Chapter III

The Protection of Privacy in the Hungarian Legal System, with Special Regard to the Freedom of Expression

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1. Introduction

The protection of privacy represents a major challenge for legal systems, especially in light of the proliferation of new technologies for monitoring and recording individuals, with a public increasingly hungry for news and confidential information. The balance between the protection of privacy and the rights and interests of the public (freedom of speech, freedom of the press, being informed on public issues, freedom of information) is difficult to strike and necessarily remains fragile. This chapter examines the Hungarian legal system, both in terms of regulation and practice, primarily from the point of view of how to define the balance between privacy and the right to freedom of expression. After offering a general overview in Section 2, the provisions of the Fundamental Law are examined in Section 3, followed by a discussion of the issues arising in private law in Section 4, while Section 5 provides an overview of the protection of privacy in criminal law. The paper then goes on to cover data protection (Section 6) and administrative procedures (Section 7) before attempting to draw general conclusions (Section 8).

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2. General overview

Privacy, according to Robert Post, is one of the social norms that ensure the existence of the individual and the survival of the community, which is made up of autonomous individuals.[1] Fortunately, one might say, the instruments available to the law are incapable of providing a satisfactory answer to all the questions that arise in the context of private life. In the modern era, the value of the protection of privacy gradually gained recognition. In the early nineteenth century, Benjamin Constant disapprovingly claimed in his 1819 essay, "The Liberty of Ancients Compared with that of Moderns," that the private sphere of modern human beings was better protected than it had been previously, but that in the meantime he is deprived of the possibility of participating in making decisions on the affairs of the community.[2]

Privacy is usually understood in different legal systems to include various partial rights, themselves sometimes named and sometimes unnamed in statutes. The US view of privacy also considers certain elements of the right to self-determination to be relevant to privacy, such as the right to control one's own body (and deriving from this, for example, the right to abortion),[3] while the case law of the ECtHR applies Art. 8 of the European Convention on Human Rights in a general civil liberty sense. In the following analysis, I shall limit the discussion to problems related to potential clashes between the private sphere and the rights to freedom of speech and freedom of the press.

As Elemér P. Balás, the first Hungarian theoretician of personality rights, put it, the law "respects the right to disgust from the public."[4] The starting point in the legal history of this issue is Samuel Warren and Louis Brandeis's classic study *The Right to Privacy* published in the *Harvard Law Review* in 1890, which explicitly stated the need for "the right to be left alone" in the face of the tabloid press, which was already a growing problem in their day.[5] According to the authors of the article, the insatiable appetite of the press for new sensations and "rumours", and the development of photographic techniques was endangering, to an unprecedented degree, the sovereign, inner world of the individual and its inviolability.

The approach of treating privacy as a value somehow related to the protection of human dignity is characteristic of continental Europe, while that of treating privacy as an aspect of the protection of personal freedom (freedom of choice) is characteristic of Anglo-Saxon legal systems, although this does not necessarily lead to practical differences in the assessment of certain facts. Even in European legal systems, the violation of human dignity is not a necessary condition for establishing an infringement as it may, for example, be infringed in cases relating to personal data,

1 Post, 1989.
2 Constant, 2016.
3 Rubenfeld, 1989.
4 Balás, 1941, pp. 653–654.
5 Warren and Brandeis, 1890.

private dwellings, the right to one's own image or likeness and the protection of private communications without violation of human dignity occurring. The right protects the person's freedom of choice and, if the freedom of choice reserved for him or her is infringed by the intervention of others, the infringement will be deemed to have occurred, even if the infringement does not otherwise undermine their dignity. Thus, if someone is photographed in their private dwelling, their right to privacy is violated, even if the image is not otherwise capable of violating their human dignity.

The current state of the information society poses greater threats to privacy than ever before, due to the technological advances that shaped it. The best-known literary depiction of the violation of privacy—and of the way it leads to the dehumanization of society—is undoubtedly George Orwell's *Nineteen Eighty-Four*.[6] Banned for decades in the eastern part of a divided Europe, the book is now read as a universal warning, not just as an indictment of totalitarian dictatorships. At the same time, the state's role as Big Brother has been joined by a number of "Little Brothers," concentrations of power which, despite having different interests, have also become enemies of privacy. They typically accumulate data on citizens for business purposes, to categorize them and find out about their shopping habits and even which books they read.[7]

The freedom of speech is, of course, protected to a certain extent, even if its exercise involves indulging in private pursuits, disclosing secrets, or taking pictures without consent. Concerning matters of public interest, the extent of the protection of privacy is more limited. Moreover, libelous statements are more tolerated if they are made in relation to matters of public interest. However, the category of matters of public interest should be construed in a limited sense: Not all matters in which the public may be "interested" are regarded as matters of "public interest."[8] This principle is reinforced by the ECtHR in its landmark decision in *Von Hannover v. Germany*:[9]

> The Court considers that a fundamental distinction needs to be made between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest"…it does not do so in the latter case.[10]…As in other similar cases it has examined, the Court considers that the publication of the photos and articles in question, of which the sole purpose was to satisfy

6 Orwell, 1949.
7 Majtényi, 2006, p. 47.
8 See *Campbell v. MGN* [2004] 2 AC 457, HL.
9 Application no. 59320/00, judgment of 24 June 2004.
10 Ibid. para. 63.

> the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public.[11]

The privacy of politicians and of the representatives of state power is also protected, just as that of ordinary citizens. However, which events or pieces of information relate to carrying out the public function of such persons, and therefore may be disclosed to the public is—and indeed, should be—open for debate. The extended scope of the freedom of the press as it applies to celebrities and the infringement of the privacy of celebrities is also subject to discussion. Similarly to persons exercising state powers, the starting point here is that even the most exposed celebrities have a certain private sphere that should be protected, the infringement of which is not justified by any public interest consideration. However, and unlike for persons exercising real powers, instances of matters falling within the privacy of celebrities that are relevant for deciding on public matters seldom arise. Liability for infringements of the privacy of celebrities is shared, at least between the press and the celebrity trying to protect their privacy. On the one hand, celebrities seek publicity, thrive on it, and ultimately make their fortune by appearing publicly. On the other hand, "stars" enjoy publicity only as long as they can benefit from it; a time may come when celebrities wish to withdraw to their autonomous private sphere.

The various aspects of protecting privacy against the freedom of speech and the freedom of the press may be hard to fit into clear-cut and well-defined legal categories, such as libel or defamation. One may consider the right to privacy to be the equivalent of a general personality right, or the general clause of personality rights.[12] It would be hard to draw up any exhaustive list of the various facts that can be relied upon to define an abstract set of circumstances covering all possible cases where there are conflicts between the freedom of speech and the right to privacy. According to William Prosser's categorization, which has come to be regarded as a classic, the different types of the privacy tort are as follows:

- invasion of privacy—the activity of obtaining confidential information;
- publishing embarrassing, private (true) information;
- misrepresenting a person by publishing facts that are true or even false but not defamatory;
- unauthorized use of a person's name or image for commercial purposes.[13]

To this can be added another type, covering cases of unauthorized disclosure of identity for which, while they might be included in the "publication of embarrassing information" above, separate treatment is justified, mainly because of the different nature of applicable regulations.

11 Ibid. para. 65.
12 Sólyom, 1984, p. 667.
13 Prosser, 1960.

3. The Fundamental Law of Hungary

Art. VI of the Fundamental Law of Hungary, in force since 2012, protects the right to the inviolability of private life, the content of which has been significantly expanded by the currently effective Fundamental Law, compared to the rules of the previous Constitution (effective prior to 2012). The Fundamental Law protects private and family life, and accords a constitutional level of protection for the home and for communications and data of public interest. The Fundamental Law requires the establishment of a special authority for the protection of personal data, the Hungarian authority for data protection and freedom of information (NAIH).

The inviolability of privacy and of the home can primarily be ensured through the legislative obligations incumbent on the state, the main instruments of which are civil law, criminal law, and data protection. At the same time, the protection of privacy is also linked to other fundamental rights, most closely to the right to human dignity which, according to the Hungarian Constitutional Court (CC, Alkotmánybíróság) it is one of the constituent elements of.[14]

Art. VI (1) of the Fundamental Law was amended by the Seventh Amendment of the Fundamental Law in 2018 to include an additional sentence that responds to the challenges of digitalization while complying with the protection enshrined in Art. 7 of the Charter of Fundamental Rights of the European Union (EU). This amendment aimed to resolve, at the constitutional level, certain possible conflicts between privacy and other fundamental rights, specifically mentioning the exercise of freedom of expression and assembly as possible limits on the protection of privacy. At the same time, the amendment to the Fundamental Law also established a framework for the exercise of the freedom of expression and assembly, by specifying the right to respect for privacy, family life and the home, thus emphasizing their increased level of protection.

4. Civil law

4.1. Disclosure of confidential information, protection of private life

Act V of 2013 on the Civil Code elevated the general protection of private life to a specific personality right,[15] in addition to the other established rights also related to privacy, but with a narrower scope (protection of private dwelling, protection of private information, protection of personal data, the right to one's name, the right to the protection of one's image and voice recording). In fact, the right to private

14 See decision of the Constitutional Court no. 1115/B/1995.
15 Art. 2:43 b) of the Civil Code.

life private law context—media-related cases included—can rarely be accorded an independent meaning which goes beyond the protection of the private dwelling and of one's image, voice recordings, personal data, and private communications. If it is given such a meaning, however, the right to privacy may play a niche role in relation to these established personality rights. Thus, in the Hungarian civil law system of the protection of personality rights, it seems to be the correct approach if the right to privacy does not have independent, *sui generis* content and interpretation beyond this gap-filling role.[16]

Art. 2:44 of the Civil Code establishes, as a basic principle, the limited assertion of the personality rights of public figures in the interests of the freedom to discuss public affairs. According to the provisions which have been in effect since August 2018,

> [Protection of the personality rights of public figures]
> (1) The exercise of fundamental rights ensuring a free discussion of public affairs may limit the personality rights of public figures to an extent that is necessary and proportionate and is without prejudice to human dignity; however, it shall not violate their private and family life and home.
> (2) Public figures shall be entitled to the same protection as non-public figures regarding communications or conduct falling outside the scope of free discussion of public affairs.
> (3) Activities and data in relation to the private or family life of public figures shall not qualify as public affairs.[17]

Art. 2:44 applies to all personality rights relevant to the discussion of public affairs, and thus also affects the interpretation of public figures' rights to privacy, to their image, to their voice recordings and to private information. Act LIII of 2018 ("on the protection of private life") also applies to the protection of these rights. According to Art. 8(1) of the Act, "The purpose of the right to respect for privacy is especially the right to a name, the protection of personal data, private information, image and sound recording, honor and good reputation." Art. 7(2) of the 2018 Act, however, stipulates that the "private and family life, as well as the home of a public figure, shall be granted the same protection as those of a person who does not qualify as a public figure." From reading the two provisions concurrently, it may also be concluded that the right to reputation and honor, as well as the right to one's image and to control over one's recorded sound, are part of the right to privacy and thus the scope of these rights of public figures are the same as the scope of the rights of private individuals.

In reality, however, this interpretation is not acceptable: on the one hand—as we shall see from case law—in terms of the enforcement of these rights, the category

16 Menyhárd, 2014, p. 224.
17 Art. 2:44 of the Civil Code.

of primary relevance is not that of the *public figure*, but of the *public affair*. On the other hand, the same 2018 Act amended Art. 2:44 of the Civil Code (with the content quoted above), which stipulates the restriction of personality rights in the context of the discussion of public affairs. Nevertheless, the new act does not introduce any new tort which may have an impact on the tests of the freedom of speech in the discussion of public affairs, hence it remains possible to establish a violation of "good reputation" or "privacy" only by taking into account the provisions of the Civil Code and the case law which develops based on them. In contrast, the new law defines separate offences of the violation of the right to respect for family life, home and relationships.

The Civil Code primarily protects individuals against the disclosure of confidential information through the protection of confidentiality[18] and the provision on data protection.[19]

The case law published to date connected to the conflict between the protection of confidential information and the right to freedom of the press is not very extensive. Decision no. BH2002. 89 states that "personal data concerning family relations constitute private information." This decision settled a case that was initiated after a newspaper published an interview with the plaintiff's partner and, in the accompanying text, provided the plaintiff's personal details and other information about their family members. The defendants (the editor-in-chief and the publisher of the journal) argued without success that the plaintiff's partner—that is, the interviewee—consented to the publication of the relevant information. This fact—which later turned out to be false—was irrelevant: for the publication of personal data concerning more than one person, the consent of all affected persons must be obtained. Each person concerned may dispose of their personal data only. Having failed to acquire such consent to publication, the journal did in fact breach the personality rights of the plaintiff, and was therefore ordered to compensate the plaintiff.

The personality right to inviolability of the private dwelling may also be relevant for the media. It may constitute a violation of this right if a person lives under the threat of being photographed or of having their voice recorded in their own home or garden without their consent.[20] The Civil Code also protects the right to private information, stating that the

> protection of private information extends in particular to the protection of correspondence, official secrets and business secrets. In particular, the unauthorized acquisition and use, disclosure, or communication of private information to an unauthorized person constitutes a breach of private information.[21]

18 Art. 2:46 of the Civil Code—right to protection of private information; see also Act LIV of 2018 on the Protection of Business Secrets.

19 Art. 2:43 e) of the Civil Code—violation of the right to protection of personal data.

20 BDT2016. 3489.

21 Art. 2:46 of the Civil Code.

The protection of private life has become an autonomous personality right in the Civil Code,[22] the independent content of which is shaped by the judicial practice. The scope of this personality right must also be determined considering the interest of an open debate on public affairs, as must the right to the protection of personal data, which necessarily overlaps with the general right to privacy.[23]

In connection with a fraud scandal which erupted in relation to the Quaestor Group (which led to the bankruptcy of the private financial institution), the same individual was involved in seven CC decisions as applicant.[24] The applicant worked for Quaestor in a relatively minor position, and his partner was the daughter of the attorney general. Publishers of newspapers, television media service providers, and Internet news portals, which had previously been sued, published articles about the Quaestor scandal, in which they disclosed the applicant's name, previous job, the fact of cohabitation with and the name of his partner and the family relations of his partner, as well as information on his wider family through this cohabitation, without the consent of the applicant. The articles insinuated from this information that the alleged delay in the prosecutor's action in the case may have been related to these work-related and family relations. (The articles did not try to prove the truthfulness of this line of thinking.)

In earlier decisions, the Kúria (the supreme court of Hungary) had upheld previous court judgments that dismissed in their entirety a claim for establishing a violation of personality rights related to privacy and the protection of personal data, with one exception, in which the CC turned down the complaint, since the courts of first and second instance established the violation of the right to privacy and personal data protection, which was also maintained by the Kúria[25] In this latter decision, the courts found the disclosure of the applicant's name to have been unlawful and found that the disclosure of the fact of his partnership and the partner's family relations did not infringe the applicant's right to privacy. The CC shared this opinion, and stated that all decisions involving public affairs, while considering the importance of the public matter, may necessitate the restriction of the right of an applicant who is not a public figure to the protection of his personal data[26] for simplicity's sake I will refer below to the first decision only, as the reasoning was essentially identical in all of them.

As far as the publication of the applicant's name is concerned, it was found that the appropriate information could have been provided through reporting without mentioning any names (i.e., anonymously), so the conduct of the press had violated

22 Art. 2:43 b) of the Civil Code.

23 On the interpretation and possible content of the "right to privacy" as a personality right see Ibid.; and see Görög, 2016.

24 3209/2020. (VI.19.) AB; 3210/2020. (VI.19.) AB; 3211/2020. (VI.19.) AB; 3212/2020. (VI.19.) AB; 3213/2020. (VI.19.) AB; 3214/2020. (VI.19.) AB; 3215/2020. (VI.19.) AB.

25 3214/2020. (VI.19.) AB.

26 3209/2020. (VI.19.) AB para. 48.

the privacy of the applicant.[27] The disclosure of his previous job without his consent was not considered a violation, however.[28] The applicant's work relationship with the head of Quaestor, as well as the applicant's private relationship with the attorney general, qualify as "personal data relating to a matter of public interest, the disclosure of which cannot be considered arbitrary or unreasonable disclosure; it enjoys a higher level of protection of freedom of opinion".[29] Regarding the reporting on family relations, the CC also attributed more weight to the task of informing the press about the protection of privacy.[30]

The applicant of decision 3308/2020. (VI. 24.) AB was the secretary general of a children's holiday foundation, about whom an article was published which included an image and video of the luxury villa he rented, its garden and a car with a covered license plate, as an illustration. The CC stated that "freedom of the press does not give a general authority to photograph the property of others".[31] The rights related to the home and the private dwelling are constitutionally protected, according to Art. VI (1) of the Fundamental Law. However, this provision does not protect the property itself, but instead the privacy of the individual.[32] Even so, the published images did not depict anything that could be linked to privacy; moreover, the owner of the rented property had previously made the address of the property and the pictures taken of it available. "The applicant chose the holiday home as a temporary location for his private life, in the knowledge that there are available recordings of it. He may not rely on the violation of privacy due to the re-publication of similar recordings."[33]

As I mentioned above, protection of privacy should be interpreted in the light of the interest in open debate on public affairs. A public figure's private life may be protected, even if what happens in it is partially related to their activities in public affairs:

> I. The right of politicians to have a private life may also be restricted on the grounds of a legitimate public interest and only if the interference is related to the public activities, the ideas promoted, and the acts and statements of the person who has an impact on public life.
> II. The rebuttal of a statement made in relation to an insignificant element of a public event of high interest to the public does not constitute adequate grounds for the press to publish an event regarding the most intimate private sphere of the public figure, an artificial intrusion into the private sphere: exercising the freedom of the press in

27 3209/2020. (VI.19.) AB paras. 51, 52.
28 3209/2020. (VI.19.) AB para. 54.
29 3209/2020. (VI.19.) AB para. 57.
30 3209/2020. (VI.19.) AB para. 60.
31 3209/2020. (VI.19.) AB para. 34.
32 3209/2020. (VI.19.) AB para. 36.
33 3209/2020. (VI.19.) AB para. 36.

such a manner is not proportionate to the violation of the personality rights of the public figure concerned in terms of privacy.[34]

4.2. Disclosure of identity

Disclosure of identity can lead to a breach of privacy in several different situations. For example, victims of accidents and crime have an overriding interest in having their identity kept secret. To facilitate reintegration into the community, the fact of a person's past offences and the punishment they have received should only be disclosed in certain justified situations. There can be an interest in concealing the identity of a person in pending court proceedings, whether as a witness or as a defendant. Finally, it is also possible that someone may be identified "accidentally"; that is, they become identifiable to those around them in such a way that the published article, photograph, etc., does not actually refer to them, and a misunderstanding arises because of similarity of likeness or identical names.

Based on the general right to protect one's name,[35] in addition to the possible infringement of a person's right to bear a name, but mostly beyond that, the infringement of privacy and, often in connection with that, the infringement of reputation and honor is often also raised.[36] Decision BH2002. 221 awarded non-pecuniary damages for a breach of the dignity of the dead and the bereaved to the widow of a security guard who died because of a fight in a nightclub, after a daily newspaper had published the full name, place of residence, and age of the deceased. The Court found that the publication infringed the surviving right to the deceased's good reputation, while it is also clear that the widow's right to undisturbed privacy was also protected by the decision.

"Incidental" identification was the subject of case BH2004.103. The newspaper published by the defendant in this case reported that members of a couple "go to great lengths to keep their erotic relationships fresh." The article reported on K. F. (marked by his initials), a forty-two-year-old mail carrier, who lived in the municipality of "K" and who was allegedly the paper's informant on the subject. The article went on to detail the strange sexual habits of K. F. and his wife. The plaintiff and his wife, who was also identifiable from the article, brought an action against the publisher. In the lawsuit, the defendant argued that the newspaper article was a verbatim translation of an article previously published in an Austrian newspaper, and that only certain details had been adapted to Hungarian circumstances. In addition, he also argued that there are seven post offices in the mail carrier's place of residence (K.), with a total of about one hundred mail carriers working there, so that misidentification was not possible. The Supreme Court, however, upheld the final

34 BDT2018. 3847.
35 Art. 2:49 of the Civil Code.
36 Navratyil, 2014, p. 108.

and enforceable decision, which found that the article was defamatory, because the data published had made identification possible.

The proceedings that preceded decision BH2005.426 were initiated by a person whose name and image were repeatedly published by the police after the infamous 2002 massacre in a bank branch in Mór (a small town near Budapest), describing him as a "person who may be linked to the crime." Although the final and enforceable decision dismissed the action for defamation, the Supreme Court finally awarded damages to the plaintiff for the violation of his personality rights. Although the statement of reasons rightly stated that the phrase "may be linked" is defamatory, as it implicitly refers to his capacity as the perpetrator, the public interest in the speedy investigation of a particularly heinous crime was not sufficiently emphasized in the judgment.

According to judicial practice, a media outlet may report objectively on the status of a criminal procedure by publishing the name of the person concerned.[37] The requirement is that the report must be in line with the current state of the proceedings and respect the constitutional principle of the presumption of innocence. A further question, concerning pictorial representation, is whether a press report may be accompanied by a pictorial illustration showing him or her in an unduly humiliating position.[38]

4.3. The protection of one's image and voice recordings

4.3.1. Requirement of consent

According to Art. 2:48 of the Civil Code:

> (1) Making and using of a person's image or voice recording shall require the consent of the person concerned.
> (2) The consent of the person concerned shall not be required for recording his image or voice and for the use of such a recording if the recording was made of a crowd or of an appearance in public life.[39]

The subject matter protected by the right to one's image is the human image and its recording using any technology. It should also be noted that, according to the case law, the right to the protection of one's image does not only include the protection of the portrait image: "[I]f the combined presentation of the person's upper body and voice creates a direct link between the person concerned and the criminal proceedings in which they are involved," an infringement is established.[40]

37 ÍH2016.13.
38 3313/2017. (XI.30.) AB.
39 Art. 2:48 of the Civil Code.
40 BDT2015. 3359.

Similarly, a distinctive tattoo, for example, may be capable of identification in public.[41]

According to the relevant section of the former Civil Code (of 1959), the permission of the person concerned was not required for making the recording, although the Supreme Court had already ruled earlier, in BH1985. 57, that the infringement of the right to one's image and voice recording can be committed not only by unauthorized disclosure, but also by making the recording without permission. Likewise, according to BH2008. 266, the "making of a voice recording without permission constitutes an abuse in itself. The burden of proving that making the voice recording was not abusive is on the offender."

A principle has emerged because of the development of judicial law—although it is not contained in the Civil Code—according to which

> a party may not successfully plead a violation of their subjective rights (misuse of their voice recording) if they seek to use this enforcement to conceal their untrue or false statement of facts and seeks to prevent the use of their statement of the truth by relying on their personal rights.[42]

This principle can also be extended to the interpretation of the right to one's image, as was partly done in BDT2011. 2442:

> The making or use of an image or sound recording shall not constitute a misuse if it is made in the public interest or for a legitimate private purpose to prove an infringement that is imminent or has already occurred, provided that making or using the image or sound recording does not cause disproportionate harm as compared to the infringement sought to be proved.[43]

In the absence of statutory exceptions, it can generally be stated that the use of images and sound recordings requires the consent of the data subject in each case (including images freely available on the Internet) and that the consent granted may not be construed in a broad sense[44]. At the same time, consent to taking a photograph or a voice recording can also be expressed by implied conduct—that is, by not objecting to the recording being made after having noticed it.[45] Naturally, it is a violation of the right to image if a person's portrait, otherwise taken with their consent, is mounted on a naked female body, thus giving the impression that the plaintiff (a school teacher) is in the picture, after which the picture is distributed.[46] According to

41 See for instance, decision no. Pf.II.20.286/2011/2 of the Szeged Court of Appeal.
42 BDT2009. 2126.
43 BDT2011. 2442.
44 For example BDT2009. 1962; BDT2007. 1682.
45 BDT2019. 4001.
46 BDT2011. 2549.

the decisions of the Supreme Court[47] settling proceedings related to the publication of the caricatures, publication of an image that does not offend human dignity and is not "unduly offensive or humiliating" is allowed—although the standard of "offensiveness" is constantly changing. These cases do not answer the questions about the boundaries of the privacy of public figures, however. The right to the expression of an opinion may lead to the recognition of exceptions to the requirement of having permission to publish images or recordings of an individual: if an image made in the context of public activities is used as a political message by another person, it shall not be considered as a violation of the law.[48]

4.3.2. Recordings of a crowd

The lawfulness of using photographs taken at mass events may be a matter of debate. According to the strict interpretation, if a person can be identified in an "image made at a mass gathering," their permission is required to take the picture. According to a more realistic, permissive interpretation, an "image made at a mass gathering" is a photograph of a group of people attending an event, where the identification of the individual participants is only incidental and the photograph is not taken with the purpose of capturing any specific individual. The lawfulness of taking "images made at mass gatherings" and the use of such photos is not disputed in judicial practice today, since no such actions have been brought before the courts recently and, because of this, it is not in itself prejudicial if someone can be identified in such an image without having expressly consented to it being taken or published.

4.3.3. Appearance in public life

In everyday life, the press interprets the criterion of public appearance in a broad sense: it does not usually ask for consent for the use of images of public figures in public places. In BH1997. 578, the court established that persons attending public events—even as passive observers—waive their right to privacy to a certain extent. Even in such cases, though, images may not be published in an abusive or harmful manner. However, no permission is required for taking pictures—otherwise not harmful—that focus particular attention on individual persons in the crowd and thereby make such persons identifiable. Active participants in public events (for instance, speakers) are unquestionably public figures, while passive observers are not public figures, although the images taken of such observers can be made public (but not misused).

According to BH2006. 282, "The image of a public figure may only be used without their consent in relation to their public appearances and in the context of their public activities, to present such activities. Images of public figures are therefore

47 BH1994. 127; BH2000. 293.
48 ÍH2015. 99.

not freely usable." In this particular case, a satirical magazine used the plaintiff's image independently of and separately from his activities as a public figure; the court found this use to be prejudicial (but did not award damages due to the lack of harm caused by the infringement). According to BDT2007.1663, for

> the purposes of taking images or making voice recordings, the conditions of public appearance are fulfilled if the image or recording is made at a public event where filming and television recording are customary, meaning that anyone attending the event must expect to be recorded—in a recognizable way.[49]

The criteria for public appearance (as part of the public figure's public affairs-related activity) were also defined by the Kúria in its "Criminal–Administrative–Labor–Civil Law uniformity decision" (BKMPJE) no. 1/2012. Accordingly,

> public appearance is considered to be a political, social, artistic activity or expression based on the voluntary and autonomous decision of the individual, which is carried out to achieve a specific goal, in a narrower or broader sense, to influence the life of the local community or society. Therefore…it presupposes an intention to do so on the part of the person appearing in public.[50]

Public figures usually appear in public of their own free will, but this is not always the case. I would therefore disagree with the findings of the judgment published in BDT1999.4 and with those of decision 1/2012. BKMPJE of the Kúria, which state that the concept of public appearance must be voluntary and intentional ("a public figure is one who comes out in public with the desire to act publicly in public affairs"). If, for example, someone is a passive participant in a demonstration that is broken up by the police, and they receive a few truncheon blows in the process, the pictures of that incident can be published without their consent, given the weight of the public interest in publishing them, and as a result the person concerned becomes a public figure against their will. (Of course, the use of the image must not be abusive or offensive, and must not misrepresent any passive, innocent protester, etc.) Similarly, the Norwegian seal hunters became unwilling media actors because their activities concerned a public affairs issue.[51] In actual fact, it is not the status of the person, but their involvement in public affairs that is decisive so from this point of view it is a secondary question whether police officers, seal hunters, demonstrators, etc., are classified by judicial practice as public figures (in the case of police officers this would certainly not be correct), because if their activities are related to the public affairs discussed in public, they will be afforded only reduced protection of their personality rights, including

49 BDT2007. 1663.
50 1/2012. of BKMPJE.
51 Bladet Tromsø and Stensaas v. Norway, app. no. 21980/93, judgment of May 20, 1999.

the protection of their images and voice recordings, regardless of their personal status.

According to the court, however,

> the act of releasing information by a police executive to members of the press on police work qualifies as public appearance. For this reason, using an image of the person delivering such information without permission as an annex to an article discussing the released information does not constitute any violation of personality rights[52].

4.3.4. Extension of the statutory exceptions: Protection of the right to discuss public affairs

The press previously often published still and moving images in which law enforcement officers may be seen with an uncovered face and can be recognized. These recordings accompany reports on matters of public interest, but the image of the police officers in itself is not newsworthy. At the same time, the persons concerned may consider the publication of these recordings as a violation of their right to their images and privacy, emphasizing that their recognizable representation does not carry any additional information; it does not "add" anything to the merit of the public affairs report's content they illustrate.

Constitutional Court decision 28/2014. (IX. 29.) AB was the first to attempt to strike a balance between the conflicting rights to image and freedom of expression in the context of recordings made of the police. In the specific case at hand, an Internet news portal published an article with an associated "image gallery." In two items in this collection of images, two police officers could be seen in a uniquely identifiable manner, in group photos which also depicted others. The police officers were carrying out their duty, securing the demonstration and standing passively in the picture; their behavior was not or could not be regarded by the press as extraordinary for any reason. These images did not add any additional information to the coverage, nor did they depict the police officers concerned in an offensive, hurtful, demeaning, or distorted way.

It is important to note that the CC did not try to force the facts of the case to fit any of the exemptions provided for in the Civil Code. The images challenged were not mass images, and the CC avoided classifying the work performed and the service provided by the police in public areas as "appearance in public life," since it cannot be considered as such. Earlier, the Supreme Court's uniformity decision had argued, through the lack of public figure status, in favor of the protection of police images but, as a rule, a police officer is not a public figure, although he exercises state powers, and his work in public is not public appearance.[53]

52 BDT2006. 1298.

53 For an argument against the public figure status of police officers, see Pokrócos, 2019.

However, the coverage of a police officer's or other law enforcement worker's activities conceptually affects public affairs, precisely because of the transparency and criticism of the exercise of state powers, therefore it is not sufficient to prove that they are not public figures.[54] The CC upheld with general validity (that is to say, not only for law enforcement officers but generally in relation to those exercising state powers), that their image can be freely published if "the non-offensive footage taken in a public space, depicting the person concerned objectively, may normally be made public without authorization if it relates to a report of public interest and is linked to information on contemporary events".[55] This is how images of police action should also be assessed.[56] The Kúria finally accepted this approach:

> If the person exercising state powers acts in the course of events influencing the public sphere, the exercise of his personality rights relating to his image and their restrictability might be subjected to rules that are different from those pertaining to the general protection of the personality rights of private persons solely participating in public events.[57]

Following this decision, therefore, constitutional aspects related to free reporting and access to information, that is freedom of opinion and of the press, should also be included in the interpretation of the Civil Code. For a while, the CC and the Kúria have not considered this aspect uniformly in individual cases, as evidenced by recent CC decisions adopted upon genuine constitutional complaints, which have reaffirmed the importance of considering the public interest aspect.[58]

As the Kúria also declared the communication of the images unlawful in a subsequent judgment following the decision by the CC, the case was again brought before the CC. The Kúria assumed that the disclosure of an image of police officers standing passively did not carry any additional information, so, because of the deliberation prescribed by the CC, the Court quite reasonably concluded that the disclosure of these images was not necessary for the purposes of proper information, and therefore it was unlawful. However, this is a misinterpretation of the decision made by the CC, as made clear in 3/2017 (II. 25.) AB. The starting point is not that the individual's right to their image is suppressed only in the event of communicating additional information, relevant for the information activity; on the contrary, it can only be enforced if the communication is abusive, self-serving, and distorted. Therefore, the presumption is that the disclosure of images of police officers in connection with reporting on a public event is permitted.

54 Regarding the constitutional issues inherent in the issue, see Balogh and Hegyi, 2014; Somody, 2016.
55 Para. 44.
56 Para. 43.
57 BKMPJE decision 1/2015, para. IV.3.
58 See 16/2016. (X.20.) AB and 17/2016. (X.20.) AB.

In the event of such circumstances, the courts may examine, in the case of a press body falling within the scope of the Press Freedom Act[59] and the Media Act,[60] the fairness and good faith of the coverage as a whole, during which the parties must be granted the opportunity to make statements and to substantiate and refute them by evidence. However, if such a circumstance did not arise, as was never the case at hand, since the plaintiffs did not state that the coverage had represented their presence and role in the event covered by the report falsely, and therefore as an end in itself, the courts are required to enforce the primacy of the constitutional interest in the presentation of contemporary events, in line with the scope of interpretation set out in 28/2014. (IX. 29.) AB.[61]

Representatives of other professions may also be photographed at public spaces against their will. Constitutional Court decision 3021/2018. (I. 26.) concerned the image rights of legal representatives acting at a trial, who were legal counsels representing the police in litigation. At the hearing, the legal counsels did not consent to photos being taken of them and the court subsequently ruled that a recording of the image and sound could only be made of the plaintiff's side and of the court itself. However, one of the applicants in the CC decision made recordings in which the solicitors were individually identifiable. A printed version of the judgment, which also included the names of the legal representatives, was presented in a recording published later, accompanied by the following commentary: "What is shocking, indeed, is the way in which the Pintér police [Sándor Pintér being the Minister of the Interior] are being defended in a sly and, let's say, unprincipled way by their legal counsels."

The CC saw no reason to annul the Kúria's decision, which had found both the preparation and publication of the recording to be infringing. A decisive factor was that the recordings were made at a court hearing, the disclosure of which is subject to special rules, and that, based on these rules, the acting judge lawfully prohibited the recording from being made, by making an order.[62] Both the context and the role of those affected distinguishes this case from police image cases; "the recording and disclosure of images despite the prohibition of a court order, in the absence of a manifest unfoundedness of the judicial discretion, cannot be considered a proper, non-abusive exercise of press freedom".[63]

The applicant in 23/2019. (VI. 18.) AB was a television broadcaster who carried a report in its news program about a trial pending before the Kúria, presenting footage in which it did not cover up the face of the law-enforcement worker accompanying the accused, and showing him in a recognizable way. In this case, the CC had to determine an important point, different from the facts of the case in the police officers' image cases: can the image of a person exercising state power, present at a court

59 Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content.

60 Act CLXXXV of 2010 on Media Services and Mass Media.

61 3/2017. (II. 25.) AB, Para. [25]. For a comprehensive overview of police image cases and the issues raised by them, see Fejes, 2017; Sándor, 2020; Tóth, 2017.

62 Para. 24.

63 Para. 30.

hearing, i.e., not in a public place, be disclosed as part of audiovisual coverage?[64] The panel established that the court decisions in the case at hand were based on the protection of the right to image, but at the same time it did not identify any element of the coverage that would have violated the dignity of the person concerned. Specifically, it found that

> the pictorial representation of the activity of a person exercising state power in this capacity is restricted only if there is a special constitutional reason for it. The administration of justice and the independence of the judiciary may justify a restriction on freedom of the press in the courtroom, but becoming recognizable is not such a reason in itself. No person exercising state powers—in accordance with the conclusions drawn in 28/2014. (IX. 29.) AB—may rely on the protection of human dignity at a court hearing only because he becomes recognizable in media content.[65]

The case law of the CC also extends to constitutional issues related to the disclosure of the image of public and political figures. Based on 3313/2017. (XI. 30.) AB, an image taken of a political figure present in a courtroom as the accused person, even if he was acquitted in subsequent proceedings, may be of high interest to the public and is linked to the status of the accused as a public figure. The media may objectively report—including by visual means—on the state of play of criminal proceedings, providing the news coverage reflects the status of the given proceedings and respects the assumption of innocence as a fundamental constitutional principle. Visual representation in itself does not violate this principle, nor does the depiction of physical means of coercion (handcuffs) used against the accused constitute abusive or degrading treatment to begin with.[66] The motion alleging a violation of personality rights was accordingly turned down by the CC.

Decision 3348/2018. (XI. 12.) AB arose following the disclosure of another accused political public figure. As an illustration to an article on an Internet news portal, the applicant used a photograph of the person that had been previously taken for another news portal during a criminal prosecution. An important circumstance is that, following the publication of the image, the public figure concerned won a civil lawsuit against the news portal that took the image, successfully prosecuting the site for abuse of his image. However, in this case, the CC stated that the constitutionality of the use of the image in the specific case may nevertheless be examined separately.[67] The image was closely related to the content of the newer article and the court proceedings of public interest presented in it, which were related to the public figure quality and position of the former politician. Furthermore, the image did not depict him in a humiliating situation, or in a way that would seriously hurt

64 Paras. 29, 30.
65 Para. 41.
66 Paras. 51, 62.
67 Para. 36.

or violate the unrestricted essence of human dignity.[68] Accordingly, the publication of the image did not constitute an abuse of the right to freedom of the press, hence the judgment of the Court of Appeal which had established such a violation was therefore contrary to the Fundamental Law.[69]

In the case that led to 26/2019. (VI. 23.) AB, footage of a political adviser keen to avoid publicity, was taken of him while he was on holiday abroad. The recording—made for a promotional video—was commissioned by the nightclub he had visited. An important circumstance was that, in accordance with the general terms and conditions of the establishment, the consultant consented to the production of a recording, including the use of his image for advertising purposes, which the nightclub used in the course of its own activities. These recordings were republished by a Hungarian online news portal. The CC rejected the constitutional complaint because the report on the consultant's holiday was a public matter, and if

> the press publishes an image in a matter related to public discourse, the "protection of image" may only be a genuine restriction of press freedom if the publication of the image violates a fundamental right beyond becoming recognizable (in particular a violation of human dignity or the right to privacy).[70]

The article and its pictorial illustration were not defamatory or insulting, and

> the press shared media content about the privacy of an individual who has an impact on public life in connection with debating public affairs. Since, in this case, the subject of a democratic debate was privacy itself (the financial situation and lifestyle of the person concerned), and the applicant had consented to it being recorded and shared it for promotional purposes, the court correctly interpreted that sharing this information with the public does not entail the violation of human dignity or the right to privacy.[71]

One of the applicants in 3467/2020. (XII. 22.) AB was a politician and the other one was his spouse, who is not a public figure. The challenged court decision rejected their claim for the protection of their right to their images. In this case, an online news portal posted photos of the politician as well as a profile picture attached to his social media account, depicting him and his spouse. The CC established that none of the images of the politician could be considered a depiction of a private event.[72] Although the wife could justifiably allege a violation of her rights to privacy in the event of her image being published, in the specific case at hand she did not become

68 Para. 37.
69 Para. 38.
70 Para. 40.
71 Para. 42.
72 Para. 69.

recognizable in the profile picture, due to its small size and the impossibility of magnifying it, so her fundamental rights were not violated.[73]

Decision 3019/2021. (I. 28.) AB was adopted after an online portal published an article analyzing the relationship of a family to the mayor of a town, as well as the evolution of the family members" financial situation. The article was illustrated with images of the mayor and various members of the family, originating from other media providers.[74] The courts found a violation of the right to image. An important criterion in the CC's decision was that the images published were not created to illustrate the article, but on the occasion of an earlier public appearance. However, the content of the article concerned public affairs.[75] After due consideration, the CC accepted the constitutionality of the decision delivered by the courts, which "in cases where the image is not related to the public speech to which the communication relates, makes the disclosure of the image conditional on the consent of the person concerned who does not exercise state powers".[76] The CC turned down the application for annulment.

In the meantime, the practice of ordinary courts in connection with the right to the protection of one's image has also shifted in favor of considering the interests of the public in a variety of different life situations, expanding the scope of exceptions afforded under the Civil Code and narrowing the scope of the right to the protection of one's image accordingly: "If somebody accompanying a public figure participates in an event which is financed from public funds, he or she might expect the media to report on that, even using his image".[77]

> I. If the representatives of the press are not granted access to an event with limited access to the press and the related prohibition is communicated by the designated person representing the press department of the public authority in the lobby of the building, the press reporting on this by publishing audio and video recordings shall not be obliged to pixelate the face of the civil servant speaking on behalf of the public authority.
> II. The pixilation of the face may essentially impact the credibility of the news report, worthy of public attention, on the event and would therefore disproportionately restrict information on current events and the freedom of the press.
> III. The civil servant performing communication-related tasks shall be obliged to tolerate the publication of his image and recorded voice with respect to an event worthy of public attention to ensure the freedom of discussing public affairs. The fundamental right of the press to the freedom of expression may restrict—to the necessary and proportionate degree—the personality rights of the representative of the public authority to his image and recorded voice.[78]

73 Para. 72.
74 Para. 2.
75 Para. 36.
76 Para. 38.
77 BH2017. 86.
78 ÍH2018. 52.

At the same time, a matter in the public sphere and the in interests of the media may not restrict the enforcement of personality rights disproportionately. Recordings made with hidden cameras may be legitimate only in exceptionally justified cases and public figures may be subjects of recordings only "in situations that are of high interest to the public."

> I. The information obligation of the press does not create privileges; linear media services are obliged to conform to legislative provisions while meeting this obligation and, as a main rule, their activities may not infringe upon others' personality rights. In the case of a video or audio recording made of a public figure without his consent, in a public place, the collision between the freedom of opinion and the protection of personality rights needs to be resolved by weighing up interests, even if the statement or publication otherwise contributes to informing the public of an affair which is of high interest to them.
> II. The usage of a recording made with a hidden camera violates the right of the public figure to his image and recorded voice if the statements recorded do not contribute to the debate of the affair of high interest to the public, or if they are not informative in a way that would stimulate this debate.[79]

> I. The publication of a recording made of a public figure may restrict the right of the public figure to his image protected by law only to the degree that is necessary and proportionate to debate public affairs.
> II. An image of a public figure taken in a situation which is not of interest to the public may only be published with the consent of the person concerned. In the absence of such consent, the image taken of him and published violates the right of the person concerned to his image, in the protection of which the injured person may file a lawsuit to enforce this right expressly.[80]

An action was filed for the violation of the right to the dignity of the dead and the bereaved by the publication of images of the corpse of the celebrity singer Jimmy Zámbó, who died in tragic circumstances.[81] The tabloid article on this event was accompanied by pictures of the body taken after the autopsy. The task of the court was to decide whether the publication of such images amounts to defamation of the deceased, thereby constituting a violation of the right to dignity. According to the final decision of the court, rights to dignity were not violated by the mere publication of the images, as "the fact and portrayal of one's death is not capable of having any negative impact on the social standing of the deceased." However, the Supreme Court did not concur, and stated that displaying a corpse "after autopsy, under humiliating

79 BDT2017. 3760.
80 BDT2017. 3693.
81 EBH2005. 1194.

circumstances, and in a condition giving rise to regret" is in itself capable of harming the honor of the deceased.

The point made in the decision, that the deceased "created a dynamic, attractive, positive image of himself in many people's minds [while] the photograph, on the other hand, shows him in a completely vulnerable position, in humiliating circumstances and in a physical state that arouses pity", thus increasing the danger of the act to society is questionable. In such a situation, the distinction between public figure and private person is hardly justified; indeed, the publication of pictures of the dead bodies of private persons can be equally unlawful.

Nevertheless, tabloids may even get away with material violations, unless an action is filed with the court. Perhaps the most outrageous example of such a violation was that of a tabloid front page photograph (published in 2004) showing the agony of Miklós Fehér, a member of the Hungarian national football team. The picture—which was displayed on the front page of the paper—showed the anguished and sweating face of the football player as he collapsed during a match in Portugal, and died within minutes of the picture being taken. While no court action was filed, the Data Protection Commissioner expressed his objections.[82]

4.3.5. Special litigation proceeding for image protection

Act CXXX of 2016 on the Code of Civil Procedure allows for a special procedure for the enforcement of the right to the protection of one's images and voice recordings, the primary aim of which is to remedy the infringement as quickly as possible.[83] The enforcement of this right, similar to the right of reply, takes place in two separate stages: the aggrieved party must first send a written request to the producer or user of the image or recording within 30 days of becoming aware of the image or sound recording having been made or used. The request (for which the law sets a three-month limitation period) may ask for an injunction to stop the infringement, for appropriate satisfaction (and publicity at the expense of the person causing the damage), or to remedy the injurious situation, restore the situation prior to the infringement, and eliminate the thing produced by the infringement or deprive it of its infringing character.

If the maker or user of the image or recording does not comply with the request or does not comply with it properly, the person making the request may bring an action, which must be brought within fifteen days of the last day of the period set for remedying the breach specified in the request. The time limit for bringing an action is of a substantive law nature, which means that the statement of claim must reach the court within fifteen days.[84] A further restriction is that the action may only request the application of the sanctions specified in Arts. 2:51(1)(a)–(d) of the Civil

82 Communication no. 135/H/2004.
83 Arts. 502–504 of the Code of Civil Procedure.
84 See BDT2016. 3502.

Code. The law provides for the application of the provisions of the procedural rules for the enforcement of the right of correction in matters not covered by the specific rules for image protection.

It should be noted that if the injured party does not wish to make use of the enforcement options or fails to meet the deadlines, they may initiate a personal rights lawsuit under the general rules. If they do so, the limitation on the range of available sanctions shall not apply either, so that, for example, a person who would like to claim aggravated damages (compensation for injury to feelings) on the grounds of an infringement cannot enforce such a claim under the special procedure.

4.4. General civil litigation proceedings

Art. XXVIII (1) of the Fundamental Law lays down the requirement for the publicity of judicial proceedings (open justice). However, the requirement of publicity as an aspect of the right to a fair trial to allow free provision of information on judicial proceedings cannot be regarded as an unlimited right. When informing the public, the media must also respect other rights. Such rights, which may restrict publicity include the personality rights of the participants in the trial (in particular, the right to the protection of one's image and voice recordings, the right to privacy and the protection of minors).

In civil actions, the relevant rule provides,[85] as an exception to the principle of the publicity of the hearing, that the court may exclude the public from the hearing for the purpose of protecting the personality rights of any party.[86] Similarly to criminal procedures, the legislature and the law enforcement authorities have an especially great responsibility in civil proceedings for striking a delicate balance between publicity and personality rights, and between data protection and confidentiality.[87]

The publicity of the courtroom is also of paramount importance for the press to fulfill its duty to inform the public on public matters. This does not mean, however, that these tasks can be carried out without any restrictions, even in cases of considerable interest, because

> [the] standards for the exercise of freedom of speech and freedom of the press with regard to taking photographs and video recordings differ in the context of courtrooms and trials on the one hand, and other venues (typically public spaces) and public events taking place there on the other. While in the latter case, recording and reporting contemporary events may be restricted only in exceptional cases, detailed legislation may be necessary in the former case, above all to ensure the independence and impartiality of the court, to guarantee the independence of the judgment from any external influence, to ensure the smooth conduct of the proceedings and to

85 Act CXXX of 2016 on the Code of Civil Procedure (hereinafter referred to as Civil Procedure Act).
86 Art. 231, para. 2 of the Civil Procedure Act.
87 Horváth, 2013.

> protect the interests of the parties to the proceedings… The courtroom is not in itself a forum for the discussion of public affairs, but a place of justice where the accusation or the rights of the parties to the proceedings are decided. In the light of the general interests of justice and the specific interests and rights of the parties involved in the trial, the press coverage of the courtroom must therefore be assessed differently, and the restriction of press freedom in this case may be justified in a broader scope than in the case of ordinary reporting on public affairs and current events.[88]

5. Criminal law

5.1. Disclosure of confidential information, invasion of privacy

Criminal law provides protection against disclosure of confidential information by defining several actions as criminal offences.[89] The offence of trespassing is intended to protect the right to the undisturbed use of the private dwelling and other premises belonging to the dwelling, as guaranteed by the Fundamental Law.[90] The object of the offence is another person's dwelling, other premises and the fenced-in area belonging to them, or the interest of their undisturbed use.[91]

The breach of private information (breach of confidence) is directed at private information as a legal category.[92] Private information is any confidential fact or information—concerning an individual's personal, family, financial situation, health, or particular habits—known only to a restricted circle or to insiders, the disclosure of which would be prejudicial to the interests of the victim.[93] An offence occurs when the private information is disclosed without good cause, but the offence can only be committed by a person who has obtained the private information by virtue of their profession or public mandate.

The protection of the confidentiality of correspondence is primarily guaranteed by the right to privacy declared in Art. VI of the Fundamental Law, and the right to human dignity declared in Art. II of the Fundamental Law as a personal right. The purpose of this law is to prevent the contents of private messages containing personal intellectual content from becoming known to persons outside the circle of

88 3021/2018. (I.26.) AB para. 26.
89 Art. 221 of the Criminal Code [Act C of 2012 on the Criminal Code]–trespassing; Art. 223—breach of private information; Art. 224—breach of confidentiality of correspondence; Art. 422—illegal acquisition of data; Art. 418—breach of trade secrets; Art. 219—misuse of personal data; Art. 220—misuse of data of public interest
90 Art. VI of the Fundamental Law.
91 BH2019. 97.
92 See also Karsai, 2013, p. 468.
93 BH2004. 170.

the sender(s) and the addressee(s). In addition, this criminal offence is committed by anyone who intercepts a communication transmitted by means of an electronic communications network, which constitutes an act intended to obtain knowledge of the content of the communication during its transmission by means of an electronic communications network. This covers eavesdropping (wiretapping) using virtually any technology.

The prohibition of the illegal acquisition of data primarily seeks to protect the personality right to the protection of private information derived from the right to privacy and the interest in the protection of personal data, business, and trade secrets, as well as the right to the inviolability of the private dwelling and the confidentiality of correspondence and private telecommunications information. It is important to note, however, that this offence is committed only when it is carried out in the (private) dwelling (home) or other premises of another person—but not in a workplace, office premises, or in the common areas of the workplace, such as a camera installed in the bathroom at a workplace.[94] Hence, a person who makes a recording without consent in a place other than the place specified in the criteria of the offence, for example "at the workplace, office premises, or common areas of the workplace," does not commit the offence of illegal acquisition of data.[95]

The illegal acquisition of data committed using a drone is considered a special offence, with a specific nature: that the observation and recording in such cases are conjunctive offences, and that the unauthorized use of unmanned aircraft for observation and recording constitutes the means of the offence itself. Unmanned aircraft are defined in Art. 3 of the Commission Delegated Regulation (EU) 2019/945 of March 12, 2019, on unmanned aircraft systems and third-country operators of unmanned aircraft systems, which defines an unmanned aircraft as any aircraft that operates without a pilot on board or is designed to do so and is capable of operating autonomously or by remote control. This concept is used in Act XCVII of 1995 regulating air traffic and in Government Decree 4/1998 (I. 16.) on the use of Hungarian airspace, which also specifies the legal framework for drone use.

5.2. Criminal proceedings

Among the basic principles of Act XC of 2017 on Criminal Procedure is the requirement to respect human dignity.[96] The Criminal Code stipulates that "the court, the public prosecutor's office and the investigating authority may only allow access to personal data and protected data processed in criminal proceedings in accordance with the provisions of the law",[97] and, during the enforcement of coercive measures, it must also be ensured that "the circumstances of the private life of the person

94 BH2017. 361.
95 BH2017. 361.
96 Art. 2, para. 1 of the Code of Criminal Procedure.
97 Art. 98, para. 2 of the Code of Criminal Procedure.

concerned not related to the criminal proceedings or their personal data are not disclosed".[98] On this basis, preventing the identification of persons under investigation became the main rule.

In criminal proceedings, court hearings are also open to the public as a general rule, and the media can report on them.[99] According to the position of the CC on the publicity of criminal proceedings, publicity is intended to promote social control over the administration of justice (that is, the enforcement of the requirement of transparency and accountability).[100] The principle is that court hearings are public as a general rule, and that anyone can attend as a listener, but this principle does not mean that anyone has a substantive right to attend, that is participation can be restricted or excluded for a well-founded reason. In certain cases, the chair of the court panel may exclude or restrict the public from the hearing, which may be done to protect the interests (including privacy) of the persons involved in the hearing.[101] One of the limits to the principle of the public nature of court hearings is that the law provides that permission to take pictures or audio or video recordings of the hearing may be refused if this would result in an imminent risk to the privacy of the person involved in the criminal proceedings.[102]

In some cases, the law itself provides for the applicability of measures restricting privacy. For example, Art. 214(1) of the Code of Criminal Procedure provides for the possibility of the use of covert/disguised instruments or means, a special activity in criminal proceedings entailing restrictions on the fundamental rights to the inviolability of the private dwelling and to the protection of private information, correspondence and personal data, and which are carried out by the bodies authorized to do so without the knowledge of the person concerned.[103] The use of secret service instruments and methods constitutes a significant intrusion into the private sphere, and it is therefore an essential requirement within the framework of the rule of law that the conditions and framework for the use of such means are laid down by law, with the necessary guarantees and safeguards.[104] In addition to the rights set out in the law, human dignity is also violated in all cases where a person—for example, a person talking on the telephone—is not treated as a person but as an instrument.[105]

It should be noted that the Code of Criminal Procedure has moved the regulations on the secret collection of information for purely law enforcement purposes, carried out by the public prosecutor's office, the police and the National Tax and Customs Administration, from the sectoral rules to the framework of criminal procedure, breaking with the previous regulatory structure. This removed the rule that

98 Art. 271,. para. 5 of the Code of Criminal Procedure.
99 Art. XXVIII, para. 1 of the Fundamental Law; Art. 436 (1) of the Code of Criminal Procedure.
100 58/1995 (IX. 15.) AB, Statement of reasons, para. II.5.
101 Art. 436, para. 4 of the Code of Criminal Procedure.
102 Art. 109, para. 1 a) of the Code of Criminal Procedure.
103 See also Gyaraki and Simon, 2020, pp. 138–140.
104 Bárándy and Enyedi, 2018, p. 97.
105 Korinek, 2019, p. 185.

allowed the results of the most intrusive means of covert information gathering to be used for purposes other than the original purpose of the criminal proceedings.[106] Moreover, the CC has examined certain elements of existing legal provisions and annulled some of them on the grounds that they used vague terms that may have led to further unpredictable interpretation.[107]

6. Protection of personal data

Data protection is the result of the development of European, and more specifically continental European law, which was previously governed by radically different rules in the Anglo-Saxon countries, especially in the United States. Its emergence can be linked to the spread of computer-based data processing and the recognition of the dangers of new communication technologies. In the 1960s and 1970s, the large paper-based public registers were gradually replaced by computerized systems. The new technology facilitated much more efficient storage of much larger amounts of data and made it much easier to link and interconnect different registers and records. All this gave the state an informational supremacy that could even bring the realistic possibility of creating an Orwellian world. To protect fundamental democratic values, it became necessary for the state to create limits—primarily for itself—to ensure the protection of its citizens' personal data and, through this, their undisturbed privacy. The aim is to ensure that citizens are "transparent" to other persons—the state and market actors—only to the extent necessary.

Data protection essentially creates a parallel privacy protection; Act CXII of 2011 on the Right to Informational Self-Determination (hereinafter referred to as the Information Act) and the EU's directly applicable General Data Protection Regulation (GDPR)[108] cover the entire scope of protection provided by traditional personality law (any information about the data subject is considered personal data and therefore protected, and taking a picture or making an audio recording is also covered by the concept of data processing), so the protection of private information, private dwelling, image, and sound recording can also be achieved through data protection. This parallelism is also observed in the Civil Code, which deals with the right to the protection of personal data as a personality right.[109] It also allows for the possibility of bringing civil proceedings for essentially any breach of data protection rules.

106 Ibolya, 2015.

107 2/2007. (I.24.) AB.

108 Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

109 Art. 2:43 e) of the Civil Code.

Personal data is therefore part of the private sphere, and data protection is a means of protecting the personality and the privacy of individuals. The right to the protection of personal data—as a personal right—can only be exercised by a natural person, meaning that legal entities and organizations without legal personality cannot exercise such a right. Deceased persons do not have such a right either, hence their relatives can make such claims instead only under the right to the dignity of the dead and the bereaved.

The right to data protection is not just a passive, protective right. In recent years, there has been a growing recognition that the essence of personal data protection lies in the right of data subjects to have control over their personal data. This right of informational self-determination can be compared to the right to dispose of property, so personal data can be understood as a kind of informational property. The data subject is free to decide, subject to certain legal restrictions, whether to disclose, consent to or withdraw consent to the processing of their personal data.

The right to the protection of personal data as a right to informational self-determination was first identified as such by the German Constitutional Court. This interpretation was adopted by the CC when, in its decision 20/1990. (X. 4.) AB, which found that the law on the declaration of assets of certain state and party functionaries was unconstitutional, it stated that the right to the protection of personal data "means that everyone is free to decide on the disclosure and use of their private information and personal data." The decisions taken on this issue in the years following the political transition are the intellectual forerunners of the first Data Protection Act of 1992 (Act LXIII of 1992), which is still widely cited today. In one of the most important decisions on this issue, in 15/1991. (IV. 13.) AB, the CC held that the "collection and processing of personal data for any future use without a specific purpose" and "a universal and uniform personal identification number (personal number) that can be used without restriction" are unconstitutional. Decision 2/1990. (II. 18.) AB found that the application of the proposal coupon (recommendation slip)—on which the name, address, and personal number had to be indicated—introduced by the Electoral Act was compatible with the Constitution. The right to the protection of personal data, like other fundamental rights, is not an absolute right, hence it is not the case that personal data "cannot be disclosed to any person other than the data subject for any reason and under any circumstances." In the same way, it does not follow from the constitutional guarantees of the right to informational self-determination that anyone may formulate a constitutional claim that a body (organization), which otherwise also performs data processing, would be obliged to scan (process) all data stored by it on non-electronic media to facilitate a search for the personal data of the data subject, even though it has not previously performed any operations on them and is not aware of their storage.[110]

The right to informational self-determination can therefore be limited. The general conditions for the restriction of fundamental rights are laid down in Art. I (3)

110 3079/2018. (III.5.) AB.

of the Fundamental Law and these were also developed by the practice of the CC (necessity-proportionality test). Regarding the right to the protection of personal data, the CC has also developed specific guarantees in addition to the general conditions for the restriction of fundamental rights. In this respect, the CC primarily evaluates compliance with the purpose limitation requirement and establishes the existence of a public interest in the disclosure and transmission of personal data. However, in 46/1995. (VI. 30.) AB, the CC ruled that the public interest alone cannot be the basis for a restriction of a fundamental right, but only if the reason for the restriction is stated in the Fundamental Law. Thus, for example, restricting the access of persons with limited capacity to gambling, thereby effectively protecting their personal and property interests, is a constitutionally acceptable objective that adequately justifies the need to restrict the right to the protection of personal data.[111]

This freedom of self-determination was previously guaranteed as a fundamental right for everyone by Directive 95/46/EC of the European Parliament and of the Council, and is currently guaranteed by the GDPR, which entered into force in May 2018. In Hungary, this freedom was guaranteed by the Constitution between 1989 and 2012, and since 2012 by the Fundamental Law. However, the GDPR, created as a result of the 2016 EU data protection reform, and the Criminal Data Protection Directive have fundamentally changed the domestic regulatory environment of data protection rights.[112] In connection with the provisions of the GDPR—as a source of EU law at regulatory level—which entered into force directly, the Hungarian legislature was expected to carry out a comprehensive review of the previously adopted, comprehensive data protection legislation (the Information Act), including the creation of institutional and procedural rules necessary for the implementation of the GDPR, as well as the introduction of possible deregulation measures, the implementation of the rules of the criminal directive and ensuring the consistency of certain sectoral rules with EU rules.[113] (These laws were adopted in July 2018 and, for sectoral rules, in April 2019.) Because of the EU legislation and the domestic legislation adopted in accordance with it, concerning data processing within the scope of the GDPR, only those provisions of the Information Act that are expressly provided for by the law as standards supplementary to the GDPR can be applied (and may be applied; see Art. 2(2) of the Information Act). Consequently, a significant part of the Information Act—a set of provisions affecting the areas covered by the GDPR—has been repealed.

From the point of view of the protection of personal data, some public figures are subject to special treatment (like the application of the provisions on the protection of reputation and of integrity and privacy). Information relating to public figures

111 3046/2016. (III.22.) AB.

112 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons regarding the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

113 Regarding this, see Péterfalvi, Révész and Buzás, 2018, p. 42.

acting on behalf of public bodies and in the exercise of their functions and powers that relates to their activities and the performance of their public interest tasks is data accessible on public interest grounds.[114] In this regard, EBH2000.323 states that "the fact that the natural person to whom the data relate will be considered a public figure years later does not in itself make the personal data…data of public interest." In the case, a historian requested access to former Prime Minister Gyula Horn's Ministry of Finance files (which are possibly related to his activities during the 1956 uprising, when he was a member of the Communist secret police), which the body refused to grant, rightly, according to the court. The past activities of public figures are therefore not necessarily considered to be public if they are not related to their present public activities. A general statement to this effect may be a matter of concern, given that citizens have the right to know everything that may influence their decisions (in the case of the prime minister, for example, their decisions at the next parliamentary elections).

However, a significant part of the data concerning and relating to public figures—which does not qualify as personal data—is public interest data or data accessible on public interest grounds. According to the ombudsman's practice, public data include, for example, the names, titles, jobs, and salaries of civil servants. Similarly, the doctoral dissertations and doctoral thesis of former party leader József Torgyán and former Prime Minister Gyula Horn are freely accessible for research by anyone. The minutes of the Opposition Round Table (in existence in 1989) are data of public interest, even though the Opposition Round Table was not formally a political organization. The names of the top executives of Hungarian Television Ltd. are data of public interest, as are the salaries of the presidents of Hungarian Television Ltd. and Hungarian Radio Ltd. or the National Bank of Hungary.[115]

7. Administrative procedures

The constitutional right to fair administration declared in Art. XXIV of the Fundamental Law has been ensured in practice by the legislature within the framework of the legislation in force regulating administrative procedure.[116] The established judicial practice in this area takes into account the relevant resolution of the European Parliament,[117] which cites the principle of respect for privacy under Recommendation No. 3 on the general principles to be respected in administrative proceedings.[118] The

114 Art. 26, para. 2 of the Information Act.
115 Majtényi, 2006, pp. 402; 416–418; 435; 438–439.
116 Act CL of 2016 on the Public Administration Procedures.
117 European Parliament resolution of January 15, 2013, with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)).
118 Barabás, Baranyi, and Fazekas, 2018.

law allows for restrictions on the right of access to documents on the grounds of the protection of private information and personal data,[119] while the conflict between the right to a fair procedure guaranteed by the Fundamental Law and the protection of privacy must be resolved by the law enforcement authorities on a case-by-case basis. (In the exercise of the right of access to documents by third parties, the assessment of personal and protected data must also follow the legal provisions of the Information Act on the disclosure of data of public interest.[120])

In the context of clarifying the facts of the case, the law regulates the institution of an official inspection, which enables the authorities to inspect or observe movable property, real estate or persons.[121] When applying this means of gathering evidence, the privacy of the person concerned must be respected, and therefore the "observation" of a person cannot be understood as the secret and continuous observation or surveillance of the person by the authorities since "secret/covert collection of information or data"; that is, the official inspection is not an investigative tool.[122] It should be noted that, in certain procedural acts, the authority may also use an official witness, who may necessarily have access to information relating to the private sphere of the person concerned, to verify the events and facts which it has observed during the procedural act. It is precisely with this in mind that the law stipulates that, as a rule, official witnesses are bound by the obligation of confidentiality regarding the facts and data they become aware of during the procedural act.[123]

8. Conclusions

Privacy protection in the Hungarian legal system is implemented in a comprehensive way. In addition to constitutional protection, privacy is specifically protected by many areas of law and by the rules governing the different types of legal proceedings. The most important of these are private law, criminal law, and data protection. Ensuring freedom of expression is also a priority, and its constitutional protection must be considered when applying the rules in all areas of the law. Beyond the rules of law, case law also plays a decisive role, as the case law of the Kúria and the CC help find the appropriate balance between conflicting rights. In this respect, the Hungarian legal system has come a long way since the democratic transformation of 1989/90, and has successfully fulfilled this task, while facing the new challenges posed by the proliferation of new technologies.

119 Art. 34, para. 2 of the General Public Administration Procedures Act.
120 Petrik, 2017, p. 99.
121 Art. 68, para. 1 of the General Public Administration Procedures Act.
122 Barabás, Baranyi, and Fazekas, 2018.
123 Art. 79, para. 4 of the General Public Administration Procedures Act.

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