PROTECTION OF THE RIGHT TO IMAGE IN THE MODERN SOCIETY

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I. Introduction

Eric Schmidt, the CEO of Google once said: 'If you have something you don't want anyone to know, maybe you shouldn't be doing it in the first place'.[1] Luckily law does not think this way when it comes to privacy. Privacy became a hot topic in modern days' personality protection law. Personality rights are getting more and more precious in modern civil societies, extending the original concept of freedom for a person as it started in the 18th century during the French revolution. The definition of '*persona'* is not a creature of modern days. In the 2nd century AD, the Institutions of Gauis and its successor, the commonly cited *Corpus Iuris Civilis* of Justinian, the Roman Emperor delivered a formal understanding of natural person as a subject of civil law. Natural persons were present in two dimensions of law: in connection with legal capacity and the capacity to act, secondly as an actor of social inter-personal relationships, like marriage, guardianship or adoption. Later, when the classic civil codes gained codified form in the 19th century, they all – most notably the French *Code Civil* and the German *Bürgeliches Gesetzbuch* (BGB) – continued this perspective as a Roman law heritage. Status of a person, however, went further and supplemented classic capacity provisions with freedoms of a natural person against not only the state and the sovereign power but other natural persons and legal entities. Personality rights were constitutional freedoms, privileges originally. These freedoms erected boundaries for the almost unlimited power of the sovereign or tyranny. When urbanization became more intense, the society communicated its general needs to a more protective and more general personality rights concept. Sanctuary of private property was a generally accepted need of people in the Middle Ages, while trespass to person was rare back in the rural style of living. Natural law and the theories of Enlightenment philosophers (Thomasius, Grotius, Pufendorf, etc.) placed the question of personal freedom and personality rights on the pedestal and claimed a more general understanding on these rights and privileges.[2] Individual determination was a core element of this concept and it required an individual approach onpersonal freedom that protected natural persons against both the state and other individuals. We would say that tort law – as it is called in common law countries – gained its origin from this change of paradigm. A person who chose poorly under the given circumstances causing damage or harm to another person shall be liable for his or her act and shall bear the consequences. Tort law got separated from criminal law, getting a more private perspective that focused mainly on reparation/compensation rather than punishment. Constitutional freedoms got a new

[1] ESGUERRA, Richard: *Google CEO Eric Schmidt Dismisses the Importance of Privacy*, Electronic Frontier Foundation, 2009/1, https://www.eff.org/deeplinks/2009/12/google-ceo-eric-schmidt-dismisses-privacy (2019. 04. 11.)
[2] FRIED, Charles: *Privacy,* Yale Law Journal, 1968/77, 475.

wing in the form of innate human rights belonging to all individuals guaranteeing them absolute immunity against another natural person's tortious acts.[3]

Privacy law is hard to define, as there is no general legal definition of what rights constitute personality. Most modern civil codes do not provide an exhaustive list on such rights. However, we would say that privacy rights have a firm connection with human dignity. Human dignity is the flagship of personality rights and provides for the core of personality protection. All personality rights are denominations of human dignity and shall be interpreted in an absolute way. The right to privacy is the most important right to a natural person to choose which information becomes public and who can interfere in his or her personal life. Privacy law, in a negative concept, may be summarized and defined as a right to be left alone. Seclusion, secrecy are essential elements of privacy law.[4] Only public matters should be public and private life must be respected. In modern days we are struggling more with privacy law. Under the rapid evolution of technology and the easy and frequent connection between people, it is very hard to categorize which information belongs to public matters and which to private ones. The once absolute theory of personality protection and personality rights are stuck in between two very different purposes. In one hand, the general need to fully respect privacy and strengthen its protection against unwanted interference pushes privacy law to a strictly protective and almost absolute understanding on privacy rights. On the other hand, the common interest in guaranteeing technology a more rapid development and making life more modern and easier requires the existence of the introduction of certain limits in the protection of privacy, making certain aspects of privacy a collateral damage or sacrifice in the altar of social development.[5] Biotechnology, online profiling, RFID technology, social networks, global navigation systems are all keys to the future, however most of them brings privacy questions in the forefront. Is it possible to find that narrow but safe dividing line between the two interests? Is it a reality to create a somewhat international approach to the laws of privacy? We would not say yes or no to either one of these questions. The purpose of this essay is to demonstrate national models and their differences or even similarities in the protection of privacy rights. We understand the impossibility to use general definitions or terminology to similar legal institutions in various countries. However, we firmly believe that common law and civil law legal systems are getting closer and closer to each other regarding the final answer to the same problem or question. We are not talking about doctrinal approximation but the harmonization of solutions. It would be foolish to deny the importance of constitutional law and the general understanding on legal policies and legislative interests in a particular state when it comes to privacy matters. We still think there is a global need to respect privacy rights and to provide for a safe and easy way of technical and social growth and development. This hypothesis is our starting point and this is why this essay intends to analyze some so-called 'hot topics' in modern days' privacy law. Deliberately, we did not pick those brand new questions like biotechnology or RFID

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[3] BRÜGGEMEIER, Gert – COLOMBI CIACCHI, Aurelia – O'CALLAGHAN, Patrick: *Personality Rights in European Tort Law*, The Common Core of European Private Law, Cambridge University Press, 2010. 19.

[4] GAVISON, Ruth: *Privacy and the Limits of Law*, Yale Law Journal, 1980/89, 471.

[5] MEISTER, Gabriel: Peering *Into the Future: Google Glass and the Law, Privacy,* http://www.sociallyawareblog.com/2013/09/09/peering-into-the-future-google-glass-and-the-law/ (2019. 04. 28.)

technology but some long existing and well-known privacy issues in connection with right to image.

II. Tort law, the law of delicts and privacy law

Privacy law has a firm connection to the law of torts in common law legal systems and the civil law of delicts. While in civil law legal systems there are no such things as torts, common law strongly emphasizes those unlawful acts or omissions that lead to causing harm or damage to another person.[6] The common law approach is closer to the concept of penal law that provides a list of unlawful behaviors rather than focusing on the end result of an act or omission. In fact, the original English tort theory is much closer to the ancient system of Roman law than the continental ones. Specific actions and torts were characteristic features of the ancient Roman law, mixing certain punitive elements in the idea of reparation. In civil law systems, delicts are private wrongs disregarding their form. All major civil codes in Europe put a significant emphasis on the actual outcome of a wrongful act. In most European civil law countries tort law is more like a law of compensation with the sole purpose to provide compensation to the aggrieved party, the injured person. In theory this reparative perspective seems to be bullet proof even in the complicated, technology driven era of the 21st century. However, we must note that there is an important dividing line between infringement against a person or his personality rights and the trespass to property. In the latter case monetary damages presume full compensation. Since these types of damages are calculable and measurable, it is relatively easy to exclude any punitive character from the procedure and to solely focus on making the plaintiff whole again. While in case of infringements against a person and it personality rights, this airtight theory of full compensation poorly fails. Personality rights are the most precious rights of a natural person. This is why personality rights do not have a commercial value. They are not transferrable. In fact, they are so precious that they are invaluable. Hurting any of these rights brings multiple problems to the surface. First, the existence of any harm is highly questionable. In contrary to monetary damage, immaterial harms are hard if not impossible to prove in most cases. Beyond the bodily harms, inner harms and psychological harms are not obvious to anyone other than the injured party himself. The civil law concept of compensation fails when a particular harm of damage is not proven in a lawsuit. Compensation as a core element in the law of delicts does not exist without some loss/harm that requires for compensation. Combine this impossible theory with the judge-centered character of most civil law litigation processes and you may get to the wrong conclusion that such damages are not granted in European civil law legal systems. Luckily it is not the case. Although civil law legal systems owe to deliver a firm theoretical background to this problem, in every system, immaterial harms are compensable throughout Europe and most certainly in the member states of the European Union.[7] This is only possible if either the legislator or the courts – or in some cases both – abandon the law of delicts from this heavily harm-driven nature in cases of restitution for damages for

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[6] SOMA, John T. – RYNERSON, Stephen D.: *Privacy Law*, Thomson West, 2008. 74.
[7] BRÜGGEMEIER, Gert – COLOMBI CIACCHI, Aurelia – O'CALLAGHAN, Patrick: *Personality Rights in European Tort Law*, The Common Core of European Private Law, Cambridge University Press, 2010. 53.

non-pecuniary loss. Despite of the diverse explanations on how this is possible, the outcome is very similar to the common law concept of torts. Doctrinal differences may serve as enormous obstacles in some cases, while in general, the right to privacy is granted to natural persons both in common law and civil law jurisdictions.

III. Right to image vs. publicity

Right to image is a popular element of privacy. Not only your inner secrets, feelings and opinions should remain hidden from curious looks but the most evident form of yourself: your image. Taking a picture, a snapshot of a person may be illegal on these grounds. The protection of privacy can, in principle, be realized through the right of image. In Austria, the *Urheberechtsgesetz*, (Copyright Act) (UrhG) in its § 78 grants this right to individuals. However, this provision only awards a claim if the snapshot is published. The mere taking of a photo is not enough to merit a claim. Publicity remains a core issue in privacy law anyway. This is one dividing line in legislation whether any infringement of privacy requires certain publicity, publicity other than the tortfeasor, the violator. In Austria, § 1328a and § 16 of ABGB (the Austrian Civil Code) aim to prevent violation of privacy. According to these provisions, not only the publication or dissemination of private information results in sanctions but even the mere intrusion into privacy. It seems to be a general problem on how to interpret a general clause of privacy together with a specific provision related to a particular element of privacy rights. Normally the old principle of *lex specialis derogate lex generalies* should be applied and go for the denial of compensation if taking a picture lacks publicity. However, this is not the case, or at least, it is not that simple. Even the mere publishing of an unwanted photo would not result in awarding damages to the subject. Infringement of privacy does not necessary mean that the mere fact of unwanted publication happens. If the subject was not in a humiliating situation in the picture or the photo does not describe him in an intimate position or life setting, damages for non-pecuniary loss is not granted in Austria. However, we may find other countries in Europe that treats right to image as a truly absolute right of a person. In Hungary, for example, the simple unwanted taking of a picture entitles the subject to claim pain award, a recently established legal institution in Hungarian civil law (introduced by the 2013 Hungarian Civil Code, Ptk)[8]. We may also see that some personality interests are of economic value to the media. This is why unjust enrichment may take into consideration in unlawful infringement of right to image, even if damages for non-pecuniary losses are not granted in a particular case. We must note, however, that proving the increase in profit for the media may be troublesome. A classic civil law compensation case requires four preconditions before awarding any damages. The existence and amount of the damage, the unlawful act (or omission), causal link that all damage you suffered is a result of this unlawful act and finally fault on the side of the tortfeasor. Both the amount of damage and the causal link would be a problem in a right to image case. Assume the subject of the unwanted picture is a public figure. Unless that specific issue of the newspaper was sold to a bigger audience of readers than normally, evidence is easy. If no increase in selling numbers is evident, we do not see how the plaintiff may claim an award on the grounds of unjust enrichment.

[8] Hungary, Act V of 2013 on the Civil Code (Ptk.).

According to § 87, subs 2 UrhG in Austria and § 2:52 Ptk. in Hungary, the seriousness of the infringement is not a precondition of awarding compensation for non-economic loss. In case of a small infringement that is theoretically an infringement against personality rights, the compensation awarded may be simply nominal in value. This perspective brings us back to the original hypothesis: civil law and common law legal systems are getting closer in the area of privacy infringements. Compensation idea is completely missing in case of nominal damages. Still classic civil law countries like Austria ad Hungary may award it anyway, just to express disapproval of the unlawful act.

Another interesting angle in this case is whether the actual situation in which the unwanted photo was taken matters or not. Professional or business affairs are not covered by the provisions on protection of privacy in Austria.[9] If the photograph has no specific intimate or defamatory content, the subject does not even have a claim if he is attending to his private affairs. It is even more so the case if the subject was at work. The place where the photo was taken really counts. In a public place (in the street, the market, in a concert or any other public event) a person is entitled to less privacy than in his own home. The idea is that in public places and events a person may expect such infringements as he is more exposed to publicity than in a private place. The public place defense is not an absolute defense. A snapshot taken in a public place may not focus on a particular person without his consent in some jurisdictions. In Hungary if the person is the main character in the photo taken in a public place and the snapshot describes him in an unfavorable and unwanted defamatory position, this may be an infringement against privacy and may entitle the subject to claim pain award.[10] It would also grant the subject damages, if he was exposed on the picture being the main character and star of the photo. In England the mere taking of a photograph in a public place does not constitute a claim. The subject may claim in breach of confidence if the photo is published in a newspaper. Although this would highly depend on whether there would have been a reasonable expectation of privacy in respect of the photo. In England we find no law against the taking of a photograph and the reproduction of it unless one owns a copyright to it. Even the fact that the subject is a public figure does not count in England. According to Lloyd J 'merely because a well-known person tries to stop people taking photographs of him or her it does not follow that any picture taken in evasion or defiance of those attempts is in breach of confidentiality'.[11] The Human Rights Act 1998 in England supplemented this concept with another aspect. Infringement would be noted if a person actually tries to stop someone else from taking photographs of him. In this case the resist shall prevent the taking of the picture. If the photographer proceeds anyway, infringement against right to privacy would happen. Finnish law is very resistant to grant protection to people in the form of right to image. There is no specific provision exists to allow a person the right to prohibit snapshots being taken of him if the picture is taken in a public place. No permission is required from the subject if the photo is taken in the street or in any other private places. Only defamation may lead to a successful claim. If the person is shown in a position or life situation that is humiliating or grotesque, the subject has a claim. Finnish law even

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[9] WITZLEB, Normann – LINDSAY, David – PATERSON, Moira – RODROCK, Sharon: *Emerging Challenges in Privacy Law: Comparative Perspectives,* Cambridge University Press, 2014. 134.

[10] Hungary, Fővárosi Ítélőtábla 2.Pf.20.440/2017/4/II.

[11] United Kingdom, *Creation Records Limited and Others v. News Group Newspapers Ltd.* [1997] EMLR 444, at 455

allows the publication of any unwanted photos unless they constitute a defamatory act. If the picture is used for a commercial purpose, the consent of the subject is essential prerequisite. This doctrine has no legislative background. The rule was created by judicial practice.[12]

In France it counts whether the subject on a photo taken in a public place is a famous public figure or not. A public figure cannot enjoin the taking and publishing of the photo. If the subject is not famous, he can enjoin the publication of the photograph. However, a complex defense would exist. The photo should be taken in a public place, there must be an incidental position of he subject in the photo, or the fact that the subject had been photographed while exercising his profession. None of the defenses will suffice to justify the subjects lack of consent. It is a general doctrine that 'the fact that a person (even of topical interest or known by the public) is located in a public place does not mean that the person renounced his/her rights to image and privacy'.[13] The German approach is very similar to this but with a new dimension. If the subject knows the photographer, his implicit consent to take the photo may be presumed. This presumed consent must not be extended to publishing the photo. It seems to be a general standard in privacy cases that any consent given to a specific intrusion shall not be interpreted extensively. There is also a general prohibition in Germany to prevent the unwanted publication of humiliating photos. Photographs depicting situations that put a person into a false light or embarrass or humiliate him (like intimate situations or naked poses) are barred from publication.[14] There was one specific case when in Germany the distribution of a copy of one of the photographs of Katharina Witt – taken from Playboy's website – in a newspaper was allowed for its informative value because the paper distributed the copy in connection with a short satirical article about the fact that Witt had exposed herself in Playboy.[15] This case shows again how different the right to privacy and most notably the right to image in case of public figures.

IV. Comparative remarks

Right to image is protected in countries examined above in general. The most notable differences in the level of protection can be identified in case of publication of a photo taken from a person. While Austria, Hungary, England, France and German all prescribe some consent prerequisite to publication Finnish law is more liberal to the press in this regard. Only publication for commercial use constitutes a case in Finland. The other notable difference is the situation when public figures come into the picture. In this essay we do not analyze what significances create a public figure in law, however this classification is very subjective in judicial practice. First, territorial approach is important in regard to what extent the infringement got publicity. Even the subject well known in a small town may be a public figure if the infringement got publicity in that particular town. Secondly, situation also counts. The purpose of publishing a picture taken from a public

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[12] *See:* United Kingdom cases 1940 I 10 and 1982 II 36.

[13] France, CA Aix-en-Provance 30 Nov. 2001, CCE 2003, No. 11, 39.

[14] Germany, BGH GRUR 1975, 561, 562; NJW 1985, 1617; OLG Hamburg NJW 1996, 1151 = GRUR 1996, 123, 124; OLG Hamm NJW-RR 1997, 1044.

[15] Germany, OLG Frankfurt/Main NJW 2000, 594.

figure should serve objective and true providing of information to members of the public rather than humiliating the personality of the given famous person (see German law). In general, public figures shall bear more intrusion in privacy than the not so famous ones. The most notable difference in protection can be seen in defamation and libel cases. The European approach of libel and slander is more restrictive than the U.S. theory. You may criticize a politician and his views involving some of his personal issues and characteristic features in the opinion until it is not overly humiliating and totally independent from the debate. Once the speech is purely about to destroy and attack the human character and human dignity of the politician and not his views, award may be granted to him. This is somewhat the case with public figures' right to image as well. Pictures taken in public places of public figures are not infringements in most countries even if the subject is captured in a humiliating defamatory position. Being a public figure always requires you to pay attention what you are doing if in a public place.

Consent is crucial for taking a picture of another person. There is a trend in European countries that tacit consent is also sufficient. The simple knowledge that someone is taking a picture of you is enough for the photographer to rely on your consent. Protest is an option if you know about this action, so tacitly allowing the photographer to take the picture is a good enough defense on his side. Publication, however, is a more serious problem in most countries, so tacit consent is not acceptable, except in Finland.[16] The purpose of publication is very important in determining whether there is a right to get damages or not. Unjust enrichment may also serve as a last relief if damages for non-pecuniary loss would not be an option. The latter one, however, requires some painful evidence process if the purpose of using the picture is not evidentially and clearly commercial.

Right to image not only remained an important element of one's privacy but got more attention and practically more protection in modern days' new industrial and technological revolution.

[16] DAWN, Oliver – FEDTKE, Jörg: *Human Rights and the Private Sphere: A Comparative Study,* Routledge, 2007. 450.