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Fruzsina Gárdos-Orosz
Centre for Social Sciences (Budapest), Hungary
ELTE Eötvös Loránd University (Budapest), Hungary
ORCID: 0000-0001-7543-1567
orosz.fruzsina@ajk.elte.hu

Bernadette Somody
ELTE Eötvös Loránd University (Budapest), Hungary
ORCID: 0000-0002-1602-108X
somodyb@ajk.elte.hu

Conceptualizing the Legal Capacity to Fundamental Rights*

Konceptualizacja podmiotowości prawnej w zakresie praw podstawowych

ABSTRACT

While the capacity to have rights has been a question since people started creating states and law, having the capacity to exercise fundamental rights is a contemporary legal issue. The article focuses on the legal capacity to fundamental rights and presents an innovative proposal for the legal doctrine related to the concept of the normative constitution of fundamental rights. The authors argue that protecting fundamental rights is incomplete if uncertainties exist regarding these rights' subjects. Due to the complexity of the problem and the relevance of the "judge-made law", the article offers a new methodological tool: instead of building a pre-set, abstractly defined comprehensive concept, concept mapping is advocated for conceptualizing the legal capacity to fundamental rights. The concept map is

CORRESPONDENCE ADDRESS: Fruzsina Gárdos-Orosz, PhD, Professor, ELTE Eötvös Loránd University (Budapest), Faculty of Law, Department of Constitutional Law, Egyetem tér 1-3, 1053 Budapest, Hungary; Bernadette Somody, PhD, Assistant Professor, ELTE Eötvös Loránd University (Budapest), Faculty of Law, Department of Constitutional Law, Egyetem tér 1-3, 1053 Budapest, Hungary.

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an organic and beneficial way to collect and structure the interrelated factors determining legal capacity. It can be a decision-support tool for judges in fundamental right-related cases to bring well-grounded decisions. As a starting point, the authors argue that an autonomous dogmatic category of legal capacity to fundamental rights is crucial for effectively protecting rights. To support this point, the complex theoretical background (the concept of person, personality, rights and fundamental rights) is reviewed. The authors point out that existing approaches do not give an unambiguous answer to what entity and how far can be the holder of what fundamental right. The article concludes with a methodological proposal of conceptualizing by mapping to maximize the effect of knowledge on factors that influence judicial decisions in this regard.

Keywords: personality; legal capacity; fundamental rights; concept mapping

INTRODUCTION

Since people started creating legal systems, the question of the capacity to bear and exercise rights has been present. Meanwhile, the distinction between being a subject of the legal order and having the capacity to exercise rights and, furthermore, the distinction between rights and fundamental rights are contemporary legal issues.

Our discussion focuses on the legal capacity to fundamental rights, which is an innovation in the legal doctrine related to the concept of the normative constitution. This article has two interrelated aims. On the one hand, we argue why the autonomous dogmatic category of legal capacity to fundamental rights, despite its novelty, is crucial for effectively protecting fundamental rights. On the other hand, we wish to explain the foundations for this conceptual approach of legal capacity to fundamental rights, which judges can effectively apply in the protection of fundamental rights.

In the first section, we summarize the doctrinal model of decision-making in fundamental rights cases and explain the role of the category of legal capacity to fundamental rights in this model. Our starting point is that deciding who or what entity is entitled to a fundamental right is an equally basic element of judging a fundamental right case as the scope of a right and the proportionality of its limitation.

The second part of the article focuses on the theoretical background of the concept. In harmony with the prevailing European approach, our background theory is liberal constitutionalism, according to which fundamental rights belong to individual human beings, and the state has to guarantee and enforce them. These most important personality rights, such as human dignity and the right to life, do not depend on the state but are inherent in everyone. In this subchapter, we build on the findings of previous comprehensive research conducted by Hungarian scholars.

Based on the above, in the last section, we propose the tool of concept mapping for conceptualizing legal capacity to fundamental rights. As the article's first part proves, in order to protect fundamental rights, judges have to decide consciously and transparently on legal capacity questions raised by the case brought before the courts. At the same time, the concept of legal capacity to fundamental rights should be able

to handle the diversity of its theoretical background about personality and the justification of fundamental rights we address in the second part. That is why, as a concept of the legal capacity of fundamental rights, we propose instead of a pre-set, abstractly defined comprehensive concept, a structured system of the factors (a concept map) that are relevant when deciding an entity's fundamental rights status.

THE QUESTION OF LEGAL CAPACITY IN FUNDAMENTAL RIGHTS ADJUDICATION

According to the theory of fundamental rights adjudication, two main questions determine whether a measure of public power affecting individuals is constitutionally permissible. The first question is whether the individual's state or action affected by the measure falls under the protection of fundamental rights; the second is whether the interference with the state or restriction of the action protected by fundamental rights can be justified.[1]

In the second step, the courts review whether, on the basis of constitutional requirements, the contested measure is acceptable in form and substance. From the perspective of the form, the question is whether the restriction of rights was appropriately provided by law. As regards the content, the substantial requirements are usually laid down in general and specific limitation clauses of fundamental rights catalogues, whose essence is the test of proportionality. The limitation clauses generally prescribe that the restrictions on fundamental rights must pursue the purposes set out therein, such as the protection of the rights of others or legitimate public interests. Regarding the extent of the restriction, they require that it be proportionate to the aim pursued by the restriction.

This second stage of review can only take place if the answer to the first question is affirmative, i.e. if the individual's (or the other entity's) state or action subject to the restriction is protected by fundamental rights. This question is essentially identified with interpreting the content of the constitutional or conventional provision on the fundamental right in question, which concludes with a decision as to whether the state or action in question falls within the scope of the fundamental right. Does the right to self-determination include abortion or the refusal of life-saving treatment? Does freedom of expression include propagating totalitarian views? If not, then the limitations on access to abortion, end-of-life decisions or the dissemination of authoritarian views do not even raise the possibility of the infringement of a fundamental right, since these actions are not protected by fundamental rights in the first place. In other words, there is no interference with fundamental rights. Otherwise,

[1] A. Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge 2012, pp. 19–21; S. Gardbaum, *Limiting Constitutional Rights*, "UCLA Law Review" 2007, vol. 54, p. 809.

that is, if the answer is yes, restrictive measures need to be justified: they can only be accepted if they serve a legitimate aim and are proportionate to that aim.

Whether fundamental rights protect somebody's state or action does not depend only on the content of the rights. In other words, it is not only a question of whether the state or action falls within the scope of the fundamental right. It must also be considered that only those who are the holders of the fundamental right, i.e. who have the legal capacity to these rights (or, more precisely, to the right in question), can claim their protection. The question of legal capacity is as essential to the theory and practice of the protection of fundamental rights as the definition of the scope of rights. Whether a particular state or action of an individual or other entity enjoys the protection of fundamental rights can be decided only by answering both questions.

Fundamental rights do not apply directly in most legal systems; litigants cannot refer to the violation of their fundamental rights before the courts, but they will base their claims on ordinary law. The vertical effect of fundamental rights is effectuated by protective constitutional and statutory provisions either ordering the non-interference of the state to the liberty of the person or providing protection for the exercise of the right. People can go to courts to enforce these vertical fundamental rights or challenge the state's legislative decisions before constitutional courts or other high courts giving constitutional protection. The doctrine of the horizontal effect of fundamental rights is a relatively new concept born in this form (*Drittwirkung*) after World War II in Germany. Many claim that the indirect horizontal effect is the most effective way to enforce fundamental rights by the state in private relations. However, reference directly to the abstract fundamental rights protected by the constitutions (direct horizontal effect) would lead to legal uncertainty, which is against the rule of law and equality before the courts.[2] In the case of the adoption of indirect horizontal effect (*Drittwirkung*), the concept of the legal capacity to fundamental rights has even higher relevance as judges (and legislators) apply fundamental rights and decide about the capacity to bear and exercise fundamental rights in regular cases in different areas of law.

THE BASIS FOR THE CONCEPT OF LEGAL CAPACITY TO FUNDAMENTAL RIGHTS

1. Person and personality in law

According to one of the seminal works on the topic written by a Hungarian private law professor who became the president of the first Constitutional Court after the democratic transition and who developed the doctrine of the protection of fundamental

[2] A. Clapham, *Human Rights in the Private Sphere*, Oxford 1996.

rights as an emblematic figure, later president of the republic, László Sólyom: "The rights of the individual are among the fundamental expressions of one's legal status. They must therefore be based on a specific conception of man.[3] This 'conception of man', together with the biological, psychological, etc. interpretation of the person, is in fact part of a particular model of society. It determines the respective role and technique of personality rights – and thus their relation to other fundamental legal institutions expressing the status of man, such as constitutional freedoms or property".[4]

The person is both the subject and object of the law. In previous research, we examined how the different areas of law are based on what conceptions of man, what conceptions of the person and what legally defined notions of personhood they operate with. The initial idea of the research was to examine what the protection of personhood means in criminal law, media law, constitutional law, medical law and private law, especially in Hungary, and whether law and the legal system are based on a common understanding of and about the core subject of the rights and obligations. In this research, we concluded that there is not one comprehensive definition of person and personhood in the different areas of law: not in theory and doctrine and even less in jurisprudential practice.[5] This research result made us consider an autonomous concept of legal capacity to fundamental rights. But why and how exactly do the approaches to the subject of rights differ in the different fields of law?

It is a question if we see "parallel realities" in the different branches of law with regard to the person and his/her rights, how are these different realities represented at the level of the respective branch of law, and what, if any, are the explanations for the differences? Are they necessary or rather undesirable and unintentional phenomena resulting practically from the different regulatory objectives, the objects and the scope of the rights-related regulation? Do we need to think about the person/individual and the protection of personal rights in law in a coherent way? If so, what role can constitutional law, the definition of man/person under the constitution, play in this comprehensive approach? What is the role of human dignity in this progress? To what extent and to what depth can the state take a position on this issue through the instrument of constitutional law, by establishing a comprehensive system of protection of personality in the framework of the fundamental rights discourse?

The practice of the Constitutional Court in Hungary prior to 2012 clearly accepted the concept of the general right of personality (connected to the right to human dignity) as a so-called mother right (source of many others), and as part of this, it identified a number of rights that affect a wide variety of areas of law for different

[3] We use the word *man* throughout this article because we often refer to classic theories using this word in the original – we understand it as any human being, natural person or human individual for the sake of our contemporary discussion.

[4] L. Sólyom, *A személyiségi jogok elmélete*, Budapest 1983, p. 10.

[5] A. Menyhárd, F. Gárdos-Orosz (eds.), *Személy és személyiség a jogban*, Budapest 2016, pp. 5–8.

legal subjects such as for the legally constructed legal persons. On the other hand, the German concept of human dignity was distinguished from the general rights to personality. While the former, as a fundamental right, meant absolute protection of the state for human beings, the latter is a derived concept which, referring to the right to the free development of the personality in Article II of the *Grundgezets*, on a functional basis provides protection to a collection of rights to individuals and legally acknowledged communities of individuals (legal persons).[6] This example clearly shows the conceptual tensions within the constitutional doctrine as well. The different areas of law affected different segments of general personality right with different intensity, and it is questionable whether the different sets of law, with their overlaps, create a coherent picture or whether this picture is consistent with the diverging constitutional law concept. This is why we decided from a methodological standpoint of the present research to go for the choice of concept mapping in order to see, analyse and connect all the factors which are relevant in this discussion.

We have seen in our previous research the justifiable reasons for the differences in legal disciplines, and we understood why the differences in perception are necessary in the different fields of law. It seems, therefore, that the protection of personality in Hungary is based on legal functionality and does not describe the person in general, nor does it define personality in general. While the protection of personality is ensured by the institutions developed in the various branches of law, an abstract, uniform and permanent legal definition of the person and personality seems unnecessary for legal theory and doctrine. Therefore, when constructing the concept of the legal capacity to fundamental rights, we did not aim to generalize or unify what we have found in the different fields of law, but rather collected those elements which are helpful for the conceptual mapping.

In his study, the constitutional lawyer Szabolcs Hegyi argues that there are two interpretative frameworks built around the person in constitutional law. One is the "private individual", and the other is the "citizen". These two must be interpreted together to provide the meaning of the constitutional status of the individual, which is, in our understanding, the basis of the legal capacity to fundamental rights. In Hungarian constitutional law, the concept of the private individual person is dominant, while the concept of the citizen of the country appears only in an *ad hoc* manner, far from being as systematic and elaborated as in some other jurisprudence.[7]

John Locke is usually cited as one of the intellectual fathers of the modern conception of man. According to the philosophy of law, "John Locke's concept of man as 'the owner of his own person' has played a major role in shaping modern political and constitutional thought and continues to shape much of the theoretical

[6] K. Zakariás, *Az emberi méltósághoz való jog*, Budapest 2019.

[7] Sz. Hegyi, *A személy alkotmányjogi fogalma és felfogásai*, [in:] *Személy és személyiség a jogban…*, pp. 119–137.

discourse on the autonomy and rights of the individual". According to Szilárd Tattay, "the thesis of 'possessive individualism', however, does not seem to be justified either in relation to medieval theories or to Locke's philosophy of law. (…) Even if Locke and many scholastic authors associated 'right' with the word *property* or *dominium*, this subjective concept of right did not take on a 'possessive character' and was not conceived as the unlimited sovereignty of the individual".[8]

Law professor Tamás Sárközy, who created the concept of the legal person in Hungary after the democratic transition, discusses whether personhood is an existing reality at all or only a legal definition in civil law, also in the case of natural persons. He shows how the set of rules applicable to natural persons can be applied to legal persons. Sárközy stresses that the concept of person – natural person and legal person – has been developed in civil law and is the basis for all other branches of law. Today, personality protection is provided through a variety of branches of law, but a fundamental difference remains between civil law and public law personality protection. "In civil law, legal personality is the basis of rights; in public law, it is the basis of obligations".[9] Referring to Ferenc Petrik, Sárközy draws attention to the fact that it is wrong to confuse the protection of fundamental constitutional rights with the protection of civil law personality. "Fundamental constitutional rights do not only protect personality, they are broader – the right of assembly, the right to vote, the right of civil disobedience, etc. The Civil Code, on the other hand, only protects the personality of civil natural and legal persons, which is capable of being grasped by civil law, by means of civil law instruments", and extends this protection to legal persons in a specific, but still controversial dogmatic order.[10]

Attila Menyhárd, civil lawyer, co-editor of the volume, highlights through the demarcation of person and property that personhood can only be consistently demarcated from property along the lines of legal personality. Neither the recognition nor the denial of the marketable right to the commercial use of certain aspects of personality, known in American law as the right of publicity derived from the right to privacy, is compatible with the currently accepted European doctrinal framework of human dignity-based personality protection, because this approach breaks the borderline between the person and the property. Ensuring marketability, and thus distinguishing between person and property, is in fact a moral issue, and the currently accepted doctrinal frameworks of personality law and property law cannot adequately reflect this.[11]

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[8] Sz. Tattay, *Az emberi személy mint „önmaga tulajdonosa": a dominium sui fogalmától a self -ownership eszméjéig*, [in:] *Személy és személyiség a jogban…*, pp. 13–32.

[9] F. Petrik, *Az ember, mint jogalany*, [in:] *Az új Ptk. magyarázata*, ed. Gy. Wellmann, Budapest 2013, p. 145.

[10] T. Sárközy, *Személy és személyiségvédelem*, [in:] *Személy és személyiség a jogban…*, pp. 47–64.

[11] A. Menyhárd, *Forgalomképes személyiség?*, [in:] *Személy és személyiség a jogban…*, pp. 65–82.

The research concludes with an analysis of the protection of personality in medical law and criminal law. Criminal lawyer Zsolt Szomora points out that criminal law works with a specific concept of personality. Honour is a criminal law concept, different from civil law and constitutional law human dignity concepts.[12]

Mihály Filó, criminal lawyer, also examines through the facts of defamation and defamation how personality is defined in criminal law by the concept of "social value judgments"; what self-esteem and reputation, the suitability to diminish honour in criminal practice says about personality, what is the protected subject of law: "is honour worthy and suitable for criminal law protection".[13]

Finally, Kinga Zakariás, a constitutional lawyer, examined how the protection of the person and personality is reflected in medical law. "In the practice of the Constitutional Court, 'person' is the normative concept of a human being (with legal capacity), the most important element of which is abstract equality. The formal category of legal capacity is given substance by the inalienable dimension of the right to dignity, which underpins the constitutional protection of 'personhood'. The rights of patients extend both to the static elements of personhood (e.g. the right to dignity, the right to health care) and to the dynamic elements of the development of personhood (e.g. the right to self-determination)".[14] When regulating legal capacity, it must also be borne in mind, apart from the biological concept of the person, that man does not live in isolation but in society.[15]

In the legal literature, the interpretation of person and personality is a frequently discussed issue, but as we could observe, the rules for the protection of personality do not form a coherent system. Different interests and values are protected by the different branches of rules, and the practice of personality protection in each branch of law is different. On this basis, we suppose that the legal capacity to fundamental rights in Europe is based on the acknowledgment and the protection of human dignity. The question is what exactly this might mean in the borderline cases, in the hard cases and when it comes to the new claims for acknowledgment. What are the standards, the guiding principles of the development of law in broadening legal capacity in order to reach the optimum of the state protection of fundamental rights?

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[12] Zs. Szomora, *A becsület mint jogi tárgy – büntetőjog-dogmatikai és alkotmányjogi fejtegetések*, [in:] *Személy és személyiség a jogban…*, pp. 247–268.

[13] M. Filó, *Személy és személyiség mint jogi tárgy*, [in:] *Személy és személyiség a jogban…*, pp. 269–286.

[14] K. Zakariás, *Személy és személyiség az orvosi jogban*, [in:] *Személy és személyiség a jogban…*, pp. 139–173.

[15] R. Cruft, S.M. Liao, M. Renzo, *The Philosophical Foundations of Human Rights: An Overview*, [in:] *Philosophical Foundations of Human Rights*, eds. R. Cruft, S.M. Liao, M. Renzo, Oxford 2015, p. 4.

2. Rights and fundamental rights of the person

Péter Takács, legal philosopher, states that all rights are related to human rights in a way as the legal system is constructed for the people, while there is a selection of rights which are acknowledged as human rights/fundamental rights by the states. The distinguishing feature of these rights is that they are strongly related to the human being.[16] Antal Szerletics successfully conducts the exercise which highlights the relation between the concept of rights and the concept of fundamental rights. He acknowledges that there is no comprehensive understanding of the relation between rights and fundamental rights.[17] Szerletics focuses on Hohfeld's status theory and the function of rights entitlements theories of will[18] and interest,[19] to outline the most important features of rights as entitlements, and then he demonstrates that human rights, as a category of right entitlements, can be described in terms of Hohfeldian legal positions.[20] There is an assumption, a classical approach in human rights philosophy that the human rights theories are based either on the will or on the interest theory,[21] but there are important attempts to depart from this approach that requires a choice between these two.[22] According to the suggestion of Domonkos Polonyi, one of these is the theory of the Hungarian-origin Scottish legal philosopher Tamás Győrfi[23] and Barosz Brożek[24] separately.

People consider it evident that human beings have rights, they are the subjects of legal rights. From the mid-20th century onwards, theories have emerged which

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[16] P. Takács, *Emberi jogok*, [in:] *Jogbölcseleti előadások*, ed. M. Szabó, Miskolc 1998, p. 213.

[17] A. Szerletics, *Jogok, jogosultságok, emberi jogok. A jogosultságfogalom és az emberi jogok igazolásának lehetséges kapcsolódási pontjairól*, [in:] *Annak, hogy tud-e valaki, a tanítani tudás a jele. Tanítványok írásai a 65 éves Takács Péter tiszteletére*, eds. P. Cserne, A. Jakab, M. Paksy, A. Szerletics, Sz. Tattay, Budapest 2020, pp. 202–204.

[18] B. Windscheid, *Lehrbuch des Pandektenrechts*, Frankfurt am Main 1906; D. Frydrych, *The Theories of Rights Debate*, "Jurisprudence" 2018, vol. 9(3), pp. 2–7; R. Cruft, *Rights: Beyond Interest Theory and Will Theory?*, "Law and Philosophy" 2004, vol. 23, p. 355; L. Wenar, *The Nature of Rights*, "Philosophy and Public Affairs" 2005, vol. 33(3), p. 237.

[19] R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Leipzig 1924, cited by P. Szigeti, P. Takács, *A jogállamiság jogelmélete*, Budapest 2004, pp. 260–261.

[20] A. Szerletics, *op. cit.*, pp. 193–211.

[21] H. Spector, *Value Pluralism and the Two Concepts of Rights*, [in:] *Perspectives in Moral Science: Contribution from Philosophy, Economics and Politics in Honour of Hartmut Kliemt*, eds. M. Baurmann, B. Lahno, Frankfurt am Main 2009, p. 359; S. Girgis, R.P. George, *Civil Rights and Liberties*, [in:] *The Cambridge Companion to the Philosophy of Law*, ed. J. Tasioulas, Cambridge 2020, pp. 295–296.

[22] A. Sajó, *Jogosultságok*, Budapest 1996.

[23] T. Győrfi, *A jogosultságok önállósága és a jogalanyiság kérdése*, [in:] *Jogosultságok – elmélet és gyakorlat*, eds. K. Ficsor, T. Győrfi, M. Szabó, Miskolc 2009, p. 55.

[24] B. Brożek, *The Troublesome 'Person'*, [in:] *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, eds. V.A.J. Kurki, T. Pietrzykowski, Cham 2017, pp. 7–10.

have focused explicitly on the philosophical aspects of human rights. It is true that these reflected only marginally on the question of the subject, which shows that the field of fundamental rights personality is in many respects unexplored. Nevertheless, because of their considerable impact, we consider it important to mention 20th-century human rights theories, including the school of thought that aims to overcome the general divisions in fundamental rights thinking.

For the idea of concept mapping to be useful in judicial and legislative practice, it is worth considering the approach of the contemporary American philosopher John Rawls about the overlapping consensus. He created a new, postmodern theory of justification, which did not draw directly from any previous theories of justification.[25] Rawls's theory is postmodern because it rejects the idea that fundamental rights can be justified philosophically. Rawls argues that fundamental rights are primarily the product not of philosophy but of politics. Nevertheless, theories of justification are part of reality and must therefore be taken into account when thinking about fundamental rights in a political context. In this case, however, we have no choice but to select the factors that are common to all theories of justification. This brings us to the so-called overlapping consensus, i.e. the point on which everyone agrees. This consensus might be the protection of human dignity.

Therefore, human dignity is the basis of contemporary constitutional protection, and it is strongly related to the former rights-entitlements theories focusing on the human being as a subject. In spite of the attempts in positive law to provide some of the fundamental rights to legal persons as well, the foundational concept in these cases either focuses on the human being or handles the question as a pure legal construction of the personality and its rights entitlements – the latter is not related to the notion of human rights. In this latter case, fundamental rights, as the most important rights of the (legal) persons, are detached from the notion of human rights.

The so-called purpose theory for justifying the attribution of rights to corporations via giving them legal personality was originally propounded by Alois von Brinz.[26] According to this theory, only human beings can be the subjects of rights protection provided by the state, and corporations are regarded only as juristic or artificial legal persons. Under this theory, the legal person is not a real person at all but merely a property destined for a particular purpose. This theory has been widely recognized in Germany, but was not favorable for the argumentation of the English courts in deciding cases on the rights of corporations.

The brackets theory claims that granting legal personality by the state is only a symbolic action to facilitate the operation of the corporation. The member of the

[25] S. Ivic, *Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism*, "Trans/Form/Ação" 2010, vol. 33(2), pp. 223–240.

[26] A. von Brinz, *Lehrbuch der Pandekten*, vol. 1, Erlangen 1873, cited by Gy. Moór, *A jogi személyek elmélete*, Budapest 1931, pp. 233–245.

corporation is the "person", and around them, a bracket is put to indicate that they are to be treated as one unit. This is why they are protected as a corporation. Also known as symbolism theory, set up by Rudolf von Jhering[27] and later developed particularly by Marquis de Vareilles-Sommières,[28] it is similar to the fiction theory in that it recognizes that only human beings have interests and rights in the construction of the legal person. A corporation is only a legal device or formula which helps to tackle complex legal relations more simply.

According to the so-called concession theory, expounded by Friedrich Carl von Savigny, the legal personality is a kind of a concession granted by the state. Savigny holds that the sovereign state and the individual human being are both realities, but the legal personality of an organization is constructed. The definition of the law and the state is essential in this theory, the author is famous primarily for working on that. According to this, the state is sovereign, and therefore it can grant personhood to the legal personality, but as a sovereign entity, by law it can withdraw it as well.[29]

These are theories based on fiction, according to which (legal) personality is attached to corporations, institutions and associations by legal fiction. The legal personality of entities other than human beings is the result of fiction. Not being a real person, the corporation cannot have any "personality" of its own. It can have only so much as the law imputes it by fiction as though it were a mere real person.

Only the so-called realist theory thinks differently from the above famous approaches. It claims that the subjects of rights are not merely human beings but any entity which possesses a will and life of its own. As such, a legal person is as existent as a human being, therefore a corporation is also subjected to rights. The theory was successfully advocated by Otto von Gierke.[30] A corporation and corporate decision-making – according to him – exists as an objectively existing reality which is different from the individual will and interest and its simple aggregation. The law merely recognizes this existing phenomenon and acknowledges its existence. A corporation from a realist theory perspective is a social organism, while a human being is regarded as a material organism.

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[27] R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. 3, Leipzig 1927, cited by Gy. Moór, *op. cit.*, pp. 145–150.

[28] P. Vareilles-Sommières, *Les personnes morales*, Paris 1919, cited by Gy. Moór, *op. cit.*, pp. 150–167.

[29] F.C. von Savigny, *System des heutigen Römischen Rechts*, vol. 2, Berlin 1840, cited by Gy. Moór, *op. cit.*, pp. 104–123.

[30] O. von Gierke, *Das Wesen der menschlichen Verbände. Rede bei Antritt des Rektorats*, Berlin 1902, cited by Gy. Moór, *op. cit.*, pp. 65–75.

3. Human dignity as the core of the concept of legal capacity to fundamental rights

In the European context, the core issue in human rights protection is rather an issue of dignity than liberty.

Martha Nussbaum or John Finnis define the scope of human needs not so much in the satisfaction of basic biological or social needs, but rather in the objective conditions necessary for the fulfillment of human existence as the main function of human rights.[31] The human rights function and the function of traditional rights entitlements are therefore defined radically differently in literature, however hidden connections might be discovered.[32]

One might suppose as an EU citizen that a moral reading of fundamental rights based primarily on the biological understanding of a person is the most dominant approach, where the fiction (or the related brackets or concession) theory gets the biggest space when it comes to the acknowledgment of rights entitlements of legal corporations, and giving some fundamental rights protection to these corporations is justified by the existing people behind the organization. If the state enforces these moral rights based primarily on the decision of the constitution-making power, the state is bound by this constitutional acknowledgment and may only restrict the protection of these rights in a proportionate manner in order to protect the rights of others directly or indirectly (protecting the constitutional value system).

Constitutional controversies emerge because not all so-called fundamental rights are necessarily moral rights as we explained a small bite of this discussion by referring to Nussbaum and Finnis, because the political constitution can give room to any social, economic or political interest as well, therefore the fundamental rights in the constitutions are not always the manifestations of the positive legal understanding of human rights. Constitutional courts may assess the status of the right in a constitutional case and controversy, whether it can indeed serve as a reason for the limitation of another fundamental right. The proliferation of fundamental rights makes these decisions complicated, while on the other hand, the question of who can have capacity to fundamental rights is also problematic. We might want to say that those who can have the capacity to a fundamental right are entitled to have this capacity by the constitutions.

The problem is not so simple, however. In case the constituent power in the constitution confirms the moral foundation of human rights besides the political one (rights are the limits of the sovereign power) and accept a moral foundation according to which a biological person deserves social protection and the possi-

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[31] Antal Szerletics refers to R. Cruft, S.M. Liao, M. Renzo, *op. cit.*, pp. 13–14; M. Renzo, *Human Needs, Human Rights*, [in:] *Philosophical Foundations of Human Rights…*, p. 579.

[32] A. Szerletics, *op. cit.*, p. 210.

bility of participation as granted by the state on the basis of being a human moral entity, which was a starting standpoint of the normative constitutions, we should distinguish human rights from other rights on a philosophical basis enshrined in the constitutions, and apply this to the conceptualization of the subjects of these rights. This choice does not restrict the constitution making majority to give other rights the status of the fundamental right (proliferation of fundamental rights) or broaden the circle of subjects with non-human beings having similar attributes such as animals, artificial intelligence or even living organisms such as plants, but the justification of this act in positive law will differ from the traditional-original normative justifications in modern normative constitutionalism of having rights entitlements and fundamental rights as beings of human value. While the application of the will and interest theories might lead to a conditional approach to fundamental rights, the mainstream Kantian, morality-based fundamental rights theories depart from this exactly for that the state provides a non-conditional approach to the legal capacity to fundamental rights. Separating the two justifications based on the two different functions of rights protection of humans and nonhumans is useful. In the case the human rights-based fundamental rights, they have moral justification, their protection is different from those of the others; while proportionality applies in one case, the public interest test could be satisfactory in the other. The case of the right to property illustrates this well. The right to property is called a fundamental right in most of the constitutions, placed within the chapter of fundamental rights. Right to property, however, receives much wider protection in our modern capitalist world than the essence of it as the financial basis of autonomous human behavior as dignity. Property as a social right, a basis for living, might be handled as a human right (basic food, any shelter, clothes), but most part of the protection is rather about the protection of wealth in contemporary society, therefore the right to property can be limited by public interest in most of the democratic states.

Who is the subject of human rights-based fundamental rights according to the German constitutional law, which is the most relevant in the EU and also in the Visegrad countries' democratic transitions?

According to Kinga Zakariás's account in her book on human dignity, Article 1 (1) of the Basic Law (*Grundgesetz*) refers to the human being as a being entitled to dignity (*die Würde des Menschen als Gattungswesen*). It belongs to everyone, irrespective of their qualities, achievements and social status. It also belongs to those who, because of their physical or mental condition, cannot act reasonably. Thus, the Federal Constitutional Court, in defining the right to human dignity, takes as its starting point the concept of biological person, according to which a person is any individual who belongs genetically to homo sapiens. Accordingly, the biological existence of the human being is interpreted as opening up the scope of personal protection of the right to human dignity. In this way, the right

to human dignity and the right to life guaranteed by Article 2 (2) of the Basic Law are linked.[33]

In our assessment, this approach is an achievement of civilization: the protection is not provided by the state based on certain qualities of the individual. Therefore such attempts to justify the fundamental rights of non-humans, such as animals, which are based on identifying similar qualities to humans, are steps taken backward from this achievement of civilization.

For example, in Hungarian constitutional law, legal persons could not invoke the dignity of the human person as a guarantee of the protection of human quality, but they could invoke the violation of the general freedom of action, which is an element of the general right of personality, as elaborated in the practice of the Hungarian Constitutional Court as part of dignity. In accordance with the international conventions on human rights, the former, 1989 Constitution recognized the legal capacity of all human beings, i.e. their legal personality, their personhood in the legal sense, from which the Constitutional Court concluded that "human being" had become a normative concept. However, the Court recognized that "legal capacity is a finite abstraction in which there is nothing exclusively human. Legal capacity is a formal quality. (…) Therefore, the basic legal status of the human person includes two 'substantive' fundamental rights which fill the formal category of legal capacity and express the human quality of the 'person': the right to life and the right to human dignity".[34] In the practice of the Constitutional Court, therefore, the right to life and dignity expresses the human quality of the "person" and fills the formal category of legal capacity.

In the Pandectists tradition, familiar and valid in Hungary, the concept of person merges the categories of legal capacity and legal personality, so that it is by acquiring legal capacity that a person becomes a person, i.e. a subject of the legal system. This leads, according to János Frivaldszky, to the conclusion that the human person does not have natural subjective rights, which the state recognizes by virtue of his/her dignity, but that all fundamental rights attached to the person are ultimately dependent on the will of the state through the category of legal capacity.[35]

Thus, the concept of the human person in the legal sense is linked to the content of the right to human dignity (and to life). The Hungarian Constitutional Court, in interpreting the right to life and human dignity, has indeed established that the normative concept of man is not defined in terms of content, and has merely estab-

[33] K. Zakariás, *Az emberi méltósághoz való jog…*, p. 95.

[34] Decision of the Constitutional Court of 17 December 1991, 64/1991 (XII.17.) AB határozat, ABH 1991, 258, 267.

[35] J. Frivaldszky, *Az emberi személy és annak méltósága jogfilozófiai perspektívában – különös tekintettel a jogalanyisághoz és az élethez való jog aktuális kérdéseire*, "Acta Humana" 2014, no. 1, pp. 31–32.

lished the requirement that nothing can be taken back from the legal position man has achieved so far. The Court made abstract equality the most important content of the legal concept of a person, and regarded the question of legal personality as a secondary issue.[36] This is confirmed by the fact that in a separate paragraph, in Article I (4), the Fundamental Law expressly states in relation to entities with legal personality (other than natural persons) that legal entities established under the law are also guaranteed fundamental rights and are subject to obligations which, by their nature, do not apply only to human beings.

If we accept this approach, then the further question is how the legal system should provide robots, organisms and animals with a legal personality that is theoretically distinct from that of humans, in both public and private law. They may have a general right of personality, which the state does not recognize but grants to the extent that is justified in the interests of a legitimate legislative objective. It is therefore a very important conclusion that the features of equality and dignity which underpin human protection and which compel the state to act cannot be applied to the legal personality and protection of non-humans.

The question is what standards are currently applied by legislators and law enforcers, what is inferred from the constitutions and what form this takes in the law or how it is reflected in case law. To explore this, we propose the concept-mapping method in the following.

THE CONCEPT MAP OF LEGAL CAPACITY TO FUNDAMENTAL RIGHTS

In order to determine who has the legal capacity to fundamental rights, one can attempt to create a universal concept of the person (i.e. the entity that has rights) or identify the holders of fundamental rights – besides humans, the legal capacity of organizations is generally acknowledged, and we can cite examples where a natural element (e.g. a river) was granted protection. However, as we argued above, a universal concept of the person is not possible but not necessary either. The identification of the already acknowledged holders of fundamental rights is also only a seemingly satisfactory answer since it leaves many further questions open, especially related to the scope of legal capacity, even in the case of humans. Do children and persons with disabilities have the same extent of legal capacity? Are legal persons entitled to the whole spectrum of fundamental rights? If animals, natural elements or artificial intelligence were acknowledged as right-holders, would they have the same legal capacity as the traditional subjects of rights? That is why, as an alternative approach, we propose such a concept of legal capacity to fundamental rights that includes the factors that should be considered when deciding about an

[36] K. Zakariás, *Az emberi méltósághoz való jog…*, p. 106.

entity's status. Instead of identifying the rights-holders, this concept collects and systemizes the relevant factors regarding legal capacity to fundamental rights.

This approach to the concept of legal capacity to fundamental rights can be helpful for judges in fundamental rights-related cases because they do not have to decide whether a type of entity is the holder of fundamental rights in general. They do not have to decide whether humans or even children are the holders of the rights in general, but decide only on the specific case, e.g. whether a 13-year-old person has the right to join an association protecting LGBTQ rights.[37] They do not have to decide whether organizations are the holders of the rights in general, but e.g. whether a business can claim freedom of conscience when refusing to make a cake for a same-sex couple's wedding.[38]

It follows from the two-step model presented above, regulating legal capacity to fundamental rights, similarly to the scope of the rights,[39] belongs to the constitution. Who and with what content is entitled to fundamental rights should be determined by interpreting the constitutions and the human rights conventions' fundamental rights catalogues. However, these documents contain few legal capacity-related provisions, and even those that exist are abstract and laconic. In statutory regulations, there can be particular provisions on children's or businesses' rights or the subjects of the specific rights in question. However, sub-constitutional provisions on who is entitled to have and exercise certain fundamental rights cannot be seen as replacing constitutional norms; they cannot be seen as defining the scope of right-holders or the extent of legal capacity. The constitutionality of these rules may be subject to review, with the result that they may be found to be an unconstitutional restriction of rights. Here we are back to the point that judges must rely on the doctrinal concept of legal capacity to fundamental rights to interpret constitutional provisions in terms of legal capacity.

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[37] The example is inspired by the decision 21/1996 (V.17.) AB of the Hungarian Constitutional Court.

[38] The example is inspired by Masterpiece Cakeshop, *Ltd. and Others v. Colorado Civil Rights Commission*, Supreme Court of the United States; *Lee v. Ashers Baking Company Ltd. and Other*, Supreme Court of the United Kingdom. In the FULCAP research project, we collected information about the potential factors determining legal capacity to fundamental rights using so-called vignettes. For a detailed description of the method, see A. Lápossy, E. Pásztor, B. Somody, P. Stánicz, *Az ember alapjoggyakorlási képességének dogmatikája*, "MTA Law Working Papers" 2022, no. 1. Based on relevant literature and landmark cases, we developed short descriptions of cases with variations which require decisions on the legal capacity of (potential) right-holders (children, persons with disabilities, legal persons and other organizations) having varied characteristics and asked both legal practitioners and theoreticians to answers the legal capacity-related questions raised by the cases. This method confirmed our assumptions and also revealed further factors that play a role in deciding on legal capacity to fundamental rights. The two examples in this article are similar to the essence of vignettes used in our research.

[39] A. Barak, *op. cit.*, p. 45.

Without going into identifying and systemizing the factors that make up the concept, based on the previous theoretical analysis, we can establish that the concept should deal with humans and the right-holders beyond humans separately. Based on their dignity, humans have full and unconditional legal capacity to the whole range of fundamental rights, while the status of non-humans supposes a different justification, which has consequences on their (potential) legal capacity.

Furthermore, we can collect potentially relevant factors relating to the legal capacity of a child. While every human being's full legal capacity is unquestionable, the question can be raised whether the living persons who have developing or impaired decision-making capacity (children and persons with mental disabilities) have a full capacity to make choices and, thus, to act and exercise their rights (agency).[40] Borrowing the categories of civil law systems, this is the question of the distinction between passive legal capacity (the capacity to have rights, legal standing) and active legal capacity (the capacity to exercise rights, legal agency). Without identifying the exact categories and their relevance, one can see the basic factors that can influence the decision on the child's (active) legal capacity: decisional capacity, participatory capacity, evolving maturity, age, the subject of the decision, parental rights, the best interest of the child, etc.[41] A specific legal capacity-related decision can be made based on weighing these factors, their relevance and their connections. It follows from the full legal capacity of every human that the limitations on active legal capacity should not be considered given and accepted without constitutional justification; it must be justified according to the principle of proportionality.

Similarly, we can collect factors determining the legal capacity of an organization in a specific case. We have already emphasized the different – not moral, but functional or instrumental – justification behind their status: according to the prevailing approach in Europe, organizations' legal capacity is a legal construction that eventually serves humans rights. This instrumental or functional legal capacity is not unconditional and does not necessarily cover all rights. The concept of legal capacity should guide judges regarding which rights and to what extent organizations are entitled to in order to fulfil the purpose of their legal capacity. The decision on legal capacity can be influenced by the degree of organization, its relationship with fundamental rights (e.g. the church as the institution for exercising freedom of religion), its relation to public power, the nature of the fundamental right in question, the purpose of the organization, etc.[42]

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[40] J.D. Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, "Columbia Law Review" 2005, vol. 105(1), pp. 204–215.

[41] For the findings of the FULCAP research project in this respect, see A. Lápossy, E. Pásztor, B. Somody, P. Stánicz, *op. cit*.

[42] For the findings of the FULCAP research project in this respect, see L. Bottlik-Granyák, *A szervezetek alapjogi jogalanyisága*, PhD thesis, 2022; L. Granyák, *Do Human Rights Belong*

Methodologically, to capture this concept, i.e. the set of interrelated factors determining legal capacity to fundamental rights, we suggest applying the tool of a concept map.[43] This method can be used to go beyond the collection of factors relevant to the legal capacity, to identify their logical relationships and, on this basis, to visually represent their complex system. In this way, the concept map can be used as a dogmatic decision-support tool to help the judge in a fundamental rights case.

According to the review of Lívia Bottlik-Granyák, the technique of mind mapping dates back to the 1970s. In the following decades, various mapping tools emerged, and after mind mapping, the concept mapping method was developed, which, although less visual, is suitable for a more formal and structured representation of concepts and their relationships. The mind map and concept map may be more familiar for educational purposes, however, they can also be useful tools for qualitative research. Although concept mapping may not be a well-established method in legal research, it has proved to be a natural and beneficial tool for sketching the conceptual components of a dogmatic category.

For example, the part of the concept map dealing with the legal capacity of organizations covers characteristics relating to both the subject (the organization) and the fundamental right in question. The legal personality granted by the state under private law may indicate the fact that the organization is an autonomous entity. However, the lack of such a status does not necessarily exclude its entitlement to fundamental rights: a certain level of organized operation can be sufficient to acknowledge an entity having rights. The purpose of the organization can be a determining factor, as well. An association or a church is the very manifestation of individuals exercising their fundamental rights; in contrast, a profit-oriented business, e.g. a giant tech company, may be considered less the instrument of serving people's freedom. Moreover, performing public power or being owned by the state generally excludes legal capacity to fundamental rights in the first place. A fundamental right (human dignity, right to life, freedom of religion, etc.) can be considered inapplicable to non-humans by its very nature. According to other approaches, only those rights can be granted that are related to the organization's purpose and activity. A case dealing with an organization's legal capacity to fundamental rights can require the judge to consider the complex structure of these interrelated factors.[44]

Exclusively to Humans? The Concept of the Organisation from a Human Rights Perspective, "ELTE Law Journal" 2019, vol. 7(2).

[43] In the framework of the FULCAP research project, concept mapping has already been successfully applied to the legal capacity of organizations by L. Bottlik-Granyák (*op. cit.*). The method presented below is based on this work (*ibidem*, pp. 13–18).

[44] See *ibidem*, pp. 189–200.

CONCLUSIONS

Legal capacity may seem to be a self-explanatory term in the field of fundamental rights. Fundamental rights, as human rights enshrined in constitutions and international conventions, belong to humans. Also, fundamental rights practice generally acknowledges that legal persons or organizations can be right-holders. In this article, however, we proved that, in fact, legal capacity to fundamental rights has a complex theoretical background (the concept of person, personality, rights and fundamental rights) that does not give an unambiguous answer to the question of who or what entity can be the holder of what fundamental right. We also explained that, despite theoretical complexity, even regular jurisdiction must face the question of legal capacity to fundamental rights, which requires the interpretation of constitutional-level norms that, however, generally do not specify the legal capacity issues.

Another lesson from the theoretical analysis was that deciding on legal capacity in specific fundamental rights cases requires considering a set of interrelated factors. We cannot speak about somebody's legal capacity in general, but we may have to take into account the characteristics of the (potential) right-holder (e.g. the age of a child, the purpose of an organization), the nature and subject of the fundamental right (e.g. a non-natural person does not have conscience), and the relations between the different relevant factors.

From a methodological viewpoint, we suggested the tool of concept mapping to conceptualize the legal capacity to fundamental rights. This is an organic and beneficial way to collect and structure the interrelated factors determining legal capacity, i.e. conceptual elements of the legal capacity to fundamental rights; based, however, on such a set of philosophical backgrounds which emphasizes the state's role in providing distinguished protection to the human value by constitutional doctrine and its enforcement. The concept map can serve as a decision-support tool for the judge in a specific fundamental right-related case in order to bring well-grounded decisions and find intellectual comfort in the consequent argumentation.

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ABSTRAKT

O ile podmiotowość do posiadania praw jest zagadnieniem istniejącym, od kiedy człowiek zaczął tworzyć państwo i prawo, o tyle posiadanie podmiotowości do korzystania z praw podstawowych jest współczesną kwestią prawną. W artykule skoncentrowano się na podmiotowości prawnej do praw podstawowych i przedstawiono innowacyjną propozycję prawno-doktrynalną związaną z pojęciem normatywnego ukształtowania praw podstawowych. Autorzy twierdzą, że ochrona praw podstawowych jest niepełna, jeżeli istnieją nieścisłości dotyczące podmiotów tych praw. Ze względu na złożoność problemu i znaczenie „prawa tworzonego przez sędziów" proponują nowe narzędzie metodologiczne – zamiast budowania uprzednio określonego, abstrakcyjnie zdefiniowanego całościowego pojęcia zaleca się mapowanie pojęć celem konceptualizacji podmiotowości prawnej do praw podstawowych. Mapa pojęciowa jest organicznym i pożytecznym sposobem gromadzenia i strukturyzowania wzajemnie powiązanych czynników wpływających na podmiotowość prawną. Może ona stanowić narzędzie wspierające proces orzekania dla sędziów w sprawach dotyczących praw podstawowych, zapewniając dobrze uzasadnione orzeczenia. Autorzy wychodzą od twierdzenia, że autonomiczna teoria dogmatyczna podmiotowości prawnej do praw podstawowych ma istotne znaczenie dla skutecznej ochrony praw podmiotowych. Dla poparcia tego twierdzenia analizie poddano skomplikowane tło teoretyczne (pojęcia osoby, osobowości, prawa i praw podstawowych). Autorzy wskazują, że dotychczasowe podejścia nie udzielają jednoznacznej odpowiedzi na pytanie o to, jaki podmiot może być podmiotem jakiego prawa podstawowego i w jakim zakresie. Artykuł wieńczy propozycja metodologiczna konceptualizacji poprzez mapowanie celem maksymalizacji efektu wiedzy na czynniki wpływające na decyzje orzecznicze w tym zakresie.

Słowa kluczowe: osobowość; podmiotowość prawna; prawa podstawowe; mapowanie pojęć