

**Eötvös Loránd University**

**Doctoral School of Law**

Balancing autonomy and protection? –

The constitutional cornerstones: the child as a fundamental rights holder, the child's legal capacity to exercise fundamental rights and the protection of the child's fundamental rights

Thesis of doctoral dissertation

Attila Láposy

Supervisor: Dr. István Kukorelli Dsc. professor emeritus

DOI: 10.15476/ELTE.2024.229

Budapest, 2024.

## Table of contents

Table of contents.....	2
1. The objectives and actuality of the doctoral dissertation .....	2
2. The thesis of the doctoral dissertation .....	3
3. The methodology of the doctoral dissertation.....	8
4. The system of sources in the doctoral dissertation .....	11
5. The results of the doctoral dissertation .....	14
Bibliography .....	18

### 1. The objectives and actuality of the doctoral dissertation

We know a lot about children, their rights, the framework of their autonomy and, above all, their protection. Our self-confidence is based on the fact that we were all children, so we necessarily have emotional experiences of being children. When we become parents, thousands of personal upbringing experiences are immediately activated when it comes to children and children's rights, their exercise and protection. Everyone has an opinion about children's rights and the exercise of rights and the restriction of these rights, and in political discourse the justification for protecting children from certain situations - and thus restricting the exercise of rights by children - is brought into focus with sometimes less and sometimes more intensity.

Guaranteeing children the ability to exercise their fundamental rights is a current issue, whether it is the right to refuse medical treatment, participate in demonstrations in the context of the climate movement, or lower the minimum voting age. In the reflection or practice of fundamental rights concerning the exercise of fundamental rights by children as distinct from adults, a few recurring and recurrent topos typically emerge. The question is why we accept statements in relation to children's rights that would not arise in this form in the case of adults' rights. Is it because the exercise of children's rights is *different*?

It would therefore be worthwhile to look beyond the traditional concepts used in jurisprudence and legal practice in the area of the exercise of children's rights, their use and our approach, to examine their role and meaning and, where necessary, to engage in debate. The objective of this doctoral dissertation is to examine, in a constitutional law approach and in general terms - not in a fundamental rights' specific way - three identifiable and interrelated

issues: the fundamental rights of the child, the exercise and capacity of the child to exercise fundamental rights, the enforceability of fundamental rights, the right to take proceedings.<sup>1</sup>

Accordingly, this dissertation analyses and evaluates the issues related to the content of the parent's right/obligation to upbringing and the state's legal protection obligation and constitutional role in the context of the exercise of the child's fundamental rights, and discusses the application of standards and tests related to the restriction of children's rights. Finally, the dissertation examines the procedural capacity of the child, the right to bring proceedings, and the accessibility of general/specific, national/international fora of the fundamental rights protection system, building on the individual enforceability of children's rights. In this way, the dissertation aims to provide a comprehensive analysis of all aspects of the exercise of rights.

## **2. The thesis of the doctoral dissertation**

1. Several serious challenges can be identified in the context of the research, including the fact that the exercise of children's rights has not been analysed from a constitutional and fundamental rights dogmatic point of view in the Hungarian literature, in contrast to the more recent approaches in civil law, political science or international law. There is much to be learned from the specific perspectives of the various branches of law, but the importance of an autonomous constitutional law focus of analysis should also be emphasised, as certain 'habits' and automatic reflexes of certain branches of law (see the capacity of children in the civil law sense or the concept of majority) can also cause difficulties in terms of understanding and practice. The dissertation will therefore focus on the definition of certain basic concepts of children's rights and on the issues and conceptual demarcations related to their use.

The importance of the constitutional law approach is that the existence and regulation of the ability to exercise fundamental rights - like the scope of rights - is a matter for the constitutions (but also the basic guarantees of the enforcement of rights). The question of who is entitled to fundamental rights and what they entail must be determined by interpreting the constitutions and the catalogue of fundamental rights in the various human rights conventions. However, these documents contain relatively few provisions on the ability to exercise rights and, where they do exist, they are rather abstract and laconic. At present, there are undoubtedly specific provisions in the form of legislation, for example on the exercise of children's rights.

---

<sup>1</sup> Primarily with regard to the fundamental rights of children and their capacity to exercise their rights, the dissertation builds on the joint reflection, work and experiences in the project „The fundamental rights concept of legal capacity” (principal investigator: Bernadette Somody) carried out between 2021 and 2024 at the Faculty of Constitutional Law of ELTE Faculty of Law, in which the author of this dissertation was an active participant.

Here we encounter the problem of a sub-constitutional norm that lays down who can be subject to certain fundamental rights, who is entitled to exercise certain fundamental rights.

With regard to the determination of the scope of those entitled to exercise rights or the extent of the exercise of rights, a sub-constitutional norm - however well-founded in terms of content - cannot replace or substitute the constitutional norm. On the other hand, the constitutionality of the rules on the exercise of rights laid down in such legislation may be subject to review, which may also lead to a finding that they are unconstitutional, for example because they impose disproportionate restrictions on rights. The doctrinal notion of the fundamental rights of the child must therefore be relied upon by law enforcers in order to interpret the constitutional provisions in this respect.<sup>2</sup>

2. Fundamental legal personality means that someone (or "something") is a holder of fundamental rights and can therefore claim the protection they provide.<sup>3</sup> Children are subjects of fundamental rights in a very specific and special situation: there is no longer any doubt that they have fundamental legal personality as human beings, that they can be subjects of fundamental rights, and that they are therefore entitled to certain fundamental rights. As the United Nations Committee on the Rights of the Child has succinctly and clearly stated, children are no longer the property of their parents or of the State, nor are they merely objects of care.<sup>4</sup> The question is, however, whether, with the recognition of all this, the child is actually able to exercise his or her fundamental rights, in particular the capacity to exercise fundamental rights.

The complex theoretical-dogmatic analysis was aimed at exploring how this specific legal personality, this "other", i.e., the different and distinct perception of the exercise of rights in the case of children, can be interpreted from a constitutional law point of view. It is relevant where this 'traditional' distinction comes from and what theoretical-philosophical perspectives have shaped its content. The fundamental rights of legal personality and the capacity to exercise rights are inseparable concepts for an adult person, but it is still relevant today that children may be subject to some degree of restriction in the light of their still developing decision-making competence, for example, which differs from that of adults. This provides sufficient support for this thesis to examine the specific aspects of a child's capacity to exercise

---

<sup>2</sup> GÁRDOS-OROSZ Fruzsina - SOMODY Bernadette: Conceptualizing the Legal Capacity to Fundamental Rights. *Studia Iuridica Lublinensia*. Vol 32, No 5 (2023). 399-403. p.

<sup>3</sup> SOMODY Bernadette: Az alapjogi jogalanyiság. In Jakab András – Könczöl Miklós – Menyhárd Attila – Sulyok Gábor (szerk.): *Internetes Jogtudományi Enciklopédia*, 2024. [1]

<sup>4</sup> General Comment No. 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment. (UN Doc CRC/C/GC/8, 2006). para 47.

fundamental rights, which are considered differently by the law when it comes to the exercise of rights by an adult and when it comes to the exercise of rights by a child.

As already mentioned, this distinction is typically embodied in the legal system in the form of restrictions, whereby the child cannot exercise his or her rights in the same way as an adult. The theoretical tension between children as subjects of fundamental rights on the one hand, and children as subjects of fundamental rights on the other, which deprive them of the full autonomy of adults, is crucial.<sup>5</sup> In this context, the dissertation will discuss how the provisions of the UN Convention on the Rights of the Child (hereafter: CRC), which are also relevant in international law, such as the principle of the best interests of the child, the consideration of evolving capacities or the right of the child to have his or her views heard and taken into account in a meaningful way, can be interpreted. The dissertation examines how these can affect the child's own exercise of fundamental rights.

In addition to the examination of fundamental rights issues relating to the child's decision-making capacity (maturity versus age), particular attention should be paid to the fact that the issue of the exercise of the child's fundamental rights is inextricably linked to the exercise of the parent's right/obligation to bring up the child. It is undeniable that efforts to recognise certain children's rights have an impact on the child-parent relationship. It is worth noting that state interference in parenting may provoke opposition, and if the state promotes children's autonomy, it may have to monitor parents' child-rearing activities much more closely, which may lead to undermining their position and authority as parents.<sup>6</sup> The dissertation also examines the question of whether it is possible to identify any arguments or considerations other than the child's decision-making capacity or the parent's right/obligation to parenting that could be put forward by the state to justify a restriction, such as the public interest or the protection of social institutions. The dissertation intends to keep in mind the mapping of the rights/interests of all actors relevant to the exercise of the rights of the child and the functions behind them.

**3.** A frequently stated basic principle of the concept of fundamental rights is that they are intended to guarantee the freedom of individuals (and their communities), primarily against the state, against public authority. Fundamental rights were classically intended to regulate the relationship between the state and the individual in relations in which the state (its organ), acting in its capacity as a public authority, is one of the actors. Children's rights, however, are best

---

<sup>5</sup> General Comment No. 12: The Right of the Child to Be Heard (UN Doc CRC/C/GC/12, 2009). para 1. M. and M. v. Croatia, 10161/13, Judgment of 03 December 2015. [171].

<sup>6</sup> Jane FORTIN: *Children's Rights and the Developing Law. Third Edition.* Theoretical perspectives and international sources. Cambridge University Press, 2009. 8-9. p.

described as a tripartite legal relationship between the child as a special legal entity, the State as the person responsible for protecting the rights of the child and the parent. In the parent-state relationship, the parent is a fundamental right holder, and thus his or her position as a duty-bearer under children's rights is different from that of the state. The State may ensure the fulfilment of the parent's obligations towards his or her child by limiting the fundamental rights of the parents.<sup>7</sup> This particular structure of the exercise of children's rights and the fulfilment of the related obligations and responsibilities has been taken into account in the structure of the thesis and in the development of its argument. Chapter by chapter, the dissertation presents each of the main actors in this tripartite system of children's rights, namely the child, the parent and the state, and the aspects of fundamental rights content, the legal capacity to fundamental rights, rights/obligations and responsibilities associated with these actors.

The relationship between the child, the parent and the State is arguably one of the most fundamental relationships in society. Embedded in the triangle of child-parent-state, certain social attitudes and norms determine how parents raise their children, and at the same time lay the foundations for the maintenance of society within a state. Many elements of this relationship, especially where state intervention is involved, may need to be regulated by law. The dissertation also seeks to answer the question of where the boundaries of law may lie in this triangle of fundamental rights, particularly in the child-parent relationship.

4. In the context of the exercise of the fundamental rights of the child, this dissertation not only attempts to identify and list the above-mentioned actors and possible aspects, but also to place them in a dynamic way in the analytical framework of the fundamental rights limitation. In this context, it seeks to demonstrate that the constitutionality and human rights compatibility of a restriction based on the capacity of children to exercise their rights should be examined by means of the fundamental rights test established in European and Hungarian fundamental rights practice, in particular by taking into account the requirement of proportionality.

It is essential that decisions on the constitutionality of acts of public authority, normative provisions or even individual judicial decisions that restrict the exercise of fundamental rights, including the fundamental rights of the child, are convincing and justifiable in all cases. The fundamental rights test is a method that allows the forum to assess the constitutionality or human rights compatibility of a public act restricting the exercise of a fundamental right, in this case the fundamental rights of the child, in a consistent and flexible manner, in the light of the

---

<sup>7</sup> LUX Ágnes: A gyermekek jogai. In Jakab András – Fekete Balázs (szerk.): *Internetes Jogtudományi Enciklopédia*, 2018. [5]

specific case.<sup>8</sup> The general test of fundamental rights, known in international literature as the proportionality test, is necessarily an abstract methodological rule that leads to specific conclusions in a given case. This test itself varies from case to case in the light of the interpretation of each fundamental rights conflict, and the content of the fundamental rights protected varies from case to case.<sup>9</sup>

The dissertation also intends to analyse whether there is a genuine conflict of fundamental rights, what the characteristics of the conflict are and how this affects the application of the test and the proportionality test, in the light of the criteria involved, such as the decision-making capacity of the child (maturity/age), the right/obligation of the parent to bring up the child and, where applicable, the protection of the public interest. It also discusses the role that the best interests of the child principle may play in relation to the restriction of the exercise of fundamental rights by children.

5. The dissertation also aims to follow a complex approach in the sense that it attempts to map the whole spectrum of children's exercise of fundamental rights, i.e., in addition to the aforementioned fundamental rights legal personality and legal capacity to fundamental rights, it also examines a segment that receives relatively little attention, namely the possibility of children's independent enforcement of fundamental rights. It is a fundamental element of the exercise of a fundamental right that, in the event of a violation of rights, the person concerned can, acting independently, seek redress for the violation of rights before the courts and other legal fora established for this purpose. We consider it to be a rule of law that, in order to protect fundamental rights, the state must - in addition to declaring these rights - establish and operate legal protection institutions and mechanisms which guarantee that state bodies operate in accordance with fundamental rights and that the exercise of public authority - both in legislation and in the application of the law - remains within the limits set by fundamental rights.<sup>10</sup> This is specific to the enforcement of children's fundamental rights, with the parent as legal representative playing a decisive role rather than initiating proceedings on their own, effective access to procedures and redress for children may be hampered for this and other reasons.

This dissertation therefore aims to explore the criteria and conditions under which national and international fundamental rights protection forums, both judicial and non-judicial,

---

<sup>8</sup> POZSÁR-SZENTMIKLÓSY Zoltán: Az alapjogi teszt újrafogalmazása. *Jogtudományi Közlöny*. 2014/4. sz. 23-24. p

<sup>9</sup> GÁRDOS-OROSZ Fruzsina: Az alapjogok korlátozása. In Jakab András – Könczöl Miklós – Menyhárd Attila – Sulyok Gábor (szerk.): *Internetes Jogtudományi Enciklopédia*, 2020. [5]

<sup>10</sup> SOMODY Bernadette – VISSY Beatrix: Az alapjogok védelme. In Jakab András – Könczöl Miklós – Menyhárd Attila – Sulyok Gábor (szerk.): *Internetes Jogtudományi Enciklopédia*. [1]

may allow children to be brought before them. For instance, whether the procedural capacity of the child is relevant in this respect, what are the operational characteristics and differences between the fora, and how can the child's autonomy be supported.

### **3. The methodology of the doctoral dissertation**

We see the essence of the fundamental legal quality of a right in its legal protection, primarily in its judicial protection, in its enforceability through the courts. In other words, the recognition of a fundamental legal personality is reflected in the fact that a given legal personality can assert a fundamental right before the courts. There are few codified rules on children's fundamental rights and the exercise of those rights, and therefore the actual enforceability possibilities are typically the basis for the perception of fundamental rights in a given fundamental rights regime. The methodology used to examine the legal personality and exercise of children's rights must be case law focused: the fundamental question is what doctrinal challenges courts, constitutional courts (and other fundamental rights forums) face in the area of children's capacity to exercise fundamental rights and what solutions they develop to address them. And if aspects of the child's legal capacity to fundamental rights and exercise of rights are primarily shaped by case law in broader rights forums, rather than by codification, it will also follow that the reconstructible concept will be mosaic and incoherent. Mosaic, because, by definition, only a subset of questions arises in court cases, and the courts deal only with the questions of legal personality that they have to answer in the cases brought before them. The courts face the problems of legal personality in the context of a specific case and develop solutions in the light of that case, but not necessarily in the overall context. Although the practice of different forums acting on the basis of different legal instruments, at national and international level, may converge in many respects, there will be inconsistencies between case law/regimes.<sup>11</sup>

The analysis of the international and European practice of fundamental rights and children's rights has also been challenging in that it is highly fragmented and does not necessarily present a coherent system. The ECtHR, the individual constitutional courts and the higher courts have exceptionally concentrated on identifying and applying a general theoretical-dogmatic framework in their decisions. Instead, they have tended to focus on the specific case, on the decision of the case, on the examination of the challenged legislation: their findings have thus not gone beyond the arguments necessary to judge the specific case. Thus, the case law

---

<sup>11</sup> LÁPOSSY Attila – PÁSZTOR Emese – SOMODY Bernadette – STÁNICZ Péter: Az ember alapjog-gyakorlási képességének dogmatikája. I. rész. *MTA Law Working Papers*, 2022.1. 2-3. p.



rarely directly identifies explicitly general findings on the fundamental rights of the child, his or her exercise of rights, his/her capacity to exercise rights, or does not address the role of the finding in the exercise of a given fundamental right in the overall scheme of the criteria. The determination of whether a child's exercise/enforcement of fundamental rights can take place in a given context depends on a combination of a number of issues, both general and specific.

The aspects governing the legal personality - exercise of rights - enforcement of rights are found sporadically, unsystematically and inconsistently in the fundamental rights case law under examination, and the application of the methodology in the course of the research had to be adapted to this situation. This dissertation uses the tool of concept mapping to achieve its aim, and by applying it, the thesis aims to objectively identify the main doctrinal issues and factors influencing the legal personality and practice of children's fundamental rights, and to outline a possible coherent system of relationships between them.<sup>12</sup>

The visual representation of knowledge, the structure of knowledge, is an important area of scientific thinking, and various mapping tools have been developed to this end: the mind mapping, the concept mapping and the argument mapping.<sup>13</sup> Concept mapping as a methodology was developed in the early 1970s by Novak with the aim of visualising the relationships between different concepts.<sup>14</sup> Concept mapping is more structured and less pictorial than mind mapping, but it is a more formal and structured way of representing concepts and especially their relationships to each other. The purpose of concept mapping is no longer merely to create spontaneous associative elements, but also to sketch the relationships between them, and it is now a relational tool.<sup>15</sup> A concept map is usually made up of concepts written in circles or boxes, with a line connecting the two concepts to indicate the relationship between them. The line may also contain linking words to describe the relationship between the two concepts. Novak defines a concept as a set of events or objects, their regularity, which is indicated by a label. Concept maps are usually drawn up with reference to the so-called focus question, i.e., a specific question for which an answer is sought. Another important feature of a concept map is the inclusion of cross-references, which are used to indicate the relationships

---

<sup>12</sup> The basic pillars of the methodology used in the OTKA research on the legal personality of organisations are described in Livia BOTTLIK-GRANYÁK (Doctoral thesis, 2022). The methodology of this dissertation is also strongly based on this methodological approach used in the research

<sup>13</sup> Simone C.O. CONCEICAO - Anita SAMUEL - Susan M. YELICH BINIECKI: Using concept mapping as a tool for conducting research: An analysis of three approaches. *Cogent Social Sciences*, 2017, 3(1). 1-18. p.

<sup>14</sup> Joseph D. NOVAK: Concept Mapping: A Useful Tool for Science Education. *Journal of Research in Science Teaching*, Vol. 27. no. 10. 937-949. p.

<sup>15</sup> Martin DAVIES: Concept mapping, mind mapping and argument mapping: what are the differences and do they matter? *Higher Education*, 2011, 62 (3). 283. p.

between concepts in different segments of the map. Cross-references are used to show how a concept in one area of the map relates to a concept in another area of the map.

It is not unprecedented that mapping techniques, the concept map tool, are also used in legal research, especially in empirical research, to analyse data and present results.<sup>16</sup> Research has also shown that among of the different types of concept maps, the relational approach is the most versatile tool: it can be used at any or all stages of scientific research, in combination with other quantitative research methods and mixed methods.<sup>17</sup> All these factors, together with the advantages of concept mapping discussed above, support the idea that concept mapping can be an appropriate research method for research on legal-dogmatic issues.

In addition to the theoretical suitability of the concept mapping in this thesis, several characteristics of the research justify its use. One of the most important of these is the need to consider, identify and organise a number of very different aspects in a coherent way. The research should be carried out by considering the views expressed in mainstream literature and the practices of these fora. The present study is made even more complex by the fact that within each case law regime there is not necessarily a coherent, visible, complex set of criteria, and there may even be conflicting decisions and findings. In addition, the arguments and aspects of each decision are often hidden, and it is not clear what role they play in the overall assessment of the restriction of children's rights and the exercise of their rights, and how the various aspects relate to each other. Thus, it is often unclear whether there is a hierarchy of importance between the different aspects, or whether a given aspect is a conceptual component or a factor affecting proportionality. In practice, these considerations and the system of relationships can often be confused and confused in the arguments that arise when a decision is made. Thus, concept mapping is an appropriate tool to identify and coherently organise the many divergent aspects, and helps to highlight key issues from the background noise.<sup>18</sup> Concept mapping is not only useful for identifying relevant concepts and dogmatic issues, but also for organising the research results, i.e., for coherently outlining a complex set of general aspects.

Methodologically the concept mapping technique can be an effective tool for capturing the interrelated factors and aspects that determine the child's ability to exercise fundamental rights. The concept mapping method can be used to adequately represent the individual actors,

---

<sup>16</sup> Jessica G. BURKE - Patricia O'CAMPO - Geri L. PEAK - Andrea C. GIELEN - Karen A. MCDONNELL - William M. K. TROCHIM: An Introduction to Concept Mapping as a Participatory Public Health Research Method. *Qualitative Health Research*, Vol. 15 No. 10, December 2005. 1392-1410. p.

<sup>17</sup> CONCEICAO - SAMUEL - YELICH BINIECKI, 2017. 12. p.

<sup>18</sup> Ian M. KINCHIN – David STREATFIELD – David B. HAY: Using Concept Mapping to Enhance the Research Interview. *International Journal of Qualitative Methods*, 2010, 9 (1). 54-55. p.

the system of relationships and responsibilities that can be set up in the aforementioned triangle of fundamental rights, the points of connection, interrelationships and the conditions for the exercise and enforcement of rights. It is suitable, for example, to show that the parent's right/obligation to education is a prominent aspect and a reason for limitation in the child's ability to exercise fundamental rights, and that it is differentiated from other groups (e.g., persons with disabilities), while the parent can also be represented as a separate important actor or pole in the triangle model. The chapters of the thesis are closed by a concept map section, which shows the relationship between the actors of the given issue, and in the conclusion summarising the results, a unified, detailed concept map presents the whole complex structure.

#### **4. The system of sources in the doctoral dissertation**

This dissertation aims to explore the aspects of European case law practice relevant to the exercise, legal capacity and enforcement of children's fundamental rights, and to examine the background, content and role of these factors, in a manner necessary for a doctrinal analysis. A fundamental question in the development of the methodology was how the source system is developed in relation to these children's rights and fundamental rights contexts, and what kind of case law - in addition to theoretical literature and discourse - can convincingly build the conceptual structure and the fundamental rights argumentation. In the case of children's rights, the specific nature of the fundamental rights source system must be taken into account: when discussing children's rights issues, considerable reliance must be placed on international conventions and the practice and findings of the treaty body, as a non-judicial forum, which monitors and interprets them in an authentic manner.

In states that have ratified international conventions, there is evidence that international legal requirements are leading to the adoption of guaranteeing legislation at the legislative level or to the revision of existing rules. Typically, the protection of children's rights has not or not necessarily become the subject of constitutional regulation<sup>19</sup>, and the obligations contained in international conventions are typically enshrined in law. Thus, in addition to the 'brisk' adoption of specialised legislation<sup>20</sup> (e.g., child protection) following the adoption of the CRC, there is no distinctive, well-established national constitutional level of enforceability and enforcement of children's rights, and thus no dominant practice of national constitutional courts and supreme

---

<sup>19</sup> Ursula KILKELLY – Laura LUNDY – Bronagh BRYNE – Jason KANG: *The UN Convention on the Rights of the Child: A study of implementation in 12 countries*. January 2012, UNICEF. 17. p.

<sup>20</sup> On the protection of children's rights: international standards and domestic constitutions. Adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014), para 13.

courts.<sup>21</sup> National supreme courts and constitutional courts usually rely on international standards and interpretations of children's rights in the cases before them. The literature points out that the lack of a constitution and, as a result, of specific constitutional powers for children's fundamental rights and legal personality is one of the obvious reasons why, in legal practice, children's interests and rights have long been invisibly subordinated to the interests and concerns of adults, and in many cases are still subordinated to them.<sup>22</sup> The paper will therefore specifically address the emergence of children's rights and the principles enshrined in the CRC, their role and significance in the various constitutional texts.

In examining children's fundamental rights and their ability to exercise them, the principles, standards and concepts contained in the CRC are therefore necessarily of particular importance. These include, in particular, the principle of the best interests of the child (Article 3), parental guidance and the evolving capacities of the child (Article 5) and the right of the child to respect for his or her views (Article 12), as well as the general commentaries of the Committee on the Rights of the Child interpreting these.<sup>23</sup> The interplay of rights of different nature and purpose is also important for the protection of children.<sup>24</sup> The principles and the specific guarantee rules of the CRC have been integrated into the law of all States Parties, including European fundamental rights practice, and play an important role in the adjudication of children's rights cases in international human rights forums.

The dissertation draws on the case law of the European Court of Human Rights (hereafter: ECtHR) on children's rights, among other sources, to examine the relevant aspects of the content of children's rights, their exercise of fundamental rights and their legal capacity to exercise their rights. The decisions of the ECtHR, which set, shape and develop minimum standards of fundamental rights in Europe, must be followed by the States Parties and their institutions. The fact that the European Convention on Human Rights (hereafter: ECHR) and the related case law are of decisive importance for Hungarian fundamental rights thinking and practice, not only in Hungarian cases, would in itself have been sufficient justification for taking the ECtHR's case law into account.

---

<sup>21</sup> Simon HOFFMAN - Rebecca THORBURN STERN: Incorporation of the UN Convention on the Rights of the Child in National Law. *International Journal of Children's Rights*, 2020, 28 (1). 149. p.

<sup>22</sup> Conor O'MAHONY: The Promises and Pitfalls of Constitutionalising Children's Rights. In James G. Dwyer (ed): *The Oxford Handbook of Children and the Law*. Oxford University Press, 2019. 3. p.

<sup>23</sup> Aoife DALY: Reconceptualising our Understanding through the UN Convention on the Rights of the Child. In Special Issue: Article 5 of the Convention on the Rights of the Child: Families, Guidance and Evolving Capacities. *The International Journal of Children's Rights*, 2020, 28(3). 471-499. p.

<sup>24</sup> Kirsten SANDBERG: Children's right to protection under the CRC. In Falch-Eriksen-Backe-Hansen (eds.): *Human rights in child protection*. Palgrave Macmillan, 2018. 15-38. p.

At the same time, the decisions of the ECtHR made a valuable contribution to the equality of rights and the protection of children even before the entry into force of the CRC in 1990, and this law-developing activity has continued since the 1990s in accordance with the interpretation of the CRC and its impact.<sup>25</sup> As an element of the right to respect for family and private life guaranteed by Article 8 of the ECHR, the ECtHR's practice explicitly enshrines the principle, following Article 3 of the CRC, that the best interests of the child must be a primary consideration in all matters affecting children, but in particular in a procedural approach, i.e., as a procedural principle.<sup>26</sup> Underpinning the clear development of the ECtHR's use of the provisions and principles of the CRC in its human rights reasoning, the CRC has had and continues to have a key role in the development of children's rights in the practice of the ECtHR.<sup>27</sup> However, the ECtHR's practice has had the difficulty of dealing tangentially with the exercise of children's fundamental rights and their decision-making capacity, specifically with issues concerning their assessment and measurement.

A third source of case law can also be identified as national constitutional and supreme court practice. As regards the identification and analysis of doctrinal solutions in the field of European fundamental rights practice, it has become necessary to present the leading decisions of the German Federal Constitutional Court (GFCC). In addition to the appropriate doctrinal usefulness, the influence of GFCC practice on Hungarian fundamental rights thinking cannot be neglected, due to its characteristic of drawing heavily on German fundamental rights findings, both in the regulation of fundamental rights and in their case-law analysis. In addition to the GFCC practice, other European court decisions specifically dealing with the exercise of children's rights, such as those of the Estonian Supreme Court and Slovak Constitutional Court, have been used as illustrations. In line with the concept mapping methodology of the essay - i.e., with the emphasis not on comparative law - relevant decisions, arguments and tests of the UK, Canadian and New Zealand supreme courts are also included. The review of these was particularly justified by their impact and their different approach from continental law in terms of the assessment of children's decision-making capacity and maturity.

The dissertation doesn't conduct independent comparative constitutional law research, however, in several chapters it draws on comparative constitutional law analyses, in particular

---

<sup>25</sup> Ursula KILKELLY: The CRC and the ECHR: The Contribution of the European Court of Human Rights to the Implementation of Article 12 of the CRC. In Tom Liefwaard - Jaap Doek (ed.): *Litigating the Rights of the Child*. London, Springer, 2014. 194. p.

<sup>26</sup> Milka SORMUNEN: Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights. *Human Rights Law Review*, Vol. 20, Issue 4, December 2020, 758. p.

<sup>27</sup> On the protection of children's rights: international standards and domestic constitutions. Adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014). [51]-[52].

the resolutions of the Venice Commission, the authoritative analyses of the European Union Agency for Fundamental Rights, which examined the constitutional rules and jurisprudence of the individual European states from the perspective of the exercise of children's fundamental rights, and also refers to comparative legal analyses, research and summaries of these analyses conducted in the literature in cooperation with UNICEF, other forums, professional workshops.

The essay provides a detailed analyses and evaluation of the practice of the Hungarian Constitutional Court both before and under the Fundamental Law in a manner necessary for the development of a conceptual and criteria-based system that will benefit Hungarian fundamental rights practice.

For the sake of a better overview of the case-law practice on each aspect, the order of the sources is identical wherever possible, following clarification of the theoretical issues and concepts. The chapters of the essay firstly examine the CRC and its meaning, reflections in the literature, followed by an analytical presentation of the relevant ECtHR practice, and then - depending on the topic and its importance - the case law practice and key findings of other higher courts and constitutional courts. Separate chapters analyse the Hungarian fundamental rights practice, the Hungarian Constitutional Court's case law findings on the legal personality of children, the exercise of rights, the legal capacity to exercise rights, the rights/obligations of parents, and the state's obligations in relation to the protection of children.

## **5. The results of the doctoral dissertation**

In seeking a fair and constitutional balance between protection and autonomy, the dilemma concerning the exercise of children's fundamental rights and the possibility of restricting them is a particular one. On the one hand, focusing on the child's vulnerability in relation to the right and responsibility to make decisions may damage the child's self-esteem and personal autonomy, undermine the child's efforts to overcome possible challenges. On the other hand, an over-emphasis on the child's resilience and the need to exercise rights can obscure the child's specific, individual vulnerability, and may even lead to the child being blamed ex post if, for whatever reason, he/she is unable to cope with the challenges and consequences of the decision.

Children have the potential for autonomy, so they also have the right to have adults provide them with what they need to become autonomous over time. Children also have rights that protect their already established autonomy. It can therefore be argued that – as Gheaus highlights – children have the right to have the distribution and content of parental/state authority over them determined in a child-centred fashion. Some of the most contentious of

children's rights are those that concern the exercise of power over them as well as those that concern their own access to political power (e.g., voting rights).<sup>28</sup>

The overall picture is full of inconsistencies and illusions, so we need the basic rights guide, which can be compiled from the functional elements of concepts and institutions. The *first example* is that, in the case of children's rights, the reference to the obligation to protect institutions raises the level of protection in relation to a state objective, but in many cases, such as in Hungarian fundamental rights practice, it is the basis for restricting the exercise of the rights of the child. The dogmatic definitions of fundamental rights are of particular importance in how we evaluate sensitive fundamental rights positions in constitutional practice, and which rights and on what basis they constitute a subjective right, be it the right of children to protection and care or the right of parents to choose the upbringing to be given to their children, but one could also mention the parent's right to contact with their child.

The *second example* is the setting of normative minimum age limits for the exercise of fundamental rights, which has been systematically avoided throughout the dissertation. The judgement of these age rules seems to be made more difficult by the fact that a 'legalisation' based on such an age limit can be seen as an achievement in the face of a lack of regulation, because it can represent progress and even guarantees for a certain group of children. One can think in particular of the 'magic' age of 16, at which informed consent for medical treatment or, in some countries, the right to vote, can be exercised. However, taken together, these solutions can dismantle the concept of the child by inherently excluding other children from the exercise of a fundamental right. Indeed, the more such 'enfranchisement/derogation' of fundamental rights takes place in the overall legal system, the more fragmented the child's fundamental rights status becomes. Therefore, the possibility of constitutional review of these normative (or even individual court decisions) restrictions, both in terms of content and procedure, is becoming more important, in the former case to justify them, to establish the relevant benchmarks, and in the latter to ensure accessibility.

In line with the thesis of the dissertation, several concrete research findings can be highlighted. The *first result of the research* is the proof that it is both possible and advisable to find solutions to the questions related to the legal personality and exercise of children's fundamental rights in an autonomous way, using the conceptual framework of the dogmatic of fundamental rights. During the analysis, the specific concepts and solutions of other areas of

---

<sup>28</sup> Anca GHEAUS: Children's human rights. In Jesse Tomalty – Kerri Woods (eds.): The Routledge Handbook of Philosophy of Human Rights, 2024.

law, in particular civil law, which do not conform to the exercise of fundamental rights, can be left out.

The *second result of the research* is the complex analysis of the theoretical background concerning the legal personality and exercise of rights of children, the systematisation of the individual functions (protection/provision and right/exercise of rights) and their connection with the solutions applied in the later practice of fundamental rights (the principle of the best interests of the child is highlighted here). In this area, the definition of autonomous constitutional concepts and their consistent use and application in the wake of international human rights practice is of great importance.

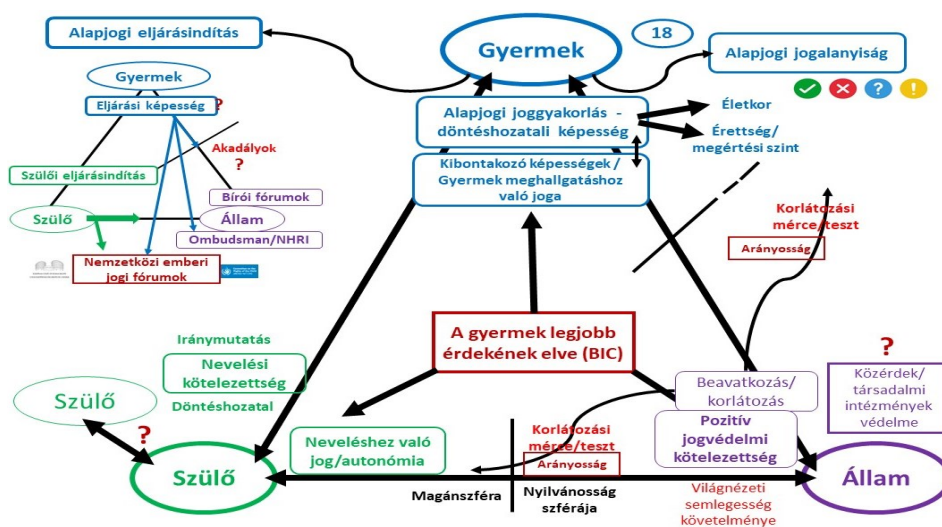
The *third result of the research* was the development and analysis of a set of fundamental rights criteria, some aspects of which are relevant for the assessment of the constitutionality of restrictions on the exercise of the fundamental rights of the child. The dissertation argues that the third of the three aspects originally considered, the protection of the public interest and social institutions, does not stand alone as a legitimate aim, while the child's capacity to make decisions and the parent's right/obligation to educate may be such a constitutional argument. Related to this is *the fourth result of the research*: the argument that special, preventive restrictions on the exercise of rights, which may relativise the fundamental rights of the child, must be judged by a strict standard, in which the appropriate instrument is the proper consideration and application of the proportionality test/principle. The child-centred approach is not merely an eloquent slogan or a movement goal, but it is precisely by requiring and weighing up a clear justification and explanation of the restriction that it can be converted into a genuine constitutional aspect.

The *fifth result of the research* is that the sources analysed in relation to the exercise of the fundamental rights of the child, in particular case law (ECtHR decisions, Constitutional Court practice, interpretative activity of other national and international forums), have made it possible to capture the mosaics of general theoretical-dogmatic aspects. Here, in addition to similar lines of reasoning (e.g., the principle of evolving capacities), the comparison of possibly different approaches (e.g., the fundamental, substantive nature of parental education) or emphases (best interests of the child) served to build a complex picture. The result of the detailed analysis of the Constitutional Court's practice is that it has shown how important, even decisive, it can be for the interpretation of the exercise of the fundamental rights of the child, the right/obligation of the parent to bring up children and the State's duty to protect children - in this context, the principle of the best interests of the child - to clarify and deal with the related dogmatic issues in a proper and consistent manner, without contradictions.



The sixth result of the research is the "big picture" of the fundamental rights of children's legal personality and exercise of their rights from two perspectives. The first is that the specific standard required in terms of rights, interests and the system of responsibility, the creation of a fair balance, can only be imagined if the views of all actors - in particular parents - are given due consideration in the fundamental rights triangle, and the constitutional factors that ensure their position are considered. The second is that the thesis has examined the full range of components of the exercise of children's rights and has drawn conclusions about the current situation of children's enforcement of their rights, the legitimacy of their right to bring proceedings and possible limitations. In addition to the right of the child to be heard and to have his or her views considered, it has identified, through legislation and practice in relevant national and international forums, the de jure or de facto barriers to access and to self-action/assisted access that actively affect the protection of children's rights. The analysis of the ECtHR and Constitutional Court practice, the cited research has shown that there is a close link between procedural issues and substantive fundamental rights aspects: in the absence of the possibility to initiate, the child's rights narrative is also marginalised.

Finally, *the seventh result of the research*, based on the chosen and confirmed methodology, is the creation of the following coherent concept map, which is built from the elements of the concept map of all relevant actors and aspects, as presented in each chapter. Two triangular models of the relationship between the child, the parent and the state can be sketched out in this way. The larger one covers the conceptual framework of the legal capacity to exercise fundamental rights, while the smaller one covers the conceptual framework of the capacity to initiate proceedings and procedures, thus visually facilitating a better understanding of the theoretical context and thus helping the reader to find his or her way around.



**Comprehensive concept map**

In connection with the use of the results, it is worth mentioning that the aim of the dissertation was also to develop a conceptual framework and criteria for the Hungarian practice of fundamental rights with regard to the legal personality and the legal capacity of the child, and therefore it analysed in detail the practice, interpretations, theorems and findings of the Hungarian Constitutional Court from the point of view of all actors, approaches and principles. These sections gave us an idea of the whole picture and of the fact that the Hungarian Constitutional Court, following the international and European discourse on children's rights, has yet to establish an autonomous conceptual framework for the exercise of children's fundamental rights and their ability to exercise their rights, which is separate from civil law dogmatics. The findings of this dissertation may be useful from the point of view that sooner or later there will certainly be a case before the Hungarian Constitutional Court in which questions of the exercise of children's fundamental rights and their restrictiveness, the role of parents and the state will arise. The dissertation doesn't argue that the Hungarian Constitutional Court should necessarily break with its previous practice, as it is evident that there have been and still are forward-looking elements, arguments that go towards the European standard of fundamental rights in the decisions (or at least in the opinions of the judges who formulated the minority position). The dissertation draws attention to the fact that it is not *ab ovo* excluded that the prohibition of reducing the level of protection and the extension of protection in a consistent manner can be somehow fitted into the logic of the institutional protectional concept.

However, this clarification should necessarily be linked to a reconsideration and reassessment of the aspects relating to the exercise of the child's own fundamental rights and the possibility of restricting them. The Hungarian Constitutional Court could repay a long-standing debt if it were able to turn the state-centred (or parent-centred) logic of protection that has taken root over the years into a truly child-centred logic based on the exercise of rights, i.e., that the question of the exercise of the child's fundamental rights should take precedence over the state's justified duty to protect rights, because the latter serves the former, not vice versa.

## Bibliography

- DALY, Aoife: Reconceptualising our Understanding through the UN Convention on the Rights of the Child. In Special Issue: Article 5 of the Convention on the Rights of the Child: Families, Guidance and Evolving Capacities. *The Int. J. of Children's Rights*, 2020, 28(3). 471-499. p.
- FORTIN, Jane: *Children's Rights and the Developing Law*. Third Edition. Theoretical perspectives and international sources. Cambridge University Press, 2009.
- GÁRDOS-OROSZ, Fruzsina: Az alapjogok korlátozása. In Jakab András – Könczöl Miklós – Menyhárd Attila – Sulyok Gábor (szerk.): *Internetes Jogtudományi Enciklopédia*, 2020.
- GÁRDOS-OROSZ, Fruzsina – SOMODY, Bernadette: Conceptualizing the Legal Capacity to Fundamental Rights. *Studia Iuridica Lublinensia*. Vol 32, No 5 (2023). 399-403. p.
- GHEAUS, Anca: Children's human rights. In Jesse Tomalty – Kerri Woods (eds.): *The Routledge Handbook of Philosophy of Human Rights*, 2024.
- HOFFMAN, Simon - THORBURN STERN, Rebecca: Incorporation of the UN Convention on the Rights of the Child in National Law. *Int. J. of Children's Rights*, 2020, 28(1). 133-156. p.
- KILKELLY, Ursula - LUNDY, Laura - BRYNE, Bronagh- KANG, Jason: *The UN Convention on the Rights of the Child: A study of implementation in 12 countries*. 2012, UNICEF.
- KILKELLY, Ursula: The CRC and the ECHR: The Contribution of the European Court of Human Rights to the Implementation of Article 12 of the CRC. In Tom Liefaard - Jaap Doek (ed.): *Litigating the Rights of the Child*. London, Springer, 2014. 193-209. p.
- KINCHIN, Ian M. – STREATFIELD, David – HAY, David B.: Using Concept Mapping to Enhance the Research Interview. *Int. Journal of Qualitative Methods*, 2010, 9 (1). 52-68. p.
- LÁPOSSY, Attila – PÁSZTOR Emese – SOMODY Bernadette – STÁNICZ Péter: Az ember alapjog-gyakorlási képességének dogmatikája. I. rész. *MTA Law Working Papers*, 2022.1. 9-24. p.
- LUX, Ágnes: A gyermekek jogai. In Jakab András – Fekete Balázs (szerk.): *Internetes Jogtudományi Enciklopédia*, 2018.
- NOVAK, Joseph D.: Concept Mapping: A Useful Tool for Science Education. *Journal of Research in Science Teaching*, Vol. 27. no. 10. 937-949. p.
- O'MAHONY, Conor: The Promises and Pitfalls of Constitutionalising Children's Rights. In James G. Dwyer (ed): *The Oxford Handbook of Children and the Law*. Oxford Un. Press, 2019. 871-896. p.
- POZSÁR-SZENTMIKLÓSY, Zoltán: Az alapjogi teszt újrafogalmazása. *Jogtudományi Közlöny*. 2014/4. sz. 23-34. p.
- SANDBERG, Kirsten: Children's right to protection under the CRC. In Falch-Eriksen-Backe-Hansen (eds.): *Human rights in child protection*. Palgrave Macmillan, 2018. 15-38. p.
- SOMODY, Bernadette – VISSY, Beatrix: Az alapjogok védelme. In Jakab András – Könczöl Miklós – Menyhárd Attila – Sulyok Gábor (szerk.): *Internetes Jogtudományi Enciklopédia*.
- SOMODY, Bernadette: Az alapjogi jogalanyiség. In Jakab András – Könczöl Miklós – Menyhárd Attila – Sulyok Gábor (szerk.): *Internetes Jogtudományi Enciklopédia*, 2024.