ON CERTAIN ASPECTS OF PRIVACY[*]

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1. Aspects of privacy have come to the forefront of interest both for the public and in the legal literature in recent decades. We dispense with a historical discussion of the issue and are content by mentioning that the chapter on privacy in the Hungarian Civil Code (1959) was all but confined to retelling what the Constitution said of the matter. The reasoning the minister of justice of the time put forward in connection with the bill of the law on the Civil Code was silent on human rights and did not elaborate on the constitutional foundations of privacy. All it said was the Civil Code treated privacy the way the Constitution did and mentioned in passing the instruments of administrative law and criminal law to protect privacy. The provisions the Civil Code offered were little more than paying lip service, as was typical of the treatment of human rights in that era.

When the Civil Code was amended in 1977, the provisions on privacy were expanded and strengthened, which reflected the change in the political climate. In a monograph written on privacy in 1983 László Sólyom described the amendment as a „major and spectacular re-regulation."[1] The reasoning the minister of justice of the time put forward, when the bill was debated in Parliament emphasized the protection of the fundamental rights of citizens. Political opening in private law apparently outpaced that in public law, just as in other matters.

The 1977 amendment acknowledged the consequences of technological progress: the growing role of the media by including provisions on libel suits, and the impact of the use of computers on privacy by including provisions on the registration of personal data in computers.

The present study discusses the impact on privacy of the consequences of technological progress, and the relationship between privacy and human rights, privacy and constitutional law.

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1 László Sólyom: *A személyiségi jogok elmélete* [A Theory of Privacy], Budapest, Közgazdasági és Jogi Könyvkiadó, 1983, p. 13.

2. Conditions radically changed in Hungary following the change of the political system, and evident is the question how should the Civil Code regulate privacy in the new situation?

In a clear departure from the Civil Code of 1959, the present provisions do not just pay lip service to the protection of human rights. The provisions of the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms have become important components of the Hungarian legal system. During the transition the fundamental rights were adjusted in the Hungarian Constitution to the Covenant and the Convention, and those considerations shaped the practice of the Constitutional Court when granting constitutional protection to fundamental rights.

In Hungarian constitutional law the human rights have assumed a new role. Consequently, the rules that were incorporated in the laws of various fields of law before the transition-related amendments of the Constitution need to be revised. Let us give you an example. It is questionable, whether the Civil Code should declare the protection of political rights, while no civil law rules are attached to those rights. Though the violation of those rights incurs tort liability, damage caused illegally could be established even if the Civil Code did not provide for the protection of those rights. Given the changes that have occurred over the past few decades, certain fundamental issues of regulation need to be overhauled.

3. Present conditions are very different from those in 1959 or for that matter in 1977 in terms of technological progress, the advance of biology, and the commercial utilization of those results. The demand for the protection of privacy in health care and for the protection of private and trade secrets require the modernization of the regulation. Such changes have directed attention to privacy both in international legal practice and legal literature. The protection and regulation of privacy varies from country to country.[2] Even the European Union finds it challenging to respond to the impact of technological progress on privacy, especially as regards the key role of information networks in economy. That is why prestigious legal experts have called for a new regulation system.[3]

The present paper sheds light on some aspects of this complex issue without going into detail.

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[2] Ansgar Ohly: Harmonisierung des Persönlichkeitsrechts durch den Europäischen Gerichtshof für Menschenrechte? *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil* 2004, Heft 11, p. 903.

[3] Ph. Alston and J. H. H. Weiler: An 'ever closer union' in need of a human rights policy: The European Union and human rights, in: Philip Alston (ed.), *The EU and Human Rights*, Oxford Univ. P., Oxford – New York 1999, p. 17.

4. Many new issues of privacy have arisen due to technological progress over the past decades. Take the example of new information networks. Today personal data are processed on a large scale, access to processed data has become easy, data controller often pass on data, and personal data are used for business and other purposes in daily routine. In fact, personal data have become a commodity, and a market emerged for them.[4]

Data protection apart, American legal journals carry conflicting views about privacy, especially in health care: donation of blood, the transplantation of organs and tissues, etc. There is disagreement on whether property rights apply to the human body, whether the exercise of rights may be commercialized as, for instance, to transfer certain rights or consent to abstaining from the exercise of certain rights – or the government should intervene and, invoking other than business considerations, restrict those rights to protect the individual (even if the person concerned opposes that).[5]

Numerous American experts argue in favour of a commercial approach and claim that ownership should prevail, even if that gives rise to unconventional proprietary categories. By contrast, other experts claim that legal regulation should be based on other than market considerations. I find the argument convincing that legal means on their own cannot be sufficient either way.[6]

The European legal approach is different, even if the business potentials of personal data are equally acknowledged. The relevant European rules focus on non-commercial considerations because of the intention to be safe against terror attacks, which Europe has been occasionally experiencing for a long time. Note that after the events of 11 September 2001, the relevant American rules also underwent substantial changes. A massive centralized network was built to survey data traffic and the relevant legal instruments were put in place.[7]

5. The way Hungarian civil law regulates this area is closely related to the approach of the Council of Europe and the European Union. The framers of the instruments of Hungarian civil law have studied the relevant international conventions, the relevant national laws and judicial practice. The author of this paper has the impression that those factors have not been sufficiently examined so far.

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[4] Paul M. Schwartz: Property, Privacy and Personal Data, *Harvard Law Review* 2004, pp. 2056-2057.

[5] Susan Rose-Ackerman: Inalienability and the Theory of Property Rights, *Columbia Law Review* 1985. 945 and later pages; pp. 968-969.

[6] Pamela Samuelson: Privacy as Intellectual Property? *Stanford Law Review* 2000, pp. 1126-1130.

[7] Michael Levi, David S. Wall: Technologies, Security, and Privacy in the Post-9/11 European Information Society, *Journal of Law and Society* 2004, pp. 196-201.

(a) Country-level data protection was augmented on 21 January 1981, when Member States of the Council of Europe signed the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data.[8] Numerous recommendations were issued later on about the various aspects of that complex issue. That development prompted experts to call for an entirely new regulation approach, some sort of a novel Code Napoleon or BGB to protect privacy.[9]

It is not the purpose of this paper to analyse that convention. Suffice it to mention that – just like other similar instruments – the convention had to balance between two conflicting requirements. The last paragraph of the Preamble provides that it „is necessary to reconcile the fundamental values of the respect for privacy and the free flow of information." The convention does not directly bestow rights on the individuals concerned, as implementation is the duty of the signatories by enacting national legislation in compliance with the convention. Paragraph 2 of Article 12 provides that „A Party shall not, for the sole purpose of the protection of privacy, prohibit or subject to special authorisation transborder flows of personal data going to the territory of another Party." Let me stress the importance for civil law of paragraph 1 of Article 3, which provides: „The Parties undertake to apply this convention to automated personal data files and automatic processing of personal data in the public and private sectors." That provision requires the framing of rules that have an effect both in the vertical relations between citizen and state and the horizontal relations between citizens.

The reasoning put forward in Parliament during the debate of the bill of Act LXIII of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest states that the law complies with the data protection convention of the Council of Europe. Article 83 of the Hungarian Civil Code only stipulates: „Data management and data processing by computer or other means may not violate privacy", and adds some other important provisions. However, a detailed regulation of that area can be found in other rules of law. That having said, the sanctions enumerated by Article 84 of the Civil Code may be applied to all cases of violation of privacy.

(b) The countries of Europe formulated their data protection laws one after the other as from the 1970s. Although they were based on the said convention of the Council of Europe, their content was far from identical. The need for some kind of a common regulation was soon recognized in the countries of the European Economic Community. The European Parliament called for the elabora-

[8] ETS No. 108.

[9] Herbert Burkert: Progrès technologique, protection de la vie privée et responsabilité politique, *Revue française d'administration publique* 1999, pp. 119-120., p.124.

tion of rules that protect privacy from 1976 on. Among the factors calling for such Community legislation were the on-going exchange of information under the Schengen Agreement, the fast growth of the information market and the stupendous evolution of data recording and forwarding techniques.[10]

Following prolonged rounds of preparatory work, the European Parliament and the Council promulgated Directive 95/46/EC.[11] That directive was followed by several other, specialized instruments.[12] It is worth mentioning among them the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive)[13], and the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector.[14]

Hungarian rules of law have been adopted in compliance with those directives but it needs to be examined, whether their relation to the general rules of privacy has been clarified.[15] That is why this paper raises some related questions.

Paragraphs 7 and 8 of the Preamble of Directive 95/46/EC clearly states the purpose of Community-level regulation: the Member States use different legal instruments to regulate the protection of privacy in connection with the processing of personal data, and those differences can obstruct the transmission of such data from one Member State to the other, can distort competition and disturb the operation of an internal market. In addition to the enforcement of the requirements of the internal market and the free flow of information, paragraph 3 of the Preamble calls for the safeguarding of fundamental rights of individuals. Paragraph 10 of the Preamble stipulates that the approximation of laws based on that directive must not result in any lessening of the protection the Member States afford.

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[10] Ulf Brühann: La directive européenne relative à la protection des données : fondements, histoire, points forts, *Revue française d'administration publique* 1999, pp. 12-14.

[11] OJ L 281, 23 November 1995, 31.

[12] For a survey of the question in Hungarian, *see* Paulina Oros and Kinga Szurday: Adatvédelem az Európai Unióban [Data Protection in the European Union], *Európai Füzetek*, no. 35, issued in 2003.

[13] OJ L 108, 24 April 2002, 33.

[14] OJ L 201, 31 July 2002, 37.

[15] *See* a related paper by György Zsolt Balogh: Az adatvédelmi törvény fejlesztésének kérdései [Aspects of the Development of the Law on Data Protection], *Jogtudományi Közlöny* 1997, pp. 271, 275; on the relationship to the freedom of information, *see* a contribution by Iván Székely in the discussions section of *Fundamentum*, 2004, pp. 53-54.

The primary purpose of the Hungarian Constitution and the Civil Code in the regulation of the rights to privacy is to protect privacy and not to remove obstacles from the way of the free flow of personal data.[16] The difference in approach may cause problems in enforcement.

The principles of the Directive are similar to those of the Convention signed by the Member States of the Council of Europe. The Directive defines the main principles that the legal instruments to be adopted by the Member States should follow. Paragraph 2 of Article 1 provides that the Member States shall neither restrict nor prohibit the free flow of personal data between Member States, for reasons connected to the protection of the rights to privacy. Item (a) of Article 7 stipulates that the Member States "shall provide that personal data may be processed only if the data subject has unambiguously given his consent", yet it offers several exemptions to that principle. Article 5 obliges the Member States to issue legislation to determine the conditions under which the processing of personal data is lawful, yet the Directive includes the common conditions to be adhered to.

As has been mentioned, item (a) of Article 7 states that personal data may only be processed if the data subject has given his consent. Subsequent provisions of Article 7 seem to be different from the underlying principles of Article 83 of the Civil Code and Act LXIII of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest. Personal data may be processed without the consent of the data subject, if processing is necessary for the performance of a contract to which the data subject is party (item [b] of Article 7), or processing is necessary for compliance with a legal obligation, to which the controller is subject (item [c] of Article 7). There is another provision that differs from the Hungarian Civil Code. Item (f) of Article 7 stipulates that data processing may take place without the data subject's consent, if processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties, to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject, which require protection.

[16] In his analysis of the relation between the Civil Code and the Constitution, László Majtényi states that the two instruments are not consistent in using certain categories, and Gábor Jobbágyi expresses dissatisfaction over the absence of a clear definition of the protection of the individual's rights in civil law. *See* László Majtényi: Az adatvédelem és az információszabadság az Alkotmányban [Data Protection and the Freedom of Information in the Constitution], *Acta Humana* 1995. no. 18-19. p. 97; Gábor Jobbágyi: Az ember és az emberi személyiség az új Polgári Törvénykönyvben [Man and Human Personality in the New Civil Code], *Jogtudományi Közlöny* 2000, pp. 262-263.

There was some uncertainty in the implementation of the Directive. For that reason the consolidated version of the Treaty on European Union, which incorporated the Treaty of Amsterdam, stipulated that the Community institutions set up on the basis of the Treaty shall enforce the Community rules on the protection of personal data and the flow of data, and it called for the establishment of an institution that would inspect adherence to the rules of data protection. Because of the problems in the implementation of European Union legislation, it was required to compile a consolidated text of the disparate array of specialized rules.[17]

The scope of this paper only allows us to mention briefly that Community legislation may not be subjected to judicial review, even if the protection of human rights is at stake. The European Court of Justice confirmed in a decision it handed down in 2004 that neither a natural, nor a legal person might institute proceedings against a general norm because paragraph 4 of Article 230 of the Treaty on European Union does not allow scope for that.[18] The judicial decision on that long-debated issue elicited instant responses outside Hungary,[19] and Hungarian legal experts have yet to analyse them.

In 2000 the Parliament, Commission and Council of the European Union adopted the European Union's Charter of Fundamental Rights.[20] The first Article of the Charter states that „Human dignity is inviolable." The modified commentary attached to the Charter emphasizes that human dignity is the foundation of human rights, and none of the rights enunciated in the Charter may violate human dignity. Even in cases, when fundamental rights need to be restricted, human dignity must be honoured. Paragraph (1) of Article 8 of the Charter provides that „Everyone has the right to the protection of personal data concerning him or her." The second paragraph adds that „Such data must be processed fairly for specified purposes, and on the basis of the consent of the person concerned, or some other legitimate basis laid down by law." The commentary on the Charter says that Article 8 was written on the basis of the relevant convention of the Council of Europe, directives of the European Union

[17] Francesco Maiani: Le cadre réglementaire des traitements des données personnelles effectués au sein de l'Union européenne, *Revue Trimestrielle de Droit Européen* 2002, pp. 298-299.

[18] Commission des Communautés européennes contre Jégo-Quéré & Cie SA, C-263/02, decision of 1 April 2004, item 30.

[19] Some examples: Jürgen Schwarze: The Legal Protection of the Individual against Regulations in the European Union Law, *European Public Law* 2004, pp. 285-303; Christopher Brown, John Morijn: Case C-263/02 P, Commission v. Jégo-Quéré & Cie SA, *Common Market Law Review* 2004, pp. 1639-1659.

[20] For a comprehensive review of the Charter, *see* Mónika Weller: Az Európai Unió Alapjogi Kartája [Charter of Fundamental Rights of the European Union], *Acta Humana*, 2001, no. 43. pp. 31-44.

and relevant practice of the European Court of Justice. Having read the reference to the convention of the Council of Europe, we cannot be surprised to see that the commentary is not content with speaking of the protection of human rights, but also of the options for restricting the rights to privacy, as laid down in certain instruments of Community legislation.

Experts disagree about the legal evaluation of the Charter. Even though the Charter has no binding force, several Advocates-General have qualified the charter as belonging to the common constitutional heritage of the Member States and it is supposed to be enforced as such. The European Court of Justice has not embraced that opinion so far in its practice.[21] The charter has been incorporated into the draft Constitution of the European Union. In case the Member States adopted the draft Constitution and it became effective, the present legal character of the charter would change.

6. Questions of data protection have repeatedly come up in the practice of the Hungarian Constitutional Court,[22] and the fast technological progress and the developments in the regulation of related matters abroad have generated considerable interest.[23] When Hungarian experts discuss related domestic issues, they seem to focus on the Convention of the Council of Europe.[24] Several judicial decisions have recently been made that are important because of their civil law ramifications. In the passage below we offer a survey of those judicial decisions.

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[21] Franz C. Mayer, La Charte européenne des droits fondamentaux et la Constitution européenne, *Revue Trimestrielle de Droit Européen* 39 (2) 2003, pp. 192-193.

[22] *See* László Sólyom: *Az alkotmánybíráskodás kezdetei Magyarországon* [Early Stages in the Work of the Constitutional Court in Hungary], Budapest 2001, pp. 463-474, which presents the historical context as well; furthermore, an analysis by István Kukorelli in: Zsolt Balogh, András Holló, István Kukorelli, János Sári: *Az Alkotmány magyarázata* [An Explanation to the Constitution], Budapest 2002, pp. 577-586.

[23] Recent writings as published in issue no. 4 of *Fundamentum* 2004: László Majtényi: Az elektronikus információszabadság törvénybeiktatása [How the Freedom of Electronic Information Became Law], Zsuzsa Kerekes: Az információszabadság az Európai Unióban [The Freedom of Information in the European Union], Máté Dániel Szabó: Elektronikus információszabadság külföldön [The Freedom of Electronic Information outside Hungary]

[24] Kinga Szurday: Az adatvédelmi jogi szabályozás szerepe, feladatai és hatása a közigazgatásra és a versenyszférára [Legislation on the Data Protection and its Role, Tasks and Impact on Public Administration and the Private Sector], *Magyar Jog* 1994, pp. 661-665; László Majtényi: A személyes adatok védelméhez való jog [The Right to Protection of Privacy], in: Gábor Halmai, Gábor Attila Tóth (ed.): *Emberi jogok* [Human Rights], Budapest 2003, pp. 585-595.

7. An example is the decision of the European Court of Justice on data made public by the Austrian Court of Audit.[25] Before discussing the details of the case, let us consider some background information. The Constitution of Austria exercises control over the pay of civil servants by obliging certain employers to inform the Austrian Court of Audit about any salary or pension paid above the sum defined by the compulsory wage scale. The Court of Audit is legally obliged to make those data public. However, the persons affected took their employer to court for making public their personal data without their consent, and the employer took legal action against the Court of Audit. Then the Austrian Constitutional Court and the Austrian Supreme Court referred for preliminary ruling the interpretation of the above-mentioned Directive 95/46/EC to the European Court of Justice.

Item 39 of the Court's decision provides that, taking Directive 95/46 as basis, the Member States must adopt legislation that ensures the unobstructed flow of data between the Member States. Item 42 stipulates that the application of the Directive may not be subject of the Member States weighing, whether the facts of the case are related to the exercise of the four freedoms. Consequently, the Court expects the Member States to assert the provisions of the Directive by relying to a large extent on their national legislation.

What the court ruling says of the right to privacy is of major importance. Item 68 stipulates that the provisions of the Directive must be interpreted by taking the protection of fundamental rights as basis, if data processing endangers the protection of privacy. Though the Directive intends to promote the free flow of data, it calls on the Member States to defend the fundamental rights, especially the private secrets of individuals, when personal data are processed (item 70).

It is interesting that the court ruling repeatedly refers to the practice of the European Court of Human Rights (items 73, 77 and 83). By doing so, it expresses the intention to establish and maintain coordination between the activities of the two judicial institutions.

Another interesting component of the decision is that it examines, whether a provision of the Austrian Constitution is compatible with Community law. The European Court of Justice honours the Constitution of the Member State concerned: it restrains from directly voicing an opinion about it. However, it calls on the Austrian court concerned to decide, whether or not the provision concerned violates human rights (item 79). What it says is an indirect taking of sides though, because it defines the criteria of adjudication and it almost sug-

[25] Judicial decisions made in the following cases: *Rechnungshof* v. *Österreichischer Rundfunk and others* C-465/00, *Christa Neukomm* v. *Österreichischer Rundfunk* C-138/01, furthermore, *Joseph Lauermann* v. *Österreichischer Rundfunk* C-139/01 (20 May 2003)

gests a decision, because it calls for the examination whether it is necessary to make public the names of the persons concerned to attain a goal, which is common interest by the way (item 90).

Though the decision of the European Court of Justice concerned is relatively recent, there have been responses to it in legal literature. An article, which is relevant to the subject of this paper, says that the European Court of Justice insists on that the Member State concerned must adhere to the fundamental rights that are recognized by the European Union, even in the course of applying its national legislation. In the past such expectation was only expressed, when Community law was enforced. Thus the European Court of Justice examines the national legislation of Member States with reference to the assertion of the fundamental freedoms and, by doing so, it inspects whether fundamental rights are duly protected.[26]

Another article says that the court decision gives very broad interpretation of the Directive's scope of application.[27] Claus Dieter Classen's opinion coincides with the previous comments. He is critical of the court decision on several grounds. In his view it is good to stress the protection of human rights, yet the Court has failed to shed light on the content of the Directive, which was interpreted very broadly. He adds that the Court did not make reference to the Charter of Fundamental Rights, which is interesting both from the aspect of the development of Community law and the national law of Member States. That omission is all the more striking as the Charter includes specific provisions about the protection of personal data, and the Advocate-General made a reference to that. The European Court of Justice did not recognize the Charter's binding force in its earlier decisions either, and the decision concerned indicates that the Court has not changed its position on that point.[28]

8. There is another decision of the European Court of Justice related to data protection, where the Directive is applied in a broad manner: the case of Mrs. Bodil Lindquist.[29]

Mrs. Lindquist was a Swedish church volunteer worker, who operated a home-based website, onto which she loaded – among other things – the names and certain data of her fellow parishioners, without obtaining the data subjects' prior consent. She published on her website for instance that a fellow worker was only available for part-time work because she had had a leg injury. Legal proceedings were then initiated against Mrs. Lindquist, because what she did

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[26] Matthias Ruffert: Die künftige Rolle des EuGH im europäischen Grundrechtsschutzsystem, *Europäische Grundrechte Zeitschrift* 2004, pp. 467-468.

[27] Birte Siemen: Grundrechtsschutz durch Richtlinien, *Europarecht* 2004, pp. 313-316.

[28] Claus Dieter Classen: Joint Cases C-465/00 and C-139/01, *Common Market Law Review* 2004, pp. 1382-1385.

[29] *See* the decision handed down in the case C-101/01 on 6 November 2003.

was seen as processing personal information under Swedish data protection legislation, which in turn is based on the relevant EU Directive. A Swedish appeal court then referred to the Court of Justice for a preliminary ruling the interpretation of the relevant Community legislation.

The decision of the European Court of Justice held that the Directive had to be applied (item 27). The Court took note that data processing did not occur in connection with a business activity and there were no flows of data between Member States, however it insisted on the application of the Directive. The Reasoning of the decision says that if the case were interpreted in another way, the implementation of the Directive would depend on uncertain judicial discretion. In that case it would be impossible to attain the key objective of the Directive: the smooth operation of the internal market (items 39-42). The Court held furthermore that the notion "health-related data" had to be interpreted broadly. All pieces of information related to the health, physical and mental state of persons must be treated as health data (item 50). The Reasoning of the decision points out, however, that the Directive did not cover data published on the Internet. Referring to those circumstances, the Court stated that there was no forwarding of data to either Member States or third countries items (67-71).

The European Court of Justice discussed fundamental rights separately. It said the process of integration and the normal operation of the market inevitably involve the flows of personal data between the Member States, which makes it necessary to deal with data protection and the right to privacy. The decision adds that the Directive offers rules in general terms and the Member States have a margin of appreciation in implementing the Directive to find the best balance between conflicting interests, when they frame national legislation. The Swedish court concerned will have to decide – on the basis of the European Union's rules that are meant to protect the fundamental rights, and on the basis of general rules (including proportionality) – how to consider the restriction of Mrs. Lindquist's right to express her views and to exercise religious activities vis-à-vis the protection of privacy of other persons (items 84-90).

Let us note that the Swedish court probably referred that question to the European Court of Justice, because in the Swedish constitutional approach the point of reference is recognition of the freedom of expression and the freedom of information, which may only be restricted in unavoidable cases. In Sweden the protection of personal data comes under the sphere of administrative law. The Directive was transposed into Swedish law by an Act of Parliament of 1998, however, that law provided: it may only be implemented if it does not contradict the Constitution.[30]

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[30] European Commission for Democracy Through Law, Opinion on the Draft Law of Luxembourg on the Protection of Persons in Respect of the Processing of Personal Data, comments by Hans-Heinrich Vogel, CDL-AD(2002)19, Opinion no. 207/2002, item 10.

In connection with the fundamental rights the Court made reference to the European Convention on Human Rights, but it was silent about the practice of the European Court of Human Rights, and did not mention the Charter of Fundamental Rights.

From the standpoint of privacy, it is a pivotal question of that decision what position did the Court take about data protection and the collision of several rights. As for the second question: the equilibrium between conflicting fundamental rights, the commentaries that have been published so far do not quite agree in their interpretation of the decision. According to one commentator, the national discretion, the acknowledgement of proportionality is only reckoned with when sanctions are to be applied.[31] Another commentator states that, according to the Court, the Directive does not provide for the restriction of fundamental rights and therefore, such a restriction may only follow from national legislation, which transposes the Directive and adds to it detailed provisions.[32] When we read the whole text of the decision, we find the second interpretation more soundly founded.

On the question of data protection, the argument of the Court is unequivocal. The operation of the internal market and the free flow of data are requirements that must be enforced. It is that framework, in which the Member States have the discretion to define the rules of the protection of privacy.

9. According to the practice of the European Court of Justice, no rule to be directly applied in civil law is generated by any directive of the European Union. The Court announced that principle in 1986 in the Marshall case,[33] and it confirmed it in the Faccini Dori case.[34] The protection of personal data in civil law did not come up in either the Austrian, or the Swedish cases. That having said, the Directive and the practice of the European Court of Justice need to be taken into consideration also in civil law cases. It is impossible to define the national rules of the protection of privacy according to legal relationships between domestic citizens and citizens of different countries, instead, they must be treated on grounds of unified principles.

As for the protection of fundamental rights, the various systems of rules have recently come to the forefront of interest. Several experts have analysed the shared and the differing components that can be found in the national legisla-

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[31] Ludovic Coudray: Case Law, Comment, *Common Market Law Review* 2004, p. 1375.

[32] Felix Hörlsberger: Veröffentlichung personenbezogener Daten im Internet, *Österreichische Juristen Zeitung* 2004, pp. 745-746.

[33] *Marshall* v. *Southampton and South-West Hampshire Area Health Authority*. Decision handed down in case C-152/84 on 26 February 1986; item 48.

[34] *Paola Faccini Dori* v. *Recreb Srl.* Decision handed down in case C-91/92 on 14 July 1994; items 19, 22 and 24.

tions, the European Convention on Human Rights, Community law and in the several levels of judicial practice. The Council of Europe also discussed the new situation after elaborating the Charter of Fundamental Rights. The Committee of Venice has worked out an opinion about the harmony and differences between the European Convention on Human Rights and the Charter of Fundamental Rights, and the possibility that the European Union would sign the Convention.[35] During the preparatory work of the draft Constitution of the European Union there were consultations on the relations between the European Union and the Council of Europe, and the relationship between the Strasbourg Court and the Luxembourg Court. In case the draft Constitution of the European Union is adopted by the Member States, the need for the unification of the practice of the two courts will receive more attention than ever before.[36]

10. Conflicting regulations and interests make it difficult to elaborate uniform criteria for the protection of fundamental rights. The criteria for judicial discretion and decisions are not identical in the practice of the various courts. Let me illustrate this point by referring to some decisions passed by the European Court of Justice and the European Court of Human Rights.

In the case that we refer to as the first example, the local loop was unbundled and there was a dilemma how best to ensure data protection, in other words, which data of the telephone subscribers could be publicly accessible. In its decision about the case the European Court of Justice strove to strike a balance between refraining from interference in the free operation of the market and protecting the personal data of subscribers. The decision held that data of all those subscribers had to be made publicly accessible, who had not prohibited their data from being published in the phone directory.[37] That decision probably complies with the principles laid down both in national legislation and the practice of courts.

The European Court of Human Rights considered a case on the basis of the 1981 European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and Article 8 of the European Convention on Human Rights and Fundamental Freedoms. The telephone conversation of a person was tapped, because that person was suspected to have committed a crime, but criminal proceedings had not been initiated yet. The European Court of Human Rights passed its decision by giving a broad interpretation to the

[35] European Commission for Democracy Through Law, Opinion on Implications of a Legally-Binding EU Charter of Fundamental Rights on Human Rights Protection in Europe, Opinion no. 256/2003.

[36] The subject has extensive legal literature. Here we only mention a recent, comprehensive analysis: Rolf Schwartmann, Europäischer Grundrechtsschutz nach dem Verfassungsvertrag, Archiv des Völkerrechts 2005, pp. 129-152.

[37] Decision C-109/03, handed down in the case *KPN Tecom BV* v. *Onafhankelijke Post en Telecommunicatie Autoriteit* on 25 November 2004, items 23, 32, 34.

notion of privacy and established a violation of law.[38] Acting in the same vein, the Court handed down a similar decision in a case, where police recorded a conversation with a suspect that took place on the premises of police, without giving preliminary warning to the person concerned about the recording.[39] In the course of implementing Directive 95/46/EC the European Court of Justice could not follow a similar practice, because paragraph 2 of Article 2 of the Directive provides that the rules of the Directive may not cover activities in the areas of criminal law.

The Strasbourg European Court of Human Rights passed a decision in connection with a case, when a press publication carried an article about some persons' salary. The case was similar to the one, where the European Court of Justice examined the conduct of the Austrian Court of Audit in connection with the salaries of civil servants (*see* above). The European Court of Human Rights considered a case, where journalists were fined in administrative proceedings for publishing in a newspaper the salary of top managers of a company, whose workers were on strike. The Court held that the publication of data was justified.[40] On grounds of different facts in another case the European Court of Justice passed a decision with a different message. The essence of its decision was that the national court concerned must find such a way of keeping the public informed, where the names and salary of the persons concerned are not made public.

In the above passages we mentioned some cases, where the court decisions considered conflicting aspects of data protection on the one hand and, on the other hand, public interest in access to information, freedom of expression and freedom of the press. My purpose with those examples was to point out that general principles articulated in international forums that have a strong influence on national judicial practice are formulated on the basis of different international legal documents that have not been coordinated.

11. When we spoke of the Directive on data protection and the flow of personal data, we mentioned that the question of the collision and restriction of fundamental rights has repeatedly come up. In that context, although unrelated to data protection, I would call attention to a decision of the European Court of Human Rights of 2004 on conflicting aspects of the freedom of the press and the protection of privacy. In the Caroline von Hannover case, which attracted considerable attention, the Court gave preference to the protection of privacy.[41]

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[38] *Amman* v. *Switzerland*, appl. no. 27798/95, item 65 of a decision, passed on 16 February 2000.

[39] *P. G. and J. H.* v. *The United Kingdom*, appl. no. 44787/98, decision of 25 September 2001, items 56, 57, 59.

[40] *Fressoz and Roire* v. *France*, appl. no. 29183/95. The decision was made on 21 January 1999, *see* items 50 and 53.

[41] *von Hannover* v. *Germany*, appl. no. 59320/00, decision of 24 June 2004.

The cause of the legal dispute was that German magazines had published photographs that showed scenes from the private life of the Princess of Monaco. The princess did not consent to the taking and publishing of those photos. The Supreme Court of Germany partly rejected the claim of the princess, stating that the princess was a public personality and the photos had been taken in public areas. Then the princess referred the case to the German Constitutional Court. The Constitutional Court established the violation of privacy in connection with the photos that show the princess alongside her children. As far as the other photos were concerned, the German Constitutional Court stated in a detailed argument that keeping the public informed is more important, than a public personality's right to privacy. The legal dispute continued as to some unresolved issues and the claimant was dissatisfied with the more recent decision of the Constitutional Court. Then the princess referred the case to the European Court of Human Rights citing Article 8 of the European Convention on Human Rights.

In item 57 of its decision, the Strasbourg Court stated that Article 8 of the Convention both protects individuals from arbitrary interference by public authority, and imposes an obligation of action on the State. The obligation of action involves measures and regulations that ensure the protection of privacy even in dealings between individuals. There cannot be a clear definition of the dividing line between the State's said obligation to act and its obligation to refrain from interfering in the privacy of individuals. What really matters is that the right equilibrium must be found between the conflicting interests. Item 63 of the Court's decision says that there is a fundamental difference between the publication of facts about the activities of politicians, such publication promoting democratic debates, and publishing details about the private lives of individuals. The Court mentioned in passing that, as the princess did not hold public office, she could not be considered a public personality. Photographs that only satisfy the curiosity of certain sections of the readership, do not promote any debates of public interest (item 65). Under such circumstances the freedom of expression must be given a narrower interpretation (item 66). The Court cited a resolution of the Parliamentary Assembly of the Council of Europe that emphasized the need for the protection of privacy against one-sided interpretations of the law by certain media that attempt at justifying their violation of the rights enshrined in Article 8 of the Convention by referring to the freedom of expression (item 67). The Court underlined the importance of privacy under conditions, when technological progress has made it possible to process, store and reuse personal data (item 70).

Summing up the main points of its decision the Court stated that, even though the princess is widely known, that fact does not justify making public newspaper articles and photographs about her private life. The imperative to protect privacy overrules readers' curiosity and profit-seeking motivations of the media (item 77).

The decision of the Court referred to a position taken earlier under the aegis of the Council of Europe, which gives a somewhat narrower interpretation to the freedom of the press than earlier. The same tendency is reflected by a declaration that the Committee of Ministers of the Council of Europe adopted on 2 March 2005, which, after emphasizing the freedom of the press, calls attention to the importance of self-restraint on behalf of the media in the face of terrorism. The Committee of Ministers calls on the media to refrain from publishing declarations that support terrorism, and be aware of their key role in preventing the spread of hate speech. The document reminds the media of their duty to respect human dignity and the inviolability of privacy.

It goes without saying that the decision of the Strasbourg Court elicited heated responses in Germany. The decision came under severe criticism by the media; voices of opposition could be heard from the Constitutional Court; certain experts on public law claimed that the decision lacked constitutional arguments, while experts on civil law interpreted the decision as strengthening the protection of privacy.[42]

12. In the above-mentioned decision the Court only passed a judgement on the legal grounds of the claim, however, it suspended proceedings concerning the compensation for non-material damage and the repayment of costs. After the decision was issued, a settlement was made between the parties to the proceedings: the claimant received 10,000 euros in compensation for non-material damage and 105,000 euros in compensation for her costs.[43]

That decision once again placed in the limelight the question of compensation for non-material damage related to the violation of privacy. That issue has been the subject of an expert debate for long.

The new practice became clear in German law in the wake of the decision of the German Supreme Court and then of the Constitutional Court about an interview with Empress Soraya of Iran. As the empress gave no interview whatsoever, a court obliged the magazine publishing the faked interview to pay massive damages on the basis of the BGB's rule about damages [in German: *Schmerzensgeld*] of that type.[44] German legal experts disagreed on whether the ruling was based on the protection of privacy under the German Constitution or on a civil law institution that seeks to prevent the violation of privacy. The opinion Larenz voiced seems to have been borne out by judicial practice,

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[42] Martin Scheyli: Konstitutioneller Anspruch des EGMR und Umgang mit nationalen Argumenten, *Europäische Grundrechte Zeitschrift* 2004, pp. 628, 633, 634., Tilman Hoppe: Privatleben in der Öffentlichkeit, *Zeitschrift für Europäisches Privatrecht* 2005, p. 659.

[43] Press release issued by the Registrar, Chamber judgment (just satisfaction) – *von Hannover* v. *Germany* 420a(2005)

[44] *Neue Juristische Wochenschrift* 1965, 685, BVerfGE 34, 269.

namely that the damages were adjudicated on the basis of civil law considerations.[45]

The nature of Schmerzensgeld (also called recompense) has also been subject of debate. Ever since the 19th century, conflicting views have been put forward, whether such Schmerzensgeld belongs to criminal law. In fact, the debate between proponents and opponents of those calling it a punishment of a private character has still not been decided. The doubts about the nature of Schmerzensgeld were not dispelled, even when in 1990 the second sentence of the first paragraph of Article 847 of BGB was repealed. That sentence included the provision that – as a rule – the claim to Schmerzensgeld was not inheritable. Even after repealing the rule that strengthened the criminal law character of Schmerzensgeld, it cannot be doubted that Schmerzensgeld has some features that are different from the universal characteristics of compensation.[46] In addition to its criminal law features, some experts criticize the uncertainty and unpredictability of that retrospective sanction in connection with privacy, in cases where there is a collision of fundamental rights (especially in cases of the collision of the freedom of expression and human dignity, and rights derived from the latter).[47]

However, respected legal experts are strongly opposed to breaking away from the core idea of compensation and stepping towards the strengthening of the criminal law character. Instead of such a change in approach, they recommend to take away the financial gain of the offender citing unjust enrichment.[48] Presently the typical amount of compensation for non-material damage ranges between 3,500 euros and 10,000 euros. The courts only adjudge a higher compensation in exceptional cases. As compensation cannot ensure appropriate protection, there is consensus among German jurists that the right to privacy should be protected with more powerful legal instruments.[49]

The protection of privacy has been a serious challenge also in French law. That is why the *Code Civil* was amended in 1970. Under Article 9 of the *Code civil*, which was inserted in that year, privacy must be honoured and, when that obligation is violated, the court may have recourse, in addition to compensation, to

[45] Karl Larenz: *Lehrbuch des Schuldrechts*, 13. Aufl. Von Claus-Wilhelm Canaris, München 1994. II/2. pp. 492-496.

[46] Bernd-Rüdiger Kern: Die Genugtuungsfunktion des Schmerzensgeldes – ein pönales Element im Schadensrecht? *Archiv für die civilistische Praxis* 1991, pp. 247-262.

[47] Johannes Hager: Der Schutz der Ehre im Zivilrecht, *Archiv für die civilistische Praxis* 1996, pp. 172-173.

[48] Franz Bydlinski: Die Suche nach der Mitte als Daueraufgabe der Privatrechtswissenschaft, *Archiv für die civilistische Praxis* 2004, pp. 345-346.

[49] Alexander Bruns: Persönlichkeitsschutz und Pressefreiheit auf dem Marktplatz der Ideen, *Juristen Zeitung* 2005, pp. 430, 434.

other measures (as for instance, the confiscation of certain objects). The violation of privacy has been subject of several debates. In most cases lawsuits of well-known personalities, such as Marlene Dietrich, Jean-Louis Trintignant, Bernard Blier or Catherine Deneuve attracted attention, yet the problem cannot be limited to famous film actors and actresses. When the *Code Civil* was amended, the imposition of compensation was among the new measures introduced. However, on several occasions the interpretation of that compensation caused controversy. In a decision of 1996 the Supreme Court (*Cour de Cassation*) stated that it is in the judicial discretion to determine the size of the sum to be paid in damages on the basis of the breach of law (publishing photos in a magazine without the consent of the person concerned). The controversy continued, however: when damages are paid with reference to Article 9, to what extent is necessary to apply the general rules of compensation.[50] The information available shows that the sum of damages so adjudged is somewhat higher than in the German judicial practice, but the difference is not significant.[51]

English tort law is radically different from that of the countries of continental Europe. Suffice it to mention here that the Law Commission has reviewed aspects of compensation for non-material damage and did not recommend introducing new rules.[52]

13. A decision the European Court of Human Rights passed in summer 2005[53] is related to that topic. The publisher of an Irish newspaper was ordered to pay IEP 300,000 in damages; the Supreme Court confirmed the sentence. The newspaper had carried an article that claimed a certain Irish politician had committed a serious crime and was a supporter of anti-Semitism and repressive Communist regimes. The damages adjudged were three times as high as those normally adjudged by the Irish Supreme Court in cases of libel. The Strasbourg Court established that the damages adjudged qualified as interference in the claimant's freedom of expression as it is defined by Article 10 of the European Convention on Human Rights and Fundamental Freedoms (item 109). However, the Court accepted the premise that in a democratic society it is necessary to apply sanctions against libellous claims, just like an earlier decision stated this in a similar case.[54] The Court found orientation in the proportionality standard of the above-mentioned case of Caroline von Hannover once again (item 110). The Court took into account that the Irish Supreme Court could inspect

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50 Henri Capitant, François Terré, Yves Lequette : *Les grands arrêts de la jurisprudence civile*, 11e éd. Paris 2000, I. pp. 91-97.

51 Bruns (op. cit., footnote 49) p. 433.

52 Winfield and Jolowicz *On Tort*, 15th ed. By W. V. H. Rogers, London 1998, p. 764.

53 Decision handed down on 16 June 2005 in the case *Independent News and Media and Independent Newspapers Ireland Limited* v. *Ireland*, appl. no. 55120/00.

54 *Tolstoy Miloslavky* v. *the United Kingdom*, decision of 13 July 1995, Series A, no. 323, item 49.

the size of the damages adjudged by the jury and that the imposition of high damages was not without precedents in the Irish judicial practice. Taking all those factors into consideration, the Court concluded that the imposition of those damages belonged to the discretion of the State indeed, and that the seriousness of libel and the magnitude of the sanction applied did not violate the principle of proportionality (items 129-132). Consequently, the Court did not establish the violation of Article 10 of the Convention.

14. In the course of regulating the civil-law protection of privacy, legislators must reckon with relevant provisions of Community law and the practice of both the European Court of Justice and the European Court of Human Rights. In 2002, during the preparatory work of the new Hungarian Civil Code the Main Committee on Codification published in the *Official Gazette* a theoretical concept of the Civil Code.[55] In 2005 the publication of preliminary draft texts of the Civil Code began, including the provisions that cover privacy.[56]

It would be beyond the scope of this paper to analyse the various tendencies in codification. I find it sufficient to mention that I sense efforts to take into consideration both the relevant provisions of Community law and the European Convention on Human Rights.[57] The declarative rule about the ban on discrimination was transposed into the draft text from the relevant Directive of the European Union. As for data protection, the draft text is content with enunciating the basic tenet, but leaves the detailed regulations to other rules of law. The way the draft text separates the constitutional and civil-law aspects of the protection of privacy seems to be more straightforward, than either the relevant provisions of the Hungarian Civil Code presently in force or the theoretical concept published in 2002.
A new legal institution, called „grievance award” (in Hungarian: *sérelemdíj)* appears both in the theoretical concept and the preliminary draft text of the Civil Code. The grievance award is payable, when privacy is violated. If adopted, the grievance award would replace the controversial public penalty, which is in the Civil Code currently in force. The grievance award could fulfil the function of compensation for non-material damage. (Ever since the adoption of the Civil Code in Hungary, the compensation for non-material damage has been subject of professional debates, yet a detailed elaboration of that subject would deserve another paper.) By comparison with the theoretical concept of 2002, the draft text of 2005 offers a more straightforward interpretation of

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[55] Magyar Közlöny (*Official Gazette of Hungary)*, no. 15 of 2002, vol. II.

[56] *Polgári jogi kodifikáció* (Codification of Civil Law), no. 3 of 2005.

[57] That statement relies, among other things, on the fact that the reasoning of the preliminary draft refers to a work written by András Sajó: *A szólásszabadság kézikönyve* [A Handbook of the Freedom of Speech], Budapest, 2005, which carries an analysis of the judicial practice of the Strasbourg Court.

the approach to the general rules of compensation. The task, in the first place, is to apply the rules of tort liability, yet when the size of the grievance award has to be adjudged, the court passes its decision upon considering all relevant circumstances of the case. The criteria of proportionality are apparently reckoned with in the draft text's provisions on how to determine the size of the damages to be paid.

15. When examining the influence of Community law and the practice of the European Court of Human Rights on the development of national legislation, we should reckon with both legislation and practice. That doubly applies to the Hungarian legal system, where judicial practice plays a greater role, than in numerous other countries of Europe. In the field of judicial procedure, the relationship between Community law and the Hungarian judicial practice seems to be simple. The relationship, however, with the practice of the Strasbourg Court does not seem to be that certain. As a rule, the decisions of the European Court of Human Rights establish obligations towards the states that have signed the European Convention on Human Rights. Recently, however, a decision was made about a case that is related to Germany, and that case attracted considerable attention in German legal literature, because it shed a new light on how to implement a decision of the Strasbourg Court.

After a court passed a binding decision on child access arrangements, the father turned to the European Court of Human Rights. The Court established that the German judicial decisions violate Article 8 of the European Convention on Human Rights. Having received the Court's decision, the father requested that the judgement of the German court concerned should be altered. In the course of the appeal proceedings the Court of Naumburg rejected the father's claim on the grounds that the decision of the Strasbourg Court may not abrogate a binding judgement that had been handed down by a German court. Then the father submitted a complaint to the German Constitutional Court. The Constitutional Court admitted his complaint. Giving a detailed analysis of the relationship between international law and national law on the basis of the German Constitution, the Constitutional Court stated that when national law is interpreted the European Convention on Human Rights must be taken into consideration, and it is the duty of all state organs to avoid any violations of the Convention. The decision of the Strasbourg Court has a binding force towards all the organs of the German State. By contrast, the Constitutional Court held furthermore, that no international organization might directly interfere in a national legal system. National courts must take into consideration the Convention and the decisions of the Strasbourg Court, but it depends on the rules of procedure concerned to what extent it is possible to pass a follow-up decision in view of facts that be-

come known retrospectively.[58] A statement the president of the German Constitutional Court issued for the *Frankfurter Allgemeine Zeitung* further complicated the matter. The statement has been interpreted as saying that, in the opinion of the German Constitutional Court, international law does not in every case place the German judicial authorities under the obligation of compliance, because in the view of the German Constitutional Court, the duty of the Strasbourg Court is to formulate general requirements related to the Convention, rather than seeking case-by-case corrections of judicial decisions.[59] The debate that has begun in the legal press covers aspects of the Convention, decisions of the Court and their relationship with international law.[60]

I consider mentioning that question timely, because since then the question of how to interpret „binding effect" has come up in connection with a more recent decision of the European Court of Human Rights.[61] Such matters constitute practical questions in the protection of privacy. In the wake of decisions handed down by the constitutional courts of certain countries, steps were taken to amend the codes of civil procedure. It would be worth examining, whether problems similar to the ones discussed in connection with German law might come up, when the implementation of decisions of the Strasbourg Court involve other measures than paying damages.

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58 Decision of the BVerfG of 14 October 2004 in the Görgülü case. Published by *Europäische Grundrechte Zeitschrift* 2004. pp. 741-748.

59 Hans-Joachim Cremer: Zur Bindungswirkung von EGMR-Urteilen, *Europäische Grundrechte Zeitschrift* 2004, p. 683.

60 Heiko Sauer: Die neue Schlagkraft der gemeineuropäischen Grundrechtsjudikatur, *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht* 2005, pp. 35-69, Jens Meyer-Ladewig, Herbert Petzold: Die Bindung deutscher Gerichte an Urteile des EGMR, *Neue Juristische Wochenschrift* 2005, pp. 15-20.

61 *Rustam Sultanovich Mamatkulov, Zainidin Abdurasulovitch Askarov* v. *Turkey*, appl. no. 47827/99 and 46951/99, decision passed on 4 February 2005. Published by *Europäische Grundrechte Zeitschrift* 2005, pp. 357-365., Karin Oellers-Frahm: Verbindlichkeit einstweiliger Anordnungen des EGMR, *Europäische Grundrechte Zeitschrift* 2005, pp. 347-350.

SUMMARY

On Certain Aspects of Privacy

ATTILA HARMATHY

The importance of the right to privacy has considerably risen in recent decades. As the legal regulation of this issue widely varies from country to country, it is justified to make a comparative approach and study related developments in several countries.

The Civil Code Hungary adopted in 1959 devoted limited scope to the right to privacy. A noticeable shift occurred, when it was amended in 1977, and then following the political changes of 1990. Changes in constitutional law, increased attention to the protection of human rights, as well as the stupendous technological progress play a significant role. Issues of data protection have come to the limelight in recent years.

An analysis of the relevant Hungarian rules of law currently in force is inconceivable without studying the relevant instruments of the law of the European Union, the practice of the European Court of Justice, the conventions signed under the auspices of the Council of Europe and the decisions of the European Court of Human Rights. Taking a closer look at the practice of the European Court of Justice, it is worth examining the case of the Austrian Court of Audit as well as the case of Mrs. Lindquist; and the case of Caroline von Hannover as treated by the European Court of Human Rights in Strasbourg.

Compensation for non-material damage – which has been the subject of a decades long debate among Hungarian legal experts – is an important institution, when we discuss the efforts at strengthening the right to privacy. Now that preparations for a new Civil Code are underway in Hungary, it is useful to examine related tendencies in Community law, the instruments issued under the aegis of the Council of Europe, and the practice of the European Court of Justice and the European Court of Human Rights.

RESÜMEE

Einige Fragen der Persönlichkeitsrechte

ATTILA HARMATHY

Die Persönlichkeitsrechte haben in den vergangenen Jahrzehnten an Bedeutung erheblich zugenommen. Die rechtliche Regelung der Frage zeigt wesentliche Unterschiede in den verschiedenen Ländern. Diese Umstände rechtfertigen eine vergleichende Bearbeitung der Frage, im Rahmen deren die auf internationaler Ebene sichtbaren Entwicklungen unter die Lupe genommen werden.

In Ungarn widmete das 1959 verabschiedete *Bürgerliche* Gesetzbuch den Persönlichkeitsrechten nur einen kleinen Raum. Zu einer bedeutenden Änderung kam es bei der Novellierung des ungarischen BGB im Jahre 1977, bzw. in der Zeit nach den Umwälzungen im Gesellschaftssystem. Eine große Rolle spielen die Änderungen im Verfassungsrecht, der Schutz der Menschenrechte und auch die sprunghafte technische Entwicklung. In den letzten Jahren traten auch die Fragen des Datenschutzes in den Vordergrund.

Auch für die ungarische Rechtsentwicklung sind einerseits die Rechtsnormen der Europäischen Union und die Rechtsprechung des Europäischen Gerichtshofs, andererseits die Abkommen des Europarats und die Entscheidungen des Europäischen Gerichtshofs für Menschenrechte von großer Bedeutung. Aus der Rechtsprechung des EuGH sind die Fälle Österreichischer Rechnungshof bzw. Lindquist, und von der Rechtsprechung des Gerichtshofs in Strassburg die Rechtssache Caroline von Hannover in Betracht zu ziehen.

Bei den Bestrebungen zur Verstärkung des Schutzes der Persönlichkeitsrechte spielt der Schadensersatz für Nichtvermögensschäden eine große Rolle, worüber auch im ungarischen Recht schon seit Jahrzehnten diskutiert wird. Auch im Zusammenhang mit der Vorbereitung des neuen Bürgerlichen Gesetzbuches ist es sehr wichtig, die Tendenzen sowohl in der Europäischen Union als auch im Europarat, und auch die Rechtsprechung der genannten zwei Gerichte zu verfolgen.