

ATTILA LÁPOSSY*

Behind the protection: Key Issues of the Child's Capacity to exercise Fundamental Rights

ABSTRACT: The study attempts to reveal from a dogmatic-analytical point of view, the issues related to the child's capacity to exercise fundamental rights based in practice-oriented approach, with case law examples. This children's rights focus is part of the larger research: the FULCAP research project aims to develop a complex concept and doctrine of legal capacity for fundamental rights (as a concept map) and to construct a normative concept of legal capacity for fundamental rights. The research seeks to answer how the definition of legal capacity for fundamental rights could be constructed, among others such as that of children. Namely the legal capacity of a child requires that the child enjoy a certain level of capacity to exercise rights and be able to exercise his or her fundamental rights. Based on the results of this research, the first part of the study identifies and examines the key factors that affect the child's capacity to exercise rights, the direct exercise of rights, or restrict it. First, the relevance of age and maturity; second, the parental rights and obligations; and finally, other factors: institutions, values, and public interest. The second part of the study tries to shed light on these factors using the example of the exercise of children's freedom to assembly and its limitations. Finally, the study sets up an "exercise of rights scale" and delineates the possible alternative legal solutions in the context of exercising the children's freedom of assembly.

KEYWORDS: children's rights, legal capacity of fundamental rights, best interest of the child, decision-making capacity, parental rights/obligations, proportionality, freedom of assembly.

* Assistant lecturer, PhD., Department of Constitutional Law, Faculty of Law, Eötvös Loránd University, Hungary, lapossy@ajk.elte.hu.

„The research on which the study was based was supported by the Ferenc Mádl Institute for Comparative Law. The language proofreading of the study was financed by the Hungarian Comparative Law Association, Miniszterelnökség and Bethlen Gábor Alap.”

1. Introduction

When we talk about children's rights, we consider the child's vulnerable position against the state's obligation to protect those rights, from which the automatic limitation of children's rights by the state is just a small step. The vulnerability of children, especially young children, is difficult to dispute. This, however, results in a situation where everyone always wants to "protect children," which can result in situations where children's capacity to exercise their fundamental rights is undermined. This approach runs counter to the fundamental guarantee that the person, including the child, is entitled to autonomy, it ensures that he or she is the subject of the decision affecting him or her and not the mere instrument of it. Nevertheless, certain difficult questions arise. How and according to what criteria can the issue of the child's exercise of fundamental rights and their limitations be analyzed? Who exactly has the responsibility to protect children, from what and why, and on what basis can we talk about the responsibility and obligation of parents, families, the state, or even society in relation to the protection of children?

The present study does not attempt to answer all these questions, but it attempts to reveal, as embedded in larger research and from a dogmatic point of view, the issues related to the child's capacity to exercise fundamental rights based on case law examples. Issues related to the exercise, protection, and limitation of children's rights can only be discussed within the framework of a global dialogue, the cornerstone of which are the principles of the UN Convention on the Rights of the Child (hereinafter, UNCRC), which have become part of the fundamental rights practice in Europe, for example, the practice of European Court of Human Rights (hereinafter, ECtHR).

The UNCRC is important as it throws new light upon the image of the child: a subject of human rights, which fundamentally influences policymaking, legislation, research, and planning around the world, at regional, national, and local levels.¹ The UNCRC undoubtedly recognized children as rights holders and provided them with individual rights. Children's rights in the UNCRC are often divided into three groups, described as the three P's: provision, protection, and participation. The first "P" is Provision, a right that enables children's growth and development including rights to adequate housing and education, and this can include

¹ Invernizzi and Williams, 2011.

childcare and play, leisure, arts, and recreation. The second “P” is Protection: these protect children against exploitation and abuse, and allow intervention when either occurs. Finally, the third “P” is Participation, which includes rights that enable children to participate in making decisions that affect them; it also includes the right to an opinion.² Children’s rights can also be approached from the perspective of the four basic principles of the UNCRC: non-discrimination, the best interest of the child, the right to survival and development, and the four basic principles of the child.³ Children’s views are also an important element in determining what is in their best interest. The meaning of the child’s best interests has remained indeterminate and opaque, so it tends to be invoked from different sides to justify sometimes opposing decisions.⁴

Children’s rights can also be defined as the legal guarantee of securing the most important needs of children, including the prevention of interventions that threaten children. Children cannot be properly protected without being provided with food, housing, care, health services, education, or the opportunity to participate in decision-making regarding their own lives and society. The interaction between different types of rights is also important for the protection of children.⁵ Children are autonomous agents who have the right to make mistakes. As human beings, children naturally have the right to be protected, however, they should not be prevented from exercising their self-determination, voice, and choice.⁶

2. About the Fundamental Rights Concept of Legal Capacity (FULCAP) Project: the aims and the concept

The Eötvös Loránd University Department of Constitutional Law (Budapest, Hungary) leads the FULCAP research project.⁷ This research aims to develop a complex concept and doctrine of legal capacity for fundamental rights (as a concept map) and to construct a normative concept

² Hammarberg, 1990, pp. 97–105.

³ Lundy and Byrne, 2017.

⁴ Vandenhole, 2017.

⁵ Sandberg, 2018.

⁶ Archard, 2014, p 123.

⁷ Project no.132712 has been implemented with the support provided by the Ministry of Innovation and Technology of Hungary from the National Research, Development and Innovation Fund, financed under the Researcher-initiated research projects funding scheme. More information: https://alkjog.ajk.elte.hu/fulcap_otka.

of legal capacity for fundamental rights. The research seeks to answer how the definition of legal capacity for fundamental rights could be constructed and, among others, its application vis-à-vis restricted capacity to exercise fundamental rights, such as that of children.

The aim of this research is also practice-oriented: to develop a doctrinal framework directly applicable in the practice of courts and other fundamental rights forums. One way of doing this could be to use civil law terms to conceptualize legal capacity for fundamental rights. However, this is rendered inappropriate by the different functions of these two branches of law.

While civil law regulates a person's property and personal relations on a horizontal basis, fundamental rights are intended to guarantee the freedom and dignity of individuals (children) against the state. The concept of the capacity to exercise fundamental rights should be in line with the UNCRC. Since a restriction on the exercise of fundamental rights are a restriction on fundamental rights itself, it must be justified by proportionality. The legal capacity of a child requires that the person enjoy a certain level of capacity to exercise rights and be able to enjoy and exercise his or her fundamental rights. If they are merely subjects of rights without the capacity to exercise them, then they fall short of having meaningful legal capacity from a fundamental rights perspective. Representatives' (e.g. "parents") decision-making cannot be understood as a form of exercise of fundamental rights. Their role is based mainly on the state's obligation to protect vulnerable people, and in the case of children, on parental rights and responsibilities.

One of the great dilemmas in the field of children's rights can perhaps be described most simply: these rights are inherent in the fact that they apply to subjects who, on the one hand, lack the full autonomy of adults, but on the other hand, are subjects of rights.⁸ A child would have a real, complete capacity to exercise fundamental rights if he or she could exercise the given fundamental right directly, without the intervention of another external actor, especially the parent, with the limitations that apply to everyone; if it is violated/restricted, he or she is able to assert his or her fundamental right independently, to request a remedy before the relevant, appropriate fundamental rights protection forums.⁹

⁸ '...children, who, on the one hand lacks the full autonomy of adults but, on the other, are subjects of rights.' CRC Committee, General Comment No. 12: The Right of the Child to Be Heard (UN Doc CRC/C/GC/12, 2009).

⁹ Láposy et al., 2022.

Three key factors exist: first, the relevance of age and maturity (1); second, the parental rights and obligations (2); and finally, other factors: institutions, values, and public interest (3).

1. Ensuring children's autonomous exercise of fundamental rights is an exception; it applies to a specific narrow group of persons (e.g., children between 16 and 18 years of age) and/or to the exercise of a specific fundamental right (e.g., health, self-determination) in practice or in law. One of the reasons for children's limited capacity to exercise fundamental rights is their limited level of understanding due to their limited maturity. There are significant differences in the level of understanding and maturity within the category of children and also within the "age groups" within that category (categories in the UNCRC's practice, such as young children and adolescents). These factors develop during childhood; as the child matures, so does their capacity to make decisions and, consequently, their capacity to exercise fundamental rights. At a given age, the capacity to make decisions varies according to the situation and kind of decision. The long-term consequences of the decision and the risks involved are also relevant; a public and sensitive situation for the exercise of fundamental rights (e.g., participation in a political demonstration) may be a relevant factor.

Children's age is one of the determining objective factors of maturity. One option is that the law sets a generally lower age of legal capacity, the attainment of which is an irrebuttable presumption of the child's maturity and the psycho-social development that goes with it (for example, the exercise of the child's right to health or information self-determination). There may be a situation where the presumption is rebuttable, and the exercise of the child's rights can be considered if the child's decision would be against their best interest (e.g., concerning contact with a separated parent). Regarding the third option, the court making the decision may consider the child's maturity and exercise of fundamental rights on an individual basis. In such a case, it is not sufficient that the child is of a certain age, additional psychosocial developmental aspects must be examined (e.g., maturity tests in the field of health self-determination). The presumption of maturity in regulation is problematic because of its inflexibility and discriminatory nature. Children above the age limit cannot be denied the exercise of their rights even if they are not mature enough, while those below the age limit cannot exercise their rights even if they are mature. In the first case (presumption), to exclude arbitrariness, it is a requirement that the statutory regulation establishing the restriction in the

form of an age limit must be based on scientific facts (verified research results), considering the current state and consensus of the scientific community. In the second case (individual basis), it is important to examine the role of facts and the examination of the actual decision-making capacity of children, which are also expected to be based on scientific evidence; however, it must be stressed that they remain legal decisions.

Examining maturity on an individual basis is a flexible solution for addressing the differences between children. However, there is a risk of arbitrary and inconsistent practices, ad hoc decisions, and the prominent role and influence of non-legal factors. In many countries, professional guidelines and specific tests are being developed to standardize discretionary practice and reduce inconsistencies, for example, the exercise of children's right to medical self-determination. In the absence of regulations or practices, parents may determine whether the child is sufficiently mature.

2. The exercise of fundamental rights by children is inseparable from their parental rights and obligations. Parenting is, by its very nature, a specific, two-faced legal institution. On one hand, it is a subjective right that imposes limits on state interference. On the other hand, it is a legally enforceable obligation for parents in relation to their children. Parents in this context only cover the child's biological or adoptive parent. Other legal representatives of the child, in particular the guardian appointed by the state, cannot be considered holders of parental rights. A person acting in the name and on behalf of the state is bound by fundamental rights, and cannot invoke parental rights vis-à-vis the state.

The parents' right to make decisions regarding the child's upbringing and the child's fundamental rights are interdependent and can be exercised with regard to each other. The interaction between these, possibly competing, rights are typically not regulated by law. However, there are examples where legislation explicitly states that the parent has the right to decide on matters relating to the child's fundamental rights (for example, the law explicitly gives the parent the right to decide on the child's education and health care and on the processing of the child's personal data, especially for younger children). Another possibility is that a joint decision between the parent and child is needed. In this case, the child is required to prove that the parent has consented to the exercise of his or her rights or has accepted

the child's decision (e.g., in cases of abortion requests, it is common to require such joint decision-making).

Parental responsibility is the duty, opportunity, and authority of the parent to guide the child in the exercise of his or her rights concerning his or her decision-making ability, age, competence, and autonomy. The relationship between parents and children can be described and modelled in several ways, particularly as a trust-based relationship. Accordingly, parents may determine the content of parenting autonomously and primarily according to their own convictions. Parenting is, however, also an obligation in relation to the child, meaning that parental rights must be exercised with regard to and in the best interests of the child (hereinafter, BIC). Therefore, the exercise of the child's fundamental rights means that, as a general rule, it is the trusted parent who is entitled and competent to determine what is in the best interests of the child.

It should be noted that, according to the CRC Committee, the child's best interests are threefold. First, BIC (UNCRC Article 3) is a substantive right. The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered to decide on the issue at stake and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children, or children in general. Second, BIC is a fundamental, interpretative, and legal principle. If a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child's best interests should be selected. Third, BIC is a rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children, or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.¹⁰ In fundamental rights practice, it is difficult to properly distinguish between the substantive (subjective right) and procedural elements of the BIC, whether it is the State or parents who intervenes in the exercise of the child's fundamental rights.

Within the framework of the parent's right to raise the child, the determination of the best interests of the child can be either subjective (the

¹⁰ CRC Committee, General Comment No. 14: The right of the child to have his or her best interests taken as a primary consideration (UN Doc CRC/C/GC/14, 2013). Although parents are not explicitly mentioned in Art. 3 para 1, the best interests of the child 'will be their basic concern' (Art. 18 para. 1).

parent freely decides) or objective (determined by the state in a normative way or through individual decisions). Owing to the civil law logic of the child's declaration of rights (age limits), there is a practical difficulty in many fundamental rights exercise decision situations: the parental statement is a valid requirement or the child cannot even make a valid statement in the first place.

An exception is when the state determines the best interests of the child. Such state interference restricts both the fundamental rights of the child and the parents' rights, significantly affecting the right to family life and privacy, as well as the requirement of the state's neutrality of ideology (e.g., cases of school choice and education). Therefore, such restrictions require strong justification. State intervention may be justified when the interests of the child and the parent appear to be in conflict, so the parent cannot be expected to make an unbiased decision in the best interests of the child. A typical legal solution to this situation is to appoint a professional guardian to protect the child's interests.

However, in the absence of procedural capacity, professional assistance, or representation, children without parental consent or involvement are typically unable to initiate proceedings to enforce their fundamental rights through courts or other forums. In such a context, the representation of children is not guaranteed independently of their parents (e.g., ECtHR cases on compulsory vaccination). When exercising the parent's right to make decisions in the best interests of the child, the child's views must be heard and considered regarding the child's maturity. Maturity and decision-making capacity are linked to parental rights/obligations, as the parent must consider the child's evolving capacities, progressive development, and increasing autonomy. This obligation forms a counterweight against arbitrary proceedings.

3. In addition to the above, the exercise of fundamental rights by children may be legitimately restricted to protect the functioning of the social institutions concerned by the exercise of fundamental rights (e.g., freedom of contract and security of property transactions, the right to vote and the electoral system, marriage, and registered partnerships), and the public interest behind them. The specific legal solutions used (e.g., setting minimum age limits for the exercise of fundamental rights) are similar; in this case, it is not the child's lack of decision-making ability that counts, but the impact of the exercise of the law and its consequences for the functioning of individual institutions. However, certain state interventions

(regulations) based on public interest limit the right or obligation to educate both the child and parent. In such cases, the restriction of the child's fundamental rights should be examined according to a proportionality test.

Proportionality is generally accepted as a measure of the restriction of fundamental rights. It follows from the very nature of fundamental rights and from the conflicts that FRs are subject to limitations (except for absolute rights). Based on the proportionality principle, a limitation of a fundamental right must be connected to a legitimate aim (e.g., the protection of another fundamental right or a specific public interest), the means used (in which the limitation is manifested) must be suitable to serve the legitimate aim, and the least restrictive measure must be chosen among the alternatives. Moreover, the importance of the legitimate aim and harm on the side of the affected fundamental rights must be proportional. According to the literature, proportionality, as the appropriate method that indicates the acceptable extent for the limitations, is justified based on arguments related to democracy, the rule of law, the conflict of legal principles, and the particularities of legal interpretation. Moreover, based on its origins in the practice of the Federal Constitutional Court of Germany in recent decades, the proportionality principle has become a central paradigm in the practice of courts dealing with fundamental rights cases worldwide, especially in Europe. It is important to emphasize that proportionality binds all branches of power (legislative, executive, and judiciary). However, if we consider the applicable, legally binding UNCRC and compare them to the European Convention of Human Rights (ECHR), including the case law of the ECtHR, we can identify common grounds as well as differences and sometimes disharmony between the regimes.

In addition to proportionality, the question of the state's neutrality in relation to the exercise of children's rights and the limitations of children's rights deserve special attention. The ideological neutrality of the state affects the entire concept of legal capacity for fundamental rights. Ideological neutrality essentially requires the state not to take a position on the question of a good life. Decision-makers (legislators and judges) need to be aware of their position on the neutrality behind their decisions. This ensures that the answers to the different questions of the concept of legal capacity for fundamental rights are coherent. This principle comes into play when the person concerned does not exercise or enforce their rights themselves and in the preceding question, when assessing decision-making capacity. What is considered to be in the best interests of the child that

influences the content of parents' parental rights and the possibility of state intervention? An outcome-based conception of decisional capacity, or best interest-based substitute decision-making, implies the definition of a good decision.

On the one hand, the premise that the state-public power restriction on the exercise of rights based on being a child (i.e., being under the age of 18) has no "self-legitimacy," i.e., it cannot be automatically accepted in any case (cf. restriction in the child's own interest, the child's self-defense), but must be constitutionally justified, can be defined as a basic premise. All situations of restriction and decisions of public authority (rules, practices, individual decisions) involving state intervention affecting the exercise of fundamental rights by children must follow the proportionality requirement. If a child's capacity to exercise his or her rights is incomplete as a result of state intervention, it must be classified as a limitation of rights, which can be considered constitutional if it is consistent with the fundamental rights limitation clause. The constitutionality of the exercise of rights is generally not accompanied by a separate, explicit clause in each constitution, and lacks a mature set of criteria in European fundamental rights practice.

3. The exercise of children's fundamental rights, possible alternatives to its limitation, and their consequences - examples from the area of the freedom of assembly

Freedom of assembly, as a classical, first-generation right that can be enforced against the state and the right to collective communication, can serve as an appropriate example for examining aspects related to the exercise of the child's fundamental rights.¹¹

Everyone has the right to freedom of a peaceful assembly, which is an essential component of democracy. The right to peaceful assembly includes the right to hold meetings, sit-ins, rallies, events, or protests. States should enable and protect the exercise of this fundamental right through various means including supportive legal frameworks. Freedom of assembly ensures that all people in a society can express opinions between civil society, political leaders, and the government. Essentially, we can say that children, just like adults, have the right to peaceful assembly, which includes

¹¹ It is no coincidence that the first of the vignettes containing fictitious children's rights cases produced in the framework of the FULCAP Project was also the assessment of the exercise and restriction of the right of assembly.

participating in a demonstration and even organizing a demonstration. This raises the question of how BIC can be determined in the context of attending a demonstration or perhaps organizing it, as well as which actor, parent, or state has the appropriate competence to decide this question in a general or concrete way. Should anyone allow a child to go to the demonstration or announce a demonstration? If so, should it be required by law or judged by the assembly authority (e.g., police or local government) or court?

Under international law, children can rely on the protection offered by Article 15 of the UNCRC, which includes the right to freedom of peaceful assembly. According to Article 15, State Parties recognize the rights of the child to freedom of association and freedom of peaceful assembly. Article 15 also states that no restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law, which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.

This raises the question of whether an age limit that prevents children from participating in a peaceful assembly is a reasonable restriction. Based on the practice of the CRC Committee in some countries, there are laws limiting children's rights to association and peaceful assembly during certain hours – curfews often imposed to prevent unaccompanied children from being out of their homes after a certain time in the evening, and often related to the age of the child. Such blanket restrictions on children's rights do not appear to fall within the very limited restrictions allowed in Article 15. Some States indicated in their Initial Reports that there is an age below which children are not permitted to join associations or to do so without the agreement of their parents.

The CRC Committee has recommended that a considerable number of State Parties should amend laws that prevent persons below a certain age from organizing outdoor meetings, as such laws are contrary to the rights enshrined in Article 15.¹² The UNCRC does not categorize children by age but recognizes the concept of the 'developing capacity of the child', the principle that children's capacities develop. The child can exercise his/her own rights, as opposed to adults exercising their rights on their behalf.¹³

¹² For example, Concluding Observations to Turkey (CRC/C/R/CO/2–3 2012, para. 38).

¹³ According to the Article 5 of the UNCRC States Parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally

Article 15 primarily considers the right to protest for older children who can form views and have attended a protest, because they wish to make a point about the issue in question. In practice, these individuals will likely be adolescents; however, this is not to assert that it might never be appropriate for younger children to form views and attend a protest.¹⁴

Although the CRC Committee's specific findings refer to the right of association and its limitations under the UNCRC, they can also be considered relevant from the perspective of the right of assembly.¹⁵ It is often observed that children often have difficulty participating in assemblies, as they often face first-line resistance from parents or caregivers, mainly from the state. The CRC Committee notes academic and legal arguments that children may have an enhanced right to participate in peaceful assemblies because they are generally unable to vote; therefore, a peaceful assembly is a means to bring about change.¹⁶

This raises the question of whether an age limit that prevents children from participating in a peaceful assembly is a reasonable restriction. The CRC Committee has taken the position that this is not an acceptable form of restriction, even if it is done to protect children. Indeed, in practice, many States do place additional restrictions on children when it comes to freedom of peaceful assembly, and the CRC Committee has frequently pointed this out to State parties. The CRC Committee has recommended that a considerable number of State Parties should amend laws that prevent persons below a certain age from organizing outdoor meetings, as such laws are contrary to the rights enshrined in Article 15 of the UNCRC.

According to the European Commission for Democracy through Law (Venice Commission) while certain restrictions may be placed on the exercise of the right to assemble by children, in view of the responsibilities of organizers or relevant safety concerns, any such restrictions must follow the requirements set out in international human rights instruments. In particular, when adopting any limits to the organization of or participation

responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

¹⁴ Daly, 2013, p. 7.

¹⁵ UNICEF, 2007.

¹⁶ See the Concluding Observations to Hungary: 'Ensure that children enjoy their right to freedom of expression including when participating in peaceful demonstrations, and do not suffer negative consequences, such as charges of petty offences by the police.' (CRC/C/HUN/6 2020, para 29).

in a peaceful assembly by children, full account needs to be taken of the best interests of the individual child and his/her evolving capacity. In addition, the right to freedom of assembly includes the right to choose not to participate in assemblies. It is particularly important as children are protected from coercive participation in assemblies.¹⁷

According to the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) panel of experts on the freedom of assembly in light of the important responsibilities of the organizers of public assemblies, the law may set a certain minimum age for organizers owing to the evolving capacity of the child. The law may also provide that minors organize a public event only if their parents or legal guardians consent to their doing so.¹⁸

The *ECtHR* explicitly asserts the right of children to attend gatherings in public spaces. As the Court noted in *Christian Democratic People's Party v. Moldova*, it would be contrary to the parents' and children's freedom of assembly to prevent them from attending events, in particular, to protest against government policy on schooling.¹⁹

Although the focus of the cited case was not the exercise of children's fundamental rights, their capacity to exercise fundamental rights, the *ECtHR* noted that

¹⁷ *Joint guidelines on freedom of peaceful assembly (3rd edition)*, CDL-AD (2019)017rev. Venice Commission. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e) (Accessed: 1 February 2023).

¹⁸ *Guidelines for drafting laws pertaining to the freedom of assembly, Second edition*. OSCE Office for Democratic Institutions and Human Rights (ODIHR), p. 58. Available at: <https://www.osce.org/files/f/documents/4/0/73405.pdf> (Accessed: 1 February 2023);

Examples: Section 5, Finland's Assembly Act (1999): A person who is without full legal capacity but who has attained 15 years of age may arrange a public meeting, unless it is evident that he/she will not be capable of fulfilling the requirements that the law imposes on the arranger of a meeting. Other persons without full legal capacity may arrange public meetings together with persons with full legal capacity. Article 6 Law on Public Assemblies of the Republic of Moldova (2008) Minors of age 14 and persons declared to have limited legal capacity can organize public assemblies together with persons with full legal capacity. The Hungarian Assembly Act does not establish age limit either for participating in a demonstration or for organizing a demonstration.

¹⁹ European Union Agency for Fundamental Rights and Council of Europe, 2022.

... Where the presence of children is concerned, the Court notes that it has not been established by the domestic courts that they were there as a result of any action or policy on the part of the applicant party. Since the gatherings were held in a public place anyone, including children, could attend. Moreover, in the Court's view, it was rather a matter of personal choice for the parents to decide whether to allow their children to attend those gatherings and it would appear to be contrary to the parents' and children's freedom of assembly to prevent them from attending such events which, it must be recalled, were to protest against government policy on schooling. Accordingly, the Court is not satisfied that this reason was relevant and sufficient.²⁰

Daly draws attention to the fact that there are a variety of reasons for neglecting these rights [right of assembly]. Daly also points out that children are generally more vulnerable than adults, which makes the facilitation of such freedom rights counterintuitive for many. Children are usually cared for by adults, and according “freedom” rights to children raises fears for some commentators that the family unit may be undermined when children are empowered. The reluctance to engage in freedom rights for children has also been due to assumptions about children’s capacities. Children’s capacities are generally less developed than those of adults; therefore, one could argue that children are more likely than adults to make poor judgment calls. For example, they may be more susceptible than adults to manipulation by groups that seek to recruit them. Daly also mentions that children may also face greater physical danger than adults in public demonstrations because they are generally of smaller stature and have less developed capacities.²¹ In many instances, children are “brought along” to protest by their parents or other adults.

In 2017, the Fundamental Rights Agency of the European Union (FRA) reviewed the rules on the age of exercise of rights for children in EU Member States in detail, many of which specifically concerned the exercise of fundamental rights (the possibility of marriage, political participation, consent to data processing, or consent to medical treatment without parental consent). In doing so, for example, the FRA concluded that children cannot,

²⁰ *Christian Democratic People’s Party v. Moldova* App. No. 28793/02, 14 February 2006, para. 74.

²¹ Daly, 2016, p. 10.

generally, independently initiate legal proceedings before they reach the age of majority, usually 18 years, and the full procedural capacity that this entails, with a few limited exceptions, and that the rights of children to be heard in court proceedings vary considerably between and within states and in different areas of law. In the cited analysis, the FRA did not make a comparison specifically regarding the right of assembly.²²

Brando and Lundy draw attention to the following regarding the limitations of children's right to assembly and age limits. Age-based differential treatment is not necessarily wrong; what we are concerned about, and claim, is that, particularly in the case of age-based differential treatment of children, there tends to be a lack of accountability for the reasons given to restrict rights and a generalized lack of justification as to why certain forms of differential treatment are required and directed specifically towards children. It is often taken as a given both in law and social life that children can have many of their political and civil freedoms justifiably restricted due to their assumed vulnerability or because of their assumed incapacity. According to the authors, this belies the fact that civil and political rights can only be restricted in several specific ways. Children can be treated differently from others based on their age, if the differentiation is proven to have a legitimate aim, to be a necessary solution to achieve that aim, and to be proportional.²³ The authors argued that such state interventions (restrictions) are often arbitrary and discriminatory, which is worth considering.

In the context of exercising the right of assembly of children, several alternative solutions are possible, along the lines of the considerations set out earlier.

One of the quasi-endpoints of the "exercise of rights scale" is the child's capacity to exercise fundamental rights freely (i.e., without child-specific restriction), in which other external actors, in particular the parent and the state, do not interfere: in this example, the child can exercise freedom of assembly by observing the rules and limits that apply to everyone else, i.e., he or she can be either an organizer or a participant in a demonstration. With this option, the state typically does not regulate this issue by law, as it is silent about it (i.e., it does not prohibit it, but it also does not allow it specifically for the child). The role of the parent can be to assist and support the child's exercise of his or her rights, explaining to the

²² FRA, 2017.

²³ Brando and Lundy, 2022.

child the rules for participating in demonstrations in accordance with his or her unfolding abilities, and possibly accompanying the child in case any risks arise. A separate issue may arise in the organization or announcement of a demonstration, where it may also be necessary to involve the state (or the parent) for the adolescent child to exercise this right. A fundamental dilemma is whether this supportive, helping attitude can be enforced against the parent by any means on the part of the state.

One alternative to the free exercise of rights may be when the parent decides within the scope of his or her parental right/obligation, considering the disadvantages, risks, and maturity of the child, and whether the child can exercise freedom of assembly in the given context. It is important to point out once again that, in such a case, the parent is not exercising the child's right to assemble, but his or her parental right/obligation. As indicated earlier, this decision may be optional from the parent's point of view (there is typically no normative requirement in this case), but the parental decision – as a validity requirement – may also be mandatory by the state (or by the court in an individual case). The mandatory parental decision may be shared with the child (joint decision), for example, the consent of the parent is required by the state, or it may be reserved exclusively for the parent. The imposition of a mandatory parental decision by the state on participation in a demonstration may present a practical difficulty, and it is not clear who would be responsible to exercise control, how such control will be exercised, and whether, if necessary, the child participates in the demonstration with the knowledge and consent of the parent and whether this obligation can be simply placed on the organizer of the demonstration. A child's declaration of rights to organize a demonstration may be easier for the state to require parental approval. In this case, the question arises as to how the child can really force the parent to decide whether or not to take part in the demonstration, since the silence of the parent also leads to the child not being able to exercise his or her freedom to assemble. There is a dilemma as to whether it is possible to provide the child with an independent, accessible means of redress against a parent's decision to refuse to participate in a demonstration or organize it. The parent's right/obligation is limited by the child's right to be heard; that is, the parent is obliged to listen to the child's opinions and views and take them into account in his or her consideration.

The third possible option is for the state to make its own decision on whether children can be participants or organizers of demonstrations, which

is another constitutionally extreme quasi-endpoint of the scale, according to which children cannot exercise their freedom of assembly at all. However, total, automatic exclusion, especially with regard to participation, is not compatible with the cited standards of children's rights and human rights. A more typical solution is that the state establishes a minimum age limit for the exercise of a fundamental right, that is, allowing a child to be a participant or organizer of a demonstration, for example, from the age of 14 or 16 years. By setting a normative age limit, the state clearly restricts both the right of assembly of children who have not yet reached a given age and the rights of their parents, so that the proportionality test must be applied to its examination. This type of regulation and automatism, in the absence of adequate evidence, also raises the problem of age-based discrimination among children. In the case of the minimum age for exercising the right as a presumption, it does not matter whether the child is sufficiently mature, for example, in relation to the risk of deciding to participate in a demonstration. No matter how the parent judges the best interests of the child in exercising the right to assemble. The only relevant factor is whether the child has reached the age limit or not. A more flexible solution could be if the legislator allows the rebuttal of the presumption in the matter of the exercise of rights; that is, the court applying the law can decide that the child can be the organizer of a demonstration.

Another consideration may be that if the state makes the child's right to organize demonstrations subject to a minimum age limit by law, it does not consider the child's maturity and decision-making ability (weighing the best interests of the child), but on the grounds of the public interest. That is, the state, as a legitimate objective, intends to limit the exercise of this right of the child specifically based on responsibility, financial responsibility, and, in general, the protection of rallies associated with the organization of demonstrations (all this is difficult to justify in connection with participation).

The State may also decide not to set a minimum age limit in the law, but to leave it to the court to determine the exercise of the child's right to assembly in the event of a dispute. This means that automatism is eliminated; however, it raises the question of the legal basis on which the judge can examine the maturity and decision-making capacity of the child in relation to a demonstration. A potentially arbitrary solution may exist not in automatism but in a lack of predictability. Instruments for standardizing

judicial practice, taking into account the function of children's right to assembly, could reduce the risks arising from insecurity.

One thing this brief analysis demonstrates is there is no bomb-proof solution for the development of regulations and practices regarding the capacity of children to exercise the right of assembly. However, inertia and silence should not follow from all this; on the contrary, it is important to identify and analyze in a meaningful way the constitutional and fundamental rights aspects relating to the child's capacity to exercise fundamental rights. The first step to this is to accept that a restriction based on the child's capacity to exercise fundamental rights, in particular, the legal setting of minimum age limits cannot be a blank cheque,' and must always be duly certified by the State. In the context of the justification of state intervention, it is of paramount importance to apply the proportionality test and to consider the principle of state neutrality in relation to intervention in parenting rights/obligations. Within the framework of the FULCAP Project, we would like to contribute to the search for answers using our dogmatic-analytical approach.

Acknowledgement

„The research on which the study was based was supported by the Ferenc Mádl Institute for Comparative Law. The language proofreading of the study was financed by the Hungarian Comparative Law Association, Miniszterelnökség and Bethlen Gábor Alap.”



Bibliography

- [1] Archard, D. (2014) *Children: Rights and Childhood*. 3rd edn, Routledge: London; <https://doi.org/10.4324/9781315740676>.
- [2] Brando, N., Lundy, L. (2022) 'Discrimination and Children's Right to Freedom of Association and Assembly', *Harvard Human Rights Journal*, 35(2), December 2022. Available at: <https://harvardhrj.com/2022/12/discrimination-and-childrens-right-to-freedom-of-association-and-assembly/> (Accessed: 1 February 2023).
- [3] Daly, A. (2013) 'Demonstrating Positive Obligations: Children's Rights and Peaceful Protest in International Law', *The George Washington International Law Review*, 45(4), pp. 763-813.
- [4] Daly, A. (2016) 'Article 15: The right to freedom of association and freedom of peaceful assembly' In the series edited by Alen, A. et al. (eds), *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden: Boston.
- [5] European Union Agency for Fundamental Rights and Council of Europe (2022) *Handbook on European law relating to the rights of the child* [Online]. Available at: https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF (Accessed: 1 February 2023).
- [6] FRA (2017) *Mapping minimum age requirements concerning the rights of the child in the EU* [Online]. Available at: <https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements-concerning-rights-child-eu> (Accessed: 1 February 2023).
- [7] Hammarberg, T. (1990) 'The UN convention on the rights of the child – And how to make it work', *Human Rights Quarterly*, 12(1), pp. 97–105; <https://doi.org/10.2307/762167>.
- [8] Invernizzi, A., Williams, J. (2011) *Introduction. The Human Rights of Children. From Visions to Implementation?* Routledge: London.

- [9] Láposy, A., Pásztor, E., Somody, B., Stánicz, P. (2022) ‘The dogmatic points of people's capacity to exercise fundamental rights - Part I’. *MTA Law Working Papers*, 2022/1. [Online]. Available at: <https://jog.tk.hu/en/mtalwp/az-ember-alapjog-gyakorlasi-kepessegenek-dogmatikaja-i-resz> (Accessed: 1 February 2023).
- [10] Lundy, L., Byrne, B. (2017) ‘The four general principles of the United Nations Convention on the Rights of the Child: the potential value of the approach in other areas of human rights law’ in Brems, E., Desmet, E., Vandenhole, W. (eds.) *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* Routledge: London; <https://doi.org/10.4324/9781315637440-4>.
- [11] Sandberg, K. (2018) ‘Children’s right to protection under the CRC’, in Falch-Eriksen, A., Backe-Hansen, E., (eds.) *Human rights in child protection*. Palgrave: Macmillan, pp. 15-38; https://doi.org/10.1007/978-3-319-94800-3_2.
- [12] UNICEF (2007) *Implementation Handbook for the Convention on the Rights of the Child* [Online]. Available at: <https://www.unicef.org/lac/media/22071/file/Implementation%20Handbook%20for%20the%20CRC.pdf> (Accessed: 1 February 2023).
- [13] Vandenhole, W. (2017) ‘Distinctive characteristics of children’s human rights law’, in Brems, E., Desmet, E., Vandenhole, W. (eds.) *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* Routledge: London; <https://doi.org/10.4324/9781315637440-4>.