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Legal understanding of the emergence and termination of freedom of will

Introduction

Free will is an essential legal idea that determines the nature of legal relations. Free will is essential for private law, as it shapes the mechanisms for entering contracts, fulfilling obligations, the scope of legal capacity, compliance with the principles of discretion, voluntariness, fairness, etc. Understanding the meaning of free will and how it is exercised affects the invalidation of transactions and legal liability. However, the issue of free will in private law has received only a few studies, creating gaps in understanding personal legal relations.

Freedom of will, like any legal phenomenon, has a moment of its emergence and completion, and the dynamics of changes in its scope demonstrate the discreteness of the available powers and the possibility of being a legal person. The endowment of a person with rights and obligations is not enough for full subjectification, which requires a real chance of exercising them. In this research, we examine the dynamics of free will, analysing its emergence in a person, increasing and decreasing its scope, and the moment of its termination.

Free will is understood similarly in philosophy, psychology and law. Modern philosophy argues that since every human being is endowed with reason, every person has free will as an ability to choose their actions¹. The psychological understanding is reduced to the concept of a “free person” who respects reasonable authority, is responsible, has self-respect and is aware of participation in decision-making². In jurisprudence, free will can be viewed as a legal idea, an idea-principle, an idea-institution and an idea-norm. In the broadest

¹ J.P. Sartre, *Being and nothingness: an essay in phenomenological ontology*, New York 2021, 928 p.

² D.G. Myers, *Determined and free*, [in:] J. Baer, J.C. Kaufman, R.F. Baumeister (eds.), *Are we free? Psychology and free wil*, Oxford 2008, pp. 32–42.

sense, free will in law is a legal idea that can be defined as follows: free will as a legal idea is a part of the legal ideology that reflects the ability of a person to consciously, freely and independently make and implement decisions on participation in legal relations by performing actions or omissions, disposing of subjective rights and performing duties, as well as the ability to bear legal responsibility for them and serves as the basis for law, its principles and legal regulation³. Summarising the existing approaches, free will is the ability to make decisions freely. In law, the range of these possibilities is determined by legal norms establishing free will limits.

The main part

Thus, free will in law is associated with the ability to make decisions and participate in legal relations. From this, we derive two components of free will: internal and external. The internal manifestation of free will does not involve active actions; it occurs as a mental process when a person thinks, reflects, analyses, etc. The inner free will is exercised through the right to freedom of thought or when a person decides to conclude a contract, create an intellectual property object, etc. The external manifestation of free will takes the form of expression of will when a person actively participates in legal relations. Freedom of will is expressed at the moment of exercise of the right. Based on this, we can state that a person is a subject of law (legal person, holder of rights) even without external manifestation of free will. However, people participate in legal relations when they express their free will.

Freedom of will arises when a person obtains legal capacity and legal personhood. To be a legal person is to be the subject of rights and duties; to confer legal rights or to impose legal responsibilities is to consult a legal personality⁴. The predecessors of the contemporary theories of rights – the so-called will and interest theories – were, in a way, developed in symbiosis with the theory of legal personhood: rights were either legally enforceable choices or legally protected interests, and persons were the holders of these rights⁵. However, despite different theories of human rights and legal personality, we agree that the emergence of rights and obligations is associated with the moment of birth and the emergence of the right to life.

In the legislation of most countries, we see a well-established position that rights arise from the moment of birth. Confirmation of this can be found in

³ V. Savchenko, *Legal nature of freedom of will: fundamental ideas and definition*, „Science-Rise: Juridical Science” 2023, No. 3(25), p. 9, DOI: 10.15587/2523-4153.2023.286533.

⁴ J.J. Bryson, M. E. Diamantis, T.D. Grant, *Of, for, and by the people: the legal lacuna of synthetic persons*, „Artif Intell Law” 2017, No. 25, p. 273–291.

⁵ V.A. Kurki, *A theory of legal personhood*, Oxford 2019, 242 pp., DOI: 10.1093/oso/9780198844037.001.0001.

Art. 8 of the Civil Code of Poland⁶, Art. 2.2 of the Civil Code of Lithuania⁷, Art. 269 of the Civil Code of Ukraine⁸, etc. The proclamation of legal personality from the moment of birth is not unique to civil law countries. For example, legal personhood is granted to all persons born alive in England and Wales⁹. This concept is criticised by supporters of the position that the right to life arises before birth, from the moment of conception or at a particular stage of fetal development, which is more in line with religious and ethical norms¹⁰. However, legal doctrine and legislation clearly define that rights cannot arise before birth because legal personality implies a real opportunity to participate in legal relations and exercise rights. Before birth, a fetus has no legal personality, whereas after it has been born, it is afforded all the rights and protections of a child¹¹. In contrast to this statement, some academics emphasise the possibility of an unborn child being an heir, which is provided for in the legislation of some countries. However, the emergence of rights recognised by law for a conceived but not yet born child depends on its birth¹². In any case, we should agree with E.C. Romanis that the law does, and seemingly always has, unambiguously distinguish between a child before and just after birth¹³.

However, the debate about the emergence of the right to life and legal personality is not fundamental to recognising the emergence of free will. If we assume that free will is associated with conscious human actions, there is no scientific evidence that an embryo or fetus can perform deliberate actions. Researchers agree that the fetus has certain reflexes that react to stimuli, sound, and the mother's state, but its movements (actions) cannot be considered conscious¹⁴. Given the above, we should note that free will does not arise before a person is born.

On the other hand, free will in law is not just a person's conscious actions but the ability to exercise their rights within the limits defined by law. This raises the question of whether a newborn has free will and whether its scope changes throughout life.

⁶ Kodeks cywilny (LJ of 2023, item 1610).

⁷ Lietuvos Respublikos civilinio kodekso (VIII-1864, 18.07.2000).

⁸ Civil Code of Ukraine (No. 435-IV, 16.01.2003).

⁹ *Paton v. British Pregnancy Advisory Service Trustees* [1979] QB 276.

¹⁰ E. Wicks, *The right to life and conflicting interests*, Oxford 2010, 278 pp., DOI: 10.1093/oso/9780198844037.001.0001.

¹¹ A. Alghrani, M. Brazier, *What is it? Whose it? Re-positioning the foetus in the context of research?*, „Cambridge Law Journal” 2011, No. 70, p. 52.

¹² Art. 2.2 Lietuvos Respublikos civilinio kodekso (VIII-1864, 18.07.2000).

¹³ E.C. Romanis, *Challenging the 'born alive' threshold: fetal surgery, artificial wombs, and the English approach to legal personhood*, „Medical Law Review” 2020, No. 28(1), p. 93.

¹⁴ E. Borsani, A.M.D. Vedova, R. Rezzani, L.F. Rodella, C. Cristini, *Correlation between human nervous system development and acquisition of fetal skills: an overview*, „Brain and Development” 2019, No. 41(3), pp. 225–233.

We link the amount of free will to two indicators: IQ and the amount of rights. This is because both indicators change with age, which makes it necessary to link the increase in the scope of legal capacity and the emergence of new rights to achieve a certain age and intellectual development.

Table 1

Diagram of the average IQ level by age

Age	IQ level
1-year-Old	between 1 and 10
2-year-Old	between 1 and 10
3-year-Old	between 1 and 10
4-year-Old	between 5 and 20
5-year-Old	between 5 and 20
6-year-Old	between 5 and 20
7-year-Old	between 10 and 30
8-year-Old	between 10 and 30
9-year-Old	between 10 and 30
10-year-Old	between 30 and 50
11-year-Old	between 30 and 50
12-year-Old	between 40 and 65
13-year-Old	between 40 and 65
14-year-Old	between 60 and 80
15-year-Old	between 70 and 90
16-year-Old	between 70 and 90
16 to 17	108
18 to 19	105
20 to 24	99
25 to 34	97
35 to 44	101
45 to 54	106
55 to 64	109
65 to 69	114
70 to 74	119
After 74 years old, the average IQ starts to drop dramatically	

Source: developed based on *Average IQ by age*¹⁵.

¹⁵ *Average IQ by age*, Iq-tests, <https://iq-tests.org/average-age-by-iq.html> (accessed: 30.11.2023).

As we can see in Table 1, the level of human intelligence is discrete. The norms of intelligence for the first three years of a person’s life are the same, but the actual level of a child’s intellectual development varies. And although, at this age, children cannot conclude a contract, they are still endowed with rights and can exercise them. For example, a child can create intellectual property objects without awareness, which requires minimal creativity, originality, and material consolidation¹⁶. Also, a child can exercise their rights through their parents. This is because the civil legal capacity of an individual arises at the moment of the birth. Free will appears from birth and initially exists in an internal form. An example of a legal reflection of this is the right to freedom of thought, which has no age correlation. Freedom of will acquire an external form (expression of will) with a child’s development when they begin to make decisions and take actions consciously.

The number of competencies held by an ordinary human individual typically increases gradually until the age of majority. Babies hold no competencies and bear no duties, but as they grow, the legal system normally grants them an increasing number of legal competencies¹⁷.

Thus, an increase in IQ leads to a rise in free will. However, we noted that the second criterion, legal capacity, should also be considered. This is because intellectual development does not directly affect the scope of rights. Thus, a minor may want to buy a car (an internal form of free will) but cannot enter into a contract (an external form of free will) due to insufficient legal capacity.

The extent of legal capacity also changes with age, as shown in Table 2.

Table 2

Scheme of the scope of legal capacity by age

Age	The scope of legal capacity
0–14	Partial
14–18	Incomplete
From the age of 18	Full

Source: developed by the author.

Separately, there is limited legal capacity (when a person has a mental disorder that significantly affects their ability to understand the significance of their actions or to control them) and recognition of a person as incapacitated (when due to a persistent mental disorder, a person is unable to understand the significance of their actions or to control them). However, this legal status is acquired only by a court decision and does not correlate with age.

¹⁶ Art. 302 U.S. Copyright Office (3d ed. 2021), *Compendium of U.S. Copyright Office Practices* § 101. Chapter 300: *Copyrightable authorship: what can be registered.*

¹⁷ V.A. Kurki, *op. cit.*

The attainment of a certain level of legal capacity expands the range of powers, rights and, thus, the scope of free will. We should note that a child has partial legal capacity until age 14, but the scope of their rights increases. For example, a minor may independently make minor domestic transactions that satisfy their domestic needs through physical, spiritual or social development. The scope of a person's free will increases within the limits of partial capacity. Table 1 shows the significant intellectual development of a child from birth to the age of 14. This means that the determination of whether a transaction is a minor household transaction will be tied to the person's level of development. For example, a child aged six can buy a candy bar, and a child aged 12 can buy a cinema ticket. These examples are conditional but illustrate the situation.

In this context, the theory of dividing legal persons into active and passive ones is recognised as relevant. V.A. Kurki argues the following position: 1. Passive legal persons have essential means of protection (protection of life, liberty and bodily integrity), have the ability to be a beneficiary of special rights, the right to own property, may have the status of a victim in criminal law and the ability to suffer legal damage; 2. Active legal persons of law may enter into legal relations without a representative (for example, enter into contracts) and may bear tort, criminal and other legal liability¹⁸. Minors, persons with limited legal capacity and persons declared incapacitated are endowed with pastoral powers and passive subjects. Their free will is primarily internal.

The dynamics of the growth of the scope of a person's free will are related to the level of their civil capacity. However, even after reaching 18 (full legal capacity), the scope of free will continues to grow. This is because a person receives certain rights upon reaching the appropriate level and not because of capacity. Here are some examples: 1. A citizen of the Republic of Lithuania who is 21 years of age and permanently residing in the Republic of Lithuania on the day of the election may be elected as a member of the Seimas¹⁹; 2. The right to be elected (passive suffrage) in the Senate elections is granted to a Polish citizen eligible to vote in these elections who is at least 30 years old on the day of the election²⁰; 3. The right to stand for election (passive suffrage) in the presidential elections in the Republic of Poland is granted to a Polish citizen who has reached the age of 35²¹. Similar and other examples can be found in the legislation of different countries.

The scope of free will can also be increased by obtaining a special legal status that expands the range of available rights. For example, a police officer,

¹⁸ Ibidem.

¹⁹ Cт. 10 Rinkimų kodeksas Lietuvos Respublikos (No. XIV-1381, 19.08.2022).

²⁰ Cт. 11 Kodeks wyborczy (LJ of 2011, No. 21, item 112).

²¹ Ibidem.

a doctor, a pregnant woman and others receive specific rights that augment their powers and the scope of their freedom of will.

At the same time, the restriction of legal capacity and the recognition of a person as incapacitated leads to a limitation of freedom of will. It should be noted that a reduction in the scope of civil capacity affects only the external form of freedom of will, the ability to express one's will. Thus, individuals with limited legal capacity can only make minor domestic transactions independently²². The scope of their free will is reduced to the scope of a minor. If a person is declared incapacitated, they lose the ability to express their will and make transactions. However, this does not mean that the person loses their freedom of will, as its internal form remains, and their rights are guaranteed at the international level. In particular, in Art. 12 of the UN Convention on the Rights of Persons with Disabilities, the following is fixed: measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body²³. Although the ability of persons with limited legal capacity to exercise their rights is limited and subject to violations²⁴, the internal form of free will remains intact. However, the inner form of free will can also be restricted and influenced by medications, propaganda, neuromarketing, etc. This issue will be explored separately.

Conclusion

The scope of free will is dynamic; it arises at birth and changes throughout life. The scope of free will is related to two main criteria: 1) the level of intelligence and 2) the extent of civil capacity. Minor children, people with limited capacity, and incapacitated persons have the lowest level of free will. Within a specific capacity, the scope of free will may also vary. For example, a person with partial legal capacity has more free will due to their intellectual development. The scope of a person's free will with full legal capacity may increase if they obtain a new legal status and additional rights.

Free will may be temporarily suspended when someone is unaware of their actions. This may be of a long-term nature (in the case of limitation

²² Civil Code of Ukraine (No. 435-IV, 16.01.2003).

²³ Cf. 12 United Nations (2006), Convention on the Rights of Persons with Disabilities, Treaty Series, 2515, 3.

²⁴ R. Dinerstein, *Implementing legal capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: the difficult road from guardianship to supported decision-making*, „Human Rights Brief” 2012, No. 2, p. 11.

of legal capacity or recognition of a person as incapacitated) or temporary (unconsciousness, state of alcohol or drug intoxication, etc.). In these cases, the previous scope of freedom of will may be renewed if the court cancels the restriction on the scope of legal capacity or when the person regains control over his or her actions (comes to his or her senses, sober up, etc.).

The complete, irreversible loss of free will occurs only in the event of death. From this moment, a person ceases to participate in legal relations and a subject of law. But even in this case, their free will, exercised during life, continues to influence legal ties. This happens through a will, the right to respect the burial place, posthumous rights, etc.

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Summary

Legal understanding of the emergence and termination of freedom of will

Keywords: civil law, freedom of will, civil capacity, the autonomy of will, legal personhood, a legal person.

Free will is an essential legal idea that determines the nature of legal relations. Free will is essential for private law, as it shapes the mechanisms for entering into contracts, fulfilling obligations, the scope of civil capacity, adherence to the principles of discretion, voluntariness, fairness, etc. The purpose of the paper is to determine the dynamics of freedom of will and to provide a legal justification for the moment of its emergence and termination. The scope of free will is dynamic; it arises at birth and changes throughout life. The scope of free will is related to two main criteria: the level of intelligence and the scope of civil capacity. Minor children, people with limited civil capacity, and incapacitated persons have the lowest level of free will. The scope of free will also vary within a specific civil capacity. Free will may be temporarily suspended when someone is unaware of their actions. A complete, irreversible loss of free will occurs only in the event of death. From that moment on, a person ceases to be a party to legal relations and a legal person.

Streszczenie

Prawne rozumienie powstania i ustania swobody woli

Słowa kluczowe: prawo cywilne, wolność woli, zdolność cywilna, autonomia woli, osobowość prawna, osoba prawna.

Wolna wola jest istotną ideą prawną, która determinuje charakter stosunków prawnych. Ma ona szczególne znaczenie dla prawa prywatnego, ponieważ kształtuje mechanizmy zawierania umów, wykonywania zobowiązań, zakres zdolności cywilnoprawnej, przestrzeganie zasad dyskrekcji, dobrowolności, uczciwości itp. Celem artykułu jest określenie dynamiki swobody woli oraz prawne uzasadnienie momentu jej powstania i ustania. Zakres wolnej woli jest dynamiczny; powstaje w momencie narodzin i zmienia się przez całe życie. Jest też związany z dwoma głównymi kryteriami: poziomem inteligencji i zakresem zdolności cywilnej. Małoletnie dzieci, osoby o ograniczonej zdolności do czynności prawnych i osoby ubezwłasnowolnione mają najniższy poziom wolnej woli. Zakres wolnej woli może również różnić się w ramach określonej zdolności cywilnej. Wolna wola może być tymczasowo zawieszona, gdy ktoś jest nieświadomy swoich działań. Całkowita, nieodwracalna utrata wolnej woli następuje jedynie w przypadku śmierci. Od tego momentu dana osoba przestaje być stroną stosunków prawnych i osobą prawną.

