function of the principle of proportionality can be highlighted based on a closer examination of certain particularities of the method. A key particularity in this regard is that the proportionality principle offers a structured framework of argumentation[18] for the examination of the fundamental rights conflict. After identifying the limitation of fundamental rights in the given case (which presupposes the identification of the affected fundamental right, the means which cause the limitation, and the extent of the limitation), the examination starts with the identification and assessment of the legislative purpose which is at the basis of the limitation (legitimate aim subtest). This legitimate aim has to be taken into consideration when examining whether the means used for the limitation are in rational connection with it (suitability subtest). When evaluating the means used – whether these are the least restrictive compared to alternative means – the legislative purpose is also the reference point of the comparison (necessity subtest). In the final stage of the proportionality examination, the importance of the legislative aim has to be balanced against the severeness of the limitation (proportionality in the strict sense). In this framework of argumentation, the logical order of the subtests is fixed, as the findings of certain subtests serve as starting points for the next subtest.

As a result – if the proportionality test is properly used – the chain of arguments and the examination of the related questions will be transparent. The transparency of the reasoning opens the possibility to trace and verify the completeness of the

M. Borowski, *On Apples and Oranges: Comment on Niels Petersen*, "German Law Journal" 2013, vol. 14(8).

[14] K. Möller, *Proportionality: Challenging the Critics*, "International Journal of Constitutional Law" 2012, vol. 10(3); M. Klatt, M. Meister, *Proportionality – a Benefit to Human Rights? Remarks on the I·CON Controversy*, "International Journal of Constitutional Law" 2012, vol. 10(3).

[15] See footnote 8.

[16] B. Schlink, *op. cit.*, p. 296.

[17] F.J. Urbina, *op. cit.*, p. 75.

[18] A. Stone Sweet, J. Matthews, *op. cit.*, p. 161.

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reasoning, the coherence, and consistency of the arguments used[19] as well as of the conclusion of the reasoning. One may add that the transparency of arguments is of key importance in fundamental rights disputes. The concurring legal values in most of the cases have identical importance,[20] while the wording of legal norms which have to be taken into consideration are formulated in an abstract language. Therefore, formulating a decision in a legal dispute requires a complex task of argumentation. The structure of the proportionality analysis pushes the court in the direction to formulate its arguments in the given framework. The result of the examination will be convincing if the court names its decisive and retrieved arguments as well as its conclusions related to every subtest.[21]

Other aspects of justification could be also mentioned. The requirement of justification is in strong relation to the rule of law principle: the principle of proportionality itself was first deduced from the principle of *Rechtsstaat* by the Bundesverfassungsgericht. Since then, in many cases proportionality is taken in the literature "as a criterion for the perfection of the 'rule of law'."[22] Kumm argues that it follows from the proportionality-based judicial review the right of the people to challenge the decisions made by state organs before independent judicial fora in order to verify the justiciability of the public interests behind those decisions.[23] Kyritsys demonstrates that the requirement of proportionality-based reasoning can be explained as a procedural right of the people to get acceptable explanations in the case of the limitation of their fundamental rights.[24] Klatt is more straightforward when explaining that the normative basis of proportionality lies in a moral right to justification.[25]

These approaches are in line with the general requirement according to which legal principles (including the proportionality principle) must serve the rationalization of legal decisions as – between certain circumstances – these limit the margin of

[19] Non-controversy and coherence can be taken as general criteria of legal reasoning, alongside universalizability and defeasibility. See D. Šušnjar, *Proportionality, Fundamental Rights, and Balance of Powers*, Leiden 2010, pp. 34–45.

[20] R. Alexy, *A Theory of Constitutional Rights*, Oxford 2010, pp. 47–48.

[21] This argumentation framework requires at the same time internal justification (related to the correctness of deducing conclusions in the given argumentation scheme) and external justification (which requires the soundness of the premises taken into consideration). See idem, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, Oxford 2011, p. 221.

[22] A. Stone Sweet, J. Matthews, *op. cit.*, p. 76.

[23] M. Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, "European Journal of Legal Studies" 2011, vol. 4(1).

[24] D. Kyritsis, *op. cir.*, p. 413.

[25] M. Klatt, *Proportionality and Justification*, [in:] *Constitutionalism Justified: Rainer Forst in Discourse*, eds. E. Herlin-Karnell, M. Klatt, H.A. Morales Zúniga, Oxford 2019.

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discretion of judges, therefore, their decisions will be less arbitrary or subjective.[26] The justification function of proportionality can also be evaluated within a wider context, the "culture of justification"[27] – this relation will be explained in detail in subsection four.

2. Precluding arbitrary decision-making

In support of the justification function, several authors invoke the objective or relatively objective nature of the principle of proportionality.[28] Beatty argues that the objectivity of proportionality is supported by the fact that it can be used to turn the principled, moral considerations and social dilemmas into factual questions.[29] Not surprisingly, those authors who take a critical stance in relation with proportionality, often question its objectivity. Their typical arguments are that in the proportionality in the narrow sense subtest, the outcome of the balancing may be arbitrary or not reflect the legal questions,[30] and it is based on the judges' personal impressions of how the competing fundamental rights positions and values are weighed against each other.[31] Critics argue that the outcome of the proportionality test more often contains mere statements (assertions) than conclusions that are actually supported by arguments.[32]

It is a key question also related to the justificatory function of proportionality the dilemma, whether the method is capable to eliminate arbitrary decisions, or at least to reduce the possibility of those. Indeed, proportionality does not offer a structure of argumentation based solely on objective findings – this is generally neither possible nor desirable in the context of deciding legal questions. Beatty's approach, according to which all the dilemmas underlying each case can be turned into questions of fact, is only partially right: only the suitability subtest can be considered as a pure factual test, requiring objective findings. However, it is of key importance to exclude arbitrary assessments and solely value judgments from the argumentation. The argumentation framework of proportionality, which requires answering a set of logically linked sub-questions, significantly reduces this chance. Proportionality

[26] T.-I. Harbo, *The Function of Proportionality Principle in EU Law*, "European Law Journal" 2010, vol. 16(2), p. 160.

[27] This notion was mentioned first in the literature by Mureinik, who characterized the transition in the Republic of South Africa as a "shift from a culture of authority to a culture of justification". See E. Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, "South African Journal of Human Rights" 1994, vol. 10(1).

[28] Y. Arai-Takahashi, *Proportionality*, [in:] *The Oxford Handbook of International Human Rights Law*, ed. D. Shelton, Oxford 2013, p. 467.

[29] D.M. Beatty, *op. cit.*, pp. 170–171.

[30] J. Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy*, Cambridge 2012, p. 259.

[31] S. Tsakyrakis, *op. cit.*, p. 483.

[32] G. Webber, *op. cit.*, p. 89.

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requires, on the one hand, the use of rational arguments in the chain of arguments and, on the other, requires the court to make its own value-related position clear, if it is necessary to apply it. Value judgments partially may take place in the balancing stage, in proportionality in the strict sense subtest. Based on the detailed analysis of the critical approaches to proportionality, Möller argues that proportionality in the strict sense provides judges with the possibility to apply moral arguments[33] – which will not be arbitrary if all of the preceding legal questions were examined in a structured and transparent argumentation framework and the subquestions to be balanced compellingly follow from the previous arguments.

One can conclude that the judicial decision based on proportionality reasoning is not arbitrary if it can be justified on a rational basis – by way of examining the consistency and coherence of the chain of arguments and its elements (internal justification), as well the soundness of the preconditions taken into consideration as premises (external justification). In this regard, the justification function and that of precluding arbitrary decision-making are interrelated. In a broader context: the use proportionality test can protect individuals against arbitrary government interventions affecting their fundamental rights.[34]

3. Other functions[35]

Other functions also can be attributed to the principle of proportionality. The transparent and professional use of the method can strengthen the legitimacy of the judicial decisions in terms of predictability of future decisions[36] and social trust in judicial decisions.[37] The proportionality principle can also have a significant impact on the effectiveness of the protection of fundamental rights in general.[38] The principle of proportionality can also support finding a fair balance in the case of concurring values related to fundamental rights. This approach is constantly present in the practice of the European Court of Human Rights (typically as a fair balance between the affected fundamental right and the competing public interest),

[33] K. Möller, *Proportionality*..., p. 717.

[34] P. Popelier, C. Van De Heyning, *Procedural Rationality: Giving Teeth to the Proportionality Analysis*, "European Constitutional Law Review" 2013, vol. 9(2), p. 261.

[35] The functions of proportionality can be grouped based on different approaches, e.g. the distinction between formal and substantive functions. See Z. Pozsár-Szentmiklósy, *The Formal and Substantive Functions of the Principle of Proportionality*, "Acta Juridica Hungarica" 2015, vol. 56(2–3).

[36] M. Klatt, M. Meister, *The Constitutional Structure*..., pp. 167–168; É. Boda-Balogh, *Case--Based Reasoning as a Measure of Constitutional Adjudication: Remarks on the Jurisprudence of the Hungarian Constitutional Court in Defamation Cases*, "Hungarian Journal of Legal Studies" 2023.

[37] Y. Arai-Takahashi, *op. cit.*, p. 467.

[38] *Ibidem*, p. 447.

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however, there are similar approaches in the practice of national courts.[39] Supporting the democratic functioning of the state can also be a function attributed to the principle of proportionality. Taking into account Alexy's concept of argumentative representation,[40] one can argue that the use of proportionality can strengthen this relation. The principle of proportionality can also have a dialectical function as it is similar to a "Socratic argumentation" because courts regularly assess the public reasons and justifications behind the decisions of state organs[41] and it leads to a constant dialogue between courts and the legislator.[42]

Among the many interesting explanations of the functions of proportionality, Möller's approach deserves special attention. He argues that the application of the proportionality principle is linked to the protection of individual autonomy, as a protected fundamental rights position. In his view, the state is obliged to guarantee equal protection for the autonomy of individuals. Therefore, every time when state intervention in individual autonomy takes place, there is a requirement of justification, which shall be based on proportionality.[43] In other words, a strict approach has to be taken in every case of the limitation of individual autonomy.

4. The culture of justification and procedural rationality

As mentioned above, proportionality, as a requirement, can be evaluated in a wider context – that of the culture of justification. Reflecting on the notion formulated by Mureinik in the context of the transition in the Republic of South Africa,[44] the concept of the culture of justification was elaborated by Cohen-Eliya and Porat. The authors argue that "at its core, a culture of justification requires that governments should provide substantive justification for all their actions".[45] In their view, the authority of state organs to act is only a necessary but not sufficient condition for legitimacy and legality. State actions "must be justified in terms of reasonableness, which means that it must be the result of a proper balance between conflicting considerations and

[39] The *Praktische Konkordanz* doctrine in the practice of the Bundesverfassungsgericht according to which the competing values have to be limited against each other to the extent of reaching the optimum and consistent functioning of each. See K. Hesse, *Grundzüge des Verfassungsrechts für die Bundesrepublik Deutschland*, München 1988, p. 27.

[40] This approach – alongside elections – takes the argumentation and discourse related to the decisions of state organs as an important factor of the relations between voters and state. See R. Alexy, *Balancing, Constitutional Review, and Representation*, "International Journal of Constitutional Law" 2005, vol. 3(4), pp. 578–579.

[41] M. Kumm, *op. cit*.

[42] A. Barak, *op. cit.*, p. 465.

[43] K. Möller, *The Global Model…*, p. 112.

[44] See E. Mureinik, *op. cit*.

[45] M. Cohen-Eliya, I. Porat, *Proportionality and the Culture of Justification*, "American Journal of Comparative Law" 2011, vol. 59(2), p. 466.

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reflect an appropriate means-ends rationality".[46] These requirements can be clearly reflected by the appropriate use of proportionality reasoning, therefore, proportionality is "an indispensable – indeed, inherent – part of the culture of justification".[47] The authors attribute these particularities to constitutional democracies which function on the basis of the concept of deliberative democracy.

Popelier and Van De Heyning accept the concept of the culture of justification and add an important component to it in relation to fundamental rights disputes. Their starting point is that in practice, there are deficiencies in the proportionality review, both in the case of national and international courts. Courts often show deference to the state's actions and in many cases do not scrutinize the governmental arguments related to the public interest articulated in the given legal dispute.[48] The authors argue that "the proportionality principle is based on the idea that individuals should be protected against arbitrary government intervention, implying that government must act in a rational way".[49] This requirement of procedural rationality[50] (to call the government to provide relevant and prudent information in relation with its decisions) could provide more efficiency for the proportionality principle. Procedural rationality is compatible with the general concept of the culture of justification.

Taking into consideration these contextual elements can significantly strengthen the justificatory function of proportionality, as well as that of precluding arbitrary decisions. In the culture of justification, the limitation of fundamental rights requires justification by every state organ. The legislative and executive powers, which impose limitations on fundamental rights, are required to explain their decisions, while the courts examine whether those limitations are compatible with the related constitutional safeguards. The proportionality analysis offers a plausible method for each of the above stakeholders to justify their position on the limitation of fundamental rights in the given context – in that regard, the justificatory function of proportionality plays a key role. Based on the requirement of procedural rationality, government is required to express sound and verifiable arguments behind its decision on the limitation of fundamental rights. Those arguments can be examined efficiently by courts within the framework of proportionality analysis. Therefore, arbitrary governmental interventions can be excluded in the given context.

[46] *Ibidem*, p. 481.
[47] *Ibidem*.
[48] P. Popelier, C. Van De Heyning, *op. cit.*, p. 238.
[49] *Ibidem*, p. 249.
[50] *Ibidem*, p. 251.

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PROPORTIONALITY AND THE IDENTIFICATION OF LEGAL CAPACITY TO FUNDAMENTAL RIGHTS: POSSIBILITIES AND LIMITS

Taking the above-described fundamental rights concept (being a right-holder is indispensable from the legal capacity to exercise and enforce rights) as a basis, the situations in which a right-holder – due to various reasons – is not in a position to enforce his, her or its fundamental rights shall be considered as limitations. These limitations do not target the concerned fundamental right itself, but rather the enforcement of the right. However, if the fundamental right is indispensable from the legal capacity to exercise and enforce it, the limitation will still affect the fundamental right itself. Therefore, it is plausible to argue that standards related to the limitation of fundamental rights might be also taken into consideration in the case of the limitation of the legal capacity to fundamental rights.

The particularities of the proportionality principle described in the first part come to play after the identification of the limitation of fundamental rights in the given context. The encroachment upon fundamental rights can be easily detected in most cases, however, important preliminary questions may also arise.

One of these questions is whether the person/the entity who/which claims the limitation of fundamental rights is a right-holder in the given context. In classic legal doctrine, the concept of the person was indispensable from fundamental rights claims. However, in recent decades, personhood has been acknowledged in the literature as an umbrella concept, composed of the biological concept of the human being, the notion of a rational agent, and a unity of consciousness.[51] These elements often but not always overlap, therefore, entities different from human persons can also have fundamental rights claims. In this context, it is a preliminary question, whether the affected fundamental right belongs to the given person or entity. In most cases, this question can be answered based on positive law: constitutions and charters on fundamental rights explicitly mention the groups of right-holders.[52] When positive law does not contain any related regulation in this regard, e.g. in the case of rights of organizations, judicial practice may also offer a consolidated and comprehensive interpretation in this regard.[53] There are also cases – mostly related to new challengers – when positive law offers no answer to this question and consolidated judicial practice does not exist. In such cases, unique, precedent-like

[51] J.D. Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, "Columbia Law Review" 2005, vol. 105(1), pp. 209–249.

[52] The general wording of the European Convention on Human Rights (ECHR) which mentions "everyone" and "no one" (in the case of bans) can be considered as typical, as well as the provisions of national constitutions which confer certain political rights (e.g. the right to vote) to citizens.

[53] In its practice, the Bundesverfassungsgericht offers a negative list of those rights which – by their nature – do not belong to organizations, only to humans. See H. Dreier (ed.), *Grundgesetz Kommentar*, Berlin 2013, pp. 1754–1755.

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decisions can formulate the possible, future approaches to these questions.[54] In both cases related to judicial interpretation – consolidated practice and unique, precedent-like decisions – the assessment of the preliminary question related to the position of right-holders is based on fundamental rights' doctrine, taking into consideration the particularities of the fundamental right in question.

After answering the first preliminary question, the second one has to be addressed which seems to be more complex, and it is related to the central dilemma of this paper: how can the legal capacity to fundamental rights identified? It is clear that such identification cannot be the same in the case of every right-holder. Adult persons who do not face any legal limitation in their capacity to act practically are in a position to exercise their fundamental rights to the full extent. In the case of limitations related to age, cognitive capacity, or regulations of specific fields of law (e.g. civil law, criminal law), the possibility to exercise fundamental rights in person can be questioned, however, the mentioned limitations do not justify the limitation of legal capacity related to every fundamental right. In the case of organizations and new challengers, only those fundamental rights come into play which can be attributed to them, however, the question of legal capacity to fundamental rights has to be answered in the case of this limited number of fundamental rights as well. Procedural acts may provide legal standing for some entities or may contain specific provisions related to representation, however, these elements of positive law offer only partial answers related to legal capacity to fundamental rights.

In the next subsections, I analyze how the principle of proportionality can be applied to the examination of the second preliminary question. After focusing on the related methodological questions, I examine the applicability of the proportionality test separately in the case of the three examined categories of right-holders (human persons, organizations, new challengers), in order to reflect on the particularities of these. As the principle of proportionality as a method leaves open the possibility to take into consideration the specific circumstances of the legal dispute in question,[55] it is plausible to examine its applicability for the identification of legal capacity in the case of three distinct categories.

Two important remarks have to be made in this regard. The proportionality test can be used for the identification of legal capacity only in the case the structure of the legal question is similar to a state intervention in an existing, protected position related to fundamental rights. In the absence of these, other methods and approaches may come into play. If this requirement is met, the proportionality analysis which might be used for identifying the legal capacity to fundamental rights will be different from the proportionality test to be used for the examination of the justifiability

[54] For example, the *Urgenda Foundation v. the Netherlands* [ECLI:NL:RBDHA:2015:7196] judgment of the Supreme Court of the Netherlands in an important climate litigation case.

[55] A. Barak, *op. cit.*, pp. 463–464.

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of the limitation of fundamental rights in the legal dispute in question. In other words, two proportionality analyses might be conducted in cases where the legal capacity to fundamental rights is not unequivocal in the given case.

1. Methodological questions

The proportionality-based examination of fundamental rights disputes has many particularities which are well-described in the literature. For the purpose of this paper, those methodological questions are relevant which focus on the relation of proportionality as a method and those notions and concepts which have to be taken into consideration in the course of the argumentation. These questions are best described by the problem of "definitional generosity". This problem refers to the fact that the limitation clauses of constitutions and fundamental rights charters use abstract terms,[56] therefore, allowing a wide margin of interpretation for the court when assessing limitations. This broad formulation of the limitation clauses in practice leads to the broad interpretation of the potential legitimate aims which will be balanced against fundamental rights. The problem of definitional generosity can be summarized in the broad interpretation and broad definition of fundamental rights themselves.[57]

Strong arguments are demonstrating that definitional generosity is not problematic and that the broad definition of fundamental rights might be preferable instead of the narrow approach. Narrow definitions of fundamental rights are the results of balancing conducted in former cases in which the limitation of fundamental rights was examined. In this regard, narrow definitions might be structurally deficient as these mix up the right's content and the right's restriction. It is more important that narrow definitions might reduce the state's duty to justify fundamental right's restrictions (in cases that seem to be in accordance with the narrow definition of the concerned fundamental right) while the broad definition of fundamental rights always requires the state to justify the limitation of rights.[58]

None of the authors question the fact that proportionality analysis operates at its best with broad definitions – the debate relates to the question of whether narrow or broad definitions lead to better protection of fundamental rights. From the point of view of the potential use of proportionality in identifying legal capacity to fundamental rights, the most relevant question is whether broad concepts are useful for this purpose. As described above, the legal capacity to fundamental rights might be handled as a preliminary question that has to be examined separately in

[56] For example, according to Article 19 (2) of the Basic Law for the Federal Republic of Germany "in no case may the essence of a basic right be affected".

[57] See S. Tsakyrakis, *op. cit.*, p. 480.

[58] M. Klatt, M. Meister, *Proportionality…*, pp. 700–701.

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the case of different rights, right-holders, and situations in which the exercise of certain fundamental rights occurs. In every case when this situational examination takes place, it is plausible to take legal capacity to fundamental rights in the broadest sense in order to justify its limitation.

2. Human persons

Human persons are by definition right-holders of fundamental rights. As mentioned above, the right-holder status of a human person – as a preliminary question – can be easily answered based on positive law and fundamental rights doctrine. However, the second preliminary question – that of identification of legal capacity to fundamental rights – is more complex and shall be examined separately in the case of typical limitations related to different groups of human persons.

Children

In almost every legal system, children are limited in their liability in legal terms related to their conduct, in their duties *vis-á-vis* society and state, as well as in their possibility to make declarations and acts which would have legal consequences.[59] All these limitations are based on age and are usually prescribed in laws that regulate a specific legal field. These provisions can be justified from the point of view of protection of public interest (related to the specific field of law) and more importantly, also from the point of view of protecting the children themselves.[60] As constitutions and fundamental rights' charters usually do not contain any age limit related to the exercise of fundamental rights, any limitation which takes place in practice in this field, requires justification. The provisions of the specific legal acts cannot serve this purpose: it is not plausible to deduct from a piece of law that takes into account the public interest related to a particular social field a general age limit related to the exercise of fundamental rights which belong to every human being and have their foundation in a higher law.

It is a scientific fact that children do not have the same knowledge, experience, and cognitive capacity as adults do,[61] which may be taken into consideration when examining the possible effects of their decisions on their own life and on society. However, children are not a homogenous group: there may be significant differences between

[59] O. Szeibert, *The Voice of the Child and the Implementation of the Child's Right to Be Heard in Parental Responsibility Matters and Cases*, "Hungarian Journal of Legal Studies" 2023.

[60] This approach has its basis in the UN Convention on the Rights of the Child (1989), and its powerful formula of "the best interest of the child" (Article 3 para. 1).

[61] H. Brighouse, *What Rights (If Any) Do Children Have?*, [in:] *The Moral and Political Status of Children*, eds. D. Archard, C.M. MacLeod, Oxford 2002.

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the cognitive capacity, life experience, and independence in the decision-making of children of the same age,[62] while the same child may make different decisions related to the exercise of the same right in his/her different ages because of his/her evolving capacities.[63] Therefore, the mentioned factors (cognitive capacity, life experience, independence in decision-making) are dynamic and unique in the case of every right-holder, also depending on the particularities and the context of the exercise of the given fundamental right. When the legislator or the court is in a position to make a decision on the legal capacity to exercise fundamental rights in the given context, it has to take into account these factors. As such decision means limiting the access of the affected persons to their fundamental rights, a strong justification is required.

Due to the fact that children are right-holders of every fundamental right, in their case, there is a need for negative justification if the state or the international human rights regime allows any departure by any means from the position of being capable to exercise those rights. In other words, the limitation of legal capacity fundamental rights needs to be justified. The application of the proportionality test is plausible for such justification as the structure of the legal question is similar to a state intervention to an existing, protected position related to fundamental rights.

An illustrative example of such, a potential justification might be the case related to the minimum voting age, decided by the Supreme Court of New Zealand.[64] According to the Electoral Act (1993) and the Local Electoral Act (2001) the minimum voting age is 18 years in New Zealand. The Bill of Rights (1990) prescribes that every citizen who is over the age of 18 years can exercise his/her right to vote,[65] and also contains a provision on the freedom from discrimination.[66] The petitioners claimed that the electoral acts contain provisions which can be considered as age-based discrimination in relation with the right to vote. The Supreme Court ruled that the provisions of the Electoral Act are inconsistent with the Bill of Rights, which inconsistencies have not been justified.[67] In this case, the Court required a stronger justification than reasonableness,[68] explicitly referring to proportionality.[69] Even in the absence of the structured reasoning based on proportionality, this case illustrates, what role could play the proportionality analysis in the justification of an age limit which results in the limitation of the exercise of a political right.

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[62] According to Archard, these elements are required for rational autonomy. See D. Archard, *Children: Rights and Childhood*, London 2015, pp. 88–91.

[63] Article 5 of the UN Convention on the Rights of the Child.

[64] Judgment of the Supreme Court of New Zealand [*Make it 16 v. Attorney General*, SC 14/2022 [2022] NZSC 134] (2022).

[65] Section 12 of the New Zealand Bill of Rights Act (1990).

[66] Section 19 of the New Zealand Bill of Rights Act.

[67] SC 14/2022 [2022] NZSC 134, section B.

[68] *Ibidem*, Reasoning, [45].

[69] *Ibidem*, [55].

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Persons living with cognitive disabilities

In the case of people living with cognitive disabilities, on the basis of the most influential international treaty,[70] their capacity to exercise rights (including fundamental rights) shall not be subject to limitations, they rather require support.[71] However, the treaty recognizes that in social life, the members of this group may face various obstacles. In the wording of the treaty, "disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".[72]

In practice, cognitive disabilities[73] could lead to decisions of national authorities on ordering (partial or full) guardianship in the case of the given persons on the basis of civil law or on declaring the absence of criminal liability on the basis of criminal law. Such decisions are usually conceived as limitations in the case of adult persons. The legal limitations to act and limitations of liability are usually specified in the language of civil law and criminal law, which might be in correlation with certain fundamental rights, but of course not every fundamental right. In other words, procedural limitations based on cognitive disability may not result in full limitation of access to fundamental rights.

As people living with cognitive disabilities are right-holders of every fundamental right, in their case, limitations of access to certain fundamental rights also require a negative justification. As the structure of the legal question is analogous with a state intervention to an existing, protected position related to fundamental rights, proportionality analysis might function as a plausible standard for such justification.[74]

The European Court of Human Rights judgment in case *Alajos Kiss v. Hungary*[75] illustrates how proportionality analysis could support the examination of

[70] UN Convention on the Rights of Persons with Disabilities (CRPD).

[71] A. Szerletits, *Paternalism vs. Autonomy? Substitute and Supported Decision-Making in England and Hungary*, "Hungarian Journal of Legal Studies" 2022, vol. 62(1), pp. 75–95.

[72] Preamble of the UN Convention on the Rights of Persons with Disabilities, Section 5.

[73] This umbrella term could include psycho-social disabilities, mental disabilities, developmental disorders, brain disorders after birth, and dementia. See E. Flynn, A. Arstein-Kerslake, *The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?*, "Berkeley Journal of International Law" 2014, vol. 32.

[74] It might be noted that in the practice of the Committee on the Rights of Persons with Disabilities (treaty body), the limitations of legal capacity based on disability are handled as a discrimination cases, with few possibilities for justification. The justifiable limitations are usually based on the "objective and reasonable justification" test. See S. Gurbai, *Beyond the Pragmatic Definition? The Right to Nondiscrimination of Persons with Disabilities in the Context of Coercive Interventions*, "Health and Human Rights Journal" 2020, vol. 22(1).

[75] Judgment of the European Court of Human Rights [*Alajos Kiss v. Hungary*, Application no. 38832/06] (2010).

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a cognitive disability-based limitation of a fundamental right. Mr. Alajos Kiss complained that – based on the provisions of the Constitution – he was excluded from the voters' list due to the fact that he was under partial guardianship (based on his manic depression), which might be in contradiction with the right to free elections.[76] The Court examined the alleged violation of fundamental rights in a detailed argumentation structure based on proportionality. The Court emphasized that the limitation affected a particularly vulnerable group, therefore, the margin of appreciation of the national legislator should be narrower in this field. It did not accept the absolute, blanket restriction of the right to vote without a detailed examination of the individual circumstances.[77] As a result, the Court found this limitation unjustifiable based on proportionality, requiring unique, strong justifications in similar cases.

3. Organizations

The jurisprudence related to fundamental rights which can be attributed to organizations is well developed in many legal systems[78] and international human rights regimes,[79] therefore, their right-holder status in the given context can be answered based on a mostly unequivocal basis. The identification of their legal capacity to fundamental rights may be examined by taking into consideration the autonomy these enjoy *vis-á-vis* their individual members and also *vis-á-vis* the state. Organizations that lack autonomy, cannot be taken into consideration from the perspective of exercising fundamental rights.

Organizations that function based on a specific aim or interest, type of activity, and organize to some extent the activity of its members, often have a status specified by law, or recognized by state organs ("legal personality"). However, this is not a necessary condition for organizations to claim their rights. A group of teachers and parents, editors, and journalists can also have legally protected interests and rights in the absence of legal personality, as informal organizations. The most plausible justification for this position is that of the indirect protection of the rights and interests of the human persons who are behind the organization. In order to make a clear distinction from the individual rights of its members, it is important to refer in this regard to rights that belong to the organization as a separate entity. In other words, organizations can claim rights based on some autonomy from its members.[80]

[76] Article 3 of the Protocol No. 1 to the ECHR.

[77] Case of *Alajos Kiss v. Hungary*, 38, 42–43.

[78] See footnote 53 related to the practice of the Bundesverfassungsericht.

[79] See Article 34 ECHR.

[80] See V. Engström, *Powers of Organizations and the Many Faces of Autonomy*, [in:] *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order*, eds. R. Collins, N.D. White, London 2011, pp. 213–214.

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In the case of organizations that do have legal personality, or which are otherwise recognized by law,[81] the legal capacity to fundamental rights may overlap with the representation structure specified by law, therefore, the representative can claim and enforce certain fundamental rights of the organization in question. The mere fact that there is no (procedural) provision of law related to representation in the case of a given (informal) organization, does not mean that the organization in question cannot claim fundamental rights which otherwise are attributed to it. Otherwise, the possibility of organizations exercising their fundamental rights would solely depend on the arbitrary decision of the legislator when creating the regulation of legal personality and representation. In other words, rules on legal personality and procedural provisions related to representation neither constitute the right-holder status, nor the legal capacity to fundamental rights. If the organization in question functions on the basis of institutional autonomy, its members are in a position to nominate their representative by formal or informal means, which shall be accepted by other stakeholders. In the case, state organs act on the contrary (do not accept informal representation), that can be considered as limitation of the legal capacity to fundamental rights of the given organization, which requires justification.

As autonomous organizations are right-holders of certain fundamental rights, in their case, limitations of access to these rights require a negative justification. As the structure of the legal question is similar to a state intervention to an existing, protected position related to fundamental rights, proportionality analysis might be a plausible standard for such justification. Alongside the justificatory function of proportionality, its function of precluding arbitrary decisions also plays a role in this regard as the state is in a position the regulate the functioning of organizations on an arbitrary basis.

The *Alberta v. Hutterian Brethren* case of the Supreme Court of Canada[82] illustrates what is the importance of such justification. The case related to the change in regulation related to the issuance of drivers' licenses in the province of Alberta. The previous regulation allowed exceptions from the requirement of photographing the holders of drivers' licenses on religious grounds, while the new regulation made the photo requirement general, without the possibility of exceptions. The members of the Wilson Colony of Hutterian Brethren challenged the constitutionality of the regulation alleging an unjustifiable breach of their religious freedom. Based on well-structured reasoning and precise proportionality analysis,[83] the Supreme Court

[81] For example, legal structures without legal personality in some legal systems (commercial partnership, public partnership, limited partnership).

[82] Judgment of the Supreme Court of Canada [*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, 2 S.C.R. 567] (2009).

[83] Z. Pozsár-Szentmiklósy, *The Canadian Approach to Fundamental Rights Disputes: Methodological Exceptionalism in Constitutional Interpretation and Proportionality Reasoning*, "ELTE Law Journal" 2017, no. 2.

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upheld the constitutionality of the regulation. However, it is more important that the Court accepted the legal capacity to fundamental rights of the given religious community in the form as it existed. The Court emphasized that the community maintains a rural, community lifestyle, carrying on a variety of commercial activities, part of which some of their members need drivers' licenses in order to maintain the viability of their communal lifestyle. In the absence of this approach, a negative justification would have been required, potentially based on proportionality.

4. New challengers

By new challengers, one might understand a heterogenous group of potential right-holders, different from human persons and organizations. Based on the present state of the national and international regulations, jurisprudence of national and international judicial fora, as well as academic works, no general and comprehensive theory can be attributed to these entities. Therefore, both preliminary questions (that of being a right holder and of having the legal capacity to fundamental rights) can be answered on a situational basis, based on unique, relevant decisions of judicial fora, in the case of the most significant groups. I will examine the possible approaches to the identification of legal capacity to fundamental rights of new challengers by focusing on future generations.

The protection of the interests of future generations has gradually become an important element of national constitutional systems and international human rights regimes in recent times.[84] The term "future generations" is often associated with children and the "rights of future generations" with children's rights.[85] By recognizing the overlap between these groups and these rights,[86] one has to emphasize that there are also significant differences between them which have to be taken into consideration. Those members of future generations who are not born are not subjective right-holders, therefore, conceptually form a different entity compared to children. For the conceptual clarity of this analysis, I take the term "future generations" as a group that is distinct from children, therefore, the interests (rights) of future generations may also differ from children's rights.

At first sight, it may seem difficult to identify the rights and interests of future generations as the entity itself has no clear definition. However, national constitu-

[84] E. Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, "The American Journal of International Law" 1999, vol. 84(1); R.S. Abate, *Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources*, Cambridge 2019.

[85] K. Ruppel-Schlichting, S. Human, O.C. Ruppel, *Climate Change and Children's Rights: An International Law Perspective*, [in:] *Climate Change: International Law and Global Governance*, eds. O.C. Ruppel, C. Roschmann, K. Ruppel-Schlichting, vol. 1, Baden-Baden 2013.

[86] G. Kecskés, Á. Lux, *There Is No Plan(et) B – Environmental "Crossroads' of Children's Rights"*, "Hungarian Journal of Legal Studies" 2023.

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tional systems[87] and international human rights regimes[88] offer important sources of interpretation in this regard. The rights/interests of future generations are often associated with the right to a healthy and sustainable environment both in positive law and judicial practice. This requirement can also be formulated as the duty of the states and of the international community to sustain a healthy environment for the future and future generations. In both approaches, healthy and sustainable living conditions are the subject of protection.

From the point of view of this analysis, future generations can be taken as an entity to which it is attributed the right/the duty to preserve the appropriate living conditions. It is a key question in this regard, how can this entity articulate its mentioned right/interest? Theoretically, this articulation might take place only based on a "fiction of representation" which opens the possibility for a stakeholder to act in legal procedures aiming at protecting the interests of future generations. These stakeholders could be independent international/state organs, organizations, or groups of individuals that claim to act in such capacity.

Due to the fact that in these cases there is a need for the acceptance of the "fiction of representation", no limitation takes place in the legal capacity to enforce the affected rights. The position of the right-holder (the future generations) to enforce its right does not exist previously, therefore, it is not possible to limit this capacity. As a result, in such cases, there is a need for positive justification in the sense that authorities shall accept the "fiction of representation" in the given case if the circumstances (i.e. the claimed interest, the legal conflict, the profile, activity and supposed interests of the claimant) indicate it. Because the structure of this legal question is not analogous with a state intervention to an existing, protected position related to fundamental rights, it is not plausible to apply the proportionality test for the positive justification. However, the approach taken into consideration for such positive justification is required to have a justificatory function as well as that of precluding arbitrary decision-making. Otherwise, the state (the international human rights regime) would empower an entity for rights adjudication in an unjustifiable and arbitrary way. To a less stringent extent, the reasonableness test could have similar effects – in line with the procedural rationality requirement of the culture of justification.[89]

In the *Neubauer et al. v. Germany* case[90] the Bundesverfassungsgericht examined the constitutionality of certain provisions of Germany's Climate Protection Act. The petitioners (a group of German youth) argued that the greenhouse gas

[87] For example, Article 20a of the of the Basic Law for the Federal Republic of Germany mentions the responsibility of the state towards future generations.

[88] For example, the UN Maastricht Principles on the Human Rights of Future Generations (2023).

[89] See M. Cohen-Eliya, I. Porat, *Proportionality and the Culture*…, p. 481.

[90] Judgment of the Federal Constitutional Court of Germany [*Neubauer et al. v. Germany*, 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20] (2021).

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emissions reduction target stipulated in the act (55% until 2030 from the 1990 level) was insufficient and violated their fundamental rights. The Constitutional Court partly accepted these arguments and declared that under certain conditions, the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. In their subjective dimension, fundamental rights are "intertemporal guarantees of freedom".[91] The Court emphasized that its decision was not based on the rights of unborn persons or entire future generations,[92] but rather on the subjective rights of the petitioners. However, the Court declared the objective duty of the state to preserve the life conditions for future generations.[93] Accordingly, the Court did not attribute rights and legal capacity to the fictitious entity of future generations, rather it argued the objective duty of protection of the state in this regard, based on rational arguments. In this case, rational arguments were taken into consideration for the positive justification of taking into consideration the interests of future generations.

CONCLUSIONS

Based on the literature review, two key functions of the principle of proportionality can be identified in relation to fundamental rights disputes. The justification function relates to the specificity of the proportionality analysis to provide a transparent, comprehensible, and verifiable framework of argumentation for the examination of the limitation of fundamental rights. If the proportionality test is properly applied, decisions to restrict fundamental rights could be acceptable, justified, and legitimate. The function of precluding arbitrary decision-making relates to the ability of proportionality analysis to limit (and, if possible in the given context, to eliminate) the role of value judgments in the chain of argumentation and to build up the explanation for the limitation of fundamental rights on a rational, acceptable basis. These two functions are interrelated and could be taken into account in the context of the culture of justification and that of procedural rationality. In this context, all state actions require substantive justification, while the government must provide relevant and prudent information in relation to its decisions. Accordingly, government is also required to justify all kinds of fundamental rights restrictions, including those related to the exercise of fundamental rights. Such justification cannot be evaded by reframing these questions as preliminary matters of the right's scope.

[91] *Ibidem*, 4.
[92] *Ibidem*, 109.
[93] *Ibidem*, 146.

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The legal capacity to exercise fundamental rights can be considered as a key element of the concept of fundamental rights. Since the legal capacity to fundamental rights relates to every fundamental right belonging to the right-holder, specific provisions of procedural law regulating certain aspects of legal capacity are not relevant in this respect. Identifying someone's (an entity's) legal capacity to fundamental rights is a preliminary question, which is different from the examination of the limitation of fundamental rights in the given context. There are no universal standards for such identification, but standards related to the examination of the limitation of fundamental rights may be relevant in this regard, as the limitation of legal capacity also has an impact on the potential exercise of given fundamental rights. In the case of human persons and organizations, a negative justification of the limitation of their capacity to fundamental rights is required, while in the case of new challengers in fundamental rights disputes (such as future generations), a positive justification is required in order to confer legal capacity on them. Proportionality can play a role in determining the legal capacity to fundamental rights of human persons because of its justificatory function. In the case of autonomous organizations, in addition to its justificatory function, proportionality may also be taken into account because of its function of preventing arbitrary decisions. In the case of new challengers, the principle of proportionality may not play a role in determining the legal capacity to fundamental rights, but rather other, rational standards that are in line with the requirement of procedural rationality.

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ABSTRAKT

Podmiotowość prawna w zakresie praw podstawowych daje podmiotowi praw zdolność do wykonywania i egzekwowania praw podstawowych. Przy braku lub przy niepewnym stanie podmiotowości prawnej podmiotu praw występuje potrzeba uzasadnienia takiego stanowiska. W tym zakresie nie da się wskazać ogólnych standardów opartych na doktrynie prawnej i orzecznictwie. W artykule skoncentrowano się na kwestii, czy zasada proporcjonalności mogłaby odgrywać jakąś rolę przy określaniu i uzasadnianiu podmiotowości prawnej w zakresie praw podstawowych. W oparciu o przeanalizowaną literaturę można wyróżnić dwie funkcje analizy proporcjonalności jako mające znaczenie w tym przypadku: wspiera ona uzasadnianie decyzji ograniczającej prawa podstawowe oraz zapobiega arbitralnym decyzjom dotyczącym ograniczenia. Autor stwierdza, że na podstawie funkcji uzasadniania proporcjonalność pełni rolę w określaniu podmiotowości prawnej w zakresie praw podstawowych w przypadku ludzi. W przypadku organizacji autonomicznych oprócz funkcji uzasadniającej można też uwzględnić funkcję dotyczącą wyłączenia decyzji arbitralnych przy jej stosowaniu jako standardu określania podmiotowości prawnej. W przypadku ludzi i organizacji autonomicznych występuje potrzeba negatywnego uzasadnienia ograniczenia podmiotowości prawnej w oparciu o proporcjonalność. W przypadku nowych wyzwań w sporach o prawa podstawowe (np. przyszłe generacje) wymagane jest pozytywne uzasadnienie dla określenia podmiotowości prawnej. Analiza proporcjonalności nie pełni tu żadnej roli w przeciwieństwie do innych standardów wymagających uzasadnienia opartego na racjonalności.

Słowa kluczowe: funkcja zasady proporcjonalności; uzasadnienie; zapobieganie arbitralności; podmiotowość prawna w zakresie praw podstawowych; negatywne i pozytywne uzasadnienie podmiotowości prawnej