

# PROTECTION OF THE PRIVACY OF POLITICALLY EXPOSED PERSONS IN THE LIGHT OF RECENT HUNGARIAN JUDICIAL PRACTICE

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**ABSTRACT:** *The article reviews the Hungarian legislation in force on the protection of the personality rights of public actors, politically exposed persons, its international legal basis and the relevant decisions of the Hungarian Constitutional Court. This study analyses in detail the current Hungarian court practice in relation to the protection of the personality rights of public actors. The study also draws basic conclusions about the nature and limits of the protection of the right to privacy of public actors, and looks at possible future directions for the development of the law and the judiciary. The author states that both the Constitutional Court and ordinary judicial practice are in favor of greater criticism of public actors.*

**KEY WORDS:** *privacy; politically exposed persons; Hungarian Civil Code; Hungarian judicial practice; reputation; protection of facial likeness; violation of personality rights*  
**JEL Code:** *K 36*

## 1. INTRODUCTION

Although the protection of personality rights in Hungary goes back many decades, this protection has undergone significant changes over time, both in terms of the scope of personality rights and the effectiveness of enforcement. Hungarian Civil Code, which entered into force on 1 May 1960 (old Civil Code)<sup>1</sup>, already contained provisions on the rights of the person in Chapter VII of the Second Section of the Code, entitled Persons, declaring that the rights of the person are protected by law.<sup>2</sup> The legislation, which consisted of seven sections, referred to the prohibition of discrimination, the right to bear a name and the protection of reputation<sup>3</sup>, without specifying the elements of the facts constituting a violation of the right. The first code of private law also includes the protection of the right to secrecy of correspondence and the right to a private home and premises for the purposes of a legal person, as well as the protection of facial likeness and

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<sup>1</sup> Act IV of 1959 on the Civil Code

<sup>2</sup> Article 81 para. (1) of Act IV of 1959 (in force on 1 May 1960)

<sup>3</sup> Article 82 para. (1) and (2) of Act IV of 1959 (in force on 1 May 1960)

recorded voice.<sup>4</sup> The old Civil Code also laid down the objective and subjective sanctions for the violation of personality rights.<sup>5</sup> The Ministerial Explanatory Memorandum to the Act pointed out that a civil law subject may also claim civil law protection for rights that are inherent in and inseparable from his or her person, and the Act ensures that "*anyone may freely and without interference exercise his or her subjective rights ... arising from his or her person.*" (Ministry of Justice, 1960, p. 68) The first amendment to the old Civil Code<sup>6</sup> expanded the scope of personal rights and provided more effective protection, but it was after the change of regime that these rights were truly appreciated and extensive judicial practice developed. However, specific legal protection for politically exposed persons did not yet exist at that time, either in the legal text or in judicial practice. Even in the contemporary monographs dealing with questions of personality law, there is no discussion of the protection of the personality rights of politically exposed persons (Törő, 1979) (Petrik, 2001).

In judicial practice, however, after the change of regime, the number of personality lawsuits increased, where, as Árpád Pataki points out, the first cases were politically motivated writings, then the number of cases related to statements in the tabloid news, and then the number of cases related to statements related to political and economic issues increased again (Pataki, no date, p. 102). In connection with these lawsuits, positions were declared for the first time in judicial practice, and consequently in the decisions of the Constitutional Court declaring the increased criticism of public actors, emphasizing the higher obligation of tolerance. (Pataki, no date, p. 103) At the "dawn" of the mass litigation on the manifestations of politically exposed persons, Árpád Pataki, who judges in personality lawsuits, said that "*it is still waiting for practice to define the boundaries of political privacy, ...*" (Pataki, no date, p. 104)

In the following we will review the current Hungarian legislation on the protection of the personality rights of politically exposed persons, its international legal basis, the Constitutional Court decisions that have had a major impact on judicial practice, and then analyse the current judicial practice. On the basis of this overview, we will draw the basic conclusions on the nature and limits of the protection of the right to privacy of politically exposed persons, and look ahead to possible future directions for the development of the law and the judiciary.

## 2. HUNGARIAN AND INTERNATIONAL SOURCES

The Constitution, which was in force before our current Fundamental Law until the end of 2011, provided for the protection of individual rights at the level of a declaration, including the right to reputation, the inviolability of the private home, and the protection of private privacy and personal data.<sup>7</sup> In what follows, we do not aim to go into the development of personality rights in general, or in relation to the protection of the personality of politically exposed persons. We will refrain from analysing both constitutional law and the historical regulation and judicial culture of civil law before 2010,

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<sup>4</sup> Article 83 para. (1) and (2) of Act IV of 1959 (in force on 1 May 1960)

<sup>5</sup> Article 85 of Act IV of 1959 (in force on 1 May 1960)

<sup>6</sup> Act IV of 1977 on Amendment of the Civil Code

<sup>7</sup> Article 59 para. (1) of Act XX of 1949

as we will limit our analysis to the current regulation and its judicial practice, the latter being the Hungarian judicial practice based on the current Hungarian regulation.

We do not analyze in detail the otherwise extensive case law of the European Court of Human Rights (ECtHR), as its review may be the subject of a separate study. In this context, we only refer to the fact that the ECtHR's practice is based on Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (which and its eight additional protocols were promulgated in Hungary by Act XXXI of 1993), which declares freedom of expression, that everyone has the right to freedom of expression and that this right includes freedom to hold opinions and to impart information and ideas regardless of frontiers and without interference by public authority.<sup>8</sup> The Convention also indicates, however, that the exercise of these freedoms, which carries with it obligations and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are considered necessary in a democratic society, in order to safeguard national security, territorial integrity, public safety, the prevention of disorder or crime, the protection of public health or morals, the protection of the reputation or rights of others, the prevention of disclosure of confidential information or the maintenance of the authority and impartiality of the judiciary.<sup>9</sup> The practice of the ECtHR also has an impact on Hungarian practice, by which we mean the ideas and legal conclusions reflected in the decisions of the Constitutional Court and the ordinary courts.

Although, as indicated above, we will not go into a detailed discussion of the ECtHR's practice, we would like to point out that in a number of ECtHR case law decisions, the position is expressed that in order to ensure freedom of public debate, the limits of permissible criticism are wider, in that the protection of reputation must be guaranteed also for public actors, but that free debate on public affairs must be ensured, distinguishing between statements of fact and judgments of value.<sup>10</sup> In particular, the ECtHR has committed itself to greater criticism of politicians in public affairs,<sup>11</sup> and the protection extends to the freedom to discuss other issues affecting the community,<sup>12</sup> an addition, there is a distinction in the practice of the ECtHR that a distinction can be made between the criticisms of different public actors, so that criticisms of the identity of judges in particular may be more limited.<sup>13</sup>

Although the Fundamental Law contains several declarations on the rights of the individual, it already states in the National Creed that human dignity is the basis of human existence, and that human dignity is inviolable. Everyone has the right to life and human

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<sup>8</sup> European Convention on Human Rights Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, Article 10 para. (1)

<sup>9</sup> European Convention on Human Rights Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, Article 10 para. (2)

<sup>10</sup> *Lingens v. Austria*, Case 9815/82, cited in *Nagykommentár - a Polgári Törvénykönyvről szóló 2013. évi V. törvény* (Vékás, Gárdos, 2013)

<sup>11</sup> *Oberschlick v. Austria*, Case 11662/85, cited in *Nagykommentár - a Polgári Törvénykönyvről szóló 2013. évi V. törvény* (Vékás, Gárdos, 2013)

<sup>12</sup> *Bladet Tromsø and Stensaas v. Norway*, Case 21980/93, cited in *Nagykommentár - a Polgári Törvénykönyvről szóló 2013. évi V. törvény* (Vékás, Gárdos, 2013), commentary to Article 2:44 of Act V of 2013

<sup>13</sup> *De Haas and Gijssels v. Belgium*, Case 19983/92, cited in *Nagykommentár - a Polgári Törvénykönyvről szóló 2013. évi V. törvény* (Vékás, Gárdos, 2013), commentary to § 2:44 of Act V of 2013

dignity.<sup>14</sup> The Fundamental Law also states that everyone has the right to respect for his or her private and family life, home, relations and reputation, and that freedom of expression and assembly must not be exercised in a way that violates the private and family life and home of others.<sup>15</sup>

The Fundamental Law also declares freedom of expression, freedom and diversity of the press, and the conditions for free information necessary for the development of democratic public opinion.<sup>16</sup> Although the Fundamental Law defines several limits to the exercise of freedom of expression, stating that the exercise of freedom of expression may not be directed against the human dignity of others or against the dignity of the Hungarian national, national, ethnic, racial or religious communities,<sup>17</sup> it does not contain any specific provision concerning politically exposed persons and their personal rights.

As regards public expression through the press, Act CIV of 2010 on Freedom of the Press and on the Fundamental Rules of Media Content (Media Constitution) contains some specific provisions, inter alia, it states that consent to the publication of a statement given to a media content provider for public communication or to be included in media content must not be abused<sup>18</sup> and that a media content provider must show a statement prepared for public communication to the person who has given the statement or been included in the media content, at the latter's request, before publication; it shall not be disclosed if the person concerned does not consent to its disclosure because it has been substantially altered or distorted by the media content provider and is harmful to the person making the statement or to the person who appears in the media content. In the event of a communication that damages reputation or honour despite the withdrawal of consent, the applicable civil and criminal law rules shall apply.<sup>19</sup> The Media Constitution further stipulates that, in addition to the above, a statement or appearance may not be withdrawn if the person making the statement or appearance made it in connection with a local, national or European public event, or in connection with an event of importance to the citizens of Hungary and the members of the Hungarian nation, or in connection with the performance of a public function by an official or public functionary, or a politically exposed person.<sup>20</sup>

An important provision of the Media Constitution is the guarantee of the right to basic information in matters of public life, so Media Constitution that declares that everyone has the right to be adequately informed about local, national and European public affairs and events of importance to the citizens of Hungary and the Hungarian nation, and the media system as a whole has the duty to provide credible, prompt and accurate information about these affairs and events.<sup>21</sup>

Act CLXXXV of 2010 on Media Services and Mass Media (Mttv.) declares the importance of media coverage of public events among its basic principles, stating that the right of the people living in the territory of Hungary and the members of the Hungarian

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<sup>14</sup> Fundamental Law Article II

<sup>15</sup> Article VI para. (1) of the Fundamental Law

<sup>16</sup> Article IX para. (1) and (2) of the Fundamental Law

<sup>17</sup> Article IX para. (4) of the Fundamental Law

<sup>18</sup> Article 10 para. (1) of Act CIV of 2010

<sup>19</sup> Article 15 para. (2) of Act CIV of 2010

<sup>20</sup> Article 15 para. (3) of Act CIV of 2010

<sup>21</sup> Article 10 para. of Act CIV of 2010

nation the right to information and to be informed, and in this context the development and strengthening of democratic social publicity, is a constitutional interest of paramount importance, and that the interest of democratic public opinion is also emphasised at the normative level.<sup>22</sup>

As with personality rights in general, the most important source of law for the protection of the personality of public figures is the Civil Code. It should be noted, however, that the Expert Proposal for the new draft of Civil Code did not contain any specific provision on the right of personality of the politically exposed persons. (Vékás, 2008) The Civil Code primarily provides for the general protection of the rights of personality, stating that everyone has the right to freely exercise, within the limits of the law and the rights of others, his or her personality, in particular the right to respect for private and family life, the home, the right to communicate with others by any means and to respect for his or her reputation, and to exercise his right to respect for his reputation freely and not to be hindered in doing so,<sup>23</sup> and declares that human dignity and the personal rights deriving from it must be respected by all, and that personal rights are protected by the Civil Code.<sup>24</sup> The new Civil Code, however, already contains a provision declaring the protection of the personality rights of the politically exposed persons. The regulation, which appears for the first time at the statutory level in the development of Hungarian civil law, builds on the principles established in the judicial practice of previous years and at the same time fills an old gap (Vékás, Gárdos, 2013).<sup>25</sup> The original wording of the Civil Code adopted by the Parliament stated that the exercise of fundamental rights ensuring the free discussion of public affairs may restrict the protection of the personality rights of the politically exposed persons to a necessary and proportionate extent, in the reasonable public interest, without prejudice to human dignity. The Constitutional Court, however, declared the wording "*in the reasonable public interest*" to be unconstitutional, annulled it and the Civil Code Article 2:44 entered into force without the annulled wording.<sup>26</sup> Article 2:44 of the Civil Code entered into force on 15 March 2014 with the following wording, in the light of the Constitutional Court's decision: "*The exercise of the fundamental rights of free discussion of public affairs may restrict the protection of the personality rights of the politically exposed persons to a necessary and proportionate extent, without prejudice to human dignity.*" The Constitutional Court ruled that the annulled text does not impose a constitutionally justifiable additional condition on the exercise of freedom of expression in the political sphere, thus unnecessarily restricting the freedom of speech and of the press as declared in the Fundamental Law.<sup>27</sup>

As of 1 August 2018, additional provisions were added to the Civil Code regulations on the protection of the personality rights of the politically exposed persons,<sup>28</sup> as from that date the sentence was added to Article 2:44 Paragraph (1) of the Civil Code, according to which the exercise of these fundamental rights, which guarantee the freedom to discuss public affairs, must not infringe the private and family life of the politically exposed

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<sup>22</sup> Article 5 of Act CLXXXV of 2010

<sup>23</sup> Article 2:42 para. (1) of Civil Code

<sup>24</sup> Article 2:42 para (2) of Civil Code

<sup>25</sup> commentary to Article 2:44 of Act V of 2013

<sup>26</sup> Decision No. 7/2014 (III.7.) of the Constitutional Court

<sup>27</sup> Decision No. 7/2014 (III.7.) of the Constitutional Court

<sup>28</sup> See amendment under Article 16 of Act LIII of 2018

persons or his or her home, and in addition, a provision was added - also with effect from 1 August 2018 - according to which a politically exposed person is entitled to the same protection as an politically non exposed person against any communication or conduct outside the scope of free discussion of public affairs,<sup>29</sup> and a provision according to which activities or information relating to the private or family life of a politically exposed person are not public affairs.<sup>30</sup> The new legislation therefore makes it clear that the increased criticism of the politically exposed persons applies only to their activities in connection with the free discussion of public affairs, and that no special rules on the protection of the personality of the politically exposed persons apply to all other areas, on the other hand, the legislator made this even clearer by explicitly declaring that activities and data relating to the private and family life of the politically exposed persons are in no way part of public activity.

Simultaneously with this legislation, the Act on the Protection of Privacy, also in force from 1 August 2018, declares that the private and family life and the home of a politically exposed person shall be protected in the same way as a person who is politically not exposed.<sup>31</sup> Thus, in parallel with the Civil Code, the legislator has regulated the protection of the private activities of politically exposed persons in a separate law, on the same level as that of politically non exposed persons, thus drawing a sharp line between the private and public manifestations of politically exposed persons, clearly declaring that public actors are subject to special rules allowing them to be subject to greater criticism only in connection with their public activities, i.e. their personality rights can be subject to restrictions only in connection with their public activities, within the limits of the law.

### 3. DECISIONS OF THE CONSTITUTIONAL COURT

As early as the early 1990s, the first years of the transition from the former socio-economic system, the Constitutional Court has consistently ruled in favor of greater criticism of public actors. At the dawn of the change of regime, the Constitutional Court declared in its Decision No. 30/1992 (26 May 1992) that human dignity can be a limit to freedom of expression, and further stated that restrictions on freedom of expression and freedom of the press are necessary and justified both by the historically proven harmful effects of incitement to hatred against specific groups of people, and by the protection of fundamental constitutional values, as well as by the country's international obligations.<sup>32</sup> The Constitutional Court also pointed out, however, that the right to freedom of expression is not only a fundamental subjective right, but the recognition of the objective, institutional aspect of the right also means the guarantee of public opinion as a fundamental political institution. It pointed out that the right to free expression of rights should be allowed only against a small number of rights, i.e. laws restricting freedom of opinion should be interpreted restrictively.<sup>33</sup> The Constitutional Court also stressed that freedom of expression has a prominent role among the fundamental constitutional rights, and is in fact

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<sup>29</sup> Article 2:44 para. (2) of Civil Code

<sup>30</sup> Article 2:42 para. (3) of Civil Code

<sup>31</sup> Article 7 para. (2) of Act LIII of 2018

<sup>32</sup> Decision 30/1992 (V.26.) of the Constitutional Court, reasoning, point IV

<sup>33</sup> Decision 30/1992 (V.26.) of the Constitutional Court, reasoning, point V

the "mother right" of several freedoms, including the so-called fundamental "right of communication".<sup>34</sup>

In its Decision No. 37/1992 (10.VI.10.) the Constitutional Court stated that freedom of expression is a specific aspect of freedom of the press, since the freedom of the press must be guaranteed by the state in view of the fact that the press is an important means of obtaining information necessary for forming an opinion, and the right to freedom of the press can be derived from the right to freedom of expression as a mother right.<sup>35</sup>

In its decision No. 36/1994 (24.VI.) the Constitutional Court explained the increased duty of tolerance of public actors, pointing out that the discussion of public affairs is an indispensable element of the existence and development of a democratic society, which presupposes the expression of different political views and opinions, and criticism of the functioning of public authority. It is of paramount constitutional interest that the activities of state and local government bodies and persons should be open to public criticism, and that citizens should be able to participate in political and social processes without uncertainty, compromise or fear. The free criticism of state and local government institutions, their operation and activities is a fundamental right of members of society, of citizens, and an essential element of democracy.<sup>36</sup> The Constitutional Court pointed out that the narrower restriction of the freedom of expression in the protection of persons participating in the exercise of public power complies with the constitutional requirements arising from the democratic rule of law.<sup>37</sup> The Constitutional Court has therefore clearly established that the politically exposed persons are subject to greater criticism, that a person who assumes a public role must also assume that public opinion will monitor his or her activities and that he or she must show greater tolerance towards criticism.

In its Decision No. 57/2001 (5.12.2001) the Constitutional Court pointed out that freedom of expression and freedom of the press play a particularly important role in the maintenance of the democratic system, in informing the community and in shaping public opinion, and therefore restrictions on these freedoms are possible only in a limited scope when it comes to political debate and criticism of the state.<sup>38</sup>

In its Decision No. 165/2011 (XII.20.) the Constitutional Court pointed out that the right to freedom of expression has a dual basis, as freedom of expression serves both the fulfilment of individual autonomy and the possibility of creating and maintaining a democratic public opinion on the part of the community. The Constitutional Court stressed that the right to freedom of the press is a demand from the political community, as is the right to obtain information in the public interest, which is essential for the formation of democratic public opinion, based on the functioning of a free press. It stressed, however, that the restriction of the right may only be exceptionally narrow and proportionate if it is necessary to protect another fundamental right or if the state has a duty to ensure the conditions for the emergence and maintenance of democratic public opinion.<sup>39</sup>

In its decision 13/2014 (IV.18.) the Constitutional Court emphasised that in order to assess whether a given communication is related to the free discussion of public affairs, it

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<sup>34</sup> Decision 30/1992 (V.26.) of the Constitutional Court, reasoning, point III

<sup>35</sup> Decision 37/1992 (VI.10.) of the Constitutional Court, reasoning, point II

<sup>36</sup> Decision 36/1994 (VI.24.) of the Constitutional Court, reasoning, point III

<sup>37</sup> Decision 36/1994 (VI.24.) of the Constitutional Court, reasoning, point III

<sup>38</sup> Decision 57/2001 (XII.5.) of the Constitutional Court, reasoning, point II.8.

<sup>39</sup> Decision 165/2011 (XII.20.) of the Constitutional Court, reasoning, point IV

is necessary to primarily take into account the manner and circumstances of the communication and the subject and context of the opinion, i.e. to examine the type of medium, the event giving rise to the communication and the reactions to it, and the role of the communication in this process, and to assess the content, style, timeliness and purpose of the communication. If, on this basis, it can be established that the communication concerns the free discussion of public affairs, the communication automatically enjoys a higher level of protection under freedom of expression, because it is one of the main guarantees of the control and controllability of public power and those exercising public power, which is an indispensable requirement for the democratic and open functioning of a society based on pluralistic foundations.<sup>40</sup>

In its Decision No.7/2014 (III.7.) the Constitutional Court pointed out that the focus of the expression of opinion and the protection afforded to it in the course of the discussion of public affairs is not primarily the status of the persons involved in the speech, but the fact that the speaker expressed his or her views on a social or political issue. The constitutional criteria governing the expression of public opinion may be broader than the scope of opinions concerning the exercise of public authority or the exercise of professional public functions, and it cannot be said that any communication concerning politically exposed persons must be judged according to these criteria. The Constitutional Court emphasizes that the focus of public expression is on public affairs themselves, not on public figures, and that a narrower restriction on freedom of speech and freedom of the press in order to protect the personality of politically exposed persons can only meet the requirements of the Fundamental Law. It is important for citizens and the press to be able to participate in social and political debates without uncertainty or fear, this is counteracted by the fact that speakers would have to fear a wide range of legal liability in order to protect the personalities of politically exposed persons.<sup>41</sup> Increased protection of political expression applies both to value judgments in public affairs and to statements of fact in the sphere of public affairs, thus, even in the case of facts that are proven to be false, it is justified to take into account the interest of the free flow of public debate when determining the extent of liability and possible legal prejudice in the context of legal proceedings.<sup>42</sup>

In its Decision No.28/2014 (IX.29.) the Constitutional Court pointed out that a photograph of a police action may be used without consent *"if the publication is not for its own purpose, i.e. if, based on the circumstances of the case, it constitutes information on current events or information of public interest in the exercise of public authority, or a visual report on a public matter."*<sup>43</sup>

In its Decision No. 3217/2020 (VI.19.) the Constitutional Court recalled the reasoning of its previous decisions on freedom of political expression and freedom of the press, pointing out that the Constitutional Court considers the freedom of the press and the verifiability of state bodies, and thus the access of citizens to information on issues affecting public affairs, to be of paramount constitutional interest.<sup>44</sup> In political disputes (especially during election campaigns), the application of a more permissive test of the establishment of facts with regard to the ascertainability of illegality is only possible in a

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<sup>40</sup> Decision 13/2014 (IV.18.) of the Constitutional Court, reasoning, point 39

<sup>41</sup> Decision 7/2014 (III.7.) of the Constitutional Court, reasoning, point IV. 47. and 48.

<sup>42</sup> Decision 7/2014 (III.7.) of the Constitutional Court, reasoning, point IV. 50.

<sup>43</sup> Decision 28/2014 (IX.29.) of the Constitutional Court, reasoning, point 43

<sup>44</sup> Decision 3217/2020 (VI.19.) of the Constitutional Court, reasoning, point 32



narrow scope, i.e. the constitutional concept of the establishment of facts must be interpreted restrictively.<sup>45</sup> In the election campaign, the freest possible debate on public issues must be ensured, and there may even be room for exaggerated, heightened formulations.<sup>46</sup> At the same time, the Constitutional Court stresses that political actors also make sharp criticisms and allegations against each other outside campaign periods, for which a higher degree of tolerance should be required.<sup>47</sup> In connection with political debates, however, not only the automatic application of the test of provability in the common sense is possible, i.e. the assessment of the statement under examination cannot be limited to its literal content, but also the fact that in the democratic debate on public affairs the parties to the debate are citizens who interpret political events in their own context and are aware of the characteristics of party political statements that are prone to attract attention and exaggeration.<sup>48</sup> In the case of media coverage of press conferences, the media is a vehicle for the expression of opinions and not an actor in the public debate. The press must communicate faithfully to the public what other people say, clearly identifying the identifiable source of the communication, without making its own assessment. A media content provider that faithfully reports statements made by politically exposed persons about each other at a press conference, identifies the source and provides space for rebuttal by the person concerned of facts that may be damaging to their reputation is fulfilling its constitutional mission protected by freedom of the press, and this activity cannot be assessed as a communication giving rise to civil sanctions for infringement of personality rights.<sup>49</sup>

In its decision No. IV/4120/2021 the Constitutional Court pointed out that a statement made by one politician at a press conference about another politician during a campaign period, to the effect that the other politician was running a criminal organisation, constituted an opinion which was part of a political debate, concerning the political activity, programme, credibility and suitability of politically exposed persons. The basis of the statement was an ongoing criminal investigation, the opinion expressed in this context is a value judgement, which is a generalised expression of the investigation, in relation to which the statements made at the press conference could be correctly interpreted by the voters, in the light of which there can be no question of a violation of reputation. During election campaigns, the boundaries between statements of fact and statements of political opinion are blurred. Even in an election campaign, however, it is not possible for candidates to disseminate any untrue information about each other, nor, even in the circumstances of the campaign, can a statement be reasonably attributed a meaning that the voters would interpret it as a political opinion on the policies or suitability of the individuals concerned. In such a case, there may be room for prosecution for untrue allegations.<sup>50</sup>

In its decision No. IV/3954/2021 the Constitutional Court, recalling its previous decisions on similar issues, pointed out that freedom of expression on a public issue, exercised in the context of a public (political) debate, can be restricted only in very specific

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<sup>45</sup> Decision 3217/2020 (VI.19.) of the Constitutional Court, reasoning, point 35

<sup>46</sup> Decision 3217/2020 (VI.19.) of the Constitutional Court, reasoning, point 36

<sup>47</sup> Decision 3217/2020 (VI.19.) of the Constitutional Court, reasoning, point 37

<sup>48</sup> Decision 3217/2020 (VI.19.) of the Constitutional Court, reasoning, point 38

<sup>49</sup> Decision 3217/2020 (VI.19.) of the Constitutional Court, reasoning, point 43

<sup>50</sup> Decision IV/4120/2021 of the Constitutional Court, reasoning, point 35-38

cases.<sup>51</sup> A statement made in Parliament by one politically exposed person about another politically exposed person on a public issue, in a typical place of public debate, is a statement that is protected by the freedom of expression, so even if it is astonishing and exaggerated, it is not an infringement of the right to value judgment.<sup>52</sup>

#### 4. JUDICIAL PRACTICE

It can be treated as a fundamental axiom that the findings of the Constitutional Court have also been adopted by the ordinary courts (Vékás, Gárdos, 2013).<sup>53</sup> In addition to this, the legal literature analysing jurisprudence also pointed to the increased criticizability of public actors already in the early 2000s, stressing that *"the increased criticism of public actors is a characteristic of the democratic rule of law,"* (Tattay, 2007, p. 63) and stating that *„In practice, politically exposed persons have to endure much more in terms of reputation, honour and dignity.”* (Tattay, 2007, p. 64)

The legal literature also agrees with the judicial practice that finds that politically exposed persons and politicians can also be found to have violated their personality rights in connection with their public activities: *„According to a final court judgment, freedom of expression does not extend to knowingly untrue statements of fact which are made as a result of the negligence of the party making the statement. There is an important societal interest in informing the public, but this means that the information must be presented in a way that reveals the truth, i.e. with credible evidence to support it, and not as it was presented in this case.”* (Tattay, 2007, p. 217)<sup>54</sup>

Levente Tattay also cites the case law of the Supreme Court (No. Pfv.E.20.885/2003), according to which *"the defendant's position that the expression of opinion cannot infringe a right of personality and that the politically exposed persons' 'duty of tolerance' was not exceeded by the statements is erroneous. As the Supreme Court has already pointed out in other decisions, a politically exposed person is not obliged to tolerate the violation of his personality rights and, pursuant to Article 75 Paragraph (1) of the Civil Code, the personality rights of public actors must also be respected by all."* (Tattay, 2007, p. 226)

However, the increased censure of politically exposed persons was already declared by the judiciary in the early 1990s.<sup>55</sup> Also in the 1990s, the court ruled that although consent is not required for the publication of a photograph of a person in a public role when he or she appears at a public event, if the photograph does not show that the person in the photograph appeared as a politically exposed person at the public event, this form of publication constitutes an abuse and infringes a right of privacy.<sup>56</sup> At the same time, in the early 2000s, the approach emerged in the judicature that the publication of a photograph of a politically exposed person, which is a caricature, does not infringe the right to facial likeness and that the opinion expressed does not violate honour or human dignity, provided that the expression is not unduly offensive or degrading.<sup>57</sup> The judicial practice of the early

<sup>51</sup> Decision IV/4120/2021 of the Constitutional Court, reasoning, point 34

<sup>52</sup> Decision IV/4120/2021 of the Constitutional Court, reasoning, point 40

<sup>53</sup> commentary to Article 2:44 of Act V of 2013

<sup>54</sup> analysis of the judgment of the Metropolitan Court of Budapest in case No 48.Pf.20598/2003

<sup>55</sup> BH 1994.127. (Court Decision)

<sup>56</sup> BH 1997.578. (Court Decision)

<sup>57</sup> BH 2000.293. (Court Decision)

2000s emphasises that an unfavourable opinion or assessment of a politically exposed person does not in itself constitute a basis for the protection of personality even if it reflects exaggerated or heightened emotions, bearing in mind that persons participating in public life must expect that their political opponents will criticise their activities and appearances, and inform the public about it. Thus, public actors have to endure opinions and criticisms that portray their person in an unfavorable way and evaluate their activities in a negative way.<sup>58</sup>

Turning to the current judicial practice of the late 2010s and early 2020s, a review of the relevant case law leads to the following conclusions.

#### **4.1. THE QUALITY OF PUBLIC ACTORS**

The Civil Code does not define who qualifies as a politically exposed person in its provisions on the protection of personality. Therefore, the practice of the courts must assess in each individual case whether the claimant qualifies as a politically exposed persons in respect of whom special legal protection is justified on the basis of that status. In this context, the recent practice of the Supreme Court (Curia) is clear, which stresses that the question of whether or not the subjects are acting in a public capacity must always be decided on a case-by-case basis, weighing all the circumstances.<sup>59</sup>

However, the Act LIII of 2017 on the Prevention and Suppression of Money Laundering and Terrorist Financing, which defines the concept of a prominent public actor - albeit not from the perspective of personality law - as a natural person who performs an important public function or has previously performed an important public function within at least one year, can also be of assistance to the legal practitioner adjudicating in personality law cases.<sup>60</sup> The Act primarily considers as persons performing an important public function the actors of domestic and international political and economic public life, including (i) the Head of State, the Head of Government, the Minister, the Deputy Minister, the State Secretary, (ii) the Member of Parliament, the member of the legislative body, (iii) the member of the governing body of a political party, the member of its executive body and its officers, (iv) members of the Supreme Court of Justice, the Constitutional Court, or a high-ranking judicial body whose decisions are not subject to appeal, such as the Curia, the Court of Appeal, or the Constitutional Court; (v) the President and Vice-President of the State Audit Office, members of the Monetary Council and the Financial Stability Board, (vi) ambassadors, clerk at the embassy and high-ranking officials of the armed forces, in particular the head and deputy head of the central body of the law enforcement agency, and the Chief of the Defence Staff and his deputies, and (vii) the chief executive officer, a member of the management body of a majority state-owned enterprise with management or supervisory powers, and (viii) the head and deputy head of an international organisation, a member of its management body or a person performing equivalent functions.<sup>61</sup> These persons are also considered public actors (as politically exposed persons) by the courts in personality lawsuits.

The jurisprudence has also made it clear that where a person who is an economic operator, participates in public procurement and uses public money, even if he is not a

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<sup>58</sup> BH 2004.104. (Court Decision)

<sup>59</sup> Decision of the Supreme Court (Curia) Pfv.20813/2021/4., Available at: HVG-Orac Legal Code - online legal database

<sup>60</sup> Article 4 para. (1) of Act LIII of 2017

<sup>61</sup> Article 4 para. (2) of Act LIII of 2017

politically exposed persons, his duty of tolerance is similar to that of a politically exposed persons, especially if he is a relative of a public actor.<sup>62</sup> However, the case law also emphasizes that the fact that a person is in a better financial position than the average, is active in economic life, is engaged in productive economic activity, or is honoured at a public event, does not make him a public actor.<sup>63</sup>

The judiciary also points out that persons who are not generally considered to be public actors (as politically exposed persons) are also considered to be public actors when they are involved in public affairs, e.g. when a company is involved in public procurement.<sup>64</sup> Even the fact that someone is a non-public actor, such as an official in a condominium, is subject to an increased tolerance obligation because of their voluntary role.<sup>65</sup> Judicial practice clearly classifies the district municipality as a legal person governed by public law managing public funds as a public actor.<sup>66</sup>

It is clear from the case-law that not only public actors (as politically exposed persons) in the traditional sense, but also persons who do not generally qualify as public actors but who participate in public life in some form, even on a temporary or ad hoc basis, are afforded the same degree of protection as public actors (as politically exposed persons), i.e. the higher degree of tolerance is also required in their case.

#### 4.2. RELEVANT PERSONALITY RIGHTS

In the context of public actors (as politically exposed persons) being more open to criticism and the protection of their personality rights, the next question is to examine which personality rights are the most "at risk" for public actors. From the case law, we can conclude that the primary problematic cases are the violation of the right to the protection of facial likeness,<sup>67</sup> the right to privacy<sup>68</sup> and the violation of reputation.<sup>69</sup>

As far as public actors are concerned, in relation to the violation of their various personality rights, it can be stated that there are specialities compared to the personality rights of non-public actors (as politically not exposed persons) only in that in certain cases - due to their increased duty of tolerance - certain manifestations in their respect, as manifestations to the detriment of public actors, do not constitute a violation of personality rights. This issue is addressed in more detail in the next subsection. In this context, we only refer to the fact that the case-law has taken a clear position on the issue that the primary protection of the right to privacy and family life is guaranteed by judicial practice.

The Supreme Court (Curia) recently handed down an uniformity decision concerning the disclosure of photographs taken in a public trial in a criminal case, which also affects persons exercising public authority. The Curia clearly stated in the uniformity decision that the absence of the consent of the person concerned does not in itself render unlawful the taking of a photograph and publication of the photo of a person exercising public authority participating in a public hearing or public session of a criminal case under the provision of the Criminal Procedure Act, according to which the taking of photographs, audio

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<sup>62</sup> BDT 2017.3760. (Repository of Court Decisions)

<sup>63</sup> BDT 2020.4251.II. (Repository of Court Decisions)

<sup>64</sup> BDT 2021.4342.IV. (Repository of Court Decisions)

<sup>65</sup> PJD 2020.4. (Civil Law Decision)

<sup>66</sup> Pécsi Ítéletábla (Court of Appeal Pécs) III.Pf.20.003/2021/8. judgment (31 March 2021)

<sup>67</sup> BDT 2017.3760. (Repository of Court Decisions) and PJD 2016.21. (Civil Law Decision)

<sup>68</sup> BDT 2018.3847. (Repository of Court Decisions) and PJD 2019.18. (Civil Law Decision)

<sup>69</sup> BDT 2021.4342. (Repository of Court Decisions)

recordings or audio and visual recordings of a person present at a court hearing may be carried out only with the consent of the person concerned, with the exception of the members of the court, the chief of protocol, the prosecutor and the defence counsel, and with the authorisation of the single judge or the President of the Chamber.<sup>70</sup> However, the publication of the photo (facial likeness) of a person exercising public authority without consent shall not be self-serving and shall not be prejudicial to human dignity.<sup>71</sup> In the opinion of the Curia, the facial likeness of a person exercising public authority participating in a public criminal trial may therefore be published without his or her consent, but such publication must not violate human dignity and must not be self-serving. This means that the appearance of a person exercising public authority at the public hearing of a criminal case is also a public expression in connection with which the public actor's right to privacy may be restricted. According to the Curia, the publication is self-serving if it is detached from the event that is the subject of the information, from the public hearing itself and the person presented is in the foreground, in contrast to or independently of the event. However, the consent of a public actor to the publication of his or her facial likeness cannot be waived if the exercise of public authority as a reason for publication loses its importance and the person presented becomes a specific actor of information. The participation of a person exercising public authority in the proceedings of a criminal court is therefore clearly considered by the Curia as public participation.

#### **4.3. DUTY OF TOLERANCE OF THE POLITICALLY EXPOSED PERSONS**

The most crucial question in relation to the protection of the personality rights of public actors, as politically exposed persons is where the line is drawn between freedom of expression and the protection of personality rights, given that, as we have seen above, both the Constitutional Court and ordinary judicial practice are in favor of greater criticism of public actors. In the event that the court finds that the person expressing criticism exercises the freedom of expression, but does not abuse it, a violation of the right to privacy cannot take place. According to judicial practice, the statement of a fact is a communication of a specific act or event that occurred in the past or in the present, which is distinguished from the expression of an opinion by the fact that while the existence of facts can be proved, the veracity of value judgments cannot.<sup>72</sup> The courts typically apply the test of provability to distinguish between statements of fact and statements of opinion, according to which a statement whose truth or falsity can be proved is a fact, while a statement whose truth cannot be proved is a statement of opinion.<sup>73</sup> However, it is never the intention of the person making or communicating the statement that is decisive in the delimitation of facts or opinions, but the totality of the communication (article) concerned, its structure, the use of words, the imagery and the content suggested by the context.<sup>74</sup>

The court found a violation of the public actors's right to privacy in a case where a recording of a private event published by a public actor (politically exposed person) on the internet was published by the press in a different context. In this context, the case-law emphasizes that such a facial likeness cannot serve to illustrate the content of ideas and

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<sup>70</sup> Article 108 para. (2) of Act XC of 2017

<sup>71</sup> Uniformity Decision of the Supreme Court (Curia) Nr. 8/2021

<sup>72</sup> BDT 2011.2403. (Repository of Court Decisions)

<sup>73</sup> BDT 2653.II. (Repository of Court Decisions)

<sup>74</sup> BDT 2021.4283.II. (Repository of Court Decisions)

opinions independent of the public actors's specific expression.<sup>75</sup> Also reflecting the sharp distinction between public and private expressions is the case law ruling that the publication of a recording of a politically exposed person at an election results party is an infringement to prove an untrue statement that the public figure is a drug user.<sup>76</sup>

According to recent case law, in order to protect freedom of expression in relation to public activity, it is neither necessary nor proportionate to use a facial likeness that depicts a minor child remotely associated with the content of an article in a negative environment by means of ridicule without due cause.<sup>77</sup> In this case, therefore, the boundaries of freedom of expression in relation to public activity have been clearly established by judicial practice. The court also found unlawful the press's refutation of a statement by a politically exposed person detained for public nuisance that he was very upset by what had happened (detention), by publishing that the politician had been advertising on a dating site the day after his release. According to the court's position, such a challenge to credibility is not proportionate to the violation of the public actors's right to privacy.<sup>78</sup>

In setting the boundaries of the duty to tolerate public actors as politically exposed persons, the courts primarily emphasize that the focus of political freedom of expression is not on public actors but on public affairs. The higher threshold of tolerance for public actors applies only to communications which are made in the context of the free discussion of public affairs.<sup>79</sup> According to judicial practice, the politically exposed person is therefore subject to a heightened duty of tolerance even if the statement in question is made in the context of a public affairs dispute.<sup>80</sup> In matters of public interest relating to the use of public money, politically exposed persons are obliged, by virtue of their constitutional right to freely discuss public affairs, to tolerate criticism that is above the average, and even exaggerated.<sup>81</sup> The focus is therefore clearly not on politically exposed persons, but on public affairs in judging whether there is, or is allowed to be, a heightened level of censure of these individuals. According to court practice, therefore, the manifestations and communications of a politically exposed person in public affairs are those in respect of which the public actor is subject to a heightened duty of tolerance, and in connection with his private manifestations he is subject to the same protection as politically non exposed persons. *"A politically exposed person is entitled to protection of personality rights under the same conditions as any other person in the event of an untrue and prejudicial statement of facts."*<sup>82</sup>

The fundamental question, a problem that arises in judicial practice in numerous cases, is whether the public actors's duty of tolerance extends to the case where he or she is accused of making statements concerning his or her public activities that suggest the commission of a criminal offence. According to settled case-law, the accusation of another person for a criminal offense in any press release, without a final judicial decision finding

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<sup>75</sup> PJD 2016.21. (Civil Law Decision)

<sup>76</sup> PJD 2019.18. (Civil Law Decision)

<sup>77</sup> PJD 2021.8. (Civil Law Decision)

<sup>78</sup> BDT 2018.3847. (Repository of Court Decisions)

<sup>79</sup> ÍH 2020.108. (Decision of the Court of Appeal)

<sup>80</sup> BDT 2017.166. (Repository of Court Decisions)

<sup>81</sup> Judgment of the Pécs General Court No. 18.P.20.230/2020/12, Judgment of the Pécs Court of Appeal No Pf.III.20.003/2021/8

<sup>82</sup> BDT 2005.1278. (Repository of Court Decisions)

the commission of the offense, is a clear violation of the right to privacy.<sup>83</sup> Also according to recent practice of the Supreme Court, the allegation that a politically exposed person has committed a criminal offence - which lacks any factual basis - is a clear basis for a finding of infringement.<sup>84</sup>

The judiciary has clearly held that statements which portray a politically exposed person as a person who has committed a crime constitute an attack on the reputation of the public actor and an unnecessary restriction on the protection of the public actors' personality rights. It is the clear practice of the Supreme Court (Curia) in such cases that: *„Making untrue and offensive statements about another person, whether during or outside the campaign period, is a violation of the reputation of the person concerned. In the present case, by interpreting the contested text in context in accordance with Resolution of Supreme Court No. 12, [...] it can be concluded that the defendants essentially stated that the plaintiff had committed a crime for which there was no factual basis [...] the communication was therefore untrue. It cannot be disputed that to say that someone is committing a crime, without any basis in fact, carries offensive content, which is a basis for a finding of infringement even in the case of a politically exposed person. This is not excluded by Article 2:44 of the Civil Code. On the basis of the above, the final judgment was correct in this matter, and no violation of the provisions of the Fundamental Law or the Civil Code can be established.”*<sup>85</sup>

Of fundamental importance is also the case-law that a violation of the right to reputation and honour was established when the chairman of a parliamentary investigative committee accused the chief of police of a crime at a press conference of the investigative committee, *„by false rumors that the applicant, as national chief of police between 1992 and 1996, had knowledge of what was going on in Bács-Kiskun County, because he had repeatedly attended events organised by the underworld and had left them in his car with bags containing sometimes 20 million and sometimes 50 million forints.”* The court applied both objective and subjective legal sanctions against the infringer, ordering the defendant to call a press conference at its own expense within 15 days of the judgment becoming final and to present the operative part of the judgment there, and ordering the defendant to pay HUF 1,250,000 in compensation for non-material damages.<sup>86</sup>

With regard to the untrue statement of fact, which also infringes the politically exposed person's right of privacy by implying a criminal offence, the case law emphasizes that *“a politically exposed person may legitimately claim that his right of privacy has been infringed by an untrue statement of fact accusing him of having committed a criminal offence.”*<sup>87</sup> The case-law also points out that the right to the presumption of innocence must be taken into account when assessing the commission of a crime, so that if the content of the assessment is not reasonable and unfounded, the person making the statement exceeds the limits of freedom of expression and commits an infringement.<sup>88</sup>

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<sup>83</sup> BH 2005.426. (Court Decision)

<sup>84</sup> BDT 2020.4250. (Repository of Court Decisions)

<sup>85</sup> Decision of the Supreme Court (Curia) in civil case Pfv.21.207/2016/4 (19 October 2016)

<sup>86</sup> EBH 2001. 514. (Court Decision in Principle)

<sup>87</sup> BDT 2020.138. (Repository of Court Decisions)

<sup>88</sup> ÍH 2017.88. (Decision of the Court of Appeal)

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#### 4.4. EXPECTATIONS OF PUBLIC ACTORS

Above, we have reviewed the legislation and judicial practice on the protection of the personality rights of public actors, focusing on potentially offensive statements made about them. In judicial practice, much less attention is paid - in the absence of specific legislation - to manifestations when politically exposed persons make offensive statements that may constitute a violation of the personality rights of persons, whether public actors or persons who are not public actors (politically exposed persons).

In judicial practice, a system of criteria is beginning to emerge which also emphasizes, in relation to statements made by politically exposed persons, that (i) they should exercise increased caution in the formulation of a statement, i.e. the court expects public actors to exercise a special duty of care in relation to their public utterances, (ii) particularly in view of the fact that they can influence public thinking in a more significant and powerful way than the average person, especially when their ideas and statements are communicated to a wider public.<sup>89</sup> Even in this area, however, there is a general experience that courts are increasingly pushing the boundaries of freedom of expression and only finding violations of personality rights in flagrant cases.

#### 5. CONCLUSION

Based on an overview of the decisions of the Constitutional Court and the case law of the courts and a comparison with the current Hungarian legislation, some basic observations can be made in the context of the judicial practice of the protection of the personality rights of politically exposed persons. The main conclusion is that the exercise of fundamental rights to freely discuss public affairs, such as freedom of expression, should not entail unnecessary and disproportionate restrictions on the personality rights of politically exposed persons. The statements under examination must always be subject to the necessity and proportionality test and only in the case of statements which meet that test may the court hold that the public actor's right to privacy has not been infringed. Neither untrue allegations without any basis, nor statements that are unjustifiably offensive or insulting in their expression, may result in a restriction of the protection of the personality rights of a politically exposed person.

In judicial practice, it must be decided on a case-by-case basis whether the actor concerned is a politically exposed person and whether the nature of the infringement is such as to entail a heightened duty of tolerance on the part of the public actor or to allow the infringement to be established. In the first case, the focus is not on the public actor, politically exposed person, but on public affairs. With regard to the latter, it can be concluded that the speciality of the protection of the personality rights of public actors compared to non-public actors is only the increased duty of tolerance, in the background of which there is a free debate on public affairs. However, criticism of public actors' public statements should not be self-serving or unduly offensive. The protection of the private and family life of public actors (politically exposed persons) must not be subject to any restrictions. No public actor can be falsely accused of committing the crime. The

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<sup>89</sup> judgment of the Kaposvár General Court No.13.P.21.118/2020/19/II. and judgment of the Pécs Court of Appeal No. Pf.20.098/2021/4



personality rights of public actors as politically exposed persons are primarily infringed in relation to their reputation, their right to facial likeness and their right to privacy, which are the rights most often affected by cases before the courts. However, judicial practice also sets a heightened standard of reasonableness for statements made by politically exposed persons, given that their statements are capable of influencing the behaviour of a wider public.

Judicial practice is currently evolving along the axioms outlined above, but this does not mean that this will not change in the future, or that case-specific decisions may not be issued that deviate from these general guidelines. The judicial practice of the protection of the personality rights of politically exposed persons can be characterised as a constantly evolving field, which responds to the new challenges of social and economic life in a reflective and constantly moving way. The background to all this is a generally formulated statutory provision (Article 2:44 of the Civil Code), which gives the court sufficient flexibility to make the correct fact-specific decisions in individual cases. There is no justification for amending the current, framework-like legislation, a flexible judicial practice can be and is constantly evolving along the lines of the current legislation, which is fully in line with the principles set out by the Constitutional Court.

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