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**Decision-making capacity and
fundamental rights:
Legal capacity of persons with cognitive
disabilities in the practice of European
fundamental rights forums**

Theses of the doctoral dissertation

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1. Objectives of the dissertation

Most people take it for granted that they have rights and can exercise them freely, allowing them control over the course of their lives through the daily choices they make.

This is not the case for persons with cognitive disabilities, for whom even the recognition of their fundamental rights and the acceptance of their legal standing had not always been evident. As a result of a socio-legal process, it is now generally accepted that all persons can be the subject of rights, thus, legal standing is universal. Nonetheless, the possibility of limiting the capacity to exercise fundamental rights (legal agency) is still more widely accepted in the case of persons with cognitive disabilities.

Throughout the dissertation I deliberately use the English term legal capacity to distinguish it from related civil law concepts such as legal standing and legal agency, which are prevalent in the continental European legal systems. One of the core aims of this dissertation is to show that the use of terminology matters and that a coherent dogmatic framework impacts the enforcement and exercise of fundamental rights and guides legal practice.

Studies have shown that restriction of legal capacity (legal agency) has been the norm rather than the exception for persons with cognitive disabilities. In Hungary, the restriction of legal capacity through guardianship currently affects more than 60,000 people,¹ more than half of whom are under plenary or fully restrictive guardianship covering all aspects of their lives.² In

¹In 2024, 57.574 people were under guardianship, 31.661 of whom under plenary guardianship and 24.314 under partial guardianship regimes. Source: https://www.ksh.hu/stadat_files/szo/hu/szo0058.html Last accessed: 6 June 2025.

²For a more detailed analysis see: Gulya Fruzsina - Hoffman István. A támogatott döntéshozatal sorsa Magyarországon. Fogytékosság és Társadalom. 2019. 5. 22-36. 10.31287/FT.hu.2019.2.2.; valamint Hoffman István - Gulya Fruzsina - Tőkey Balázs: A nagykorúak cselekvőképességének korlátozása - hazai jogi keretek és azzal kapcsolatos főbb adatok. Közjogi Szemle 2020/1. 22-33.; Kiss Valéria - Maléth, Anett - Tőkey, Balázs - Hoffman, István - Zsille, Katalin - Dombrovsky, Borbála: A gondnoksági perek empirikus vizsgálata. In: Gulya,

contrast, supported decision-making, which leaves legal capacity intact, is available to a few hundred people.³ Institutionalisation is common for persons with disabilities, affecting more than 20,000 persons with disabilities, who are often placed in residential care against their will or as a consequence of financial difficulties.⁴

The fundamental rights research group that I represent considers the exercise and enforcement of fundamental rights as the primary object of fundamental rights analysis, defining the enforcement of fundamental rights as a conceptual element of fundamental rights themselves. My view of fundamental rights is, thus, a strictly legal approach. It follows from this perspective that the true nature and limits of fundamental rights can be observed and conceptualised from the practice of these forums.⁵

The most prominent element of the research process is the practice of fundamental rights forums and the perspective that foregrounds the practical enforceability of fundamental rights. The case law methodology logically follows from a concept of fundamental rights that regards enforceability as a definitional element of fundamental rights. In my view, the current practice of fundamental rights forums and the legal literature do not offer a consistent answer to questions concerning the decision-making capacity of persons with disabilities, which also impacts and impedes the exercise of their fundamental rights. These differing approaches result in the absence of generally applicable, coherent answers to general dogmatic questions, which can fragment the enforcement of rights. It is not an objective of this research to take a position on major academic debates — for example, on the permissibility of substituted decision-making. Nevertheless, I consider it essential to present what is currently realized and enforceable by and for persons with disabilities in legal practice. While the correctness of the practice of fundamental rights-protecting bodies may be subject to debate, it is — in my opinion — a matter of fact what content of fundamental rights, at a given moment in time, can be invoked against states and enforced through fundamental rights forums, as this determines the everyday exercise of rights and the lived realities of persons with disabilities.

Fruzsina; Hoffman István (szerk.): A nagykorúak cselekvőképességének korlátozása Magyarországon. Budapest, Magyarország : ORAC Kiadó Kft. (2024) 253 p. pp. 33-69. , 37 o.

³ Ibid.

⁴ Petri Gábor: Financing of Care Services for Persons with Disabilities – Hungary. EASPD: Brussels. 2020. DOI: 10.13140/RG.2.2.25594.62409.

⁵ HALMAI Gábor – TÓTH Gábor Attila (szerk.): Emberi jogok. Budapest, Osiris, 2003.

The first research question examines how disability and decision-making capacity are defined and appear in the practice of European fundamental rights forums. The research concept — which begins with the enforceability of fundamental rights — and the case-law focus form a tightly integrated whole. The fundamental rights claims of persons with disabilities and their enforceability, along with the practical frameworks of legal capacity, can be directly identified through the jurisprudence of the forums adjudicating such claims. Fundamental rights forums necessarily take positions on dogmatic questions in the course of adjudicating individual cases — even if the dogmatical significance of a case may not be fully recognized by the deciding body. Decision-making capacity, in the case of persons with cognitive disabilities, is a concept that falls outside of the legal field, yet, it is one that plays a central role in the legal assessment of restrictions on legal capacity. This research question seeks to determine how disability and decision-making capacity have been addressed in cases brought before European fundamental rights forums, and what definitions — explicit or implicit — have been applied by those bodies.

The next research question focuses on the paradigms underlying and characterizing the European fundamental rights forums. Specifically, it inquires into the paradigms within the European fundamental rights space that shape the content of fundamental rights and the adjudication of rights claims. The definition of the European fundamental rights space rests on guiding and characteristic similarities observed in the adjudication of fundamental rights. The research hypothesis posits that the paradigms of necessity, proportionality and judicial balancing pervade the practice of European fundamental rights forums and significantly influence it.

My third research question investigates the dogmatic questions that can be identified in the jurisprudence concerning decision-making capacity and the restriction of legal capacity. This question partially overlaps with the first, but it is more specific and explicitly focuses on identifying issues of dogmatic significance. According to the research hypothesis, fundamental rights forums must provide coherent responses to dogmatic questions in order to ensure consistent rights enforcement and avoid fragmentation in fundamental rights protection.

Closely related is the fourth research question, which examines whether the various forums provide coherent responses to the identified dogmatic questions. Identifying such dogmatic issues and analyzing the case-law positions on them has significance from multiple perspectives. For individuals, it defines the opportunities and limits of rights enforcement; on a

systemic level, it may influence even the dogmatic definitions of key legal concepts. The research hypothesis is that a coherent, unified dogmatic framework and its integration into jurisprudence can facilitate effective and consistent protection of rights.

My final research question is, in fact, a pair of related questions. The primary inquiry is: how does the European imprint relate to the broader international dimension, namely the CRPD? Closely tied to this is the question: if differences exist, what explains them? Among the forums examined within the European fundamental rights space, the CRPD Committee is unique in that its jurisdiction extends beyond Europe. The research hypothesis here is that the paradigms of the European fundamental rights space shape both the adjudication of rights claims and, consequently, the possibilities for exercising rights. From the perspective of a research concept rooted in the enforceability of fundamental rights, this touches upon the very essence of fundamental rights. In answering the research question, the study first analyzes the practices of the relevant forums, identifying differences and similarities, followed by a dogmatic analysis aimed at providing a unified conceptual framework for the issues examined. The hypothesis is that there are indeed divergences among the forums examined, and one possible explanation lies in the defining influence of the European fundamental rights space.

While this dissertation focuses on persons with disabilities, it is important to highlight that the analysis primarily addresses questions of dogmatic relevance affecting persons with cognitive disabilities. Persons with disabilities face numerous barriers in exercising their rights — some stemming from legal regulation, others from the operation of the legal system or from practical, non-legal factors. Without denying the existence of such obstacles in general, the present study specifically investigates the role of decision-making capacity. Restrictions on the legal capacity of persons with cognitive disabilities are typically based on the absence or atypical functioning of decision-making capacity. Decision-making capacity, therefore, is a factor that arises specifically in relation to persons with cognitive disabilities, which justifies narrowing the scope of the research. This dissertation seeks to establish a dogmatic framework based on legal capacity and rights enforcement. The dogmatic approach aims to offer coherent responses to dogmatic questions identified in the practice of fundamental rights forums, thereby contributing to the consistency of legal protection. In my view, the concept of legal capacity as presented in this dissertation is suitable for application in both fundamental rights protection and legal practice, and — according to the hypothesis — has the potential to explain and mitigate the fragmentation currently observable in this field.

2. Methodology and structure of the dissertation

The framework of the research is defined by the European fundamental rights space, which, according to this dissertation, is constituted by the European standards of the paradigms of equal human dignity and proportionality. The research occasionally extends beyond these frameworks to reflect on the broader context, but the core trajectory of thought remains within the paradigms of European fundamental rights dogmatics. At the heart of the analysis lies the question of how the exercise of fundamental rights by people with cognitive disabilities — particularly individual autonomy and legal capacity — appears in the practice of fundamental rights forums. A key focus of the research is comparing the normative and practical levels, thereby uncovering issues related to the enforceability of fundamental rights.

My research questions are as follows:

How are disability and decision-making capacity defined in the practice of European fundamental rights forums?

What paradigms in the European fundamental rights space shape the content of fundamental rights and the adjudication of fundamental rights claims?

What dogmatic questions can be identified in the practice of fundamental rights forums concerning the restriction of decision-making capacity?

Do the individual forums provide coherent answers to these dogmatic questions?

How does the European approach relate to the broader international dimension, particularly the CRPD?

If divergences exist, what are the reasons behind them?

The research methodology is primarily desk-research. In addition to reviewing and summarizing relevant literature, a prominent role is given to presenting and evaluating the practice of fundamental rights forums. Within the scope of European normative principles and case law, I examine the most significant international legal documents and the practice of fundamental rights forums relevant to the topic. These include the ECHR European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR), the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and its Committee (CRPD Committee) and the Court of Justice of the European Union (CJEU).

Although the dissertation makes findings applicable to people with disabilities in general, the primary focus of the research is on questions affecting people with cognitive disabilities that also carry dogmatic significance. People with disabilities encounter numerous obstacles in exercising their rights; some of these stem from legal regulations, others from the functioning of the law, or from practical, non-legal factors. While acknowledging that people with disabilities generally face many barriers in legal practice, this thesis specifically investigates the impact of decision-making capacity. The restriction of legal capacity for people with cognitive disabilities is typically based on the absence of, or deviation from, typical decision-making capacity. Thus, decision-making capacity is a factor particularly relevant for people with cognitive disabilities, justifying the narrowing of the research scope.

The structure of the thesis begins by identifying how disability emerges in legal practice through disability models. Although these models originate outside the legal realm, they play a decisive role in legal practice by influencing how forums understand disability and whom they consider to be a person with a disability. Next, the thesis explores the factors that shape the legal perception of disability in Europe, moving from overarching principles through normative provisions in international legal documents and scholarly legal interpretations to the actual practice of fundamental rights forums. This is done by first identifying the leading paradigms of the European fundamental rights space, then reviewing the text and academic interpretations of the ECHR and especially the CRPD, and finally, analyzing case law from the ECtHR, the CRPD Committee and the CJEU. Based on conclusions drawn from the case law analysis, the focus shifts to the concept of legal capacity as a means of enabling or restricting the exercise of rights by people with disabilities. The thesis deliberately uses the English term legal capacity to distinguish it from related civil law concepts such as legal standing and legal agency, which are prevalent in the continental European legal systems. Showing the differences of terminology and its consequences (especially in the Hungarian language and literature) is a concrete aim of this thesis.

Chapter II, following the introduction, provides a detailed analysis of disability models and presents how the protection of people with disabilities appears on the map of fundamental rights. Early, fragmented representations of disability were eventually replaced by *sui generis*, unified approaches, often referred to as disability models. These models reflect different perspectives on the lives of people with disabilities. Despite their differences, they share a common focus, providing a basis for further comparative analysis. In my view, each model

offers a unique perspective on disability and the situation of people with disabilities, and collectively—if all relevant viewpoints could be grasped—would form a crystal-like matrix revealing all aspects, challenges, specificities, diversity, and joys of life with a disability.

Relying on earlier disability studies research and relevant literature,⁶ György Könczei and his research group argue that *“there is no linear development leading toward an ever more positive outcome. Nor is there any spirality in the history of disability. The historical dynamics shaping the lives of those affected are diverse and branching, continuously presenting changing patterns of inclusion and exclusion.”* Thus, the approach to disability is far from static; on the contrary, it changes dynamically in time and space, reflecting the socio-cultural environment in which all people live together. However, the dynamism of disability models does not imply continuous progress; with time, models do not necessarily become “better” or “more advanced.”⁷

In Chapter II, I examine the most accepted approaches to disability through disability models. Building on this, Chapter III explores dogmatic questions emerging in the practice of fundamental rights forums in relation to disability. This chapter first outlines the relevant dogmatic concepts, which presents a dogmatic problem map of fundamental rights. The case law analysis focuses on the pre-identified dogmatic questions and highlights interpretations and conclusions from the practice of different forums. Throughout the chapter, the problem map provides direction and determines the focus of the analysis.

I examine dogmatic concepts that are most significant for the individual's exercise of rights. Exercising a right begins with the individual making a decision (which is a non-legal matter), followed by a legal assessment determining whether the law accepts and validates the decision or denies its legal consequences. This assessment influences the extent to which an individual

⁶ KÖNCZEI György: A nem-orvosi rehabilitáció elméletéhez. A rehabilitáció néhány sarkkérdése Magyarországon 1968-1986. Szövetkezeti Kutató Intézet, Közlemények 200., Budapest, SZKI., 1987.; KÁLMÁN – KÖNCZEI: A Tajgetosztól az esélyegyenlőségig.; KÖNCZEI György: Transzformációk a társadalomtörténetben és tudományunk történetében. In HERNÁDI Ilona – KÖNCZEI György (szerk.): Fogyatéktudomány a mindennapi életben. Budapest, Budapesti Műszaki és Gazdaságtudományi Egyetem, 2007. 19-42. o.

⁷ See: STIKER, Henri-Jacques: A history of disability. University of Michigan Press 1999.; ROSE, M. Lynn: The Staff of Oedipus. Transforming Disability in Ancient Greece. Ann Arbor, The University of Michigan Press, 2006.; ADELSON, Betty M.: The Lives of Dwarfs. Their Journey from public curiosity toward social liberation. New Brunswick – New Jersey – London, Rutgers University Press, 2005.; DASEN, Veronique: Dwarfs in Ancient Egypt and Greece, Oxford, Clarendon Press, 1993.; BRADDOCK-PARISH: Chapter 2: An Institutional History of Disability.; FOUCAULT, Michel: A rendellenesek. Előadások a Collège de France-ban (1974- 1975). L'Harmattan Kiadó-Szegedi Tudományegyetem Filozófia Tanszék, Budapest.; FOUCAULT, Michel: A szexualitás története. A tudás akarása. Atlantisz Kiadó, Budapest, 1996.

can enjoy their full spectrum of fundamental rights. For people with disabilities, support may be a necessary and desired element in this process. Accordingly, relevant dogmatic concepts include decision-making capacity, legal capacity, legal standing, legal agency, as well as substituted and supported decision-making.

The next subsection (III.ii) offers a detailed analysis of the European fundamental rights space and its concept of proportionality. By European fundamental rights space, I refer to the generally accepted framework of fundamental rights in Europe, centered around the principle of proportionality. The realization and enforceability of fundamental rights and their practical exercise are conditions for individual autonomy for every person. Proportionality is a standard method for resolving fundamental rights conflicts and introduces a new vocabulary—such as interest, cost, weight, balancing, sufficiency—replacing traditional concepts like right, wrong, good, bad. Proportionality has become an established tool in interpreting and resolving constitutional rights conflicts. As Louis Henkin notes,⁸ we live in an age of rights—and proportionality.⁹

The concept of enforceable fundamental rights rests on the European fundamental rights space, in which proportionality plays a central role. In the practice of European fundamental rights forums, proportionality is indispensable, and therefore, it is of utmost importance in this research. It functions as a general dogmatic tool for evaluating whether and how fundamental rights can be restricted, and it crucially affects the scope of enforceability. This is particularly relevant when evaluating the true autonomy of persons with disabilities, as the limits of their rights are generally defined by forums through proportionality assessments.

Given the importance of individual autonomy and the capacity to exercise fundamental rights, the thesis examines the practices of three international forums that are crucial in Europe: the CRPD Committee (subsection III.iii), the ECtHR (III.iv), and the CJEU (III.v). These are all fundamental rights forums or adjudicators of fundamental rights related cases. While they share similarities in their functions, they also differ in significant ways. Understanding these

⁸ HENKIN, Louis: *The Age of Rights*. Columbia University Press, 1990.; BOBBIO, Norberto: *The Age of Rights*. John Wiley & Sons, 12 Jun 2017.

⁹ Barak (2010) 14.o.; Stone Sweet, Alec and Mathews, Jud, *Proportionality Balancing and Global Constitutionalism* (2008). Columbia Journal of Transnational Law, Vol. 47, pp. 68-149, 2008, Available at SSRN: <https://ssrn.com/abstract=1569344>

THOMAS, David, WOODS, Honor: *Working with People with Learning Disabilities: Theory and Practice*. Jessica Kingsley Publishers, 2003.

similarities and differences is essential, as the current content and boundaries of legal capacity restrictions, rights exercise, and state obligations are essentially defined by these three forums. After presenting each forum's role, the thesis offers a detailed analysis of their relevant case law. The chapter concludes with a possible explanation of the similarities and differences identified in the practice of the various forums, tracing them back to the dominant proportionality paradigm in the European fundamental rights space. This conclusion is addressed in a separate subsection (III.vi).

The case law analysis is followed by a dogmatic examination of legal capacity in Chapter IV, continuously reflecting on the issues that arise in legal practice. The chapter begins with detailed definitions of the previously introduced concepts, then returns to the practical barriers faced by individuals, thus framing the theoretical discussion.

Subsection IV.i elaborates on the fundamental rights interpretation of legal capacity. This includes the civil law distinction between legal capacity and legal agency, contrasted with the thesis's fundamental rights-based approach. Separate sections (IV.i.A–IV.i.E) address the methods used to assess decision-making capacity.

In IV.i, I review and analyze in detail the dogmatic concepts most relevant to legal enforcement. The dogmatic analysis is complemented by a multidisciplinary perspective on decision-making capacity as a non-legal fact, drawing heavily on findings from medical and neuroscientific research. After this interdisciplinary detour, I return to legal dimensions by examining how such non-legal facts are treated in legal proceedings.

Subsection IV.ii brings the analysis back toward practical implementation in legal procedures, exploring the impact of dogmatic findings through the lens of legal enforcement. From the individual's perspective, a key question is what obligations can be demanded from the state—in other words, how enforceable the fundamental rights concept of legal capacity is in practice. Therefore, this subsection examines the state's positive obligations.

One major disadvantage of a fundamental rights concept based on enforceability is that fundamental rights forums can only make determinations—whether case-specific or general—in cases brought before them, thus defining the boundaries of enforceability. Subsection IV.iii addresses this issue.

The limitation of this rights-enforcement-centered fundamental rights concept cannot be ignored. Fundamental rights forums can only make individual and generally applicable statements in cases brought before them, thereby defining the boundaries of the enforceability of fundamental rights. Subchapter IV.iii addresses the limitations of the legal capacity-related interpretation possibilities stemming from this enforcement-centric perspective, and explores the potential of a more inclusive, preventive approach beyond adjudicated cases. Here, the focus shifts to the structural conditions of the realization of rights and explores what fundamental rights-based requirements can be inferred in relation to accessibility, support, or awareness-raising.

The final, fifth chapter of the dissertation summarizes the findings. The conclusion organizes the research results around the key concepts: legal capacity, decision-making capacity, and the enforceability of rights. This is followed by a reflection on the similarities and differences between the practices of the various European fundamental rights forums and the implications these have on the effective protection of the rights of people with cognitive disabilities. The dissertation concludes with suggestions for further research directions and indicates areas where legal theory or jurisprudence could be further developed to ensure better alignment with the CRPD paradigm.

3. Summary of the results and conclusion of the dissertation

Disability appears as a central issue in the practice of fundamental rights protection forums—both as a primary question (for example, in cases before the CRPD Committee examining the justification of differential treatment based explicitly on disability) and as a related issue (for instance, in ECtHR judgments assessing the permissibility of restrictions on liberty). In summary, it can be concluded that the issue of disability and the fundamental rights claims of persons with cognitive disabilities have left a tangible imprint on the jurisprudence of fundamental rights protection forums.

These forums employ various, sometimes inconsistent, approaches to disability. Substantial differences can be observed among the forums themselves. For example, similar to the medical model, the ECtHR tends to consider decision-making capacity and the existence of mental

disorders as medical factual matters, whereas the CRPD Committee rejects the legitimacy of the medical approach. The social and human rights models of disability, as well as the functional approach to decision-making capacity, are also strongly present in the jurisprudence of fundamental rights forums.

In the European fundamental rights framework, the application of the proportionality paradigm is fundamental to resolving conflicts of fundamental rights. Proportionality also concerns the substance of fundamental rights (for instance, in the case of absolute rights) and constitutes the principal benchmark in assessing limitations of fundamental rights. While the doctrine of proportionality is supported by an extensive body of legal literature, what is even more crucial from the perspective of this study is that forums such as the ECtHR and the CJEU do not deviate from applying proportionality—even when reviewing restrictions on legal capacity based on decision-making ability. In contrast, the CRPD Committee in some instances rejects the possibility of limiting fundamental rights on the basis of proportionality when the underlying reason for such limitation or unfavourable treatment is the individual's disability.

A key dogmatic question that arises in this analysis is whether it is acceptable to restrict legal capacity on the basis of an individual's decision-making capacity being different from the majority's. The ECtHR and the CJEU both clearly answer this in the affirmative: they consider restrictions on legal capacity acceptable if the requirements of proportionality are met (i.e., the restriction is a measure of last resort) and appropriate procedural safeguards are respected. However, even in the ECtHR's practice, such restrictions are not boundless—where restrictions extend to all areas of life, the Court acknowledges a violation of private life, but still evaluates this on a case-by-case basis through the lens of proportionality. The same applies to automatic restrictions imposed without individual assessment.

The CRPD Committee offers a partially divergent answer. In its practice and in its General Comments interpreting the CRPD, it generally considers restrictions of legal capacity based on disability to be unacceptable. The Committee accepts justification only in specific instances and in other cases treats differential treatment based on disability as effectively subject to an absolute prohibition. Therefore, as a dogmatic issue, the restrictability of legal capacity does not receive a uniform answer across forums.

Another key dogmatic issue is the question of justification—if the restriction of legal capacity based on decision-making capacity is acceptable, what constitutes sufficient justification? The ECtHR and the CJEU apply proportionality as the primary standard, while also employing the test of “objective and reasonable justification.” Additionally, the ECtHR uses its own specific tool, the Winterwerp test. The CRPD Committee, where it allows justification at all, also applies the objective and reasonable justification test. The forums essentially interpret this concept in a harmonized manner.

I also consider the reference to, application, and interpretation of the CRPD itself to be a dogmatic issue. The CRPD Committee is the dedicated body for the CRPD, empowered to oversee both general implementation and individual complaints, and it provides authoritative interpretation through General Comments. In my view, the Committee’s interpretations are indeed authentic interpretations of the Convention, though their binding nature is debatable. The Committee naturally applies the CRPD in its procedures and in its periodic and ad hoc country reviews. The ECtHR’s practice shows variability: in some disability-related cases, it does not refer to the CRPD at all, while in others it assesses the merits explicitly based on the CRPD. However, the ECtHR usually engages only with the text of the Convention itself and does not adopt the Committee’s interpretations; indeed, recent case law marks a clear departure from them. The ECtHR applies and interprets the CRPD according to its own framework. The same applies to the CJEU: while it applies CRPD provisions, it does so based on its own interpretation. The CJEU has even stated that certain CRPD provisions lack sufficient clarity to be directly applicable in adjudication. Overall, the CJEU does not base its reasoning on the Committee’s interpretation, but on the text of the CRPD itself.

There is a clear divergence between European and international practice, visible in the respective forums’ jurisprudence. This divergence may have multiple causes, nevertheless, this dissertation emphasizes those linked to differing fundamental rights paradigms. In the European space, proportionality is the prevailing framework, guiding practical resolutions of many dogmatic questions. The ECtHR and the CJEU even interpret absolute rights through proportionality, viewing non-derogability as the result of a prior proportionality test. Consequently, the justifiability of fundamental rights restrictions is essentially determined by proportionality. It is therefore not surprising that the ECtHR and the CJEU take positions divergent from the CRPD Committee on whether any justification is permissible for restricting rights based on decision-making capacity.

A further explanation for divergence lies in the different functions of the forums. The CRPD Committee is specialized in disability matters, with a far more detailed practice in this area than either the ECtHR or the CJEU. Moreover, it is not a judicial forum, and its decisions are not enforceable, thus it may be more willing to adopt expansive interpretations of state obligations. Notably, its members are not necessarily lawyers, and several are persons with disabilities themselves, which gives them deeper familiarity with the real-life situations underlying these cases, potentially resulting in more grounded and complex perspectives than those of the legalist ECtHR and CJEU. The ECtHR, as a general human rights court, develops universal tests for the rights enshrined in the Convention. Issues of discrimination, including disability-based differential treatment, usually appear as secondary to violations of other Convention rights. It applies its general tests to disability-related cases with only minor adaptations, as reflected in its procedural lens—especially in relation to the right to a fair trial. The ECtHR is less ambitious in its interpretation of the CRPD compared to the Committee, and after an initial period of active engagement with the CRPD, its more recent case law reflects considerable self-restraint. The CJEU does engage in fundamental rights adjudication, but this is not its primary mandate. Its jurisprudence is framed by its role in interpreting EU law and assessing its compatibility with national laws, meaning many situations affecting persons with disabilities—such as national rules on guardianship—fall outside its purview.

This study has examined the exercise and limitation of fundamental rights by persons with cognitive disabilities through the concepts of decision-making capacity, legal standing, legal agency and legal capacity. The deliberate use of the foreign term legal capacity reflects the normative position taken at the outset: a fundamental rights-based perspective cannot accept a notion of legal capacity devoid of any right to act, as this could strip individuals of their capacity to exercise rights. Legal restrictions, in my view, must not go so far as to completely nullify an individual's ability to exercise their rights.

Exercising fundamental rights nonetheless presupposes some form of action, behavior, or decision on the part of the individual. In the conclusion of the chapter reviewing international forum practices, I noted that decision-making capacity should be treated as a factual matter, which may be entirely absent in extreme situations (e.g., coma, vegetative state). I therefore consider at least a minimal degree of decision-making capacity to be a natural prerequisite of legal capacity. This understanding also shapes my position on the debate over substitute versus supported decision-making.

My own perspective most closely aligns with the consistently articulated views of Professor Kees Blankman.¹⁰ According to him, the CRPD's text does not impose a binding obligation to abolish substitute decision-making in all circumstances. He argues that eliminating substitute decision-making without viable alternatives would deprive vulnerable persons of any protection, making them even more exposed. To address this fragmentation and promote convergence, the Stelma-Roorda–Blankman–Antokolskaia group¹¹ proposed a middle-ground approach. According to this view, if the protection of the rights and interests of the person with disabilities genuinely necessitates it, a limited guardianship regime—restricting legal capacity only in certain areas—may be justifiable as a temporary measure, until supported decision-making can function effectively. The only exception to this would be legal measures resulting in the total exclusion of legal capacity, such as full guardianship, which unjustifiably and disproportionately restricts individual autonomy and violates the principle of equal human dignity.

In my view, the CRPD Committee's categorical rejection of substitute decision-making is a response to the fact that, once universal legal capacity is formally recognized, states often continue to apply broad restrictions on the legal capacity of persons with cognitive disabilities. Also relevant here is that many states cite resource constraints and the challenges of transforming support systems as reasons for non-compliance with CRPD obligations. Still, I cannot fully endorse a position that calls for the immediate and total abolition of substitute decision-making, nor one that holds that supported decision-making is suitable in all cases.

From a practical perspective, the unresolved question remains: how can we facilitate decision-making for a person who entirely lacks decision-making capacity, or whose internal decisions are entirely inaccessible to the outside world? For instance, in the case of a person in a coma or permanent vegetative state who has left no advance directive, I do not see supported decision-

¹⁰ Kees C. Blankman: The Yokohama Declaration and maximising autonomy in the Netherlands. In: Lipp, V., Coester-Waltjen, D. & Waters, D. W. M. (szerk.): *Liber Amicorum prof. Makoto Arai*. 2015., München, p. 115-124; C. Blankman & K. Vermariën, Conformiteit van het VN-Verdrag inzake de rechten van personen met een handicap en het EVRM met de huidige en voorgestelde wetgeving inzake vertegenwoordiging van wilsonbekwame personen in Nederland, 2015.; H.N. Stelma-Roorda, C. Blankman, and M.V. Antokolskaia, 'A Changing Paradigm of Protection of Vulnerable Adults and Its Implications for the Netherlands', *Family & Law* 2019.; Kees Blankman Rieneke Stelma-Roorda: The empowerment and protection of vulnerable adults The Netherlands. Country report: https://www.fl-eur.eu/working_field_1_empowerment_and_protection/country-reports Last accessed 16 May 2025.

¹¹ STELMA, H. N., BLANKMAN, C., ANTOKOLSKAIA, M. V. (2019). A changing paradigm of protection of vulnerable adults and its implications for the Netherlands. *Familie & Recht = Family & Law*, 2019 (Februari), 1-18. <https://doi.org/10.5553/FenR/000037>

making as feasible. While future technological developments may eventually address such extreme scenarios, I do not currently consider them resolvable. As a result, in the debate between substitute and supported decision-making, the crucial issue for me is how we can ensure that substitute decision-making is used only in those exceptional cases where a non-legal factual condition renders support ineffective. Current legal practice, however, does not face this extreme challenge, but rather the systemic subjection of persons with cognitive disabilities to substitute decision-making, which is incompatible with any interpretation of the CRPD.

4. List of publications on the subject of the dissertation

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