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"PROTECTIVE ARMOUR" OR ILLUSION? THE LEGAL FRAMEWORK FOR THE INTERPRETATION OF THE RIGHT TO PRIVACY

Theses of the PhD dissertation

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Table of contents

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I. The subject and aim of the dissertation

Human personality is an elusive, indescribable and extraordinary concept. To fully decipher and map it is an impossible task, but protecting it is a fundamental and essential task of modern legal systems.

This dissertation is concerned with the analysis of this right, the right to privacy. The importance of this right, which is highly sensitive to the public-private relationship and to technological developments, is unquestionable today. Thus, according to our basic thesis, the right to privacy is a core value of the legal system, the protection of which is essential for the protection of human personality. In domestic legal literature, the right to privacy, also referred to as *"privacy"*, *"private life"* or *"private sphere",* raises a number of questions of interpretation that need to be explored.

On the one hand, this is due to the fact that privacy, as a subject of rights to be protected, is essentially a concept with an indeterminate content, which is protected by a general legal regulation. The right to privacy is also recognised as a fundamental right, declared as a right of personality in our Civil Code, and since 2018, a specific law has also provided for the main rules of its protection. *This regulatory approach provides a complex legal protection mechanism for the right to privacy, which underpins the interdisciplinary, cross-disciplinary approach of this thesis.* However, the effectiveness and enforcement framework of complex legal protection raises a number of questions, a characteristic example of which is the issue of the conflict between freedom of expression and the right to privacy. In view of this, our dissertation places particular emphasis on exploring the points of conflict and limitations of the right to privacy and on resolving possible conflicts.

Thirdly, an important question related to the interpretation of the right to privacy is to what extent this right can be interpreted independently in the field of civil law, alongside the other named personality rights and the general general rule of protection of personality. In relation to this issue, the special law on privacy has added more nuances to the discourse, especially in relation to the right to privacy of public figures, the interpretation of which and the exploration of the regulatory dissonance that arises is also the subject of this paper.

Fourthly, the right to privacy can be seen as a right whose history is in fact linked to the development of technology, following it as a kind of protective shadow, while the 'brave new world' created by technological novae constantly challenges the exercise of this right. In view of this, our paper outlines, in a thought-provoking way, areas of technological development that

are sensitive to privacy and could be targets for future research. Our aim is to illustrate the impact of technological developments on privacy and to draw attention to areas where the 'armour' of privacy has been excessively thinned by these innovations.

Overall, it can be concluded that our dissertation has a clear objective to provide a comprehensive interdisciplinary analysis of the implementation of the right to privacy, to identify possible legislative and enforcement dissonances, and to outline the historical developmental trajectory of the right, as well as possible new directions for its evolution.

II. Structure of the dissertation

In order to achieve the objectives set out above, the essay discusses in *ten chapters* the most important areas of the interpretation of the right to privacy.

After the introduction, the starting point for the research is an analysis of the relationship between the public and private spheres, followed by an outline of the historical foundations of the development of the right (*Chapters I and II*). These first two chapters thus serve to provide a dogmatic and historical grounding of the subject by presenting the main theoretical trends and the most important stages in the development of the separation of the public and private spheres.

In the next chapter (*Chapter III*), attempts to define the right to privacy will be examined, with a separate attempt at a general definition at the end of the chapter. In our view, a precise, general definition of the right to privacy cannot be given, nor would it be appropriate, but an analysis of the various academic attempts at definition is essential to uncover the essential elements of the right to privacy.

The following structural units (*Chapters IV, V, VI*) are intended to illustrate the place of the right to privacy in the legal system. For the first time, the right to privacy is analysed as a fundamental right, which, in addition to the relevant legislative context, includes an examination of the case law of the European Court of Human Rights and the jurisprudence of the Constitutional Court in the field of law development. Following the interpretation of the right to privacy as a fundamental right, it will be analysed as a civil right of personality, drawing on the practice of the civil courts, in view of the fact that the general rule of the Civil Code is given substance by judicial interpretation. Following the chapter on civil law interpretation, we discuss the rules of Act LIII of 2018 on the protection of privacy, which, in an unusual way, protects the right to privacy as a separate law, and at the end of the chapter we outline the legal protection in other branches of law, thus pointing out that the right to privacy is a core value of the legal system, which is protected by a complex legal protection mechanism.

In the next chapter (*Chapter VII*), we will examine the privacy rights of public figures in the light of the changes brought about by the 2018 Act of the Right To Privacy (Mvtv.) and the points of conflict between freedom of expression and the right to privacy. The right to privacy of public figures is a highly distinctive and central issue for the topic of this dissertation, and thus the relevant case law is analysed in this chapter.

In the following section (*Chapter VIII*), the intersection between the different branches of the media and the right to privacy will be discussed, with a particular focus on the novae created

by social media, which pose a strong challenge to the right to privacy. In this context, particular attention will also be paid to the analysis of privacy issues in social platforms.

The last chapter of the thesis (*Chapter IX*), before the conclusion, is the chapter on technological novae that have a strong impact on the right to privacy. While these tools and methods have a number of undeniable positive effects, they also raise a number of privacy concerns that pose a major challenge to both lawmaking and law enforcement. In doing so, we present a subjective selection of the new challenges to the right to privacy, outlining the range of legal issues that arise in a forward-looking way. The conclusions of the findings in each section of the dissertation are drawn in the final part of the thesis, the conclusions.

III. Methods used in the research and evaluation of the topic in the literature

Given the nature of the chosen topic, the dissertation was written using a *variety of research methods and an interdisciplinary approach.*

The first of these methods is the *historical method*, which is used to explore the purpose and functions of the right to privacy by looking at the history of the development of the right to privacy in Hungary and Europe. In this respect, it is also important to present the different paths of Anglo-Saxon and continental legal development and legal conceptions, but the description of the stages of Anglo-Saxon legal development is beyond the scope of this essay. By presenting examples taken from the regulation of the states of the continental legal system and by applying the comparative method, the work reveals details that can be used from a dogmatic and jurisprudential point of view, which can also serve as useful lessons for domestic judicature and legislation. It also outlines the milestones of the vast body of philosophical literature on the private sphere. In addition, the history of technological developments in privacy is highlighted, which have had a profound impact on the understanding of privacy, tracing an evolutionary arc through the ages that continues today.

The paper uses the dogmatic and normative method to present the theoretical foundations and the legislation in force. In addition to exploring the scientific and theoretical foundations of the right to privacy, the dissertation will also provide a detailed analysis of the application of the law. In addition to the presentation of domestic judicial practice, forward-looking foreign case law examples and the jurisprudence developed by the European Court of Human Rights will be analysed. *The interpretation of the various legal provisions has been based on a grammatical and logical interpretation of the legal provisions and, in a number of cases, on critical analysis.*

The forward-looking part of the paper is devoted to the technological novelties affecting privacy, with just a few examples, such as social networking sites, biometric identification or unmanned aerial vehicles, all of which are challenges that require an effective legislative and enforcement response. Thus, we have also relied on descriptive, analytical and critical research methods to examine these institutions. In order to further the search for answers to the questions raised, the theoretical issues raised are addressed alongside the difficulties in applying the law, thus providing a constructive and forward-looking analysis of the present problem.

The research has been based on a wide range of existing legislation, given the cross-cutting nature of the chosen topic. In this respect, the analysis of the regulations of the Fundamental

Law, the Civil Code, Act LIII of 2018 on the Protection of Privacy, as well as the analysis of several other domestic legislation and international legal documents are worth highlighting.

In addition to the examination of the relevant legal regulations, the exploration and examination of the relevant practice of the European Court of Human Rights, the Constitutional Court and civil law courts also form an integral part of the dissertation, in view of the general nature of the legal regulations. Thus, in the analysis of the right to privacy, the dissertation places a special emphasis on the exploration and analysis of the relevant case law, which is also illustrated by the large number of ECtHR, Constitutional Court and ordinary court judgments discussed in the dissertation.

With regard to the literature, we have primarily relied on domestic sources of law, but a significant number of foreign academic works have also been included in the work. In terms of domestic sources of law, the works of Elemér P. Balás, Artúr Meszlény, Tamás Fézer, András Koltay, Márta Görög, Attila Menyhárd, Tamás Lábady and László Sólyom are exemplary and have greatly assisted the author of this dissertation. However, it is important to emphasize that in the Hungarian legal literature, no academic work comprehensively dealing with the right to privacy had been written by the end of the thesis.

Among the foreign legal literature, the seminal work *"The right to privacy"* by Samuel Warren and Luis Brandeis, as well as the relevant works by Thomas M. Cooley, Clinton Rossiter, Milton R. Konvitz and Daniel Solove deserve special mention.

In terms of the research methods used in this thesis and the use of the available literature, it can be concluded that, overall, the author's conclusions were reached after synthesising, examining and analysing the available sources. The research has also placed the legal institution under study in the context of its historical development, in order to outline a useful evolutionary arc for the chosen topic. In addition, interdisciplinary, comparative, historical, logical, grammatical, dogmatic and critical methods were used. We have analysed, interpreted, systematised, compared and distinguished the legislation we have examined. After the exploration and analysis of the available legislation, an in-depth analysis of the literature and the application of the research methods mentioned above, the final conclusions and recommendations of the dissertation were drawn.

IV. Summary of the research results and its utilization

The right to privacy is an extremely broad right, of paramount importance for the protection of human personality. The right to privacy, also referred to as the right to intimacy, protects in a general way the inner, secret core of the personality, which is closed off from the outside world, and which can be described in essence as the right to "privacy". The aim of this thesis was to explore the interpretative framework of the right to privacy, and with this aim in mind, we have followed an interdisciplinary approach in our research. The conclusions of our thesis are summarised in the following points:

1) The starting point for our research on the interpretation of the right to privacy was the distinction between the public and private spheres. The relationship between these two "spheres" has taken different forms in each period, and has been and is still widely discussed in the field of philosophy. Today, the public and private spheres cannot be sharply separated, given, for example, the proliferation of social networks and the 'structural changes' in modern society. *Nevertheless, however, a person's personal relations, inner thoughts, habits, freedom of expression, the right to be undisturbed and to be free from prying eyes, fall under the umbrella of privacy, private life, which must also be protected by the law.*

2) Our analysis of the right to privacy has also been based on a brief review of the history of its development. This has shown that the paths of Anglo-Saxon and continental legal development have diverged considerably. In the common law systems, the development and interpretation of English and US law also diverged. In England, the recognition of the right to privacy has gradually gained ground and is still not covered by a separate *"tort"*, but there is a frequent reference in case law to Article 8 of the European Convention on Human Rights, which declares the protection of private and family life. In US practice, the four-part division developed by William Prosser in 1960, which treats the right to privacy not as a single concept but as a general right that can be flexibly adapted to several areas, is still considered to be decisive. In contrast, in continental law, the right to privacy is derived from the general right to privacy. In terms of the development of Hungarian law, it can be noted that the demand for a right to privacy first appeared in academic discourse and judicial practice, and was followed relatively late by legislation. To take just two examples, Artúr Meszlény wrote as early as 1903 about the problem of certain ladies' portraits being 'displayed in public stalls', but in 1927 P. Elemér Balás also discussed the significance of the 'secret sphere' in a

very graphic way. *The recognition of this right has been greatly assisted by supranational human rights documents and by the case law of the Constitutional Court and the civil courts.*

3) After outlining the philosophical and historical foundations, it was considered important to present the academic attempts to define the content of the right to privacy. This was also justified by the "birth" of the right itself, which can be considered an anomaly. The term 'the right to privacy' was first used by Thomas M. Cooley in 1888 and was taken up in 1890 by Samuel Warren and Luis Brandeis, who published their seminal paper in the Harvard Law Review. Contemporaries immediately recognised the significance of the writing and with it 'the right to privacy'. Drawing on natural law thinking, the authors named privacy as a right with an absolute structure, the essential element of which they captured in the 'right to be left alone'. Since the publication of this study, an almost untraceable body of legal literature has been produced, which has attempted to define the right to privacy in various ways. Some authors have captured it as a single concept, while others have broken it down into compartmental rights. Some views have seen privacy as part of the freedom of self-determination, while others have captured its essence in the 'right to privacy' as noted by Warren and Brandeis. *For our part, we regard the right to privacy as a right which, deriving from human dignity and freedom of self-determination, is intended to guarantee the right of a person to be left alone, to remain aloof from others (both physically and psychically) and to have control over information about him or her.* This right must apply both vertically, in the relationship between the State and the citizen, and horizontally, in the relationship between individuals. The framework and guarantees for the protection of the former are laid down in international human rights instruments and in constitutional and other public law rules, while the horizontal scope is governed by private law and specific legislation.

4) In the analysis of the legal regime, we first examined the regulation of the right to privacy as a fundamental right. In this respect, the basis for legal protection is provided by the various supranational human rights instruments and the Fundamental Law, but it is for the case-law to give substance to the norms. In this context, we have analysed in detail the practice of the European Court of Human Rights, which is justified by the fact that the principles developed by the Court of Justice in Starsbourg have served and continue to serve as a guide for the interpretation of the law by the domestic Constitutional Court and civil law courts. The ECtHR's practice is characterised by a very specific decision-making on the conflict between the right to freedom of expression and the right to privacy. In these cases, the assessment is made on a case-by-case basis, but the ECtHR essentially considers as a decisive factor whether or not the communication infringing the privacy of the person concerned serves the

free discussion of public affairs, a principle which is also consistently applied in domestic jurisprudence. *In the practice of the ECtHR, no uniform definition of the right to privacy has been elaborated, the forum considers Article 8 to be applicable in a very broad sense to a wide range of life circumstances. The three most important areas include proceedings relating to the integrity of persons, privacy cases and cases relating to personal identity, which also include a number of other sub-areas. The Constitutional Court, in its jurisprudential interpretation, has examined the right to privacy in the context of a number of life relationships, and interprets privacy as a right whose essence is that it cannot be invaded or viewed by others without the will of the person concerned, thus ensuring his or her "right to be left alone".*

5) Turning to the civil law, our research has led us to the conclusion that the right to privacy, which is recognised as a general, civil law general clause in our Civil Code as a named right of personality, is given substance by judicial practice. An examination of civil law jurisprudence leads to the conclusion that the right to privacy is mostly and typically always exercised by or alongside another named personality right. Such rights include the right to image and sound recording, the right to honour, the right to reputation, the right to the protection of personal data, the right to a private dwelling and the right to privacy. If the violation of personality is attributable to conduct in order to establish a right to privacy in addition to another right to personality, an additional element is required. In our view, this additional element may essentially take the form of an unwarranted intrusion into the private sphere, a violation of the *"right to privacy". In sum, in civil law, the right to privacy is seen as a named right of personality which, alongside the general right of personality, serves to protect human personality as part of it, with a subsidiary, gap-filling role. Despite the general role of the general right to personality and the fact that some of the subordinate rights in the private sphere also serve to protect personality as a named right, we do not consider it unnecessary to recognise the right to privacy as a right to personality, given its gap-filling, flexible nature and the fact that it is a core value of the legal system which must also be applied in individual private legal relationships.*

6) In the third chapter on legal regulation, we examined the rules of Act LIII of 2018 on the Protection of the Right to Privacy (Mtv.) and the rules protecting the right to privacy in other branches of law. In the Mtv., the legislative intention to enhance the protection of the right to privacy is manifested. For our part, we welcome the fact that the legislation refers to the challenges posed by technological innovations and the threats to privacy in the online space. With regard to the provisions of the legislation, the provisions on the right to privacy of

public figures deserve to be highlighted, as they allow for a narrower scope of jurisdiction than previously and raise important questions for judicial practice. In our view, a rethink of the legislation may be necessary in this respect, and we do not consider the designation of the right to family life as a sub-area of the right to private life, or the distinction between the right to private life in the narrower and broader sense, to be doctrinally correct. The Mvtv. can essentially be seen as the product of an unusual legislative solution. Since its entry into force, the MVA has been referred to several times in civil law case law, but the provisions of Act LIII of 2018 do not add anything to the meaning of the right to privacy. In addition to the Civil Code and the Fundamental Law, this legislation plays a kind of "complementary" role, and its independent practical implementation is not facilitated by the fact that the system of sanctions for the reparation of conduct infringing the right to privacy is essentially taken over from the Civil Code. In terms of the legal regulation of the right to privacy, the areas of labour law, data protection law, civil and criminal procedural law, substantive criminal law and prison law deserve special mention. *As regards the regulation of the right to privacy, it can be concluded that it is protected in a complex way in the domestic legal system. Constitutional protection protects privacy vertically in the system of relations between the state and individual citizens, while civil law creates the framework for protection in the relations between individual legal entities. Act LII of 2018 creates a specific situation in this regard, in our view, the law is alien to the unity of legal regulation in terms of its taxonomy, dogmatics and provisions on public actors. The norms that protect privacy in all areas of law can be considered to be fairly general, and their content and characterising attributes are determined by practical legal interpretation.*

7) The relationship between the public and private spheres has a significant impact on the exercise of the right to privacy, as we indicated at the beginning of this paper. *The media is an essential platform for the public sphere, public affairs and information, and we believe that it has a crucial and irreplaceable role to play in the functioning of a democratic state governed by the rule of law.* The classical media, such as the press, radio and television, in addition to being traditional areas of linear media services, are in many cases also 'arenas' of collision between freedom of expression and the right to privacy. In this respect, it is worth highlighting that, in addition to legal regulation, the protection of the right to privacy is also reflected in certain ethical standards. The rise of social media, which has in practice redrawn the boundaries of privacy, is a new area that is somewhat outside the law. *A precise legal definition of social networking sites has not yet been drawn up, but for our part, we generally use the term to refer to services (websites and applications) which, by providing a*

framework, enable users, once registered, to become part of an online social network, where they can access, create and share content. In social media, the right to privacy can be violated in two sets of relationships. On the one hand, in the legal relationship between the social networking site and its users, and on the other hand, in the relationship between users themselves. The former typically takes the form of infringements of personal data, but we consider as a strong violation of the right to privacy the use of algorithms, small tracking files and all the tools that serve the 'zero-price' business model of social media, which fully map the identity of users but are trade secrets and therefore inaccessible, as having a strong privacy impact. Also of concern are the general terms and conditions set out by the providers of social media sites, which are rather narrow in their scope in terms of the portal's obligations to respect the privacy and fundamental rights of users. Resolving this imbalance and more robust legal regulation of the business model of social networking sites seems essential to ensure users' right to privacy. The other set of relationships that give rise to privacy violations is the relationship between users, which typically involves the violation of a privacy right through unauthorised uploading, sharing and posting. In this respect, we consider the privacy legislation to be satisfactory, but it is a regrettable trend that users are more likely to express their opinions on social media platforms in a simplistic and thoughtless manner, in many cases in violation of the law. This requirement also arises in the context of ensuring children's right to privacy in social media, which is an area of major public interest. The rules declaring the protection of minors' rights in this context are rather general, and it is therefore essential, in our view, to adopt specific rules for social media in the future, which would balance the vulnerable position of children in social media and thus facilitate the effective exercise of their right to privacy.

8) In our research, we have placed considerable emphasis on the examination of the right to privacy of public figures, given the very rich jurisprudence and the fact that case law decisions generally arise in relation to the conflict between freedom of expression and the right to privacy. A precise, general legal definition of public figures has not yet been established, but in our view this is not necessary, as the capacity of public figures is decided on a case-by-case basis by the court seised. In our view, an important new "group" of public figures is the online opinion leaders, who, given their impact on society and their often hundreds of thousands of followers, may be justified to be classified as public figures. *The key question regarding the right to privacy of public figures is where the line is drawn between free criticism and invasion of privacy? In this respect, the ECtHR and (based on it) the domestic Constitutional Court apply a graduated system of discretion. However, since*

the entry into force of the Mvtv. and the amendment of the Civil Code, both public opinion and judicial practice have sought to strike a delicate balance between the right to privacy and the ability to criticise public figures who play a public role in promoting democratic discourse. Finding this balance can be seen as essential, since the conflict between the right to privacy and freedom of expression seems to be decided in favour of the former, on the basis of the rules of the Mvtv. In this respect, the courts may be assisted by a restrictive interpretation of when the misuse of personal data, secrets, images, audio recordings or the violation of honour and reputation that an individual wishes to keep private in connection with his private life also constitutes a violation of the right to respect for private life. The tightening of the definition of the latter concept could be a means of providing a relatively broader interpretation of freedom of expression and of bringing it closer to the principles developed by the judiciary.

9) From the point of view of the protection of the right to privacy, certain technological and methodological innovations cannot be ignored, given that the need for recognition of the right to privacy was born precisely by such a tool, which was developed in its time. Since 1890, the social and technological environment has obviously changed a great deal, and today we have virtually arrived at a threatening and utopian image of the Metaverse, which, in addition to its many innovative and undeniable positive effects, also poses a major threat to the private sphere. *Other areas that can be mentioned in this context include biometric identification, personalised medicine, unmanned aerial vehicles and artificial intelligence.* These issues can be seen as further avenues of research, but we cannot agree with Mark Zuckerberg's view that privacy has ceased to be a social norm, and that *privacy is a core value of the legal system that must be protected in today's digitalised reality, despite the often unpredictable pace of technology.*

This being so, the right to privacy, in answer to the question posed in the title of our thesis, can in no way be considered an illusion. Generally speaking, it is an integral part of the fabric of the law, transcending the legal disciplines, and it protects the sensitive area of human existence, the secret essence of the soul of the subjects of the law, as a real *armour*. But this protection is not uniform. The norms of complex legal regulation, the principles developed by case law, are all part of it, and its sectional rights form a rounded whole, like a colourful mosaic. *And where these pieces of the mosaic appear incomplete or do not fit together properly, the gaps are filled by the general rules, thus reinforcing and serving the armour of the right to privacy.*

V. List of publications related to the dissertation

1) HALÁSZ Csenge: A közszereplők személyiségi jogai a hazai esetjog és az Emberi Jogok Európai Bíróságának joggyakorlata tükrében, In: III. Fiatalok EUrópában Konferencia. Sopianae Kulturális Egyesület, Pécs, Magyarország : Sopianae Kulturális Egyesület (2017) pp. 144-155.

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3) HALÁSZ Csenge: A közösségi médiában megvalósuló személyiségi jogsértések a hazai bírói gyakorlat tükrében, In: Szabó, Miklós (szerk.) Doktoranduszok fóruma : Miskolc, 2017. november 16. : Állam- és Jogtudományi Kar szekciókiadványa, Miskolc, Magyarország : Miskolci Egyetem Tudományos és Nemzetközi Rektorhelyettesi Titkárság (2018) 165 p. pp. 36-41., 5 p.

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8) HALÁSZ Csenge: Ujjlenyomatban a privátszféra? A biometrikus azonosítás és a magánélethez való jog metszéspontjai, Publicationes Universitatis Miskolcinensis Sectio Juridica Et Politica, 2019 : 2 pp. 303-318.

9) HALÁSZ Csenge: Privacy az új szabályozás tükrében, avagy a magánélethez való jog pillanatnyi állapota, In: Szabó, Miklós (szerk.) Doktoranduszok fóruma : Miskolc, 2018. november 22. : Állam- és Jogtudományi Kar szekciókiadványa, Miskolc, Magyarország : Miskolci Egyetem (2019) pp. 41-45.

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