

PROOF OR PROMISE?

THE PROMISE OF PRIVACY-PROOF EVIDENCE-GATHERING IN THE INFORMATION AGE

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MÁRTON SULYOK PHD, DR. JUR.

UNIVERSITY OF SZEGED

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INVESTING IN YOUR FUTURE

STARTING POINT

***„I need
proof, not a
promise!”***



“TO GIVE OR NOT TO GIVE?”

Privacy is an **old spice** of constitutional debates about covert information-gathering
(e.g. *Katz v. US*, 1967)

It is “**the salt and pepper**” of debates in the IT-context
(e.g. *BVerfG* 2008, Nissenbaum 2010, 2015 FRA-report on surveillance)



PRIVACY AND SOCIETY: POV'S NOW AND THEN

***“No secrets can be kept in a civilized world.
There is no privacy that cannot be penetrated.”***

***“The era of privacy is over –
it is no longer the social norm.”***



IT DEVELOPMENT AND THE SOCIAL CONTRACT

THE TERMS OF THE
**SOCIAL
CONTRACT**



- *IT - Empowerment and “Deprivacy” – two concurrent trends*
- **NEW IT social K**: is privacy is strong as a protection right = participative democracy successful (changing roles of state and society)
- **What was once “state” can now be “private”**
(e.g. surveillance)



COVERT INFORMATION GATHERING BY AND AMONG PRIVATE PARTIES

- Not only “PI stuff” – everyday people can do it too!
- *Private parties gather information through covert means – “business as usual” (and) in their “relationships of trust”*
- ***Breach of confidence OR breach of privacy? Are these independent?***



Enter The World Of

007

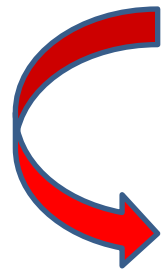
With Spytek

PROOF OR PROMISE? – THE PROBLEM

- Reasonable expectation (the promise of confidentiality)
- State promise to protect correspondence – constitutional and sectorial
- Relationships of trust – “promise” based on reasonable expectation to keep confidentiality - OR NOT?

IT'S ALL FUN AND GAMES, BUT

- If trust (family, marriage, business...) deteriorates

 ***“I need proof, no promise!”***

Covert tools = “tainted evidence”

- Correspondence is targeted
- *Violation easier online AND Reaction from victim is stronger*

RIGHTS IN COLLISION: privacy vs. fair trial (providing evidence)



Balancing exercise: constitutional rule + sectorial exclusionary rule

NEW FUNDAMENTAL RIGHT FOR THE FUTURE?

- **BVerfG 2008 “IT-decision”** – right to the integrity and confidentiality of closed communication networks (IT systems)
- *Covert investigation (spyware) – „combing through” personal computers + monitoring online comm.*
 - GG 1, 2, 10 – **protection of confidentiality covers e-mail as well**
 - New right under the umbrella of privacy (rt to personality)!

CONFIDENTIALITY AS THE NEW DIRECTION?

„... Our examination of the history reveals that **the law of privacy in the West is far more complex than a dichotomy between liberty and dignity. Confidentiality represents a third understanding of privacy**, one with firm foundations in both American and English jurisprudence. For all their differences, conceptions of privacy based on liberty and dignity often have been highly individualistic.

Confidentiality, in contrast, is a significantly different conception of privacy—one based on the protection of relationships.”

(Daniel J. Solove – Neil M. Richards, 2007: Privacy’s Other Path)



CCL - CONVERGING SUPERSTRUCTURES

- Posner-Dixon: **constitutional convergence**
- Similar IT-induced problems – similar answers! (pl. privacy by design, PET - -- what about exclusionary rules?)

LEARNING THEORY

- Looking at converging systems – learning (through dialogue)
- Legal importing (**borrowing, migrating ideas, transplants**)
- A dangers of transplantation (***external imposition, “emulation”***)

CONSTITUTIONAL PROTECTION AGAINST “TAINTED EVIDENCE” IN EUROPE

- **For *privacy and other rights explicitly but not as part of FT* protections**
 - GR 9, 9A, 19. – all procedures
 - PT 32. – only CP
- **Does *not restrict to certain individual rights (especially privacy), but as part of FT* protections**
 - HR, 29. – all procedures
 - IT, 111. – all procedures
 - UA, 62. – only CP – as part of *in dubio pro reo*

HUNGARIAN STATUS QUO?

Sectorial approach based on Article VI of the new fundamental law (on privacy)

ACT XC OF 2017 - HCPC

- Art. 214 – gathering evidence through covert means (CGI)

- **SPECIAL** activity

- By **AUTHORIZED** organ, **SUBJECT UNAWARE**

- Through **VIOLATION** of: private home, “private secrets”, secrecy of correspondence, DP rights

(Judicial approval - prior)

CONSTITUTIONAL POV

- restriction of rights of the subject or others is **not disproportionate** in light of the desired objective
 - ***Exigent necessity***
 - Acquisition of **evidence is probable**
- + ***EXCLUSION*** – ***HCPC, Art. 167 (5)*** obtained through **crime**, in **prohibited fashion** or through the **material breach of the rights of parties** to the procedure

CIVIL PROCEDURE – ACT CXXX OF 2016

- exclusion (**new element**) – so far: only judicial practice
(OK - to prove violation)
 - **NOT SPECIAL activity BUT GENERAL trend!**
(what if there is no violation to prove? “data stockpiling” for
future use)
- **NOT by those entitled, but SUBJECT UNAWARE**
- **VIOLATION** of private home, “private secrets”, secrecy of
correspondence, DP rights

CIVIL EXCLUSION (FROM JANUARY 2018)

- HCvPC, Article 269 – **EXCLUSION:**
 - Obtained in **violation of life or limb, or threat thereof**
 - **Created or obtained illegally**
 - would violate ***personality rights***

CONSTITUTIONAL POV

- No necessity and proportionality standards in regulation
- Practice now: BDT2015.3243: *e-mails unlawfully obtained can be used if there is relevant connection to the subject of litigation!*
 - *NECESSITY* – if obtained through crime (against life or limb) – then exclusion, otherwise: discretion (**HIATUS**)
 - *PROPORTIONALITY* – examining admissibility (**HIATUS**)

PROOF OR PROMISE?

Privacy vs. Fair Trial (offering evidence)

- **Concurring FR positions**
- **Role of Constitutional Courts:**
constitutional requirements – “fair balance” – **to orient judicial practice**
- In doing so: **follow comparative patterns!**

SO – PROOF OF PROMISE?

Why reform? **Increase Public Trust** – HOW?

- CGI by PP in civil cases (e.g. divorce, child custody)
 - Exclusion (through constitutional and sectorial rules)
- Acknowledging ***“the law of confidentiality”*** to **protect the promise of individual privacy protections in relationships of trust**

NOT AN EASY TASK

(NEITHER IS FINISHING UP)

Questions?

E-mail:

msulyok@juris.u-szeged.hu

MAY THE FOURTH
AMENDMENT
BE WITH YOU

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**THANK YOU
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