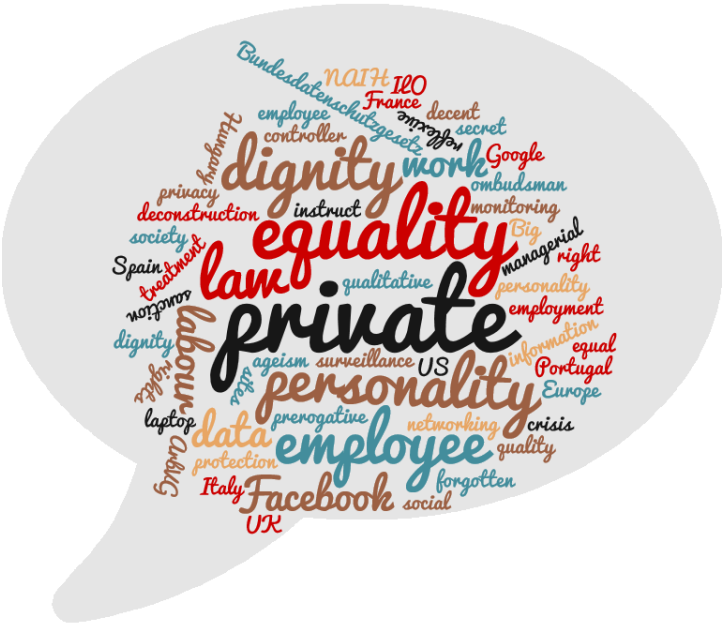
Edit Kajtár

DIGNITY AT WORK:

EMPLOYEES' PERSONALITY RIGHTS IN THE 21ST CENTURY



Dignity at Work:
Employees' Personality Rights in the 21st Century

PÉCSI MUNKAJOGI KÖZLEMÉNYEK. MONOGRÁFIÁK 6.
PMJK MONOGRAPHS, 6

Edit Kajtár

This book was written with the support of the Hungarian Scientific Research Fund – OTKA, PD109163 grant

EDIT KAJTÁR

DIGNITY AT WORK:

EMPLOYEES' PERSONALITY RIGHTS IN THE 21ST CENTURY

Pécs • 2016

ISSN 2416-075X

Scientific Lector: Dr. habil. Bankó Zoltán

Published by: University of Pécs, Faculty of Law
Printed by: Kódex Nyomda Kft, Pécs
Editor in chief: Simon Béla
August 2016

‘Dignity consists not in possessing honours,
but in the consciousness that we deserve them.’

Aristotle

Table of Contents

PART I: INTRODUCTION

I. Why this Subject?

With the new features of the 21st century labour market, ranging from *post-crisis instability* through *intensified fragmentation of the workforce* to an *unprecedented level of digitalisation*, protection of the employees' personality rights is more important than ever. This research selects two rights that bear particular relevance in contemporary labour law. The first one is a classic right, the *right not to be discriminated*. As most personality rights have *privacy and data protection* relevance, this field is chosen as the second example. The protection of these two rights has far reaching consequences. To give one example, research of the last two decades clearly shows that constant monitoring significantly increases stress and leads to higher rates of depression of the workers. Abuse of the right to surveillance is therefore a psychosocial risk factor.

The preliminary hypothesis is that *constitutional principles function differently in the labour law environment*. The classic system of protection needs to be adapted according to the specialities of employment relationship. The new Hungarian Labour Code is focusing on competitiveness, and this may jeopardise enforcement of personality rights. This more flexible code is criticised for detectably decreasing employee protection.[1]

II. The Aim of the Research

The aim is to provide an overview of different approaches to the selected personality rights issues, compare these to Hungarian efforts to regulate, and *highlight the positive and*

[1] See for instance: Kártyás, Gábor and Gyulavári, Tamás. Az új Munka Törvénykönyve. A világ legrugalmasabb munkajogi szabályozása? In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 127-142. 131; Czuglerné Iványi, Judit. A szakszervezeti jogok gyengülése az új Munka Törvénykönyvében. In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 51-75.

negative prospects for the field. The research provides a *systemic review* of controversial issues and latest developments. It focuses on *critical regulations of the new Labour Code in international context.*

The key questions are as follows: how does the new regulatory environment affect the enforcement of employees' personality rights? What trusted international solutions are transplantable into the national practice? What are the historical experiences attached to the subject? Is Hungarian regulation in conformity with international and EU requirements? How to protect human dignity, equality as well as privacy and personal data in this new environment? How to foster decent work while at the same time increasing the efficiency and competitiveness of the employer?

III. Methodology

This research is based on *comparative methodology*, which is capable of unveiling the blind spots. Examples are given from various parts of the world. The Hungarian regulation and practice is contrasted to that of Western European countries (Germany, France, the United Kingdom and the Netherlands). Because of the shared heritage, Austria lends itself for comparison too. From the Mediterranean cluster Portugal, Italy and Spain are selected, from the Scandinavian countries Finland. From Eastern Europe references are made to Romania, Bulgaria, and Slovenia. The European models are compared to the models of the United States as well. It is displayed how in similar circumstances very different answers are given. The legal environment at *international, EU and national levels* is analysed as well as *recent case law development and the recommendations of national authorities*. Different *regulatory layers* of employees' personality rights, such as constitutions, acts, code of conducts, employment contracts and other agreements of the parties are covered. The research draws on findings of previous as well as current studies and scientific literature. It is examined how current trends are displayed in *different disciplines* and in *statistical data.*

IV. Background and Novelty

Different *labour law aspects of protection of personality rights* have been examined by prominent academic scholars. The findings of *previous grand-scale projects* serve as solid ground to the attempt to detect what has changed, and what are the new challenges after 2012. (The list is only exemplificative.) *Kiss György*'s monograph on collision of basic rights in labour law is a sophisticated and meticulous dogmatic analysis of the field and a point of reference for all researchers.[2] From the recent academic literature on discrimination in the employment context, amongst others, the analysis of *Zaccaria Márton Leó*[3], *Gyulavári Tamás*[4], *Nacsa Beáta*[5], *Lehoczkyné Kollonay Csilla* [6] and *Barakonyi Eszter*[7] offer valuable dogmatic and practical aid. *Hajdú József*'s monograph[8] from 2005 and *Arany-Tóth Mariann*'s comparative books from 2008[9] and 2016[10] provide comprehensive guide on data protection within employment relationship. The participants of the *PAW project* (including the author of this book) engaged in a comparative assessment of data protection law and self-regulation in Germany and Hungary. The findings of the project give insight to the practice based on the old Labour

[2] Kiss, György. *Alapjogok kollíziója a munkajogban*. Pécs: Justis, 2010.
[3] Zaccaria, Márton Leó. *Az egyenlő bánásmód elvének érvényesülése a munkajog területén a magyar joggyakorlatban*. 2015, Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2015.
[4] Gyulavári, Tamás and Hős, Nikolett. Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts, *Industrial Law Journal* 42.3 (2013): 289-297. 18.; Gyulavári, Tamás. Age discrimination: recent case law of the European Court of Justice. *ERA Forum* 3 (2013): 377-389.
[5] Nacsa, Beáta. *Country report. Gender equality. How are EU rules transposed into national law? Hungary.* http://www.equalitylaw.eu/downloads/3790-hungary-country-report-gender-pdf-1-mb
[6] Lehoczkyné Kollonay, Csilla. The significance of existing EU sex equality law for women in the new Member States: The case of Hungary. *Maastricht Journal of European and Comparative Law 1*2.4 (2005): 467-493.; Lehoczkyné Kollonay, Csilla: Work and family issues in the transitional countries of Central and Eastern Europe. The case of Hungary. In: Conaghan, Joanne and Rittich Kerry (eds.). *Labour Law, Work, and Family: Critical and Comparative Perspectives.* Oxford: Oxford University Press, 2005. 289-315.
[7] Barakonyi, Eszter. *A munkavállalói aktív életkor meghosszabbításának lehetséges eszközei. Ph.D. thesis.* Pécs: PTE ÁJK, 2010.
[8]Hajdú, József. *A munkavállalók személyiségi jogainak védelme. Az adatvédelem alapkérdései.* Szeged: Pólay Elemér Alapítvány, 2005.
[9] Arany-Tóth, Mariann. *A munkavállalók személyes adatainak védelme a magyar munkajogban.* Szeged: Bába K. 2008. 72-74.
[10] Most recently: Arany-Tóth, Mariann. *Személyes adatok kezelése a munkaviszonyban.* Budapest: Wolters Kluwer Kft., 2016.

Code and Data Protection Act.[11] From the recent Hungarian studies on the *digital workplace*, the monograph of *Bankó Zoltán* and *Szőke Gergely* is to be highlighted.[12]

Former OTKA[13] projects also give insightful comments.[14] A project led by *Török Gábor* and *Tényi Géza* analysing how personal rights are shaped in the information society, drew attention to the digitalisation of elements of human personality and emergence of new forms of personality. They warned that traditional private law is not able to handle these new phenomena, these areas become unregulated and human personality is losing protection.[15] The current research can verify these words. In the last six years this *tendency only accelerated*.

In the last years *important pillars of the Hungarian legal system* were codified. The coming into force of the *new Labour Code* (Act I of 2012 on the Labour Code, hereinafter referred to also as LC); the new Constitution (Fundamental Law of Hungary, 25 April 2011, hereinafter referred to also as *Fundamental Law*); the *new Civil Code* (Act V of 2013 on the Civil Code, hereinafter referred to also as Civil Code); as well as the *new data protection act* (Act CXII of 2011 on Information Rights and the Freedom of Information, hereinafter referred to also as DPA) validate the *currency of the research*.

Because of the *drastic changes in technology and society, previous case law becomes outdated faster* than before. From the changing regulatory environment numerous problems to be solved arise, problems which – due to, amongst other factors, the short time frame – have not been in-depth investigated by the academic community. This research scrutinises the new regulations and it displays applicable options. *Areas of ethical concern* that need public discourse are also highlighted. Despite the relevance of personality rights, many of the essential issues regarding the use and consequences of personality rights remain unsettled. I hope the information provided here is useful for policymakers

[11] Szőke, Gergely László (ed.). *Privacy in the Workplace: Data Protection Law and Self-regulation in Germany and Hungary*. Budapest: HVG-ORAC, 2012.
[12] Bankó, Zoltán and Szőke, Gergely. Az információtechnológia hatása a munkavégzésre. Pécs: Justis. 2016. (*PMJK Monografiák* 5.).
[13] Hungarian Scientific Research Fund
[14] Prugberger, Tamás, et al. Alkotmányjogi kérdések a munkajogban. OTKA Kutatási Jelentések = Questions of the Constitutional law in the labour law. 46436 OTKA Research Reports. 2009.
[15] Török, Gábor and Tényi, Géza. K78686 project *Personal rights in the information society 2009-2010*.

and legislators, when considering reform. My aim is to aid practitioners, scholars and students when they assess these areas, and to provide basis for further debate and research.

V. Structure

The book is divided into six parts:

After the introduction (*Part I*), it examines the general system of personality rights. Here, the nature and significance of personality rights as well as the relevant provisions of the Civil Code and the Labour Code are discussed (*Part II*).

Part III is dedicated to the ever growing tree of anti-discrimination law. It starts with the roots of primary and secondary EU legislation and arrives to the different branches of protected characteristics. Part III points out the differences between and within the clusters and displays ways of interactions between them. In this part, I examine how the principle of equality is regulated at international, regional, EU, and national levels. In the next sections, three specific fields are discussed in detail. The first field is related to having children. Several personality rights are affected by the regulation on the data of an employee's plans to have children, pregnancy and any disclosure obligation to that effect. The Decision No. 17/2014 (V.30.) of the Hungarian Constitutional Court is analysed. Secondly, the place of age as a distinctive protected characteristic within the general system of non-discrimination at EU as well as national level is examined. Difference in treatment based on age remains common in the EU. The mandatory retirement for judges was put to the test of the Court of Justice of the European Union. Last, but not least, near the old limbs of the anti-discrimination tree new twigs appear. 'Lifestyle discrimination' (e.g. smoking ban) as a novel, emerging form are discussed under a separate heading.

In *Part IV* I seek to demonstrate the drastic effect of digitalisation on the right to privacy and protection of personal data. Amongst others, the recent ruling of the European Court of Human Rights from 12 January 2016, about the monitoring of

employees offers an illuminating example. The key areas covered include: the use of telephone and cell phone, CCTV camera surveillance, GPS, internet (browsing history), company computer or laptop, e-mail and messenger as well as alcohol and drug testing at the workplace. The cases discussed reflect complexity and challenges.

Part V is dedicated to a recent phenomenon, the effect of social networking sites on the workplace. This research provides insight into the nature of these relatively new, digital channels of communication as well as the socio-legal environment they function in. Facebook and the likes lend themselves for analysis, as they have high relevance to both data protection and discrimination. Negative comments on the management posted online by employees can be used as a basis for disciplinary actions including termination of the employment relationship. I follow the parties to the employment relationship as they use or abuse the opportunities offered to them by social networking sites; and examine how the employees' right to data protection and equal treatment is balanced against the employers' lawful rights and interests. In search of key patterns as well as potential answers, cases from different countries in and outside the European Union are studied.

In Part VI remarks are offered on the place for personality rights in the 21st century labour law, a labour law that is characterised by a quest for renewal and new paths.

PART II: PERSONALITY RIGHTS IN LABOUR LAW

I. Personality Rights

Personality rights are *ancient* parts of the legal systems. They reflect the very essence of human physical and spiritual integrity; their roots go back to the beginning of law.[16] However, ancient does not mean fixed. The system of personality rights is very much *alive*, it is a field of expansion and changes. Personality rights are inextricably linked to basic values, amongst others private autonomy and human dignity. These concepts are filled with different content at different times and spaces.[17] Now, as many times in legal history before, they stand in the limelight of reform programs.[18] *Private autonomy* in the broadest sense means that everyone has the possibility to establish and shape their legal relationships through a legal environment that helps self-determination. This autonomy has public as well as private law implications.[19]

To quote *Professor Ádám Antal*:

> 'The law has the capability to create, to serve and to protect values', 'the basic legal norms are the more thousand year-old legal products of constantly changing human wisdom'.[20]

Human dignity has its origin in this 'human wisdom' as well. *Dignity* is what separates us from animals. *Pico della Mirandola* locates dignity in the human freedom to be whatever

[16] Barcsi, Tamás. *Az emberi méltóság filozófiája*. Budapest: Typotex Kiadó, 2013.
[17] Sólyom, László. *A személyiségi jogok elmélete.* Budapest: Közgazdasági és Jogi Könyvkiadó, 1983; Sólyom, László. Adatvédelem és személyiségi jog. In: Péterfalvi, Attila (ed.). Tízéves az adatvédelmi biztos irodája. Budapest: Adatvédelmi Biztos Irodája, 2006. 9-20.
[18] Szabó, Imre. A személyiségi jogok védelmi rendszere a magyar jogban. *Acta Conventus de Iure Civili* 2 (2008): 43-60. (2008); Görög, Márta. A magánélethez való jog mint a személyiségi jog újabb, magánjogi kódexben nevesített vonatkozása. In: Balogh, Elemér (ed.). *Számadás az Alaptörvényről: Tanulmányok a Szegedi Tudományegyetem Állam- és Jogtudományi Kara oktatóinak tollából.* Budapest: Magyar Közlöny Lap- és Könyvkiadó, 2016. 51-63.; Székely, László. *A személyiségi jogok hazai elmélete: A forrásvidék.* Budapest: ELTE Eötvös Kiadó, 2011.
[19] Bankó, Zoltán, Berke, Gyula, Kajtár, Edit, Kiss, György, and Kovács, Erika. *Kommentár a Munka Törvénykönyvéhez.* Budapest: CompLex Wolters Kluwer. (KJK-kiadványok).
[20] Ádám, Antal. *Bölcseletek, vallások, jogi alapértékek.* Pécs: PTE Állam- és Jogtudományi Kar, 2015. 207-208.

it wants to be.[21] The concept of dignity appears whenever concerns arise about different aspects of human life, including work. *Dignity in work* means worthwhile and meaningful work, while *dignity at work* means being treated and valued as a human being in the work environment,[22] its subjective elements include self-esteem and autonomy.[23]

> 'The attainment of dignity at work is one of the most important challenges people face in their lives. Ensuring dignity of employees is equally important for organisations as they attempt to make effective use of their human and social resources.'[24]

Dignity at work is about respecting workers as people and not merely as means to an end.[25] Respect and protection of personality rights contribute significantly to the achievement of human dignity. Discriminatory practice violates dignity and so does violation of privacy and personal data. The misuse of information systems to tightly monitor workforce can have undignified consequences for workers.[26] For *Kiss György* human dignity is a point of reference. He emphasises that it equals to the per se acknowledgement of human existence.[27]

II. Background: the Hungarian Civil Code

In the new Hungarian Civil Code we find an 'exact, fluent rule grasping the essence of personality rights'.[28] Rights relating to personality are regulated under a separate title. Personality rights are absolute rights; they shall be respected by everyone. The system

[21] Copenhaver, Brian. Giovanni Pico della Mirandola. Edward N. Zalta (ed.). *The Stanford Encyclopedia of Philosophy* (Fall 2016 Edition), forthcoming. http://plato.stanford.edu/archives/fall2016/entries/pico-della-mirandola/ (Last accessed: 10.08.2016).
[22] Bolton, Sharon C. Dignity in and at work why it matters. In Bolton, Sharon C. (ed.). *Dimensions of dignity at work*. Routledge, 2007. 3 -8.
[23] Bolton, 2007. 4.
[24] Hodson, Randy. *Dignity at work*. Cambridge University Press, 2001. 4.
[25] Sayer, Andrew. What dignity at work means. In: Bolton, Sharon C. (ed.). *Dimensions of dignity at work*. Routledge, 2007. 17-29.
[26] Doolin, Bill and McLeod, Laurie. Information technology at work: the implication for dignity at work. In: Bolton, Sharon C. (ed.). *Dimensions of dignity at work*. Routledge, 2007. 159.
[27] Kiss, György. *Alapjogok kollíziója a munkajogban*. Pécs: Justis, 2010. 67-68.
[28] Székely, László and Vékás, Lajos. *Személyiségi jogok*. In: Vékás, Lajos (ed.). A Polgári törvénykönyv magyarázatokkal. Budapest: CompLex, 2013. 56.

is of *general character*, even those personality rights that are not regulated expressis verbis enjoy the safeguard of the Code (see general clause in Section 2:42).

At the very core of the regulation stands human dignity. The Civil Code, in line with the practice of the Constitutional Court, derives personality rights from human dignity. However, it is important to emphasise, that despite of common areas, personality rights are not the same as basic rights.[29]

Under the 'General provisions and certain rights relating to personality' title it is stated that:

> 'everyone is entitled to freely practice his personality rights within the framework of the law and within the rights of others, and to not be impeded in exercising such right by others. Human dignity and the related personality rights must be respected by all.'

Section 2:46 'Right to privacy' is of special interest for us. It reads:

> '(1) The right to the protection of privacy shall, in particular, cover the confidentiality of correspondence protection, professional secrecy and commercial secrecy.
> (2) Invasion of privacy shall, in particular, cover the unauthorized access to and use of private secrets, including publication and disclosure to unauthorized persons.'

The following Section 2:47 is dedicated to the right to commercial secrecy and know-how. This section gains relevance amongst others, in scenarios, where the employee's activity on a social media site affects the employer's right to trade secrets. Section 2:48 on the right to facial likeness and recorded voice is especially significant when it comes to monitoring and surveillance of the employees. It states:

> '(1) The consent of the person affected shall be required for producing or using his/her likeness or recorded voice.
> (2) The consent of the relevant person is not required for recording his/her likeness or voice, and for the use of such recording if made of a crowd or in a public event.'

[29] Péterfalvi, Attila. A személyiségi jogok védelme. In: Török, Gábor (ed.). *Polgári jogunk alapvonásai.* Budapest: Nemzeti Közszolgálati Egyetem Közigazgatás-Tudományi Kar, 2014. http://vtki.uni-nke.hu/uploads/media_items/polgari-jogunk-alapvonasai.original.pdf 21-32. 23.

The Civil Code (nor other acts including the Labour Code) does not and in fact cannot provide with a precise catalogue of protected personality rights and cases of violation.[30] For this reason the case law could play a crucial role.[31] In *Section 2:43* of the Civil Code, specific personality rights are included.

> 'The following, in particular, shall be construed as violation of personality rights:
> a) any violation of life, bodily integrity or health;
> b) any violation of personal liberty or privacy, including trespassing;
> c) discrimination;
> d) any breach of integrity, defamation;
> e) any violation of the right to protection of privacy and personal data;
> f) any violation of the right to a name;
> g) any breach of the right to facial likeness and recorded voice.'

Payment of restitution (sérelemdíj) is a new instrument.[32]

Section 2:52 on Restitution states:

> (1) Any person whose rights relating to personality had been violated shall be entitled to restitution for any non-material violation suffered.
> (2) As regards the conditions for the obligation of payment of restitution - such as the definition of the person liable for the restitution payable and the cases of exemptions - the rules on liability for damages shall apply, with the proviso that apart from the fact of the infringement no other harm has to be verified for entitlement to restitution.
> (3) The court shall determine the amount of restitution in one sum, taking into account the gravity of the infringement, whether it was committed on one or more occasions, the degree of responsibility, the impact of the infringement upon the aggrieved party and his environment.

[30] Fézer, Tamás. Személyiségi jogok. In: Osztovits András (ed.). *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja I. kötet.* Budapest: OPTEN Informatikai Kft., 2014. 249-355.; Barzó, Tímea. A személyiségi jogok. In: Bíró, György and Lenkovics, Barnabás (eds). *Új Magyar Polgári Jog I.-VIII.: Általános tanok.* Miskolc: Novotni Kiadó, 2013. 234-311.

[31] Halmai, Gábor. A bírói jogértelmezés elvett szabadsága: A kollégiumi állásfoglalás szerepe a személyiségi jogi ítélkezésben. *Fundamentum* 3-4 (2002): 135-143.

[32] Sipka, Péter: A személyiségi jogok megsértéséért fennálló munkáltatói felelősség egyes gyakorlati kérdései. *Hr & Munkajog* 6.10 (2015): 6-8.

The methodological characteristic of the Civil Code is the lack of hierarchy, i.e. that the parties stand and are also handled on equal levels. This does not exclude the use of civil law principles to other types of contracts such as the employment contract.[33] Yet, the application of the Civil Code to labour law cases is not without difficulties. Section 9 of the LC refers to Civil Code provisions. However, the whole sanction system of the Labour Code also serves as a shield for personality rights.[34]

III. General Protection of Personality Rights in the Hungarian Labour Code

The most relevant characteristic of the employment relationship is the presence of power imbalance. This implies that to protect the employee, i.e. the party with less power, additional safeguards will be needed if personality rights are to be efficiently safeguarded.[35]

One indicator of the new Labour Code's effectiveness is the number of cases in front of the labour court. Labour statistics show a clear decrease in the numbers. Obviously, this tendency occurs due to a set of complex and interacting factors, such as costs attached to court procedure. After analysis of the data Pethő Róbert points out that making the previous provisions more precise also contributed to the fact that the parties are less likely to turn to court to settle their rights disputes.[36]

Section 9 states:

> (2) The rights relating to personality of workers may be restricted if deemed strictly necessary for reasons directly related to the

[33] Kiss, György. A rugalmasság és a státuszvédelem egy lehetséges megközelítése. In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 215-235. 225; Nochta, Tibor. *A kártérítési felelősség alaptanai a 2013. évi V. törvény alapján*. Budapest: Menedzser Praxis Kiadó, 2014.

[34] Lőrincz, György. I. fejezet. In: Pál, Lajos et al. *Az új Munka Törvénykönyvének magyarázata*. Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2012. 41.

[35] Rácz, Zoltán. A munkavállalók személyiségi jogainak védelme, különös tekintettel az adatvédelemre. In: Csák Csilla (ed.). *Ünnepi tanulmányok Prugberger Tamás professzor 70. születésnapjára.* Miskolc: Novotni Alapitvány, 2007. 212-231.

[36] Pethő, Róbert. Az új Munka Törvénykönyve hatása a munkaügyi perek számának alakulására. In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 366.

intended purpose of the employment relationship and if proportionate for achieving its objective. The means and conditions for any restriction of rights relating to personality, and the expected duration shall be communicated to the workers affected in advance.
(3) On general principle, worker may not waive their rights relating to personality in advance. Any legal statement concerned with the rights relating to personality of a worker shall be formally valid if made in writing.

Section 10:

(1) A worker may be requested to make a statement or to disclose certain information only if it does not violate his rights relating to personality, and if deemed necessary for the conclusion, fulfilment or termination of the employment relationship. An employee may be requested to take an aptitude test if one is prescribed by employment regulations, or if deemed necessary with a view to exercising rights and discharging obligations in accordance with employment regulations.
(2) Employers shall inform their workers concerning the processing of their personal data. Employers shall be permitted to disclose facts, data and opinions concerning a worker to third persons in the cases specified by law or upon the worker's consent.
(3) In the interest of fulfilment of obligations stemming from an employment relationship, the employer shall be authorized to disclose the personal data of a worker to a data controller as prescribed by law, indicating the purpose of disclosure, of which the affected worker shall be notified in advance.
(4) Information and data pertaining to workers may be used without their consent for statistical purposes and may be disclosed for statistical use in a manner that precludes identification of the workers to whom they pertain.

PART III: THE RIGHT NOT TO BE DISCRIMINATED[37]

I. Non-discrimination

1. Roots

The anti-discrimination system of the European Union is similar to *a hundred-pronged, ever growing tree*. The roots grow deep in the soil, the trunk is strong, the branches are diverse, some thick and sturdy, others more fragile, in need of extra support. Buds appear from time to time and it is not always easy to foresee which of them will turn into fruit. The deepest root, the principle of equality is *deeply embedded in contemporary legal culture*. To cite *Luhmann*, it is the most abstract preference of the legal system, the last criterion for assigning disputes to right and wrong.[38] The 'alike must be treated alike' norm is a commonly agreed starting point for justice.

a. International and Regional Law Sources

At international level, the Universal Declaration of Human Rights (hereinafter *UDHR*),[39] the document which set out, for the first time, fundamental human rights to be universally protected provides the obvious point of reference. The equality clause in Article 2 of the 'the Magna Charta of all mankind'[40] states:

---

[37] This chapter builds partly on the following articles of the author: Kajtár, Edit and Marhold, Franz: The Principle of Equality in the EU Charter of Fundamental Rights and Age Discrimination: Hungarian and Austrian Experiences. European *Labour Law Journal* 6.4 (2016): 321-342.; Edit Kajtár, Please, Climb that Tree! Some Thoughts on the Obstacles that Prevent Members of 'Vulnerable Groups' from Entering the Labour Market, *Pravni Vjesnik,* 30. 2. (2014): 15-40. Kajtár, Edit: Munkaerőpiaci esélyek válság idején: Gondolatok az „elveszett nemzedék" útkereséséről. *Tudásmenedzsment* 15.2 (2014):43-62.

[38] Luhmann, Niklas. *Law as a Social System,* Oxford: Oxford University Press, 2004. Cited by Thüsing, Gregor. *European Labour Law*, München, C.H. Beck 2013. 45.

[39] Proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

[40] Risse, Thomas, Ropp, Stephen C., and Sikkink, Kathryn (eds.). *The Power of Human Rights: International Norms and Domestic Change*. Cambridge [u.a.], Cambridge Univ. Press, 1999. 1.

> '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'

The International Covenant on Civil and Political Rights (hereinafter *ICCPR*)[41] the International Covenant on Economic, Social and Cultural Rights (hereinafter *ICESCR*),[42] the two major multilateral human rights treaties from 1966 have anti-discrimination provisions as well. Article 26 of the ICCPR provides that:

> '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

The wording of Article 2(2) of the ICESCR reads as follows:

> '[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

The instruments refer to traditional grounds, the two lists are *identical* in the itemised protected characteristics.

Under the aegis of the *International Labour Organisation, Convention 111* targets discrimination in employment and occupation. Article 5 singles out age as a characteristic and allows *adoption of specific measures*. It states:

[41] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.
[42] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

> '[a]ny Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.'

Turning to the instruments of the *Council of Europe*; neither the European Convention, A*rticle 14 of* the European Convention on Human Rights (hereinafter: ECHR) states:

> '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Visibly inspired by Article 14 of the ECHR the *Revised European Social Charter* states in Article E:

> '[t]he enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health association with a national minority, birth or other status.'

b. EU Measures. Non- discrimination as Building Stone

Protection against discrimination is one of the most important elements of European labour law, one that was present from the very beginning of integration and has grown ever since, influencing other areas of law. Key element is the fight against stereotypical approach treating individuals on the group basis.[43]

[43] Sargeant, Malcolm. *The law on age discrimination in the EU*. Vol. 34. Kluwer Law International, 2008. 5.

The Community Charter of Fundamental Social Rights for Workers of 1989 lists the general aim to ensure equal treatment:

> '[w]hereas, in order to ensure equal treatment, it is important to combat every form of discrimination, including discrimination on grounds of sex, colour, race, opinions and beliefs, and whereas, in a spirit of solidarity, it is important to combat social exclusion…'

Subsequently, the document further elaborates the general principle of equal treatment in two concrete fields: in the conditions governing access to vocational training there may be no discrimination on ground of nationality (Title I 15); and equal treatment for men and women must be assured (Title I 16).

Turning to primary law sources, according to *Article 2 TEU* the Union is founded on the values of respect for human dignity, freedom, democracy, *equality*, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, *non-discrimination*, tolerance, justice, solidarity and equality between women and men prevail. Also noteworthy is *Article 3 TEU* on aims. This article states that the Union's aim is to promote peace, its values and the well-being of its peoples. The Union:

> 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the Child.'

This article also refers to the strict observance and the development of international law, including respect for the principles of the UN Charter.

In the Treaty on the Functioning of the European Union (hereinafter TFEU) we find both general regulations and regulations related specifically to European labour law. From outside labour law Article 18 TFEU provides for a general discrimination prohibition:

> '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.'

Discrimination is also prohibited in relation to the freedom to provide services (Article 56 TFEU), free movement of goods (Article 36 TFEU) and free movement of capital (Article 65 (3) TFEU). These rules do not only prohibit discrimination on grounds of nationality but also non-discriminatory restrictions that, even though applicable without discrimination on grounds of nationality, are liable to hamper or to render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty.[44] Labour law benefitted from the case law related to the prohibition of discrimination regarding the four freedoms, for example the concept of indirect discrimination was exported from judgements on service provision.[45] Amongst the employment-specific rules Article 45(2) TFEU is relevant, which states that freedom of movement for workers shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

Before 1997 few express Treaty Regulations existed on discrimination: one was related to *nationality*, the other to *equal pay for male and female* workers. The pioneering Directive was related to the latter. On the basis of Article 119 EC Treaty (now Article 157 TFEU) Directives 75/117/EEC (currently Directive 2006/54/EC) and 76/207/EEC (now Directive 206/54/EC) were built. Later on came Directive 97/80/EC on the burden of proof in cases of discrimination based on sex.[46]

The list of prohibited grounds of discrimination *has been gradually expanded by the Treaty amendments*. The Court of Justice of the European Union (CJEU) has played a prominent and active role, as within the framework provided by the primary sources it

[44] Case *C-19/92 Dieter* Kraus *vs. Land Baden-Württemberg* [1993] ECR I-1663.
[45] Case *C-152/73 Sotgiu vs. Deutsche Bundespost* [1974] ECR 153. Tax benefits granted only to residents of a Member State may constitute indirect discrimination by reason of nationality.
[46] As it was pointed out earlier, on a more general level (European Law as a whole, not only European Labour Law) the prohibition of discrimination based on sex was preceded by the prohibition of discrimination based on nationality.

has opened up the range of cases which might be brought within one of the fixed categories by different forms of interpretation.[47]

The evolution was not confined to growth in the number of protected characteristics; there was also a *shift in perception*, and anti-discrimination was no longer seen as a mere instrument of economic integration. Mark Bell describes the development of competences as a dialogue between two evolving policies: market integration and social citizenship.[48] The expansion of the list of prohibited grounds of discrimination at EU level has been linked to a shift in the general purpose of EU law.[49] In the *Schröder* case[50] the CJEU ruled that the economic aim is secondary to the social aim and that the principle of equal pay is an expression of a fundamental human right. To quote Catherine Barnard: '…as the EU's self-perception changed from a European Economic Community to a European Union, so its task and objectives have been broadened to take into account a broader range of policies which may complement but may also obstruct free trade.'[51]

On a secondary law level, Directive 2000/78/EC on Employment Equality[52] (the Framework Directive) established a general framework for equal treatment in employment and occupation and extended the ground for protection to religion or belief, disability, age and sexual orientation.[53] The Framework Directive is distinctive in many respects.

---

[47] For example, even before the Framework Directive the case law established that discrimination on the basis of gender identity was a form of impermissible sex discrimination. Case *C-13/94 P vs. S and Cornwall County Council*, [1996] IRLR 347. See the overview of the CJEU judgements. In: Kaiser, Jens. Das Verbot der Altersdiskriminierung in der Rechtsprechung des EuGH, *ZESAR* 13. 11-12. (2014): 473-482.

[48] Bell, Mark. *Anti-discrimination Laws and the European Union.* Oxford: Oxford University Press, 2002. 6.

[49] Bamforth, Nicholas, Malik, Maleiha, and O'Cinneide, Colm. *Discrimination Law: Theory and Context.* London: Sweet and Maxwell, 2008. 99.

[50] Case *C-50/96 Deutsche Telekom vs. Schröder* [2000] ECR I-743 para 57.

[51] Barnard, Catherine. *The Substantive Law of the EU: The Four Freedoms*. Oxford: Oxford Univ. Press, 2004. 23.

[52] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[53] Council Directive 2000/43/EC implemented the principle of equal treatment between persons irrespective of racial or ethnic origin.

c. Protection against Discrimination within the Charter of Fundamental Rights of the European Union

There is interaction between the different levels at which protection against discrimination is guaranteed. The rights embodied in international documents as well as the constitutional heritage of the Member States radiate beyond their respective (international and national) scope; they form part of the European Union's anti-discrimination law. In relation to age discrimination, the Charter of Fundamental Rights of the European Union stands out. Article 6(1)TEU states that:

> '[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

The lines that follow, however, set strong limits to the application of the Charter. It is stated that:

> '[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties…'

We find a similar restrictive part in relation to the ECHR in Article 6(2)TEU:

> '[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'

Article 6(3)TEU creates the abovementioned link between national, international and European levels; it reads as follows:

> '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

According to Article 51(1) of the Charter, the Charter is applicable to Member State's action only when they are implementing Union law. The *extent of the restriction is unclear*. The CJEU may use a broad interpretation; in fact in the *Åklagaren vs. Hans Åkerberg Fransson* case it established that in practice the Charter is applicable whenever Member States are acting within the scope of EU law. Here, the CJEU pointed out that:

> '[s]ince the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.'[54]

The significance of the Charter cannot be emphasised enough. Though it does not create new rights (neither in general nor in respect of age discrimination) its importance is vital. What is apparent from the beginning is that the Charter is the first formal EU document that gathers *under a single legal text* all the economic and social, as well as civil and political, fundamental rights and values that were previously regulated in different documents. By treating human rights in a clear and detailed manner under the heading of a single document these rights are made more *visible*.[55]

The European Commission stated that it would treat the Charter as if it were binding, even before its proclamation.[56] From 13 March 2001, the Commission decided to utilise the Charter as a *filter* or guardian *in the normal decision-making procedures*. Any proposal for legislation and any draft instrument to be adopted by it were to be scrutinised for compatibility with the Charter, and that legislative proposals and draft

[54] Case C-617/10 *Åklagaren vs. Hans Åkerberg Fransson* [2013] para. 21.
[55] The Preamble of the Charter states that 'it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.'
[56] *Communication on the Legal Nature of the Charter of Fundamental Rights of the Union*, COM (2000) 644 final, of 11.10.2000.

instruments with specific links to fundamental rights were required to include a formal statement of compatibility.[57]

The Charter represents a '*genuine departure from the economic orientation* of European integration'.[58] The following articles bear special relevance for our topic: Article 20, 21 and Article 25 from Chapter III entitled Equality; Article 15 from Chapter II on Freedoms; and Article 28 from Chapter IV on Solidarity.

Article 20 declares the fundamental principle of anti-discrimination:

> '[e]veryone is equal before the law.'

Article 21 itemises the prohibited grounds of discrimination, including age. It states:

> '[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
> (2) Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.'

Article 21(1) contains a very lengthy list, one of 18 protected characteristics. In contrast to this, the TFEU lists – besides nationality – eight grounds of prohibited discrimination: sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation.

[57] *Commentary of the Charter of Fundamental Rights of the European Union* Available at: http://bim.lbg.ac.at/sites/files/bim/Commentary%20EU%20Charter%20of%20Fundamental%20Rights%5B1%5D.pdf 15.
[58] Bell, Mark. *Anti-discrimination Laws and the European Union.* Oxford University Press, Oxford, 2002. 23.

2. Different Branches

In the Treaty, besides nationality, six grounds of prohibited discrimination are listed: sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. The EU Charter of Fundamental Rights of the European Union (representing a 'genuine departure from the economic orientation of European integration'[59]) contains 17 grounds: sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation (Article 21 (1)). An impressive list. However, it was not always like this. The equality domain expanded on a long time scale gradually. It is possible to talk about two clusters of regulation. The protection was traditionally linked to a certain characteristic of worker as a human being (such as sex, race, ethnic origin, religion, belief, disability etc.), later on the protection was extended to a different field, namely the status (contract) of the worker. It is to be seen to what other realms will open in the future.

a. First Cluster: Characteristic of Worker as a Human Being

Before 1997, only few expressed Treaty regulations existed on discrimination: one was related to nationality, the other to equal pay for male and female workers. The pioneer directive was related to the latter. Based on Art 119 EC Treaty (now Art 157 TFEU) the Directive 75/117/EEC (currently Directive 2006/54/EC) and 76/207/EEC (now Directive 206/54/EC) were built. Later on came Directive 97/80/EC on the burden of proof in cases of discrimination based on sex.[60] Only with the Amsterdam Treaty was the list of grounds extended. Based on this regulatory ground Directive 2000/78/EC established a general framework for equal treatment in employment and

[59] Bell, 2002. 23.
[60] As it was pointed out earlier, on a more general level (European Law as a whole and not only European Labour Law) prohibition of discrimination based on sex was preceded by prohibition of discrimination based on nationality.

occupation and extended the ground for protection to religion or belief, disability, age or sexual orientation. Council Directive 2000/43/EC implemented the principle of equal treatment between persons irrespective of racial or ethnic origin.

Though the range of prohibited grounds of discrimination has been *always expanded* by the Treaty amendments, within the framework provided by the Treaty the CJEU felt (feels) empowered to offer a broader approach and opened up the range of cases that might be brought within one of those fixed categories by interpretation. The scope of application of the measures concerning the protected categories may vary somewhat, and some room may be left for judicial interpretation of the range of litigants or groups who can claim protection.[61] The CJEU plays a prominent and activist role. For instant in *P v. S*[62] the sex equality Directive was interpreted as applicable to a case involving unequal treatment of a transsexual person, arguing that the measure was 'simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law. Consequently, even before the Framework Directive the case law[63] established that discrimination on the basis of gender identity was a form of impermissible sex discrimination. It was stated that the Treaty provisions (such as Articles 34(2) or 49) and Directives concerning equal treatment between men and women are considered by the Court as specific manifestations of an unwritten general principle which is binding on the Community. The *Mangold judgement* raised high expectations concerning advancement of other grounds of discrimination as well. Here the Court stated that 'the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law'.[64]

The change was not confined to growth in the number of protected characteristics, there was also a *shift in perception*, and anti-discrimination was no longer seen as mere instrument of economic integration. The expansion in the list of prohibited

---

[61] Bamforth–Malik–O'Cinneide, 2008. 98-118.
[62] *Case C-13/94, P v. S and Cornwall County Council [1996] ECR I-2143*, para. 18.
[63] The other two cases of the famous trio, beside P v. S and Cornwall County Council, are *C-249/96 Grant v South-West Trains* and *Joined Cases C-122/99 P C-125/99 PD and Sweden Council.*
[64] *Case C-144/04, Mangold v. Helm [2005] ECR I-9981* para 75.

grounds of discrimination at EU level has been tied to a shift in the general purpose of EU law.'[65] In the *Schröder case*[66] the CJEU ruled that the economic aim is secondary to the social aim and that the principle of equal pay is an expression of a fundamental human right.' '…as the EU´s self-perception changed from a European Economic Community to a European Union, so its task and objectives have been broadened to take into account a broader range of policies which may complement but may also obstruct free trade.'[67] Mark Bell describes the development of competences in the realm of racial and sexual orientation discrimination as a dialogue between two evolving policy: the market integration and social citizenship.[68]

b. On the Heterogeneity of the Protected Characteristics in the First Cluster

Prohibition of discrimination is a duty that covers various areas. Each category has its own characteristics. The *difficulty around coining a uniform definition* captures well the complexity of the protected grounds. The Racial Equality Directive and the Employment Equality Directive require Member States to prohibit discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation, however it do not contain any definition of these grounds. Or going back to the afore-mentioned category of age, it is generally assumed to be an objective characteristic with a natural meaning and hence it is not defined in national legislations.[69]

Although *race* is also a well-established prohibited ground, the exact meaning of race is extremely contested. Especially social science scholarship challenges

[65] Bamforth–Malik–O'Cinneide, 2008. 99.
[66] *Case C-50/96, Schröder* [2000] ECR I-743 para 57.
[67] Barnard, Catherine. *The Substantive Law of the EU: The Four Freedoms.* Oxford: Oxford Univ. Press, 2004. 23.
[68] Bell, 2002. 6.
[69] Developing Anti-Discrimination Law in Europe – the 25 EU Member States compared II. http://migpolgroup.com/public/docs/21.DevelopingAntidiscrimination-Comparativeanalysis_II_EN_11.06.pdf (Last accessed: 02.06.2016) 20-24.

essentialist and biological definitions.[70] Some countries argue that even inclusion of the terms 'race' or 'racial origin' in anti-discrimination legislation reinforces the perception that humans can be distinguished according to 'race'. Austria is one of the prominent examples. 'Race is substituted with 'ethnic affiliation'. Hungary refers to 'racial affiliation' and 'belonging to an ethnic minority'. It is questionable to what extent characteristics such as colour, national origin, membership of a national minority, language or social origin fall within the scope of 'racial or ethnic origin'. The boundary between ethnic origin and religion is blurred.

The concept of *religion and belief* is similar to race and ethnicity, and also overlaps with these protected characteristics.[71] Regarding the definition of these terms no Member State has a definition fixed in the law. The Netherlands includes 'philosophy of life' into the definition, giving a broad interpretation of the concept. In Austria, the explanatory notes for the Federal Equal Treatment Act refer back to that the Framework Directive which states that the terms religion and belief must be interpreted broadly. Matter of interpretation by national courts or some countries provide further guidance in accompanying explanatory notes to legislation, such as in Belgium, France and Germany.[72]

Age is also a very flux category, (see the remarks in part 'Age as a Distinctive Protected Characteristic').

Very few states have defined *sexual orientation* within anti-discrimination legislation. Generally defined as 'heterosexual, homosexual or bisexual orientation' (e.g. Bulgaria, Germany, Ireland and Sweden).[73] The 2006 German General Law on Equal Treatment adopts the term 'sexual identity' while the Federal German Constitutional Court refers to both sexual identity and sexual orientation, going beyond sexual orientation and encompassing protection against discrimination for transsexual people.

---

[70] Bamforth–Malik–O'Cinneide, 2008. 755.
[71] Bamforth–Malik–O'Cinneide, 2008. 956.
[72] http://www.era-comm.eu/oldoku/Adiskri/01_Overview/2011_04%20Chopin_EN.pdf (Last accessed: 03.10.2014) 2.
[73] Developing Anti-Discrimination Law in Europe – the 25 EU Member States compared II. http://migpolgroup.com/public/docs/21.DevelopingAntidiscrimination-Comparativeanalysis_II_EN_11.06.pdf (Last accessed: 03.10.2014) 23.

In France and the Netherlands, the concept of sexual orientation has not been interpreted in a way that covers transsexuality and transvestism, in contrast with Denmark. Discrimination on these grounds is regarded as sex discrimination.[74]

We find many variations on *disability* definition at national level, but these mostly come from the context of social security legislation rather than anti-discrimination law. Disability is not defined in the Framework Directive. This deficiency means that at national level, the term may be interpreted in many ways and this eventually may lead to curtailing the rights provided by the Directive. For this reason, the elaboration of a uniform concept rests on the CJEU (see later on).[75]

c. The Second Cluster: the Status (Contract) of the Worker

Disadvantage may stem not only from characteristics attached to the employee as a human being, but also from disadvantaged position due to the specific nature of the employees' contract. So far, the following categories have been singled out: part-time work, fixed term work, temporary agency work and telework.[76]

The issue of discrimination in temporary agency work is covered by Directive 2008/104/EC and the area of telework is tackled by the 2002 Framework Agreement. Directive 97/81/EC embodies the non-discrimination principle for part-time work 'unless different treatment is justified on objective grounds', and Directive 1999/70/EC does the same for fixed-term work.

The idea behind these rules is that certain employment relationships, different from what we call 'typical' or 'standard' (in other words full-time, permanent

---

74 http://www.era-comm.eu/oldoku/Adiskri/01_Overview/2011_04%20Chopin_EN.pdf 4 (Last accessed: 03.10.2014).

75 For details see: Barnard, Catherine. The Changing Scope of the Fundamental Principle of Equality? *McGill Law Journal* 46.4. (2001): 955-77.; Bell, Mark and Waddington, Lisa. Reflecting on Inequalities in European Equality Law, *European Law Review* 28.3. (2003): 349-369.

76 Bankó, Zoltán. Experiences of the regulation of the status of employees in atypical employment. *Tudásmenedzsment* Special Issue 14.1 (2013): 14-20.; Bankó, Zoltán. *Az atipikus munkajogviszonyok*. Budapest–Pécs: Dialóg Campus, 2010.

employment) are *precarious*, and persons employed under atypical contracts[77] deserve protection.[78] Anti-discrimination law aims at inclusion of disadvantaged groups. Typically, the hourly wages of part-time workers are lower, they are not eligible for certain social benefits, and have limited career prospects.[79]

The key factor regarding the fixed term worker and temporary agency worker (the latter being in principal and in many ways the most flexible type of atypical workers) status is the limited duration of the employment relationship.[80] Discrimination in relation to *access to training* is especially common. Nienhüser and Matiaske points out that implementation of the Temporary Agency Workers Directive may be a necessary but insufficient tool to improve the terms and conditions of temporary agency workers. In countries where the principle of non-discrimination is in force, discrimination increases significantly in the area of employer-provided training. Firms, because of higher costs for workers, invest less in training to compensate for the (possible but empirically insignificant) increase in wage expenses.[81]

Regarding teleworkers the risk factor lies in the isolated work location. The disconnectedness may very well result in discrimination with regard to working time, workplace standards or access to training.

---

[77] Many definitions exist. Bankó, Zoltán. Az atipikus munkajogviszonyok a magyar munkajogi szakirodalomban. In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára*. Budapest: ELTE Eötvös Kiadó, 2015. 35-49.

[78] See for instance: Davidov, Guy and Langille, Brian. *Boundaries and Frontiers of Labour Law. Goals and Means in the Regulation of Work*. Oxford: Hart Publishing Limited, 2006.

[79] For instance a study in Austria issued by the Federal Ministry of Labour, Social Affairs and Consumer Protection has shown that on average, part-time workers earn 24.2% less per hour than full-time workers. workers. http://www.eurofound.europa.eu/eiro/2013/09/articles/at1309031i.htm (Last accessed: 03.10.2014).

[80] See also: Boto, José María Miranda. El nuevo contrato de trabajo por tiempo indefinido de apoyo a los emprendedores. *Actualidad laboral* 8 (2012): 2.

[81] Nienhüser, Werner and Matiaske, Wenzel. Effects of the 'principle of non-discrimination' on temporary agency work: compensation and working conditions of temporary agency workers in 15 European countries. *Industrial Relations Journal* 37.1. (2006): 64-77. For the Hungarian situation see: Kártyás, Gábor. Csorba kiegyenlítés? A kölcsönzött munkavállalók egyenlő bánásmódhoz való joga az új munka törvénykönyve után. *Esély: Társadalom és Szociálpolitikai Folyóirat* 3 (2013): 25-47.

d. On the Distinct Nature of Protected Characteristics in the Second Cluster

While the prohibition of discrimination based on a certain feature of the individual (e.g. sex, age, etc.) is a classic category directly connected to human dignity, when the protected characteristic is a status assessment is more complicated. I would like to highlight three points.

Firstly and most importantly, the use of traditional discrimination argument is very difficult. These forms of employment are *meant to be flexible*, and flexibility lays in the possibility to apply different conditions. If this feature is taken away the employer is no longer motivated to employ on a part time or on a fixed-term basis, through temporary agency etc. Consequently, the directives give room for justifications for different treatment and allow a wide range of exemptions. As we see these categories cannot be fitted into the traditional framework of anti-discrimination, or only with major adjustments.

Secondly, discrimination regulations deal with potentially disadvantaged group of workers. Perhaps one of the most important questions is as follows: *is precarious always precarious?* Though work arrangement of employees in high position (i.e. manager) are very flexible they cannot be labelled as precarious. In addition, atypical forms of employment may serve both parties (employers and employees). Oftentimes part time workers for personal reasons (e.g. family commitments) want to work under atypical contracts. Agency work on the other hand is in most cases involuntary. There is a need for differentiation!

Finally yet importantly, we have to ask ourselves *what is the real reason of precariousness*. Is it the status (contract) of the employee or some other typically (first cluster characteristic)? Is fixed term work for instance really a risk factor or is it more the interplay of fixed term and other factors such as gender, age, nationality, level of education etc. that deserves heighted attention?

3. Interaction between Branches: Combination, Collision and Competition

The different grounds of discrimination interact in various ways. They are (1) combined with one another (discrimination on more than one ground), (2) collide and oftentimes (3) compete.

Regarding *combination*: we have to discuss multiple inequalities and the accumulated effect of 'interceptions'. *Multiple (additive or compound) discrimination* is based on two or more grounds simultaneously, where the role of the different grounds can be distinguished). Those experiencing these complex forms of discrimination are among the most vulnerable, marginalised and disadvantaged.[82] Victims of multiple discrimination have a lower overall job quality compared to those previously affected by no discrimination or by discrimination on a single ground among people of equal qualification.[83] Only a small number of Member States provides categorical provisions for protection against multiple discrimination. One of the examples is Austria, where multiple discrimination should lead to higher amounts of compensation according to the Equal Treatment Act for the private sector (Gleichbehandlungsgesetz) and also the Equal Treatment Act for the federal public sector (Bundes-Gleichbehandlungsgesetz).[84] Multiple discrimination constitutes an aggravating circumstance in Romanian law. In Portugal, multiple discrimination may increase the level of compensation.[85]

Intersectional discrimination is discrimination resulting from the interaction of grounds of discrimination, where the role of the component cannot be detangled.[86]

---

[82] Jakab, Nóra: Megváltozott munkaképességű és fogyatékos személyek a munkaerő-piacon. In: Jakab, Nóra (ed.). *A foglalkoztatás elősegítés és igazgatás joga.* Miskolc: Bíbor Kiadó, 2016. 168-184.

[83]Tardos, Katalin. *Halmozódó diszkrimináció. Kirekesztés és integráció a munkaerőpiacon.* Szeged, Belvedere Meridionale, 13.

[84] Thomasberger, Martina. H*ow are EU rules transposed into national law? Country report. Gender equality. Austria.* 2015.

[85]Chopin, Isabelle and Germaine, Catharina. A comparative analysis of non-discrimination law in Europe 2015. *A comparative analysis of the implementation of EU non-discrimination law in the EU Member States, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey*. Brussels: European Commission, 2016. Available at: http://www.equalitylaw.eu/downloads/3824-a-comparative-analysis-of-non-discrimination-law-in-europe-2015-pdf-1-12-mb 39.

[86] Lawson, Anna. *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*. Routledge, 2016. 3.

Originally, the concept of intersectionality was developed mainly in relation to the intersection between race and gender, and to some extent class.[87]

Arguable the combination of certain protected characteristics is more 'explosive' than others, however de facto race, culture, religion and belief also often overlap. It is a question of risk accumulation. Intersectionality and multiple discrimination are burning issues; this approach however is not without its dangers. The assumption that social categories connected to inequalities as well as the mechanisms and processes that constitute them are the same or equivalent is false. Inequalities have differentiated character and dynamics, not to mention the political dimension of equality goals. There is a clear need for a tailor made approach.

Regarding *collision*: religion and belief very often clash with other prohibited grounds of discrimination such as sex and sexual orientation and is likely to remain one of the most controversial areas of discrimination law in the future.[88]

Last, but not least: *competition*. While gender equality has the status of a well-established principle of European Law surrounded by enormous case law[89], disability discrimination for instance had been treated as the foster child of both international and EU law sources and a neglected subject of the legal curricula up till the opening decade of the millennium.[90] Age has gained increased attention in the last decade.[91] Also, with anti-discrimination legislation the focus is on groups that are perceived as in need of extra protection. But what is perceived as vulnerable or precarious varies. Policy and law makers prioritise. Grounds 'compete' with one another at EU as well as national level. On EU level the CJEU applies diverse testing standards when checking on a law's

---

87 Crenshaw, Kimberlé. Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, *University of Chicago Legal Forum*, Volume 1989. 139-168.

88 Bamforth–Malik–O'Cinneide, 2008. 973.; Hopf, Herbert, Mayr, Klaus and Eichinger, Julia. *GlBG Gleichbehandlung - Antidiskriminierung*, Manz Verlag, Wien, 2011, 532-543.

89 On the complexity of the case law on indirect discrimination against women see: Mestre, Bruno. Comparators and Indirect Discrimination: an Illustration of the Difficulties, *European Law Reporter*, Issue 12. 2011, 372-379.

90 Kajtár, Edit. Life Outside the Bubble: International and European Legal Framework of Discrimination in Emloyment. *Pécsi Munkajogi Közlemények Special Edition 6* (2013): 5-21. 5.

91 Gyulavári, Tamás and Bitskey, Botond. Age discrimination in employment (chapter on Hungary), In: Malcolm Sargeant (ed.). *The law on age discrimination in the EU,* Alphen aan den Rijn: Kluwer Law International, 2008. 135-158.

compatibility with the general equality clause. Its approaches range from low through heightened and then to strict scrutiny.[92] For example, the Rosenbladt ruling[93] suggests that there are almost no limits to the discretion of Member States in adopting mandatory retirement rules.[94]

At Member State level, we can observe *very different political hierarchies of inequalities*. To trace the competition or hierarchy of grounds it is worth taking a look at the structure of national equality bodies. A study by *Andrea Krizsan, Hege Skjeie and Judith Squires* identifies *four types of equality institutionalization regimes*. The first type, named as 'layered' characterises several countries, including Hungary, Romania, Slovenia, Denmark, Germany, France and Sweden. While these countries provide symmetrical institutional protection under their anti-discrimination bodies, they have a favoured one. Slovenia, Germany, France and Sweden privilege gender, while Hungary and Romania ethnicity. In the second, 'hierarchical' model gender-equality has a separate institutional structure and all the other inequality categories are bundled together on the assumption that they are similar in relevant aspects. Belgium, Finland and Spain follow this pattern. The third model, illustrated most consistently by Portugal, is a 'dual' model in which the two inequality grounds, gender and ethnicity, are placed on the top of the hierarchy, while other grounds such as disability or sexual orientation are in the back row.[95] Lastly, the 'integration' model represented by the United Kingdom and Norway stands on a strong affirmation of the need to address different inequalities in integrated ways under integrated institutions serving the various functions of anti-discrimination and political

[92] Croon, Johanna. Comparative Institutional Analysis, the European Court of Justice and the General Principle of Non-Discrimination-or-Alternative Tales on Equality Reasoning. *European Law Journal* 19.2 (2013): 153-173. 154-158.

[93] *Rosenbladt v Oellerking Gebäudereinigungsges mbH Case C-45/09*. The CJEU said that a German law allowing employers to agree with employees under a collective agreement that they must retire when they become entitled to a pension could be justified; and that the Government had in mind the legitimate aim of seeking to promote access to employment by means of better distribution of work between the generations.

[94] Schlachter, Monika. Mandatory Retirement and Age Discrimination under EU Law, *International Journal of Comparative Labour Law and Industrial Relations* 27.3 (2011): 287-299.

[95] Coelho Moreira, Teresa. *Igualdade e Não Discriminação–Estudos de Direito do Trabalho.* Coimbra: Almedina, 2013.

administrative bodies.[96] This segmentation reflects the fact that while the Member States´ legislation derives from the very same set of EU rules on non-discrimination, the de facto application is substantially influenced by national priorities and different levels of legal awareness, both of which is shaped by the unique cultural, historical and political context of the given states.

II. Old Age[97]

1. Age as a Distinctive Protected Characteristic

Within the territory of discrimination, age stands out for numerous reasons. First, age does not have a uniform definition; it is generally assumed to be an objective characteristic with a natural meaning and hence is *not defined* in national legislation.[98] In itself the difficulty of coining a uniformly applicable term is nothing exceptional; the construction of a legal concept for race, ethnic origin or disability puzzle the legislator just as much, however it does predict the complexity of the issue.

Secondly, often it proves to be a very *challenging task to identify* the groups against whom discrimination takes place and consequently to single out who the comparator shall be. Young entrants are often discriminated against but so are those near child-bearing age, as well as older workers. The question arises: at which other ages do we put the markers? At 45, 50, 60, 65?[99] Or *is every case special* and therefore to be individually

[96] Krizsan, Andrea, Skjeie, Hege, and Squires, Judith. The changing nature of European equality regimes: explaining convergence and variation. *Journal of International and Comparative Social Policy*, 30.1. (2014): 53-68. 54.

[97] This subchapter builds on the following article: Kajtár, Edit and Marhold, Franz: The Principle of Equality in the EU Charter of Fundamental Rights and Age Discrimination: Hungarian and Austrian Experiences. European *Labour Law Journal* 6.4 (2016): 321-342.

[98] *Developing Anti-Discrimination Law in Europe – the 25 EU Member States compared II.* http://migpolgroup.com/public/docs/21.DevelopingAntidiscrimination-Comparativeanalysis_II_EN_11.06.pdf (Last accessed: 15.11.2014) 20-24.

[99] Marhold, Franz. Differenzierung nach dem Alter. In: Tomandl, Theodor and Schrammel, Walter (eds.). *Wiener Beiträge zum Arbeits- und Sozialrecht, Band 49, Arbeitsrechtliche Diskriminierungsverbotet*, Wien: Braumüller, 2005. 83-92.

assessed? Colin Wolf was aged only 29 when his application to become fire fighter was refused because he was considered too old to start the professional training.[100] From this example, it becomes clear that neither the young nor the old(er) workers stand as a solid and standardised group. Age is a *flux category* and a *heterogeneous one.* The individuals the law aims to protect within the framework of age discrimination vary in many respects, most importantly, at least from our point of view, in terms of their income, health, labour market status and chances of employment.

The third crucial characteristic to be pointed out about age is that it *could affect everyone*. In fact *in surveys* age is the *most frequently cited ground* of discrimination.[101] This last point also substantiates the need for, and the timeliness of, research on age discrimination.

Despite the relevance of the subject, compared to other high-profile categories such as gender, race or religion, age discrimination is, as Helen Meenan puts it a '*late bloomer*'; it came to the forefront of academic and policy attention only in the last decade.[102] Even at the present time, unjustified negative treatment based on age is treated with certain *ambiguity* and scepticism.[103] Conceivably, this tendency is linked to the *social perception of age*, namely that it is something inevitable, that just happens and that the various employment law consequences attached to it are just as natural. *It feels* (and the choice of word is intentional here) somehow *fair* that young graduates earn less than their older colleagues, or that age and/or seniority brings extra privileges. It is also generally accepted that at a certain point, corresponding to the pension age workers transfer from the labour market to retirement.

In fact, the cited examples are not only perceived as normal but are also *widespread* in national practices. In other words, law responds to the social consensus; the common perceptions manifest in very concrete legal forms. One prominent

---

[100] Case C-229/08 *Colin Wolf vs. Stadt Frankfurt am Main* [2010]. On the contrary, in a similar case, C-416/13 *Mario Vital Pérez vs. Ayuntamiento de Oviedo* [2014], the CJEU found that a notice of competition setting a threshold of 30 years of age for local police was not justifiable.

[101] Meenan, Helen. Age Discrimination in Europe: Late Bloomer or Wall-flower? *Nordisk tidsskrift for menneskerettigheter, Nordic Journal of Human Rights* 25. 2(2007): 99-102.

[102] Meenan, 2007. 97-118.

[103] Bamforth–Malik–O'Cinneide, 2008. 1111-1114.

example on the 'young side of the spectrum' is the *contrat première embauche* (first job contract in France)[104] Work training contract in Italy offered reduced labour costs and normative advantages in forms of contrary to the general rules it offered liberal hiring rules and possibility of fixed term hiring freely or the *disregard of periods of employment* before a certain age for counting the periods of notice.[105] As the years pass by, seniority (especially in the public sector) is honoured with *automatic pay rise and career advancement* as well as *extra days of paid holiday*. Some of these additional rights and privileges (like the pay rise) express the appreciation of seniority-associated values such as loyalty or experience, while other rights (such as entitlement to extra days of paid holiday) aim to accommodate the special needs of older workers.[106] Getting closer to retirement age we find *fixed-term employment contract* for older workers. Finally, at the other end of the spectrum stand *compulsory retirement age and special provisions for pensioners*, i.e. the withdrawal of protective measures connected to the termination of employment. This latter category may include a provision stating that the employer is not obliged to give reason for the ordinary dismissal of pensioners, or a provision providing that, unlike non-pensioners who enjoy protection in certain circumstances (e.g. during illness), pensioners can be dismissed by ordinary dismissal at any time. Lack of entitlement to severance pay also falls under this category.

The above-mentioned social perception has another – related – implication. When compared to other forms of discrimination, age is often regarded as an *issue of minor importance*. In other words, the perception produces a social consensus that, in contrast to other, 'real' forms of unequal treatment (racial discrimination for instance), age discrimination should not be taken seriously. Again, the consensus takes legal forms and manifests in *less strict prohibitions and numerous exceptions from unlawful discrimination*. The law responds half-heartedly to the precariousness of the older workers' position on the

[104] The legislative proposal to make termination of contracts concluded with workers younger than 26 years of age was met with severe disapproval of the society. For details see: Laulom, Sylvaine: France. In: Sargeant, Malcolm (ed.). *The Law on Age Discrimination in the EU*. The Netherlands, Kluwer Law International, 2008. 55-79. 70.

[105] Case *C-555/07 Seda Küçükdeveci vs. Swedex GmbH & Co. KG*, [2010] ECR I-365. The threshold was set at 25.

[106] There is an assumption that with age recreation needs increase.

labour market and offers only limited protection. *Protected characteristics 'compete'* with one another at EU as well as national level. At EU level the CJEU applies diverse testing standards when checking on a law's compatibility with the general equality clause. Its approaches range from low through heightened, to strict scrutiny.[107] The level of scrutiny is visibly lowered when it comes to age discrimination, albeit the severity of this also depends on the nature of the measure (entrance to the labour market, exit from it or measure on the way).

Any discourse on age discrimination is *bound to be influenced by policy considerations* of various kinds, employment, population, economic and education policy to name but a few.[108] Let us examine age discrimination from a demographic-economic point of view. The issue has to be addressed against the 'age-quake' or 'silver tsunami' that is currently transforming both the society and the workforce of Europe.[109] *Demographic* changes such as the greying of the population caused by a low fertility rate and longer life expectancy, but education reform (i.e. more years spent in education), have a deep impact on the labour market. These factors drastically modify the active-inactive ratio of the population and question sustainability. In this respect anti-discriminatory provisions (and especially the exceptions allowed by law) function as tools for maintaining an economic equilibrium. These measures give a helping hand to the *employment policy* or to put it more mildly they respond to the needs of the latter. The exceptions permitted in age discrimination are meant to counter-balance economic tendencies (such as regression and high rates of youth unemployment).

The permissiveness can be viewed against the need for *inter-generational solidarity*, and the permanently and significantly *high unemployment rate of youngsters*. For instance, in

---

[107] Croon, 2013. 154-158.

[108] Barakonyi, Eszter. Időspolitika, és az idősek jogai az Európai Unióban. In: Szretykó, György (ed.). *Gazdasági kannibalizmus, hátrányos helyzetű csoportok a munkaerőpiacon és az emberi erőforrás menedzsment: A hátrányos helyzetű csoportok munkaerőpiaci helyzetének szociológiai és humánpolitikai aspektusai*. Pécs: Comenius Kft, 2012.; Barakonyi, Eszter. Aktív öregedési stratégiák a munkaügyben – a stratégiák kialakításának lehetséges szempontjai. In: Lőrincz, Ildikó (ed.). *XIII. Apáczai Napok 2009: Nemzetközi Tudományos Konferencia: Tanulmánykötet, Kreativitás és innováció – Álmodj, alkoss, újíts!* Győr: NYME Apáczai Csere János Kar, 2010. 406-416.; Glowacka, Marta. Altersdiskriminierung wegen längerer Vorrückungszeiträume am Beginn der Karriere? Alle guten Dinge sind drei Neuerliche Vorlage beim EuGH. *ZESAR*, 2016, 150-159.

[109] Brownell, Patricia and Kelly, James J. (eds.). *Ageism and Mistreatment of Older Workers, Current Reality, Future Solutions,* Dordrecht, Netherlands: Springer, 2013, xi.

the *Rosenbladt* case[110] a regulation of the German AGG[111] that allowed employers to agree with employees under a collective agreement that they must retire when they became entitled to a pension got the 'could be justified' approval of the CJEU. The measure was justified by a legitimate aim of the government, namely the promotion of access to employment by means of the 'better distribution of work between the generations'. Loosening protection for older employees is perceived as a magic tool to save the young entrants to the labour market - the 'lost' or 'scarred generation'.[112] On the other extreme we find the pro-age argument that the consequences of discrimination are also different for the different age groups. The same failed job application which is a missed opportunity for a young college graduate can very well mean the end of a working career for someone in his late 50s.[113] While solidarity is a *classic legal and societal value with especially heightened relevance* in certain law branches such as employment, social protection or human rights law, these arguments are flawed. Apart from professions with 'closed numbers' systems there is no direct connection between old workers exiting the labour market and youngsters entering it. The *lack of concrete statistical evidence* is a prevailing problem in relation to other aspects of age discrimination too. There is no statistical evidence to prove that lowering employment protection leads to more jobs for young or for old workers, and in fact for any kind of worker in general.

[110] Case *C-45/09. Rosenbladt vs. Oellerking Gebäudereinigungsges mbH.*

[111] Paragraph 10 of the General Law on Equal Treatment. *Allgemeines Gleichbehandlungsgesetz of 14 August 2006* (BGBl. 2006 I, 1897).

[112] Kajtár, Edit. Please, Climb that Tree! Some Thoughts on the Obstacles that Prevent Members of 'Vulnerable Groups' from Entering the Labour Market, *Pravni Vjesnik* 30.2. (2014): 15-40.

[113] Sargeant, Malcolm. *Age Discrimination in Employment,* Aldershot: Ashgate Gower Pub Co, 2007. 4.; Schlachter, Monika. Mandatory Retirement and Age Discrimination under EU Law. *The International Journal of Comparative Labour Law and Industrial Relations* 27. 3. (2011): 287-299.

2. Prohibition of Age Discrimination within the General System of Non-Discrimination

a. International and Regional Sources

At international level, the *Universal Declaration of Human Rights* does not include age amongst the protected grounds. There are references to the special needs of different age groups (childhood and old age), however age is not viewed as a problem of discrimination. In fact the following article captures the issue from a very different angle - that of *social protection*. Under Article 25(1) UDHR old age is perceived as an inevitable risk which triggers the individuals' right to social protection. It reads as follows:

> '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'

Neither the *ICCPR nor the ICESCR* mention *age discrimination.* Under the aegis of the *International Labour Organisation, Convention 111* targets discrimination in employment and occupation. Article 5 singles out age as a characteristic and allows *adoption of specific measures*, however age as a ground for prohibited discriminatory treatment is not tackled. It states:

> '[a]ny Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.'

Turning to the instruments of the *Council of Europe*; neither the ECHR nor its counterpart,[114] the (Revised) European Social Charter makes reference explicitly to prohibition of age discrimination in the employment field. The *Revised European Social Charter* states in Article E:

> '[t]he enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health association with a national minority, birth or other status.'

b. Protection against Discrimination: EU Measures

> '[w]hereas, in order to ensure equal treatment, it is important to combat every form of discrimination, including discrimination on grounds of sex, colour, race, opinions and beliefs, and whereas, in a spirit of solidarity, it is important to combat social exclusion…'

While age is not mentioned, the *open ended list* may include this characteristic as well. Discrimination based on age is not mentioned, however there are provisions related to the *'protection of children and adolescents'* (Title I 20-23) and 'elder persons' (Title I 25). The latter provides that:

> '[e]very person who has reached retirement age but who is not entitled to a pension or who does not have other means of subsistence, must be entitled to sufficient resources and to medical and social assistance specifically suited to his needs.'

The Community Charter is the legal instrument that, towards the end of the 1980s, established the major principles for the European labour law, yet it made no specific reference to the prohibition of age discrimination. Only the rights of 'elderly persons' (a term used by the document) to basic social help appeared.

[114] Evju, Stein. The European Social Charter. *Bulletin of Comparative Labour Relations*, Deventer Then The Hague- (2001): 19-32. 19.

Turning to primary law sources, noteworthy is *Article 3 TEU* on aims. This article states that the Union's aim is to promote peace, its values and the well-being of its peoples. The Union:

> 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the Child.'

The primary source for EU level action against age discrimination is provided by *Article 19 TFEU*:

> '(1) [w]ithout prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
> (2) By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.'

On a secondary law level the *Framework Directive* established a general framework for equal treatment in employment and occupation and extended the ground for protection to age. The Framework Directive is distinctive in many respects. Only with regard to age and not with other protected characteristics does the Framework Directive enable a wide range of exceptions to the principle of equal treatment. This creates an '*inherent vulnerability*' at the heart of the prohibition of age discrimination, and indicates that a careful balance has to be struck in order to ensure that the prohibition

is meaningful.[115] The justification provisions are of crucial importance. Article 6(1) on Justification of differences of treatment on grounds of age provides that:

> '[n]otwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.'

Amongst the differences of treatment three examples are highlighted:

> '(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
> (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment.
> (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.'

In practice a safeguard provision could be to require a *higher degree of proof of the proportionality* of treating an individual differently where that treatment is explicitly on the ground of age.

It is *unclear* if the term 'legitimate aims' is confined to public interest and social policy objectives or whether *private entrepreneurial aims* are included as well. [116]

Article 6(2) of the Directive provides a specific and *well-defined exception* to the principle of equal treatment:

> '[m]ember states may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of

[115] European Commission. *Age and Employment*. Luxembourg, Publications Office of the European Union. 2011. 5.
[116] European Commission, 2011. 5.

> different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.'

The CJEU applies a less rigorous proportionality test to mandatory retirement. The decisions in cases such as *Rosenbladt, Palacios de la Villa,*[117] and *Age Concern England*[118] suggest that there are almost no limits to the discretion of Member States in adopting mandatory retirement rules. *European Commission vs. Hungary* stands out as an exception. This case concerned the lowering of the retirement age for Hungarian judges, prosecutors and public notaries from 70 to 62 within a year. The CJEU found this drastic and swift change to be unlawful.[119] However, the outcome here was sui generis, it depend more on the particularities of the case.

Monika Schlachter points out that the general labour market policy of Member States will probably continue to be exempt from strict judicial scrutiny when it comes to long-standing, common features of employment law. On the other hand, in relation to rules for specific occupations or specific age-related entitlements, the margin of discretion left to the Member States is narrowed down significantly.[120]

The CJEU judgement which received the most attention from the scientific community was undoubtedly the one delivered in the *Mangold* case.[121] Here, the German law contained a requirement of an objective justification for the conclusion of fixed-term contracts, however if the employee has reached the age of 52, this objective justification was no longer required, unless there was a close connection with an earlier

[117] Case *C–411/05, Palacios de la Villa vs. Cortefiel Servicios SA* [2007] ECR I-8531.
[118] Case *C-388/07, The Incorporated Trustees of the National Council on Ageing (Age Concern England) vs. Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I.-1569.
[119] A new law adopted by the Hungarian Parliament on 11 March 2013 lowered the retirement age for judges, prosecutors and notaries to 65 over a period of 10 years, rather than lowering it to 62 over one year, as before. For analysis of the case see: Gyulavári, Tamás and Hős, Nikolett. Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts. *Industrial Law Journal* 42. 3. (2013): 289-297.
[120] Schlachter, 2011. 287-299.; See also: Kiss, György. A Dominica Petersen ügy tanulságai a kor szerinti diszkrimináció versus igazolt nem egyenlő bánásmód körében - hazai összefüggésekkel *Pécsi Munkajogi Közlemények* 3.1. (2010): 105-118.
[121] Case *C-144/04, Mangold vs. Helm* [2005] ECR I-9981.

contract of employment of indefinite duration concluded with the same employer.[122] The purpose of this derogation was to *promote the vocational integration of unemployed older workers*, insofar as they encountered considerable difficulties in finding work. The applicant, 56-year-old Mr. Mangold, argued that his fixed-term contract concluded in line with the national law was incompatible with both the Fixed-term Work Directive and the Framework Directive (for the latter the implementation period had not yet elapsed when the dispute arose). The CJEU found the national provision to be compatible with the Fixed-term Work Directive. Regarding the Framework Directive it arrived to the opposite conclusion; it ruled that that Community law - in particular Article 6(1) of Directive 2000/78 - precludes national legislation such as the one in question. The CJEU also pointed out that it was for the national courts to ensure the full implementation of the general principle of non-discrimination on the ground of age by refraining from applying any incompatible provision of national legislation, even if the implementation period for the Directive had not yet elapsed.

At least five major consequences follow from the *Mangold* decision. The importance of the first one goes well beyond the field of age discrimination. By allowing for the horizontal direct effect of a not yet implemented Directive (i.e. enabling private persons to rely on the Directives' regulations) it *called a consistent, or, more precisely, a previously consistent, doctrine into question*. Analysis of this revolutionary aspect would lead us to territories not covered by this research; therefore we direct our attention to the other consequences.

The major achievement of the Mangold decision is the elevation of the prohibition of age discrimination *to constitutional Community law status.* The Court stated that 'the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law'.[123] This declaration, however, was not an unexpected turn; previously the CJEU took the same road in connection with gender

[122] Section 14 para. 3 TzBfG.

[123] Case *C-144/04, Mangold vs. Helm* [2005] ECR I-9981 para 75. See this view reinforced in *C-555/07 Küçükdeveci,* para. 21. and *C-447*/09 *Prigge and others* vs. Deutsche Lufthansa AG [2011] ECR I-8003. para. 38.

discrimination.[124] Also, at an even broader level human rights in general have been recognised as general principles of Community law from as early as the 1960s.[125] Thirdly, this case is of particular relevance because it *raised high expectations* concerning the advancement of other grounds of discrimination. The fourth major implication of the decision is the construction of *a bridge between the general principle of discrimination* on the one hand *and age discrimination* on the other. Last but certainly not least, the Mangold decision also *constructed a passage between the prohibition of discrimination in EU primary and secondary legislation (specifically the Framework Directive) and the prohibition of age discrimination in the Charter*. This leads us to the next subchapter.

c. Protection against Age Discrimination within the Charter of Fundamental Rights of the European Union

Article 21 itemises the prohibited grounds of discrimination, including age. It states:

> '[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
> (2) Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.'

Article 21(1) contains a very lengthy list – one of 18 protected characteristics including age. In contrast to this, in the TFEU – besides nationality – eight grounds of

[124] The CJEU declared that the general principle of non-discrimination in respect of gender as established in Directive 76/207/EEC belongs to the fundamental rights of Community law. It has to be noted, though, that the applicability at the national level was restricted to cases when specific Community law or national law concerning the non-discrimination of gender existed. See: Marlene Schmidt: The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's Mangold Judgment. *German Law Journal,* 7. 5. (2006): 505-524. 518.

[125] See: *Case C-29/69*, *Erich Stauder vs. City of Ulm - Sozialamt* [1969] ECR 419, where the CJEU first states that it ensures the respect of fundamental human rights enshrined in the general principles of Community law.

prohibited discrimination are listed: sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation.

Article 25 is relevant for obvious reasons, as it covers an age-related issue - the rights of the elderly:

> '[t]he Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.'

Article 15(1) recognises the right to engage in work. This article was cited, for example, in the *Fuchs* decision, in which the CJEU pointed out that the Member States may not frustrate the prohibition of discrimination on grounds of age set out in the Framework Directive. That prohibition must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights of the European Union.[126]

Finally, Article 28 entitled 'Right of collective bargaining and action' states:

> '[w]orkers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.'

This article is highly relevant, because collective agreements very often contain provisions connected to age, such as jubilee money, age-related automatic pay rises or automatic retirement provisions (see e.g. *Rosenbladt, Palacios de la Villa*).

The Charter was of assistance in age discrimination cases at the institutions of the Community itself. The European Ombudsman launched an inquiry into recruitment in all Community institutions, bodies, and decentralised agencies. The process resulted in the abolishment of age discrimination in recruitment to Community institutions and bodies on the basis of Article 21(1) of the Charter.[127]

[126] Case C-156/10 and C-160/10 *Fuchs and Köhler* ECR [2011] *I-06919* para. 62.
[127] OI/2/2001/(BB)OV of 27.6. 2002.

Already before its official entering into force on 1 December 2001, the Charter served as *an intense stimulus* for European employment law cases.[128] The CJEU has made reference to the Charter on several occasions (the *Mangold* case being the most prominent example). Amongst the cases concerning discrimination against young workers *Kücükdeveci* is of particular importance. On the one hand, the decision may be arguably read as one that underlines the potential significance of the Charter; as a *benchmark* against which national legislation that falls within the scope of EU law may be measured.[129] However, we cannot help but notice that the CJEU's reference to the Charter is rather brief and unelaborated. The Charter *appears, but only as one of the law sources* (as an extra 'support' for the main argument, so to speak) in HK Danmark[130] and in the aforementioned *Vital Pérez* case as well. In the latter the CJEU stated:

> '[i]t follows that, when it is ruling on a request for a preliminary ruling concerning
> the interpretation of the general principle of non-discrimination on grounds of age, as enshrined in Article 21 of the Charter, and the provisions of Directive 2000/78, in proceedings involving an individual and a public administrative body, the Court examines the question solely in the light of that directive.'[131]

On other occasions, the Charter was assigned *a more important role* and was treated as an autonomous legal source. For instance, in the *Fuchs* case,[132] the CJEU disregarded other international documents (in particular the ECHR and the related case law) or common constitutional traditions of the Member States; it even referred to an article of the Charter without the national courts request. The citation of the Charter in this case

[128] Berke, Gyula. Az Európai Unió Alapjogi Chartájának alkalmazása munkajogi (szociálpolitikai) ügyekben. *Lex HR Munkajog*, 2013/11. (2013): 8-14.
[129] Murphy, Cian. EU Charter of Fundamental Rights after Kücükdeveci, *Human Rights in Ireland* [academic blog] Jun 7, 2010 http://humanrights.ie/civil-liberties/eu-charter-of-fundamental-rights-after-kucukdeveci/ (Last accessed 22. 11.2014).
[130] Case *C-476/11 HK Danmark* (acting on behalf of Kristensen) *vs. Experian A/S* (Beskæftigelsesministeriet intervening) [2013]. The case concerned a Danish occupational pension scheme, where the contribution paid by the employer was corresponding to the age of the employee.
[131] Case C-416/13 *Mario Vital Pérez vs. Ayuntamiento de Oviedo* [2014] para. 25; See also Case C-132/11, *Tyrolean Airways Tiroler Luftfahrt* [2012] para. 21 to 23.
[132] Case C-156/10 and C-160/10 *Fuchs and Köhler* ECR [2011] *I-06919*. The case concerned the compatibility of a German provincial rule with EU law, which provided the compulsory retirement of prosecutors on reaching the age of 65.

did not directly follow from the provisions of the Directive either.[133] 'It seems from this technique of interpretation that the *Court can refer at any time to* the fundamental rights and freedoms set out in *the Charter in order to support its main argument*.'[134]

d. Age Discrimination at National Level

Turning to national legislation and practice, it is to be noted that the legal protection against different forms of discrimination is a *key pillar of the constitutional architecture of contemporary liberal democracies*.[135] All EU Member States (except, obviously, the UK for it lacks a written constitution) have included the general principle of equal treatment or specific grounds of discrimination either in their *Constitutions and/or in their national anti-discrimination* legislation. *Article XV of* Fundamental Law of Hungary states:

> '[e]veryone shall be equal before the law. Every person shall have legal capacity.
> (2) Hungary shall guarantee the fundamental rights to everyone without discrimination based on any ground such as race, colour, sex, disability, language, religion, political or any other opinion, ethnic or social origin, wealth, birth or any other circumstance whatsoever.
> (3) Women and men shall have equal rights.
> (4) Hungary shall promote equal opportunities and social convergence by means of introducing special measures.
> (5) Hungary shall introduce specific measures to protect families, children, women, the elderly and the disabled.'

When it comes to an explicit constitutional reference to the prohibition of discrimination on the ground of age one encounters a similar situation to the one

133 Hős, Nikolett. The Role of General Principles and the EU Charter of Fundamental Rights in the Case Law of the European Court of Justice in Relation to Age Discrimination, *Hungarian Labour Law E-Journal*, 1.1. (2014): 48-72.62, 67.
134 *The evolution of the case law of the Court of Justice of the European Union on Directive 2000/43/EC and Directive 2000/78/EC (2012) European Commission Directorate-General for Justice*, 5. Available at: http://www.non-discrimination.net/content/media/Evolution%20and%20Impact%20EN%20FINAL.pdf Cited by: Hős, Nikolett, 2014, 67.
135 Bamforth, Nicholas. Conceptions of Anti-Discrimination Law, *Oxford Journal of Legal Studies* 24. 4. (2004): 693-716.

described before in relation to the examined international documents. Only the *Finnish* and the *Portuguese Constitutions* contain an *expressis verbis* provision on age discrimination. Age, on the other hand, is listed in several national anti-discrimination legislations.

In relation to age discrimination, based on the authorisation of the Framework Directive the Member States have adopted *different systems and* permit different *degrees of justification of direct discrimination*. The legal landscape is diverse, and the systems can be categorised under the following sub-clusters: (1) the system referring to genuine and determining occupational requirement (e.g. Hungary); the open-ended list (e.g. UK, Portugal); literal transposition (e.g. Austria, Greece); the open list with examples (e.g. France, Germany, Italy); and finally the closed list (e.g. Bulgaria, Croatia, Poland, Spain). Amongst the various models, *open or exemplar systems of justification are predominant*. The above cited section 10 of the German AGG, for instance, sets out a broad list of legitimate aims including six items. Only a minority of Member States opted for a closed list. Most of the Member States apply the exemptions in relation to occupational pension schemes as permitted by Article 6(2).[136]

In Hungary Article 22(1) of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities refers to 'genuine and determining occupational requirement', the differentiation must be proportionate, justified by the characteristics or nature of the job and based on all relevant and legitimate terms and conditions that may be taken into consideration in the course of recruitment. As we pointed out earlier the CJEU loosens the proportionality test to mandatory retirement. While the mainstream case law (*Rosenbladt, Palacios de la Villa, Age Concern England*) gives the impression, that there are almost no limits to the discretion of Member States, *European Commission vs. Hungary* stands out as an exception. This case concerned the lowering of the retirement age for Hungarian judges, prosecutors and public notaries from 70 to 62 within a year. The CJEU found this drastic and swift change unlawful. A new law adopted by the Hungarian Parliament on 11 March 2013 lowered the retirement age for

[136] European Commission, 2011 17-21.

judges, prosecutors and notaries to 65 over a period of 10 years, rather than lowering it to 62 over one year, as before.[137]

Age is a decisive factor in shaping other aspects of the employment relationship too. In the public sector *seniority is rewarded* with automatic pay rises and career advancement; the length of paid holidays increase with age in both the private and public sectors. However, when it comes to the termination of the employment relationship of *pensioners* the legislator takes a rather different approach. *Usual protective measures are withdrawn*, i.e. the employer is not obliged to give a reason for the ordinary dismissal, and pensioners are not entitled to severance pay.[138]

III. Notification Obligations Regarding Pregnancy[139]

Many times extreme reactions are observed when talking about regulations on prohibition of termination for expectant women. People on one end of the spectrum wrap the expectant woman in halo and people on the other end of the spectrum regard her to be a millstone for employers. Even the terminology used by analysts says a lot.

> Be with child (in literal Hungarian: be in a blessed state)?
> Gravida (the Hungarian word is the mirror translation of the original Latin)?
> Expectancy?

The employee is expecting a baby and the employer a good, resilient and reliable work force. The two does not exclude each other.

[137] For analysis of the case see: Gyulavári, Tamás and Hős, Nikolett, Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts. *Industrial Law Journal*, 42. 3. (2013): 289-297.

[138] For examples of age-based differentiation in Hungarian employment law see: Kovács, Erika and Vinković, Mario. Are older workers second-class? - The case of Croatia and Hungary. In: Drinóczi, Timea et al. (eds.). *Contemporary Legal Challenges: EU–Hungary–Croatia*, Pécs: Faculty of Law Pécs: Faculty of Law Osijek, 2012. 671-695.

[139] This part builds on the following previous works of the author: Kajtár, Edit. Miért nem szólt?: A várandósságra vonatkozó tájékoztatási kötelezettségről munkajogi szemszögből. *Infokommunikáció és Jog* 11:(58) 92-96. (2014); Kajtár, Edit and Zeller, Judit: A várandósságra vonatkozó tájékoztatási kötelezettségről az Alkotmánybíróság határozata nyomán. *Közjogi Szemle* 7:(4) 20-26. (2014).

1. Subsection (5) of Section 65 of the Labour Code

Several personality rights are affected by the regulation on the data of an employee's plans to have children, pregnancy and any disclosure obligation to that effect. Especially important are *the right to data protection, human dignity and equal treatment*. The problem may be approached from the aspects of constitutional law, labour law, family law, data protection. This chapter focuses primarily on the labour law aspects. The subject became especially current with Decision No. 17/2014 (V.30.) of the Hungarian Constitutional Court. The respective article of the Labour Code[140] affected by the decision of the Constitutional Court reads as follows:

> 'The employer may not terminate the employment by notice:
> during pregnancy;
> during maternity leave;
> during a leave of absence without pay taken for caring for a child (Section 128 and 130);
> during any period of actual volunteer reserve military service; and
> in the case of women, while receiving treatment related to a human reproduction procedure, for up to six months from the beginning of such treatment.
> …
> The provisions of Points a) and e) of Paragraph (3) hereof shall apply only if the employee has informed the employer thereof before the notice was given.'

Decision No. 17/2014 (V.30.) of the Constitutional Court *annulled the text*

> 'before the notice was given'

The regulation is ineffective since 31 May 2014. As the result of the adoption of the Constitutional Court decision, expectant women and women participating in human reproduction procedure (commonly known as IVF) are only obliged to inform the employer of their protected status upon being given the notice for termination.

[140] Subsection (3) and (5) of Section 65 LC

2. Protection of Motherhood in Labour Law

Several norms of labour law are *sensitive to the special needs* of the so-called delicate or vulnerable employees. These classic, protective regulations appeared early in the (universal) history of this branch of law. Protective norms apply to age (young employees, employees close to retirement) pregnancy, motherhood/fatherhood and disability.[141] Rules protecting young (under 18) employees regulate the difficulty of the work, more advantageous prescription apply – compared to employees over 18 – in terms of working hours, breaks at work, weekly rest times, vacation.

There is also *a long tradition* of rules for pregnant women and women with small children (see: prohibition of night shift, prohibition of work with potentially adverse health effects, special vacation etc.). *Increased protection* is necessary for expectant women (whether the pregnancy is spontaneous or the result of IVF procedure) due to their altered physical and psychological status during and after pregnancy.[142] The situation of women participating in IVF programs is especially sensitive and requires careful approach.[143] Termination protection during pregnancy means, on the one hand, that that the employment may not be terminated by notice. On the other hand, it means that after maternity leave the mother may return to the same position or a same quality position. In addition, her salary shall be modified in accordance with any upgrade made during her absence. The rights deriving from the employment (e.g. length of service for pension, training opportunities) cannot suffer.[144] The regulations on pregnancy

[141] Lehoczkyné Kollonay, Csilla: Work and family issues in the transitional countries of Central and Eastern Europe. The case of Hungary. In: Conaghan, Joanne and Rittich Kerry (eds.). *Labour Law, Work, and Family: Critical and Comparative Perspectives.* Oxford: Oxford University Press, 2005. 289-315., Lehoczkyné, Kollonay Csilla. The significance of existing EU sex equality law for women in the new Member States.: The case of Hungary. *Maastricht Journal of European And Comparative Law* 12:(4) 467-493. (2005).

[142] Lőrincsikné Lajkó, Dóra. A munkáltatók munkajogi és szociális jogi kötelezettségei a terhes munkavállalók viszonylatában. *Munkaügyi Szemle*, 51.1 (2006): 46–50.

[143] Zeller, Judit. A reprodukciós szabadságról magyar és strasbourgi szemszögből. *Jura,* 19.2 (2013): 150–155.

[144] Gyulavári,Tamás. Az egyenlő bánásmód elvének dogmatikai és gyakorlati jelentősége. In: Kiss, György (ed.). *Az Európai Unió munkajoga.* Budapest: 2001, Osiris, 55–168.; Lehoczkyné Kollonay, Csilla: Kezdeti lépések a foglalkoztatási diszkrimináció bírósági gyakorlatában. *Fundamentum*, 2.4 (1998): 91–95.

protection are of special importance, because, among other consequences, they bear relevance on the career and life plans of women.[145]

The *reason for the protection* is that the temporary unavailability of the employee to perform the main obligation of the employment (working) is without any fault on the employee' part and it shall not result in the employees' losing their jobs and that the fear of such result should not influence women in their decision to have children, at the same time it excludes those dangers and adverse effects a termination may have on the physical and psychological status of women with children.[146]

Regulation on prohibition on pre-birth dismissal has more than eight decades of history in Hungarian law.[147] *Act No. V of 1928* already included provisions for protecting children, youth and women employed in industry and some other companies with respect to the prohibition of termination. Interestingly the knowledge of the employer about the pregnancy and providing information on the pregnancy was also part of the text of Article 8.[148] Jumping ahead in time the labour code immediately preceding this Labour Code (Act No. XXII of 1992; hereinafter: *previous Labour Code*) prescribed a prohibition of dismissal during pregnancy and the medical treatment for human reproduction procedures.[149]

Without these protective measures we may not talk about *'fair employment'*. At the same time the prohibition is not unlimited, it only blocks unilateral termination related to the behaviour of the employee with respect to employment, the employee's abilities and the reasons related to the operations of the employer, all in employments concluded for indefinite term. The employment may be terminated through other

---

[145] Rab, Henriett, and Zaccaria, Márton Leó. Az Alkotmánybíróság 17/2014. (V. 30.) számú határozatának megítélése a munkajog aktuális tendenciáit meghatározó munkaerő-piaci szempontokra figyelemmel. *Miskolci Jogi Szemle* 10.1 (2015): 52-69. 69.

[146] Constitutional Court decision No. 17/2014 (V.30.) Par. 36

[147] Göndör, Éva. A nőket érintő felmondási tilalmak munkajogi fejlődéstörténete. In: Horváth, István ed. *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 101-117. 111.

[148] 'Termination of employment during the period of six weeks before and after giving birth is ineffective if upon termination the employer was aware of the pregnancy or birth or if the woman – in the case of oral termination – immediately, in the case of termination by other means within eight days from disclosure informs the employer …'.

[149] Point d, Subsection (1) of Section 90 of the previous Labour Code.

ways, like mutual decision or immediate termination. The Constitutional Court decision says that the employment can be terminated without reasoning during the probation period even if the employee is protected. My opinion is that this case cannot be assessed so unequivocally. Even though reasoning is not accessory to probation period, the dismissal of a pregnant women might raise the question of unlawful discrimination.

Besides the well-established norms, we can also find elements that clearly carry a decrease in the level of protection. Such is the above described rule – ruled recently by the court to be against the Fundamental Law of Hungary – according to which *pregnancy and receiving treatment in human reproduction procedure* only results in prohibition of dismissal if the relevant person informs the employer beforehand. Modern labour law provides equal protection to women receiving treatment for human reproduction procedure and expectant women. The rules are implemented through prohibition, limitation and exemption and encompass working conditions, working hours, position – a temporary modification of which might be necessary – safety, exclusion of working conditions with potentially adverse health effects, maternity leave, protection against termination etc. I especially underline prohibition of dismissal as this is the one that fundamentally affects possibilities of pregnant women and women with small children to remain in the labour market. Setting up prohibitions and limitations are the strongest tools to protect delicate employees. Prohibition of dismissal serves as an absolute barrier to an employer's opportunities to terminate the employment as it is the law that prohibits the dismissal of employees of certain status, situation. This extremely strong, objective rule was jeopardized by the Labour Code, which only allowed protection for women against dismissal if they informed the employer of their situation (pregnancy, IVF program) before the termination was disclosed to them.

> 'The provisions of Points a) and e) of Paragraph (3) hereof shall apply only if the employee has informed the employer thereof before the notice was given.'[150]

[150] Subsection (5) of Section 65 LC

Even though Subsection (1) of Section 85 allows for the parties to deviate in the employment agreement in favour of the employee, as a rule of thumb the legal regulation set out disclosure as a precondition for the prohibition to apply.

3. Data Protection Related to Starting a Family: Hungarian Practice and Examples from Abroad

To link the prohibition of termination to prior notification raises serious questions on data protection. Personal data about being pregnant or participating in an IVF program are health related data and as such they are regarded as especially sensitive data and their protection requires a more prudent approach.[151]

According to a *study prepared by the International Labour Organization in 2013* – from among the 141 countries where data was available – the legislation of 47 countries included prohibition either explicitly or implicitly to perform a pregnancy test (e.g.: *Albania, Argentina, Brazil, Denmark, France, Portugal, Romania, Serbia, Slovakia, Slovenia*). *Mongolian* law prohibits to pose questions on pregnancy, while in *Slovakia and Slovenia* the prohibition regards obtaining information pertaining to pregnancy.[152]

Critical situation is the frequent question at *job interviews*:

'When do you want to have children?'

The requirement on the prohibition of discrimination shall (should) be observed with respect to questions asked at job interviews. However asking questions that breach the requirement of equal treatment does not in itself substantiate direct discrimination. The question asked at the job interview only breach the requirement of equal treatment, if as a result of it the employee is treated adversely compared to a peer person or group due to characteristics whether perceived or real as set out in *Section 8 of the Equal*

[151] Arany-Tóth, Mariann. *A munkavállalók személyes adatainak védelme a magyar munkajogban*. Szeged: Bába Kiadó, 2008. 72–74.

[152] Addati, Laura, Cassirer, Naomi, and Gilchris, Katherine. *Maternity and paternity at work: Law and practice across the world.* http://www.ilo.int/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_242615.pdf (Last accessed at: 05. 01.2014).

Treatment Act. Obvious case of adverse treatment is if the employer does not establish employment with the candidate due to the answer given to the question breaching equal treatment or due to the refusal to answer such question. Adversity may appear by employing the candidate with less favourable conditions (e.g. for a definite term, by prescribing probation period while other candidates are employed for indefinite term, without probation period). The questions that cannot be asked, cannot be listed exhaustively. Mostly questions directed at personal life, partnership, family relations, planned family may result in direct discrimination. Such questions refer to the existence or lack of the protected characteristics set out in Section 8 of the Equal Treatment Act or may directly be linked to any of the protected characteristics.[153] The strength of protection is substantiated by the fact that to questions, such as

- 'Do you want children?'
- 'Are you pregnant?'

the candidate is entitled to give incorrect answers (i.e. lie). We can also see similar legal approach in the *Austrian law*.

4. Notification, Cooperation, Proper Exercise of Rights

Thus the legislator has to decide whether the employer has to be informed about pregnancy/participation in IVF procedure and if yes, when. It is important to see that when mutual (!) information obligation is prescribed by the Labour Code – whether generally or with respect to a specific topic – *the intention behind it is not the invasion of privacy*. Prescription of notification may be justified by the interest of the employer, the employee and third parties (in this case the child to be born). Notification is essential for exercising and performing certain employer's and employee's rights. Prohibitions (e.g. night shifts, heavy physical work) and benefits (e.g. maximizing working hours, tax

[153] Opinion No. 1/2007 TT of the Equal Treatment Advisory Board – Egyenlő Bánásmód Tanácsadó Testület – on the questions employers may ask at job interviews.

reliefs) can only be implemented, if the employee notifies the employer. Measures corresponding health status (transfer to appropriate position, modification of position) is only possible if information is given. Moreover, during employment handling of data on pregnancy is justified by the management of substitution during the employee's maternity leave.

Stating that the employee does not have to notify her employer of her pregnancy at all contradicts the purpose of employment (work for consideration) and is against the principles of labour law (cooperation, proper exercise of rights) and last but not least, is unrealistic. *The question is not whether notification should be given,* rather *when, and with what consequences*. Answering to the question of when, *job candidates* cannot be obligated to provide information, apart from a very limited number of positions (e.g. the employee would be subject to radiation and thus the health of the foetus justify information needs) asking questions about family planning and pregnancy is unlawful. During the employment, notification obligation and any question to that effect shall be related to the exercising and performing of specific rights and obligations and shall observe the general requirements of data protection.[154] Pregnancy, like all other *personal data* of the employee shall be handled lawfully and properly and only for the purposes directly related to employment. Instead of detailing these principles I would like to point to the requirements of cooperation and proper exercise of rights which shall also be implemented with respect to data on pregnancy.

It is *prohibited to require the employee to test for pregnancy* or to provide a certificate for a test for pregnancy, except if it is required by law for the examination and evaluation of job suitability. The concrete right establishing the notification obligation is the exercising of the right of termination by the employer, which activates a prohibition of termination situation. The condition for making use of the protection is providing information. In my opinion with the exception of this special case for the legislator the

[154] See: Act No. CXII of 2011 on Informational Self-determination Right and on the Freedom of Information, EU data protection directives, ILO practical code, European Convention on Human Rights, etc.

most practical date to set is the one when the employee has to provide the notification *the latest*.

We can find several examples to this *in the national legislations*. Notification obligation for maternity leave is regulated e.g. in *Croatia* where the employee has to inform the employer that she would like to start maternity leave at the earliest possible date but no later than one month before the start of the maternity leave. In *Belgium* this date is six weeks before expected to give birth the latest (the date shall be verified by a medical certificate). In *Colombia* the date of the notification is not regulated, however its content is. The employee has to indicate the expected date of giving birth, the commencement date of the maternity leave and a medical certificate shall also be provided.[155]

5. Retroactive Protection

In many cases the existence of prohibition of termination is not clear to the employer. In these cases a solution respecting privacy can be for the employee to notify the employer upon receiving the termination (but not previously). Such a regulation can be found in the *Austrian* law, where the prohibition of termination exists in the case of pregnancy notified within five days after the receipt of the termination.[156]

At the same time, it is possible that the expectant woman is unaware of her condition when the termination is received. The question is, whether the protection can be implemented retroactively as well. According to *previous judicial practice* a woman may refer to the prohibition of termination even if upon receiving the termination she was unaware of her condition. There are two aspects to this rule. On the one hand, it is very detrimental to the employer as the reason for the termination is a condition they could not have calculated with. On the other hand however, if we consider the aim and the function of this legal instrument (that is the increased protection of pregnant women

[155] Addati - Cassirer – Gilchrist. 42-43.
[156] http://www.jusline.at/Mutterschutzgesetz_%28MSchG%29.html (Last accessed at: 05. 01.2014).

and the children) it is only the pregnancy that is relevant, hence it is completely irrelevant who and when became aware of the pregnancy. Previous judicial practice extended the protection to this effect.

The application of law based on Section 90 of the previous Labour Code from 1992 regarded the prohibition of termination with respect to pregnancy upon announcing ordinary termination (in the terminology of the current labour code: termination) to be of

'objective nature'

In a concrete case the defendant employer filed a request for review because in its opinion the court's decision on the ordinary termination being unlawful due to prohibition of dismissal was not substantiated because of the employee's deliberate concealment of her pregnancy. The conduct of the claimant did not meet the requirement of good faith and fairness, she breached her obligation of cooperation and exercised her rights unlawfully. The Supreme Court found no ground for ordering review, in its opinion the defendant employer correctly referred to the obligation of the employee to cooperate with the employer in good faith and fairness during employment, the deliberate denial of a material fact from the prospective of the prohibition of dismissal does not comply with such requirements. However in the given case the proceeding courts concluded correctly that the ordinary termination is *unlawful* on the basis of the prohibition of termination due to the claimant's pregnancy.

In a concrete case the early (six-week) pregnancy was determined by the doctor five days after the ordinary termination. The claimant denied the acceptance of the ordinary termination, thus the employer mailed it per post. The Curia of Hungary decided that the termination breached the prohibition and thus was unlawful. Further the court elaborated that the pregnancy existed both at the time of denying acceptance and upon postal delivery and during the proceeding there was no evidence that the claimant had been aware of the pregnancy before the medical examination[157]. If the

[157] BH2004. 521.

claimant employee was unaware of her pregnancy upon the employer's ordinary termination, then she may request lawfully the determination of the unlawfulness of the termination in the procedure of the first instance based on the prohibition of termination. In the opinion of the court pregnancy existing at the disclosure of the (ordinary) termination of the employer give ground to the prohibition of dismissal even without of the knowledge of the employee and the employer.[158] Since the Constitutional Court annulled the text

'before the disclosure of the termination'

the above rule worked out by the judicial practice can be applied unambiguously again.

6. EU and International Legislation on Prohibition of Termination with Respect to Pregnant Women

Zaccaria Márton Leó emphasises, employment segregation of women hardly ever disappears, yet the CJEU regards it only partly, in most cases on weighing the situation in human resource market.[159] It is expedient to review the EU and international legislation below from more than one aspect. On the one hand because the Hungarian legislator and law practitioners are also bound by them and on the other hand they reflect on the purpose of the protective rule and also because they make it clear that the different norms ensure different level of protection.

The EU Charter of Fundamental Rights declares that the family shall enjoy legal, economic and social protection.

[158] EBH2005. 1242.

[159] Zaccaria, Márton Leó: The new challenges of equal employment in the European Union. *Procedia - Social and Behavioral Sciences* 62 (2012) 1355-1359, 1358. See also: Zaccaria, Márton Leó. Néhány gondolat a női munkavállalók közösségi szintű védelméről. *Debreceni Jogi Műhely* 7.1 (2010): 9. ; Zaccaria, Márton Leó. Az egyenlő bánásmód elvének érvényesülése a munkajog területén a magyar joggyakorlatban. *Miskolci Jogi Szemle* 9.2 (2014):127-144.

> 'To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity.'[160]

Council Directive 92/85/EEC obliges the member states to ensure protection against termination during the whole period of pregnancy, however it acknowledges the legislators' freedom for special cases irrespective of the condition of the employees.

> 'Member States shall take the necessary measures to prohibit the dismissal of workers, in the spirit of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent.' [161]

For the purposes of the Directive pregnant worker shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice. The purpose of the Directive set out in Section 1 is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.

On regional level *the European Social Charter* sets out prohibition of dismissal for the period of maternity leave: the Contracting Parties undertake:

> '(…) to consider it as unlawful for an employer to give a woman notice of dismissal during her absence on maternity leave or to give her notice of dismissal at such a time that the notice would expire during such absence.'[162]

The protection of motherhood has been in a prominent place on the agenda of the *ILO* from the beginning. The International Labour Organization adopted the Maternity Protection *Convention No. 3* as early as in 1919. During the last hundred years international labour law norms and standards have been developing more and more

[160] EU Charter of Fundamental Rights Subsections (1)-(2) of Section 33.
[161] Subsection (1) of Section 10 Council Directive 92/85/EEC.
[162] Section 8 of the European Social Charter.

towards inclusion, extending the protection to more and more working women, irrespective of the status of the employee or the nature of the work.

Convention No. 183 of the ILO prohibits employers to terminate the employment of a woman during pregnancy or absence on maternity leave, or during a period following her return to work – within a period determined by the member states – on grounds related to pregnancy, childbirth and its consequences, or nursing. Pursuant to Section 8 entitled: employment protection and non-discrimination:

> '[t]t shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing.'

Thus it shall rest on the employer to prove that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing.

Section 9 prescribes prohibition on pregnancy tests:

> '[e]ach Member shall adopt appropriate measures to ensure that maternity does not constitute a source of discrimination in employment, including - notwithstanding Article 2, paragraph 1 - access to employment.
> (2) Measures referred to in the preceding paragraph shall include a prohibition from requiring a test for pregnancy or a certificate of such a test when a woman is applying for employment, except where required by national laws or regulations in respect of work that is: (a) prohibited or restricted for pregnant or nursing women under national laws or regulations; or (b) where there is a recognized or significant risk to the health of the woman and child.'

We can see that every piece of legislation provides special protection to pregnant employees.[163] However, the *level of protection is not identical*. It is important to point out, that the prescriptions of the Hungarian Labour Code – following the decision of the Constitutional Court – complies profoundly with the international end EU

[163] Kovács, Erika and Hießl, Christina. 92/85/EEC: Maternity Protection, In: Schlachter, Monika (ed.). *EU Labour Law – A Commentary*. Kluwer Law International, 2015. 283-320.

regulation and even goes beyond it. In the case of employment for indefinite term the Labour Code excludes the possibility of termination by the employer absolutely irrespective of the termination being related to pregnancy or completely independent thereof.

7. Constitutional Court Decision No 17/2014. (V. 30.)

After examining the subject from all aspects let us look at the Constitutional Court decision itself. Following a *motion filed on 14 December 2012 by the Commissioner for Fundamental Rights*, on 27 May 2014 the Constitutional Court ruled unanimously in its decision that the above referred prescription of the Labour Code about prior notification obligation is against the Fundamental Law of Hungary and thus was annulled. The decision comprised of 48 (with the minority report 53) points refers to previous decisions examining personal rights and the different aspects of the protection of motherhood and elaborates in detail the internal and external legislation on the protection of motherhood and human dignity, moreover the termination scheme set out in the Labour Code.

Hungary protects the family as the basis of the survival of the nation and encourages the commitment to have children.[164] Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.[165]

Pursuant to the Fundamental Law of Hungary

> Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected. Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest.[166]

[164] Article L Fundamental Law of Hungary
[165] Article II Fundamental Law of Hungary
[166] Article VI Fundamental Law of Hungary, Subsection (1) of Section 59 Constitution

The Constitutional Court derives the right to private sphere and the freedom of private life from the right to human dignity. According to the Constitutional Court an essential element of the definition of private sphere is for

> 'others not to be allowed to enter into it, moreover they may not be allowed to have access to it without the will of the person'[167]

The Constitutional Court interprets the right to the protection to personal data as informational self-determination right:

> '[t]he essence of this right is that each person himself/herself disposes of the disclosure and use of his/her own personal secrets and personal data.'[168]

Turning to the Constitutional Court decision No. 17/2014. (V.30.) with respect to the relevant section of the Labour Code: the Court examined the history and the scheme of the regulation of prohibition of termination. The decision sets out that it is *unconstitutional* that the Labour Code *limits the right to private life and human dignity of women having children at the same time discriminating against those women who are unaware of their pregnancy*. The reasoning of the decision of the Constitutional Court underlines that spontaneous pregnancy and participation in human reproduction procedure are circumstances in the private or intimate sphere of the women and thus she cannot be obliged to disclose this information to her employer. Moreover, notification *cannot be regarded as voluntary* since it is a precondition for enforcing the prohibition of termination. Even though the state enjoys the freedom of deciding the method to provide the extra protection for women having children in the world of work, the conditions of the protection cannot lead to the unnecessary and disproportionate limitation of the fundamental rights of the employee. Notification on data of the private sphere is only necessary if the event relevant for the implementation of the prohibition of dismissal, i.e. the termination itself occurred.

[167] Constitutional Court decision No. 36/2005. (X.5.).
[168] Constitutional Court decision No. 20/1990. (X.4.).

8. Follow-Up and Closing Remarks

For a long time it was a question how the *termination becoming unlawful* due to the notification on pregnancy/IVF procedure can be resolved fairly for both parties. *The dilemma was solved by the amendment of the Labour Code*[169]. When the employer learns that the employee is pregnant, *15 days are available to withdraw its regular notice* in writing. If the notice is withdrawn, the employment relationship is not interrupted, and the employer must reimburse the employee's lost pay for the time period between the withdrawal and the expiry of the notice period.

But is everything solved? The question of labour law protection of pregnant women is extremely complex. This *complexity* can be well illustrated by the Constitutional Court decision examining whether the prior notification preceding the enforceability of the prohibition of termination breaches the Fundamental Law of Hungary. The Constitutional Court examined the issue from several angles, in excess of classic constitutional arguments the reasoning considered psychological aspects as well (see reference to psychological pressure on pregnant women, the sensitive nature of early pregnancy and IVF procedure) however it did not mention economic factors shaping the labour market. In the decision the constitutionality of a labour law norm was measured. The *forming of labour law norms* to be found on the border of public and private law is an *act of balance between economic and social aspects*. Citing from case No 63/2010 of the Equal Opportunity Authority:

> 'the more frequent absence of employees with family from the workplace is not such a factor that the employers would necessarily weigh in when deciding on termination.'

At the same time the Authority also explains that:

> '[f]amily status, a respectable situation to be protected in which there is a working mother, raising her small children is not an all-convincing argument against the employer'.

[169] Act LXVII of 2016

Subsection (5) of Section 65 of the Labour Code prescribing prior notification considered the *economic* from the two aspects (the employer's if you will) thus rendering the already sensitive workforce vulnerable.

Naturally there are positions and work schedules where and when the employee must know of her pregnancy at the earliest possible time for the protection of the foetus' health and the obligatory protective measures (see typically the prohibition of night shifts). The allocation of tasks, organization of work and the ability to plan can also be reasons for notification. Notification advancing exercising rights in good faith and performing obligations are integral parts of the employment. This shall however, be differentiated from the rule examined by the Constitutional Court that linked the prior notification to the prohibition of dismissal, thus enforcing it undifferentiated. This norm invaded the private sphere unnecessarily, thereby violating human dignity. Therefore the decision of the Constitutional Court tipped the balance of the regulation back to social aspects. In this respect the decision can be regarded as a milestone. Without rules protecting motherhood we cannot talk about sexual equality at the workplace.

Can notification on pregnancy and participation in IVF procedure be required for the enforcement of the prohibition of termination? To this question the Constitutional Court gave a *characteristically European answer*. European, in the sense that on other continents (meaning typically the legislation of the USA and Japan) different answer would have been given, due to the different role of labour law,[170] and the *different concept* of private sphere[171]. The protection of pregnancy is linked essentially to such areas as workplace health protection (meaning the health of mother, foetus and child), and – looking ahead – it has clear economic, employment and population policy significance. We should not forget however, that labour law legislation '*cannot be*

[170] See e.g. Finkin, Matthew W., Cutcher-Gershenfeld, Joel et al.: *Multinational human resource management and the law: common workplace problems in different legal environments*. Edward Elgar, cop., 2013.

[171] We can find surprising differences even when remaining on our continent. About the differences in German and Hungarian employer and employee attitudes regarding data protection see: Balogh Zsolt György et al.: Comparative Report on the Regulation of Workplace Privacy in Germany and in Hungary. In: Szőke, Gergely László (ed.). *Privacy in the Workplace: Data Protection Law and Self-regulation in Germany and Hungary*. Budapest: HVG-ORAC, 2012.

overburdened". Citing the thoughts of Kiss György: the problem is wider than the dogmatic of labour law, the public law intervention of the state is needed for the enforcement of the requirement of equal treatment. Intervention however, has to be sufficiently differentiated; standardization with respect to equal treatment, equal opportunities and positive measure result in more tension than satisfying results.[172] Section 65 of the Labour Code (within the framework prescribed by law) can protect the expectant women from termination, however it will not create a mother-friendly workplace, improve the labour market statistics of expectant women or women with small children, and in no case will it change the stereotype: expectant employee = millstone. The definition *how surplus burdens and risks related to motherhood should be allocated* among the state, the employer and the employee remains a problem to be solved.

IV. New Twigs

1. At the Level of National Legislations: Opening the List

The EU Directives use closed lists, however numerous Member States decided to opt for a more elastic system. Hungary alongside with Belgium, Bulgaria, Cyprus, Poland, Romania, Spain, and Sweden etc. does not restrict their anti-discrimination laws to the grounds found within the Directives. The new prohibited grounds include nationality, health condition, colour, language, marital status.[173] The Finnish Non-Discrimination Act of 2014 prohibits discrimination in all public and private activities (save from private life, family life and practice of religion), on the grounds of ethnic origin, age, disability,

[172] See commentary to the topic: requirement of equal treatment in labour law. In. Bankó, Zoltán, Berke, Gyula, Kajtár Edit, Kiss György and Kovács Erika. *Kommentár a Munka Törvénykönyvéhez*, Budapest: CompLex Wolters Kluwer. (KJK-kiadványok) and Kiss, György. Az egyenlőségi jogok érvényesülése a munkajogban. *Jura*, 8.1 (2002): 48–61.

[173] http://www.era-comm.eu/oldoku/Adiskri/01_Overview/2011_04%20Chopin_EN.pdf Last accessed: 03.10.2014. 3.

religion or belief, sexual orientation, nationality, language, opinion, political activity, industrial activity, family ties, state of health or *other personal characteristics*.[174]

Key piece of legislation transposing EU anti-discrimination law into the Hungarian legal system is Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA).[175] The ETA'S list is entirely open, Article 8 provides that provisions that result in a person or a group is treated less favourably than another person or group in a comparable situation because of his/her

> 'a) sex,
> b) racial origin,
> c) colour,
> d) nationality,
> e) national or ethnic origin,
> f) mother tongue,
> g) disability,
> h) state of health,
> i) religious or ideological conviction,
> j) political or other opinion,
> k) family status,
> l) motherhood (pregnancy) or fatherhood,
> m) sexual orientation,
> n) sexual identity,
> o) age,
> p) social origin,
> q) financial status,
> r) the part-time nature or definite term of the employment relationship or other relationship related to employment,
> s) the membership of an organisation representing employees' interests,
> t) other status, attribute or characteristic (hereinafter collectively: characteristics) are considered direct discrimination.'

The last category opens the door for protection against new types of discrimination. '*Other status, attribute or characteristic*' may refer to the fact that the employee was previously

[174] Chopin - Germaine, 44, 66.
[175] Mohay, Ágoston. Az uniós egyenlő bánásmód joganyag és implementációja a magyar jogban. In: Tilk, Péter (ed.). *Az uniós jog és a magyar jogrendszer viszonya*. Pécs: PTE Állam- és Jogtudományi Kar, 2016. 147-164.

involved in a court case with the employer or has higher level of education.[176] The category of 'other status, attribute or characteristic' leads us to the next subchapter and the field of lifestyle discrimination.

Still, an open-ended list does not necessarily lead to an all-encompassing prohibition of discrimination. In his comparative analysis of judicial interpretations under EU and US, non-discrimination law Joseph Damamme draws attention to Spanish cases. The Constitutional Court of Spain established that Article 14 of the Spanish Constitution, albeit open - ended, encompasses only those grounds that have been historically linked to forms of oppression and segregation towards determined group of persons. Based on this jurisprudence, a regional court established that the obesity in the given case did not serve as ground for discrimination.[177]

2. At EU level: Broad Interpretation of Existing Protected Grounds, Assumed and Associated Discrimination

a. Broad Interpretation of Existing Protected Grounds: Disability and Weight Discrimination

Though the list did not open up at EU level, the scope of EU equality law has been widening through the case law. As it was stated before, the Community started from a 'disability equals social anomaly' approach and arrived to a 'right to equal opportunity' approach.[178]

---

[176] Gyulavári, Tamás. Egyenlő bánásmód törvény – célok és eredmények. In: Majtényi, Balázs (ed.). *Lejtős pálya. Antidiszkrimináció és esélyegyenlőség.* Budapest: L'Harmattan Kiadó, 2009. 9-26.

[177] STC 166/88 and Tribunal Superior de Justicia, Valencia, 9 May 2012, Ar. 1843. Cited by Damamme, Joseph. How Can Obesity Fit within the Legal Concept of Disability-A Comparative Analysis of Judicial Interpretations under EU and US Non-Discrimination Law after Kaltoft. *Eur. J. Legal Stud.* 8 (2015): 147-149.154.

[178] Garrido Pérez, Eva. El Tratamiento Comunitario de la Discapacidad: desde su Consideración como una Anomalía Social a la Noción del Derecho a la Igualdad de Oportunidades, *Temas Laborales*, No. 59. 2001. 165-192.; Halmai, Gábor (ed.). *A hátrányos megkülönböztetés tilalmától a pozitív diszkriminációig*, Budapest: AduPrint-INDOK, 1998; Jakab, Nóra. Az Európai Unió szociálpolitikájának alapjai az elsődleges és

In its infamous decision *Chácon Navas*[179] the CJEU conceptualises disability as an impairment that hinders participation in working life for a substantial period. The approach to the meaning of disability used a medical rather than a social model of disability. The definition used in Chácon Navas represented a step backwards compared to the definition used in the UNCRPD.[180] In joined Cases C-335/11 and C-337/11 (11 April 2013) the CJEU luckily modified this outdates view.[181] The cases are critically important for two main reasons. First, they represent a further step along the path of addressing disability discrimination. Second, the CJEU introduced the social model into the directive's concept of disability. The main reason for it was the fact that in the meantime the EU ratified the UNCRPD. The Court started by explaining that the concept of disability must be interpreted as including a condition caused by an illness, if that illness entails a limitation which results in particular from physical, mental or psychological impairments, which in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. The Court observed that the concept of disability does not necessarily imply complete exclusion from work or professional life.[182]

After the Ring case, the notion of disability discrimination became even more flexible. In Case C 354/13 concerning the lawfulness of Mr Kaltoft's dismissal, allegedly on the basis of his *obesity* CJEU recognised that, in some cases, differential treatment on the basis of obesity can amount to disability discrimination. The Framework Directive - it was stated- 'must be interpreted as meaning that the obesity of a worker constitutes a 'disability' within the meaning of that directive where it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the

másodlagos jogforrásokban, avagy az Európai Unió szociálpolitikájának a fejlődése, In: *Publicationes Universitatis Miskolciensis. Sectio Juridica et Politica.* 25/1. tom., Miskolc: Miskolc University Press, 2007. 337.

[179] *Chácon Navas v Eurest Colectividades SA. C-13/05.*

[180] See the Opinion of Advocate General Kokott in the later cases, delivered on 6 December 2012.

[181] *Ring v Dansk almennyttigt Boligselskab DAB, Skouboe Werge v Dansk Arbejdsgiverforening* Cases C-335/11 and C-337/11 ECJ.

[182] *Kajtár*, 2013.

person concerned in professional life on an equal basis with other workers.' Thus CJEU recognises that the participation of disabled in society is determined by stigmatizing and stereotypical behaviours that limit disabled people's life chance. [183] In my opinion this case did not redraw the boundaries of EU equality law, however it did expand the concept of discrimination to an unexpected direction.

b. Assumed and Associated Discrimination

Discrimination on grounds of assumed protected characteristic is also prohibited. For example an employee who are not disabled but their condition is falsely perceived as one that would hinder fulfilment of employment tasks may claim unlawful discrimination[184]

Discrimination can also occur because a person is associated with another person of a particular characteristic. The most well known example is Ms Coleman's case, who worked for a London law firm. Her dismissal was not due to her disability, but that of her child.[185] The CJEU stated:

> 'the prohibition of harassment laid down by those provisions is not limited only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee.'[186]

[183] Flint, Stuart W. and Snook, Jeremé. Disability Discrimination and Obesity: The Big Questions?. *Current obesity reports* 4.4 (2015): 504-509. 509.
[184] Cathaoir, Katharina Ó. On Obesity as a Disability. *Eur. J. Risk Reg.* 6 (2015): 145. 150.
[185] *Case C-303/06, S. Coleman v Attridge Law and Steve Law.*
[186] Para 64.

3. Lifestyle Discrimination (Drinking, Smoking, Motorcycling, Getting a Butterfly Tattoo on The Shoulder and Commenting on All the Above on Facebook)

Lifestyle discrimination cases can be grouped under the first cluster, however because of their novelty it is worth to discuss them under a separate heading. The best place to look for insight is the United States. Unfortunately, these cases do not only occur Overseas.

a. Smoking Ban

Here the best place to look for insight is the United States: twenty-eight US states and the District of Columbia passed so-called 'lifestyle discrimination statutes' in the 1990s. There are three main types of lifestyle discrimination statute: the simplest (and most narrow) one protects the freedom of employees to smoke when off duty, the widest one protecting employee freedom to engage in all lawful activity in general when off duty, while in the middle there are statutes protecting the freedom of off-duty employees to use lawful products. These statutes came as a response to the common practice of employers basing their hiring decision on what employees do off work. There is a clear discrimination *smokers* even if they only entertain this habit when off duty, but there are also cases on off-duty drinking, motorcycling, cholesterol levels and obesity[187] which clearly shows that the States is indeed the land of opportunities, at least for the employers.

Especially health care institutions, including academic health centres, have adopted policies excluding smokers from employment. This is more than a mere no smoking at work policy, it is a complete ban both at both work and home settings. In practice candidates for employment are tested for nicotine and those testing positive

[187] Sanders, Astrid. The law of unfair dismissal and behaviour outside work, *Legal Studies*, 34. 2. (2014): 328-352. 331.

are not hired. As the US has an employment at will system, the employers do not need to justify their decision, however they do need to comply with the anti-discrimination provisions. For this reason, it is useful to take a look at the arguments pro and contra the strict employee smoker ban. The advocates for this practice claim that exclusion of smokers from the workforce results in financial savings (reduced health costs, less working hours lost due to smoke breaks), a more productive workforce (better health condition). One justification is symbolic, to send a message of healthy living, i.e. employees must serve as role models for patients. A ban also serves as an incentive for smokers to quit.[188] Furthermore, bans in health care institutions uphold professional norms in those institutions.

Opponents of employee smoker ban underline that the time saving argument do not readily justify categorical denial of employment to persons who smoke at home. The ban has clear ethical dimension and is strongly paternalistic in nature. It reflects a moralization of health.[189] Employers, interfere with the private lives of employees when private activities do not affect workplace performance. As to the argument on the incentive to quit, if legislative bans do not reduce population level active smoking, it seems probably employee bans will fail too. As to the professional norms: among the norms of medical practice care is more important than health. Health care workers exemplify an *ethic of care*, including care for those whose ill health might be their own doing. Regarding the message: the policy has another message: if allowing smokers to work in an institution conveys institutional support of smoking, how does allowing smokers to be cared for in the same institution not similarly convey such support? In addition, in settings where large medical schools operate, it is likely to be the poor (including members of minority groups), who, under an employee smoker ban, will lose

[188] Rose, Allison et al. The Role of Worksite and Home Smoking Bans in Smoking Cessation among U.S. Employed Adult Female Smokers, *American Journal of Health Promotion*, 26. 1. (2011): 26-36.
[189] Douglas Olsen P., The Ethics of Denying Smokers Employment in Health Care, *American Journal of Nursing,* 114. 6. (2014): 55-58.

the opportunity to work for an employer that offers health insurance and other benefits. Not to mention the fact that smoking is addictive and therefore not voluntary.[190]

It is common in European practice that certain specific types of employers, often called as 'tendency' undertakings (*Tendenzbetrieb*) (e.g. those with political, religious, military profile) place extra restriction and requirements on their employees. Article 4(2) EFD stipulates that affiliation to a particular religion and/or belief can be demanded by organisations for which this is a justified requirement having regard to the organisation's ethos. They wish to be distinguished by following specific norms and (and naturally within legal limits) they rightfully do so under EU law.[191]

However this US case is different. It invades private life or put it into anti-discrimination context, it discriminates on the basis of lifestyle even if it does not interfere with performance at work. Otherwise perfectly qualified job candidates are discriminated on the basis of their health-related behaviour. This case reflects the complexity of discrimination cases, and leaves it unclear to what extent employers must respect employee's privacy and health decision choices when these choices influence the employer's productivity and effective operation.

b. Facebook Dismissals

Monitoring of online activities of the employees or job candidates may give rise to discrimination issues. So-called Facebook dismissals are present in the European as well as the US scene. Perhaps we find them under the heading of data protection or protection of employee privacy. Tracing the employee profile on social media sites is common practice. The posts, comments, pictures and music shared on Facebook reveals a multitude of information on the style and lifestyle, family status, sexual

[190] Huddle, Thomas S., Kertesz, Stefan G., and Nash, Ryan: Health Care Institutions Should Not Exclude Smokers From Employment. *Academic Medicine,* 89.6. (2014): 843-847.

[191] See: Kiss, György. Alapjogi összeütközések a munkajogviszony teljesítése során a meggyőződés szabadsága és a munkáltatóhoz való lojalitás tükrében, In: Lehoczkyné Kollonay, Csilla and Petrovics, Zoltán (ed.). *Liber amicorum: Studia Ida Hágelmayer dedicata. Ünnepi dolgozatok Hágelmayer Istvánné tiszteletére*. ELTE ÁJK, Budapest: 2005. 271-332.

orientation of the employee. As we can see these are not work related, but concern private life, often the most private aspects, in terms of anti-discrimination law they are protected characteristics. Photos and comments posted for private reasons (to keep in touch with friends) are now used for a completely different reason without the authorisation or even previous knowledge of the owner of the profile. The consequence can very well be *interference with personality (privacy) rights*, *discrimination and unethical practice*. The issue will be examined in details in PART V.

PART IV: PRIVACY AND DATA PROTECTION[192]

I. Key Concepts

1. The Concept of Privacy

The right to privacy is included in the subsidiary fundamental right to *human dignity*.[193] But *what exactly do we mean by privacy*?

> 'Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all.'[194]

The thoughts of Robert C. Post perfectly capture the slight confusion one experiences when confronted with the concept of privacy. Privacy needs to be context-sensitive; one single definition might even be counterproductive.[195] And indeed, there is no shortage in definitions. Different disciplines ranging from law to philosophy have made abundant attempts to capture the essence and define the meaning of this composite concept.[196]

The need for privacy is a *universal human trait*. Although concrete privacy behaviours are culture- and context-dependent, the need for privacy itself is culturally universal. Privacy-seeking behaviours are found in peoples and cultures across time and

[192] Part IV builds upon the author's previous work: on personality rights and privacy published in: Bankó, Zoltán, Berke, Gyula, Kajtár, Edit, Kiss, György, and Kovács, Erika. *Kommentár a Munka Törvénykönyvéhez*, Budapest: CompLex Wolters Kluwer, 2014. (KJK-kiadványok)

[193] Sólyom, László and Georg Brunner. *Constitutional judiciary in a new democracy: The Hungarian constitutional court*. University of Michigan Press, 2000. 6.

[194] Post, Robert C. Three Concepts of Privacy *Georgetown Law Journal* 89 (2000–01): 2087, 2087.

[195] Loosen, Wiebke. Online Privacy as a News Factor in Journalism. In: Trepte, Sabine and Leonard Reinecke (eds.). *Privacy Online: Perspectives on Privacy and Self-Disclosure in the Social Web*. Berlin, Heidelberg, Germany: Springer-Verlag. 2011. 205-218. 206.

[196] Menyhárd, Attila. A magánélethez való jog elméleti alapjai. *In Medias Res* 2 (2014): 384-406.; Menyhárd, Attila: A magánélethez való jog a szólás- és a médiaszabadság tükrében. In: Csehi, Zoltán, Koltay, András, and Navratyil, Zoltán (ed.). *A személyiség és a média a polgári és a büntetőjogban: Az új Polgári Törvénykönyvre és az új Büntető Törvénykönyvre tekintettel*. Budapest: CompLex Wolters Kluwer, 2014. 177-226.

space.[197] Privacy is inseparably linked to at least two, oftentimes *competing core ideas*. Privacy is, on the one hand, about creating distance between oneself and society, about retiring and being left alone (*privacy as freedom from society*). On the other hand, it is also about protecting elemental community norms which concern, for example, intimate relationships and public reputation (*privacy as dignity*).[198]

Privacy loss oftentimes leads to being shamed[199] or 'losing face', privacy protective measures are therefore *the safeguards for individuals to 'keep their face'*. Saadi Lahlou considers that the East Asian social construct of 'face' ('mientze' in Chinese, 'taimien' in Japanese) can serve as a basis for privacy guidelines worldwide. In the East Asian sense, 'face' is literally 'the appearance of one's self', and includes five facets: moral integrity or virtue, true intention, position and role, propriety, and outward behaviour. People have different roles and pursue simultaneously different lines of action, for which they do not necessarily put on the same 'face'. The different roles determine what can and cannot be said, and how. Privacy is connected to keeping appearances coherent with the current activity vis-à-vis others, in other words 'keeping face' in this activity. The roots of most privacy issues are the role conflicts between activities and the difficulty of following simultaneously activity tracks. [200]

Privacy connects with equally intricate notions such as freedom and dignity; its advocates view it as a structural element of social interactions; *invasion* of what *offends the*

---

[197]Acquisti, Alessandro, Laura Brandimarte, and George Loewenstein. Privacy and human behavior in the age of information. *Science* 347.6221 (2015): 509-514. 509; Moore, Adam D. Privacy: its meaning and value. *American Philosophical Quarterly* 40.3 (2003): 215-227.; Ingham, Roger. Privacy and psychology. *Privacy* 35 (1978): 57.; Foddy, William H. and W. R. Finighan. The concept of privacy from a symbolic interaction perspective. *Journal for the Theory of Social Behaviour* 10.1 (1980): 1-18.

[198] Diggelmann, Oliver and Maria Nicole Cleis. How the right to privacy became a Human Right. *Human Rights Law Review* (2014): 441-458. 442.

[199] Sajó, András. Érzelmek a jogi intézményekben: a személyiségi jogok és a szégyen kapcsolata. In: Kisfaludi, András (ed.). *Liber amicorum: studia L. Vékás dedicata, 2009: ünnepi dolgozatok Vékás Lajos tiszteletére*. Budapest: ELTE ÁJK Polgári Jogi Tanszék, 2009. 249-264.

[200] Lahlou, Saadi. Identity, social status, privacy and face-keeping in digital society. *Social Science Information September* 47.3 (2008): 299-330, 314-315.

human spirit[201], and claim that a society *without privacy* would be *a society deprived of meaningful social relations.*[202]

2. Privacy in the Employment Context

As mentioned before, there are abundant attempts to define the meaning of privacy in the legal sense.[203] The legal notion (i.e. the right to privacy) has been enshrined in numerous international treaties. Being a very complex umbrella concept, its fine tuning is left to different law branches. Privacy is always context-dependent; in our case it has to be viewed against the employment background. This way the elusive, philosophical notion may be made more concrete for the regulator/employer/employee.

This specific scenery however will further increase the level of our confusion. On the one hand, we have to take into account *the purpose of the employment* relationship, that is provision of work for remuneration under terms and conditions defined by, at least typically and mainly, the employer, typically, for a certain period of time and in a certain space and manner, the employee's physical and mental capacities are at the disposal of the employer. On the other hand, the most relevant characteristic of the employment relationship is the presence of *power imbalance* between the parties. This implies that to protect the employee, i.e. the party with less power, additional safeguards will be needed if privacy is to be effectively protected. Although the default position is that the

[201] Warren, Samuel and Brandeis, Luis. The Right to Privacy. *Harward Law Review* 4.5 (1890): 193-220. 197.
[202] Roessler, Beate, and Mokrosinska, Dorota. Privacy and Social Interaction. *Philosophy & Social Criticism* 39 (2013): 771-791, 779.
[203] See the emblematic article of Warren and Brandeis entitled The Right to Privacy *Harward Law Review* 4.5 (1890): 193-220 193; Post, Robert C. Three Concepts of Privacy. *Georgetown Law Journal* 89 (2000): 2087; Whitman, James Q. The two western cultures of privacy: Dignity versus liberty. *Yale Law Journal* (2004): 1151-1221, 1153.; Mindle, Grant B. Liberalism, privacy, and autonomy. *The Journal of Politics* 51.03 (1989): 575-598. 575; Solove, Daniel J. Conceptualizing privacy. *California Law Review* (2002): 1087-1155.; Solove, Daniel J. A taxonomy of privacy. *University of Pennsylvania law review* (2006): 477-564.; Griffin, James. Human Right to Privacy. *San Diego L. Rev.* 44 (2007): 697.; Moreham, N. A. *Privacy in the common law: a doctrinal and theoretical analysis.* (2005). 121 LQR 628.; Gavison, Ruth. Privacy and the Limits of Law. *The Yale Law Journal* 89.3 (1980):421-471.; Gerety, Tom. Redefining Privacy. 12 *Harv CR - CL Law Rev* (1977): 233-296; Rachels, James. Why privacy is important. *Philosophy & Public Affairs* (1975): 323-333; Wagner De Cew, Judith. The Scope of Privacy in Law and Ethics *L & Phil* 5.2 (1986): 145-173.

employee enjoys the right to privacy, this right is *not absolute*. Employment law acknowledges the *employer's right to monitor*. There is extensive academic literature on the use of CCTV camera, alcohol and drug tests, on the monitoring of emails and traditional letters addressed to the workplace etc. However, while the 'classic' inspection activity takes place within working hours and at the workplace, the monitoring of SNSs expands outside this time frame and goes beyond the physical workplace.

3. Private versus Public, Work versus Private Life

The protection of the right to privacy inevitably leads to the dichotomy of public and private. The distinction of the latter dates back to antiquity. Privacy is related to control of access. Something is private when the individual is in the position of and have the right to control access to it. Informational privacy is control over what others know about us. To behave in a self-determined fashion, one must believe and be able *to presume that one is not being observed or eavesdropped on*.[204]

Critical in this respect is the tendancy tendency that the *boundaries between work and private life are becoming more and more fuzzy*. With the advancement of IT and the spreading of atypical work arrangements, strengthenes this tendency. Oftentimes the same equipment (e.g. laptop, computer, smart phone) is used for both work and personal purposes, making it difficult to say what can and what cannot be monitored. Also, private life flows over the working one and vice versa. The same employee who updates his status on Facebook within working hours might convert his living room into 'workplace' when he uploads a project report from his private laptop at midnight, just before the final deadline expires. While the employee is required to dedicate his energy and time to his work, *the workplace is by no means a 'completely privacy free zone'*. Craig refers to private matters such as making a phone call to a sick child or arranging medical appointment and also points out the different nature of personal time (lunch and coffee

[204] Roessler and Mokrosinska. 2013. 772 .

breaks).[205] Certain rights and obligations arising from the employment relationship are not only active within working hours; we have to bear in mind that certain duties such as to act in line with the principle of loyalty or not to harm reputation do not end with the working day. The question inevitably arises: where does work end and private life begin? And also, where is the border between inspection and invasion?

> 'Workers don't leave behind their rights as persons (and certainly not their right to privacy and data protection)…'[206]

4. Private Life and the Right to Work within the 'Integrated' Approach to Human Rights

One interesting question relating to private life is its connection to right to work. The European Court of Human Rights reads the right to work into *Article 8 of the ECHR* that protects the right to private life. This decision is remarkable in many senses. The Court uses a new method of interpretation, which came to be known also as the 'holistic' or 'integrated' approach to human rights. This approach is based on the idea that the enjoyment of civil and political rights is rendered meaningless if social rights are neglected and that social entitlements are as intrinsically valuable as the interests underlying civil and political rights. In the *Sidabras and Dziautas v Lithuania* case, Lithuania's legislation was contrary to the right to work, for it made it almost impossible for the applicant to enter into employment. Virginia Mantouvalou points out that the Court's approach implied that the *protection of private life against external interferences embraces* something *more than life within employment.* [207]

At a national level, the Fundamental Law of Hungary explicitly protects the right to work. *The Hungarian Constitutional Court* in 1999 stated that work is the quintessence

[205] Craig, John D.R. *Privacy and Employment Law.* Oxford etc.: Hart, 1999. 20.
[206] Moreira, Teresa Coelho. The Digital To Be or Not To Be: Privacy of Employees and the Use of Online Social Networks in the Recruitment Process. *Journal of Law and Social Sciences (JLSS)* 2 (2013): 76-79.
[207] Mantouvalou, Virginia. Work and Private Life: Sidabras and Dziautas v. Lithuania *European Law Review* 30 (2005): 573-585.

of personality, protected directly by the Civil Code. As *Nádas György* emphasises, the Curia recognis t*he right to work as personality – related right*. The unlawful infringement of this right will likely to lead to growing use of payment of restitution (sérelemdíj).[208]

5. Data Protection

What data protection (*adatvédelem, Datenschutz, la protection des données à caractère personnel*) means is constantly changing.[209] *Jóri András*, former data protection commissioner defines it as '*legal protection that aims at protection of the individual's private sphere by prescribing regulation on personal data processing*'.[210] It has to be separated from data protection in a technical sense. The latter may enhance but also hinder protection of personal data (personenbezogene Daten, données à caractèrepersonnel).[211]

II. International Documents

Numerous UN documents contain regulations on the protection of the private sphere: *Article 12 of the UDHR* provides that:

> 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.

The *ICCPR provides in article 17* that:

[208] *A személyiségi jogok védelmétől a sérelemdíjig*. http://munkajog.hu/rovatok/munkahely/a-szemelyisegi-jogok-vedelmetol-a-serelemdijig

[209] Jóri, András. *Adatvédelmi kézikönyv: Elmélet, történet, kommentár*. Budapest: Osiris, 2005. 16-21.

[210] Jóri, András 2005. 20.

[211] See: Jóri, András. Az információs társadalom hatása a személyiségi jogokra: Az adatvédelmi jog kialakulása. In: Sárközy, Tamás, and Pázmándi, Kinga (eds.). *Az információs társadalom és a jog átalakulása. Magyarország az ezredfordulón. Stratégiai tanulmányok a Magyar Tudományos Akadémián. Muhelytanulmányok*. Budapest: MTA Társadalomkutató Központ, 2002. 49-74.; Balogh, Zsolt György. Bevezetés az adatvédelem jogába. Magyarország TÁMOP-4.2.2.C-11/1/KONV-2012-0013 *Infokommunikációs technológiák és a jövő társadalma* (FuturICT.hu), Szeged: Szegedi Tudományegyetem, 2014.

> 'no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation'.
> It further states that
> 'everyone has the right to the protection of the law against such interference or attacks.'[212]

The individual complaint system operating on the basis of the first optional protocol strengthens the protection for Hungarian employees as well.

The UN High Commissioner for Human Rights highlighted that metadata may give an insight into an individual's behaviour, social relationships, private preferences and identity that go beyond even the data that was conveyed.[213]

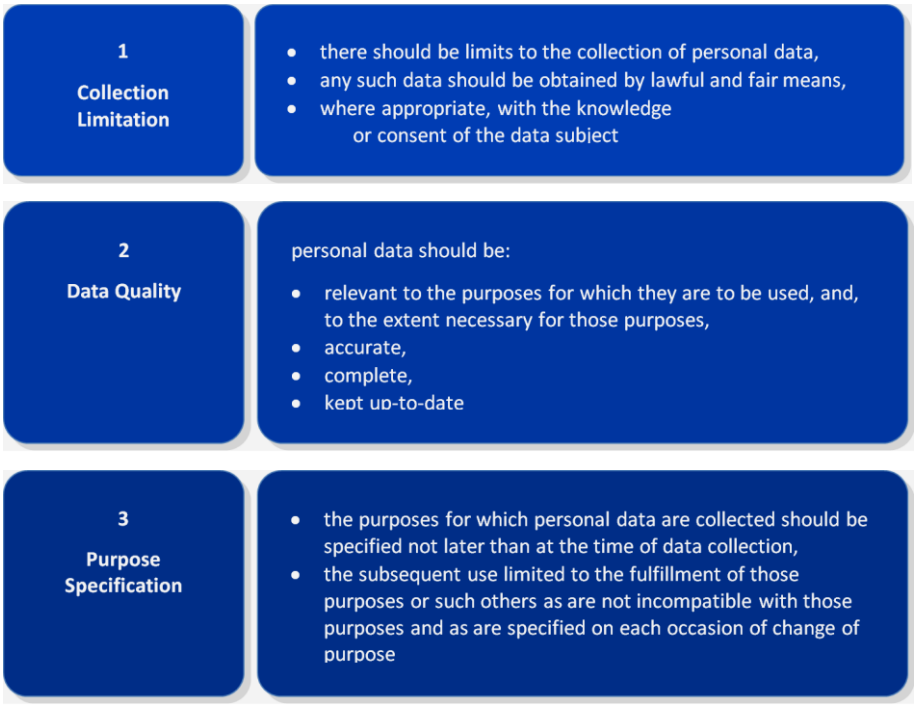
As a member of the OECD, Hungary also benefits from the revised Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (OECD Privacy Guidelines).[214] The *OECD Privacy Guidelines* represents the first internationally agreed-upon set of privacy principles. The document was accepted in 1980, thus commentators suggest that the Expert Group was in an advantageous position being able to draw on the work of the Council of Europe as well as the contributions of those member countries that had existing privacy legislation.[215] The significance of the OECD document is apparent in many respects. First, it is the basis for countries around the word, its mark can be seen on most of the national data protection legislation and model codes of the OECD member countries.[216] Secondly, though the guidelines were updated, the principles were left unchanged. 33 years passed since their adoption, yet they did not use their validity. The principles are highly adaptable to the varying government and legal structures of the implementing countries and the changing social and technological environment. They are concise, technologically neutral, non-binding,

[212] Law-Decree No. 8 of 1976.
[213] Report of the Office of the United Nations High Commissioner for Human Rights, 30 June 2014, paragraph 19 (A/HRC/27/37) under paragraph 19.
[214] *The OECD Privacy Framework*. OECD, 2013. Available at: http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf (Last accessed at 21.07.2016)
[215] http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf (Last accessed at 21.07.2016) 74.
[216] http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf (Last accessed at 21.07.2016) 66.

and written in a commonly understood language, which factors together explain their enduring influence and importance. [217]

The OECD Privacy Guidelines were *updated in 2013*. They give guidance regarding lawful practice. The document is very flexible, instead of obligatory requirements, it provides with basic principles, framework rules and possible ways to process personal employee data.

The document is intended to serve as a development tool for legislation, different forms of regulations, collective agreements, work rules, policies and practical measures at enterprise level. The personal scope of the Code covers employees, former employees, job applicants, private and public employees, TWAs and workers' representatives. The Code regulates various ways of processing data, including collection, use, management or disclosure. *The general principles* of the Code are displayed in the following boxes:



[217] http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf (Last accessed at 21.07.2016) 76.

4 **Use Limitation**	personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with Paragraph 9 except: • with the consent of the data subject; or • by the authority of law
5 **Security Safeguards**	personal data should be protected by reasonable security safeguards against such risks as loss or unauthorized access, destruction, use, modification, or disclosure of data.
6 **Openness**	• there should be a general policy of openness about developments, practices and policies with respect to personal data • there should be readily available means of: ➢ establishing the existence and nature of personal data, ➢ the main purposes of their use, ➢ the identity and usual residence of the data controller
7 **Individual Participation**	an individual should have the right: a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him, b) to have communicated to him, data relating to him 1. within a reasonable time; 2. at a charge, if any, that is not excessive; 3. in a reasonable manner; and 4. in a form that is readily intelligible to him; c) to be given reasons if a request made under subparagraphs (a) and (b) is denied, and to be able to challenge such denial; and d) to challenge data relating to him and, if the challenge is successful, to have the data erased, rectified, completed or amended
8 **Accountability**	• a data controller should be accountable for complying with measures which give effect to these principles

III. Council of Europe

1. Main Regulations

The Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data from 1981 (hereinafter: the *Data Protection Convention*) is the first binding international instrument which protects the individual against abuses which may accompany the collection and processing of personal data.

The right to protection of personal data is also protected under *Article 8 of the European Convention on Human Rights (ECHR)*, which guarantees the right to respect for private and family life, home and correspondence and regulates the conditions under which restrictions of this right are permitted.

> Right to respect for private and family life
> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

2. Classic Cases from the Case Law of the ECtHR

Infringement of Article 8 ECHR was the subject of the two landmark cases, *Copland*[218] and *Halford*[219]. *telephone calls* from business premises are prima facie covered by the

[218] Copland v. United Kingdom, Application no. 62617/00, Judgment of 3 April 2007
[219] Halford v. the United Kingdom, Application no. 20605/92, Judgment of 25 June 1997

notions of 'private life' and 'correspondence' for the purposes of Article 8.[220] In Copland,[221] personal use was allowed, and the surveillance aimed to determine whether the applicant had made 'excessive use' of the facilities. However, unless the employer gives prior notification about the contrary, the employee reasonably expects that e-mail and Internet usage at the workplace for private purposes remain private.[222] It was stated that even if the monitoring is limited to 'information relating to the date and length of telephone conversations and in particular the numbers dialled', it still violates Article 8 of the ECHR.[223]

According to the ECtHR's case-law *e-mails* sent from work should be similarly protected under Article 8 as telephone calls from business premises. The European Court of Human Rights declared that unauthorized interference with electronic correspondence may constitute the violation of the confidentiality of correspondence, and as such it may interfere with the right for the protection of private life guaranteed by Article 8 of ECHR.[224] The ECtHR reads private life broadly; it treats it as a comprehensive concept, one that encompasses, amongst others the right to establish and develop relationships with other human beings and the right to identity and personal development,[225] although not without possible limits.

Amongst the ECtHR's recent decisions on checking the *employee's computer*, the *Libert v. France* case[226] dealt with this issue. Here, the employer (the French national rail company) opened the employee's professional computer's hard drive named 'personal data' without the employee being present.

---

[220] Halford v. the United Kingdom, 25 June 1997, Reports 1997-III, § 44, and Amann v. Switzerland [GC], no. 27798/95, § 43, ECHR 2000-II,
[221] Copland v. the United Kingdom no. 62617/00, ECHR 2007-I,
[222] Copland § 41
[223] Copland § 43
[224] ECTHR, *Wieser and Bicos Beteiligungen Gmbh v Austria , Application no. 74336/01*, See also: C-*342/12 - Worten*
[225] *Niemietz v. Germany* (16 December 1992, Series A no. 251 § 29; Fernández Martínez v. Spain [GC], no. 56030/07, § 126, ECHR 2014;E.B. v. France [GC], no. 43546/02, § 43, 22 January 2008, and Bohlen v. Germany, no. 53495/09, § 45, 19 February 2015
[226] *Libert v. France no. 588/13*

3. A Recent Decision: Bărbulescu v. Romania

On 12 January 2016, the European Court of Human Rights handed down a new ruling regarding the monitoring of employees' electronic communications.[227] The main partakers of the case were *Mr. Bărbulescu*, an engineer, his employer, a heating company, and a *Yahoo Messenger* account, that was set up by Mr. Bărbulescu at the request of his employer. At the background of the case we also find the company's internal regulation that stated, inter alia:

> 'It is strictly forbidden to disturb order and discipline within the company's premises and especially ... to use computers, photocopiers, telephones, telex and fax machines for personal purposes.'

This provision was obviously disregarded by the employee. When the employer monitored his Yahoo Messenger communications for the course of eight days, it was discovered that he had used it for personal purposes. When confronted with this, Mr. Bărbulescu denied such use in writing. At this point he was presented with a forty-five-page (!) transcript of his communications on Yahoo Messenger containing all the messages that he had exchanged with his fiancée and his brother during the monitoring period. Some of these were related to sensitive topics such as health, a car accident and sex, and the transcript also contained five short messages between the employee and his fiancée sent using a personal Yahoo Messenger account (the latter did not disclose any intimate information). Mr Bărbulescu was *dismissed for personal internet use at work against the company's internal regulations*. He did not accept this, and applied to the labour court claiming that the dismissal was unlawful because the monitoring constituted an interference with his right to respect for private life and correspondence.

Before a ruling could be asked from Strasburg, *the domestic remedies* had to be exhausted. Each Romanian court involved in the case found that the employer had acted in within the disciplinary powers provided for by the Romanian Labour Code: the employee had used Yahoo Messenger on the company's computer during working hours. On this basis

[227] *Bărbulescu v. Romania, Application no. 61496/08*

Mr. Bărbulescu's disciplinary breach was established. Finally, the case arrived at the ECtHR. At this stage it was accepted that there has been an interference with the applicant's 'right to respect for private life and correspondence' (Article 8 of the ECHR). The Court accepted the domestic courts' findings. The employer had accessed the applicant's Yahoo Messenger account in the belief that it had contained professional messages, since the latter had initially claimed that he had used it in order to advise clients. The Court agreed with the domestic courts, saying 'it is not unreasonable for an employer to want to verify that the employees are completing their professional tasks during working hours.' The communications on Mr Bărbulescu's Yahoo Messenger account were examined, but not the other data and documents stored on his computer were not accessed; consequently the employer's monitoring was limited in scope and proportionate. In the Court's opinion, the domestic authorities found a fair balance, within their margin of appreciation, between the applicants' right to respect for his private life under Article 8 and his employer's interests. Consequently the Court ruled that there was no violation of Article 8 of the Convention.

In the news the case appeared as one, which diminishes the level of data protection and gives unprecedented power to the employers to monitor the employees' electronic correspondence. Such presentation of the case is, however, misleading and false. As a legal blog points out: The case did not grant any laissez-faire right to access employees' personal e-mails or messages. The ECtHR simply recognised the need for employers to be able to verify that employees are dedicated to work during work hours.[228]

Does Mr Bărbulescu have a reasonable expectation of his right to privacy being respected (i.e. that his messages would not be read)? The decision of the ECtHR is fuzzy in this respect. One interesting and contested aspect of the case concerns the timing of notification. There was a clear dispute between the parties about when did the notification take place. The employer claimed that first he raised his concerns to the

[228] Roath, David and Willshire, Andrew. *Is there a right to privacy at work? Monitoring employees.* Blog posted 25th January 2016. http://www.parissmith.co.uk/blog/is-there-a-right-to-privacy-at-work-monitoring-employees/

employee about the private use of the account, and he only later examined the content of the messages, after the employee denied private use. Mr Bărbulescu claimed that the Yahoo Messenger account was monitored without previous warning; furthermore, the fact that he himself could choose the password for the account without the obligation to show it to his employee, indicates that he had a reasonable expectation to privacy. The ECtHR did not clear the ambiguity, or, to put it more strongly, did not want to clear it, instead it found the general warning from the employer sufficient. The partly dissenting opinion provided by *Judge Pinto de Albuquerque* tackled exactly this issue. As one commentator of the case points out:

> 'Given the wide ranging implications regarding the use of personal Internet communications by others in the employment context, one would think that a more specific and considered warning and notification procedure would be required'.[229]

IV. European Union

1. Primary Law Sources

The right to the protection of personal data can be found in *Article 16 TFEU*:

> 'Everyone has the right to the protection of personal data concerning them.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the

[229] Available at https://ukhumanrightsblog.com/2016/01/14/surveillance-of-internet-usage-in-the-workplace/

scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.' Article 39 TEU states:

> 'In accordance with Article 16 of the Treaty on the Functioning of the European Union and by way of derogation from paragraph 2 thereof, the Council shall adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of this Chapter, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.'

The *EU Charter of Fundamental Rights* regulates respect for private life and protection of personal data as closely related but separate fundamental rights. Especially the right to the protection of personal data in Article 8 got heightened attention in recent years.

2. Secondary Law Sources

a. Directive 95/46/EC and the Activity of the Data Protection Working Party

Detailed regulation is provided at the level of directives. From the perspective of our theme, the most relevant one is Directive 95/46/EC of the European Parliament and of the Council of the European Union of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement (hereinafter: DPD). The DPD was crafted not only with work related data in mind, but it is an instrument that provides *general protection* for any kind of data processing. Article 2(a) of the Directive defines *personal data* as:

> *'any information relating to an identified or identifiable natural person',*

and asks for the Member States to prohibit processing of personal data concerning,

among other things, 'health or sex life'.[230] To contribute to uniform application of law, an independent advisory body, the *Data Protection Working Party* was established under Article 29 of the DPD. The organisation's main focus was to examine surveillance of electronic communications in the workplace and to evaluate the implications of data protection for the parties to the employment relationship. The Working Party's opinion 8/2001 on the processing of personal data in an employment context lists the following *fundamental data protection principles*:

- finality,
- transparency,
- legitimacy,
- proportionality,
- accuracy,
- security and
- staff awareness.

Article 29 Working Party's opinion 8/2001 suggested that monitoring of employees should be:

> *'a proportionate response by an employer to the risks it faces taking into account the legitimate privacy and other interests of workers'.*

The Working Party's 'Working document on the surveillance and the monitoring of electronic communications in the workplace' from 2002 asserts that the fact that monitoring or surveillance conveniently serves an employer's interest could not justify an intrusion into workers' privacy. Any monitoring measure must satisfy the requirement of transparency, necessity, fairness and proportionality. 'Prompt information can be easily delivered by software such as warning windows, which pop up and alert the worker that the system has detected and/or has taken steps to prevent an unauthorised use of the network.'

Opinion 8/2001 of the Data Protection Working Party holds that: opening an employee's e-mail may also be necessary for reasons other than monitoring or

[230] Article 8(1) DPA

surveillance, for example in order to maintain correspondence in case the employee is out of office (for example due to sickness or leave) and other forms of communication cannot be guaranteed (e.g. autoreply or automatic forwarding is not feasible).[231]

The CJEU warns about the *consequences of processing metadata*, because, taken as a whole, it may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained.[232] In the absence of notification that one's calls can be monitored, the employee has reasonable expectation that the calls made from a work telephone are classified as private communication.

b. General Data Protection Regulation (GDPR)

Regarding data protection at the workplace, *the most significant change at EU level* is the General Data Protection Regulation (GDPR).[233] The GDPR heralds the *next generation of data protection laws*. It introduces fresh aspects and mechanisms and can be considered as the instrument of a new era.[234] The European Commission describes the GDPR as an instrument that

> 'will enable people to better control their personal data… the modernised and unified rules will allow businesses to make the

[231] Opinion 8/2001 of the Data Protection Working Party on the processing of personal data in an employment context p. 14

[232]Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others, Judgment of 8 April 2014, paragraphs 26-27, 37

[233] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/EC. The other pillar of the reform is Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

[234] Kiss, Attila and Szőke, Gergely László. Evolution or revolution? Steps forward to a new generation of data protection regulation. In: Gutwirth, Serge, Leenes, Ronald, and De Hert, Paul (eds.). *Reforming European data protection law*. Springer Netherlands, 2015. 311-331.; Fritsch, Clara. Data Processing in Employment Relations: Impacts of the European General Data Protection Regulation Focusing on the Data Protection Officer at the Worksite. In: *Reforming European Data Protection Law*. Springer Netherlands, 2015. 147-167.; Kiss, Attila. Az Európai Unió adatvédelmi reformja. In: *Belső adatvédelem* 2015 http://vtki.uni-nke.hu/uploads/media_items/belso-adatvedelem.original.pdf 35.

> most of the opportunities of the Digital Single Market by cutting red tape and benefiting from reinforced consumer trust.'

The regulation aims at creating a uniform data protection standard within the European Union. Here, I discuss the provisions targeting data protection at the workplace.

In line with Article 88, Member States may opt for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context. The specific rules may take the form of law or collective agreement. The GDPR singles out data processing for the purposes of recruitment; performance of the contract of employment including discharge of obligations laid down by law or by collective agreements; management, planning and organisation of work; equality and diversity in the workplace; health and safety at work; protection of employer's or customer's property; and - for the purposes of the exercise and enjoyment, on an individual or collective basis - of rights and benefits related to employment; and for the purpose of the termination of the employment relationship. Subsection (2) of Section 88 states that:

> 'Those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place.'

The *new definitions* provided by the GDPR (e.g. enterprise, group of undertakings) are vital in the employment context.

Another important change affects the *rights of the employee's (data subject's) as well as the employer's obligations.* Personal data should be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed.[235] The employee has the right not to be evaluated and not to be subject to a measure based on profiling. In order to have one single and

[235] Personal data may be stored for longer periods insofar as the data will be processed solely for historical, statistical or scientific research purposes.

consistent definition of consent, and also to avoid confusing parallelism with 'unambiguous' consent,[236] the Regulation sets that the employee's *consent to the processing of his data must be 'explicit'*.

The GDPR means for the employees *easier access* to their personal data, *a 'right to be forgotten'* as well as the *right to know when data has been hacked*. Regarding the employers' side: enterprises where the core activities of the controller or processor consist of processing operations, which require regular and systematic monitoring, a mandatory '*data protection officer'* has to be appointed. This obligation also exists where the core activities of the controller or the processor consist of processing on a large scale of special categories of data. Regarding the employer's rights, *processing of sensitive personal* data is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller in the field of employment law in so far as it is authorised by Union law or Member State law, providing for adequate safeguards.

V. The Hungarian System

1. Structure

In Hungary, more than thousand legal regulations contain data protection-related elements. Data protection has its roots in general personality rights protection therefore the *Civil Code* bears specific relevance.[237] Naturally, the Data Protection Act provides basic concepts, definitions and principles.[238]

There is no separate act regulating data protection at the workplace. The new *Labour*

[236] (11) of Article 4

[237] Jóri, 2005. 20.

[238] Hegedűs, Bulcsú and Kerekes, Zsuzsanna (eds.). *Adatvédelem és információszabadság.* Budapest: CompLex, 2010.; Polyák, Gábor, and Szőke, Gergely Lászó. Elszalasztott lehetőség? Az új adatvédelmi törvény főbb rendelkezései. In: Drinóczi, Tímea (ed.). *Magyarország új alkotmányossága*, Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kar, 2015. 155-177.
In: Drinóczi Tímea (szerk.). Magyarország új alkotmányossága. Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kar, 155–177. o.

Code certainly brings substantial changes and provides with a more detailed regulation than its predecessor; however, even now it falls short from being a precise, sector specific regulation tailored to the specialties of the world of work.[239]

We may contrast our practice with the *Finnish* one, where Act 759 of 2004 regulates protection of private life at the workplace.[240] The act consists of 26 sections, and regulates a wide range of issues ranging from CCTV camera surveillance through genetic testing and drug testing to monitoring the email account of employees.

In shaping the data protection environment*, data protection authorities* play a crucial role. As *Jóri András* points out in commenting upon the various systems, data protection authorities serve dual functions: they are shaping and applying data protection law, they are *advocates, ombudspersons, mediators and administrative authorities* at the same time.[241]The recommendations of the data protection commissioner, from 2012 onwards the recommendations of the Hungarian National Authority for Data Protection and Freedom of Information (NAIH) fill the gaps left by hard law regulations. The *number of cases* relating to data protection at workplace is *growing dynamically*. Employees, employers and trade unions is asking the NAHI for opinion. Important change in the scenery is the *right of the NAIH to impose penalty*.

2. Constitutional Protection

> '[e]veryone shall have the right to respect for his or her private and family life, home, communications and reputation.
> (2) Everyone shall have the right to the protection of his or her personal data, as well as to have access to and disseminate information of public interest.'*[242]*
> 'Everyone shall have the right to freedom of expression. '*[243]*

[239] Bankó - Szőke 2016.
[240] *Sähköisen viestinnän tietosuojalaki*, Act on Data Protection in Electronic Communications
[241] Jóri, András. Shaping vs applying data protection law: two core functions of data protection authorities. *International Data Privacy Law* 5.2 (2015): 133. 134.
[242] Article VI Fundamental Law of Hungary, previously: Constitution e) (1) 59
[243] Article IX Fundamental Law of Hungary

The Constitutional Court derives the right to privacy and freedom of private life *from right to human dignity*. The Fundamental Law states:

> '[h]uman dignity shall be inviolable. Everyone shall have the right to life and human dignity….'[244]

According to the Constitutional Court, an essential element of the private sphere is

> 'others shall not intrude nor look into without the consent of the one concerned'.[245]
> 'The content of this right is that everyone has the right to determine the disclosure and use of their personal secrets.'

The Constitutional Court declared that the right to the protection of personal data is not a traditional right of defence but a *right of self-determination in an active sense*. As *Majtényi László* points out, individuals are free to decide whether or not to supply their personal data - unless their right to do so is limited or suspended by a provision of law. Furthermore, they are entitled to information on the fate of the relinquished information.[246] The content of this right is that processing and use of personal data is at the discretion of the individuals themselves. Collecting and use of personal data is only allowed with the consent of the data subject; the entire path of data processing has to be transparent and visible for the subject, i.e. individuals have the right to know who uses their personal data, when, and for what purpose. As an exception, the law can order compulsory data processing and can also decide the way of usage. [247]

The Constitutional Court stressed in several of its decisions that the restriction of a fundamental right may only be regarded as constitutional if it is indispensable, that is, if it is *the only way to secure the protection of another fundamental right, liberty or constitutional value.*[248]

---

[244] Article II Fundamental Law of Hungary
[245] Constitutional Court Decision 36/2005. (X. 5.)
[246] Majtényi, László. *Freedom of Information. Experiences from Eastern Europe. Presentation by former Data Protection and Freedom of Information Commissioner of Hungary* (2004). http://www.osce.org/fom/36235
[247] Constitutional Court Decision 20/1990. (X. 4.), Constitutional Court Decision 879/B/1992.
[248] Constitutional Court Decision 30/1992. (V. 26.), Constitutional Court Decision 58/1994. (XI. 10.)

One form of violation of personality rights is *breach of the right to facial likeness and recorded voice*. In its decision *36/2005 (X. 5.) AB* the Constitutional Court declared that:

> 'recording performed in the above manner may affect – in a broader and deeper sense – the right to human dignity in general. It is the essential conceptual element of privacy that others should not have access to or insight into such private sphere against the affected person's will. When an unwilled insight nevertheless happens, the violation may affect not only the right to privacy itself, but also other rights in the realm of human dignity, such as the freedom of self-determination or the right to physical-personal integrity.'

3. Basic Concepts of the Data Protection Act and Grounds for Processing of Data

a. Basic Concepts

Key concept of data protection is *personal data*:

> 'any information relating to the data subject, in particular by reference to his name, an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity, and any reference drawn from such information pertaining to the data subject'[249]

Special data shall mean:

> 'personal data revealing racial origin or nationality, political opinions and any affiliation with political parties, religious or philosophical beliefs or trade-union membership, and personal data concerning sex life, as well as personal data concerning health, pathological addictions, or criminal record.'[250]

[249] Subsection (2) of Section 3 DPA
[250] Ponts a)–b) of Subsection (3) of Section 3 DPA

Processing of data shall mean:

> 'any operation or set of operations that is performed upon data, whether or not by automatic means.'

This concept again cannot be defined by providing a fixed list, the act itself only provides typical examples, such as *in particular*:

> 'collection, recording, organization, storage, adaptation or alteration, use, retrieval, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction, and blocking them from further use, photographing, sound and video recording, and the recording of physical attributes for identification purposes (such as fingerprints and palm prints, DNA samples and retinal images).'[251]

The DPA implements Directive 95/46/EC and *transplants its basic principles*: data processing must be fair and lawful; data must be only processed for a specified purpose, to exercise a right or to perform an obligation; and this purpose must be followed during all phases of data processing; the data processing must be indispensable and suitable to achieve its purpose; data must be processed only to the extent and for the duration necessary, to achieve the purpose of data processing; data must be accurate, complete and, if it is necessary, kept up to date; identification of data subjects is possible for no longer than it is required for the purpose for which the data is processed. [252]

b. Grounds for Processing

The DPA distinguishes *two plus one grounds for processing personal data*: (1) the data subject's consent, (2) mandatory processing and (3) as the result of the balancing of interests test.

The consent shall be freely and expressly given, specific and informed indication of the wishes by which the data subject signifies his agreement to personal data relating to him being processed without limitation or with regard to specific operations when

[251] Subsection (10) of Section 3 DPA
[252] Section 4 DPA

processing is necessary as decreed by law or by a local authority based on authorization conferred by law concerning specific data defined therein for the performance of a task carried out in the public interest ('opt-in').[253]

A very *important exception* is provided under Section 6:

> 'Personal data may be processed also if obtaining the data subject's consent is impossible or it would give rise to disproportionate costs, and the processing of personal data is necessary for compliance with a legal obligation pertaining to the data controller, or for the purposes of the legitimate interests pursued by the controller or by a third party, and enforcing these interests is considered proportionate to the limitation of the right for the protection of personal data.'

Bankó and Szőke point out that this third ground is contrary to the DPD of the EU; however, it did make the regulation more life-like and feasible.[254]

> 'Where processing under consent is necessary for the performance of or the entering into a contract with the controller in writing, the contract shall contain all information that is to be made available to the data subject under this Act in connection with the processing of personal data, such as the description of the data involved, the duration of the proposed processing operation, the purpose of processing, the transmission of data, the recipients, and the use of a data processor. The contract must clearly indicate the data subject's signature and explicit consent for having his data processed as stipulated in the contract.'[255]

An internal data protection officer[256] gives extra safeguard for data protection, therefore, it is advisable to elect one, even in cases where there is no legal obligation to do so.

[253] Subsection (7) of Section 3 DPA, Ponts *a)–b) of Subsection (1)* of Section 5 *D*PA
[254] Bankó – Szőke. 2016. 35-36.
[255] Subsections (4) of Section 6 DPA
[256] Subsections (1)–(2) of Section 24 DPA

4. Fundamental Provisions of the Labour Code, Points of Reform

Crucial changes compared to the former Labour Code are the emergence of authorisation by law (ground two for processing), the inclusion of a new ground on the basis of balancing of interests test and detailed regulations on monitoring. The implications are profound.

As apparent from the wording of the LC ('if deemed necessary for the conclusion, fulfilment or termination of the employment relationship') protection of personality rights is a duty not only *during but also before and after the employment relationship.* Pre-employment relationship issues include data processing with relation to job advertisements, job interviews or the work of temporary work agencies'.[257] After the employment relationship is over, storage of ex workers' data, or non-compete agreements also have a personality right dimension.

The processing of the employees' data is inevitable. Let us think about the data necessary to draft the most common employment contract or the data necessary to pay wages. Even sensitive data must be processed at times. The employees have to inform the employer about their trade union membership if they want the membership fee to be deducted from their wages or enjoy specific protection. In order to get extra days off, the employees also have to provide information about their children etc. An important field for processing data is connected to monitoring. The employee is obliged under Section 52 of the LC to appear at the place and time specified by the employer, in a condition fit for work; be at the employer's disposal; perform work, with the level of professional expertise and workmanship that can be reasonably expected; and cooperate with their co-workers. During the life of the employment relationship, workers shall not engage in any conduct by which the legitimate economic interests of the employer are jeopardized, unless so authorized by the relevant legislation[258]. Workers may not engage in any conduct during or outside their paid working hours that –stemming from the

[257] Ferencz, Jácint, Kun, Attila, Fodor, T. Gábor, and Mészáros, Katalin Éva: *A munkaviszony létesítése.* Budapest: Wolters Kluwer, 2016. (Munkajogi kiskönyvtár) 10.
[258] Subsection (1) Section 8 LC

worker's job or position in the employer's hierarchy – directly and factually has the potential to damage the employer's reputation, legitimate economic interest, or the intended purpose of the employment relationship.[259] The duty to act in good faith as well as the duty to refrain from activities that would endanger or damage the employer's rights and interests works both in- and outside working hours, in real life as well as in online environment. Abuse of rights is prohibited.[260] It is in the lawful interest of the employer to ensure and monitor that/if these duties are fulfilled in a manner they should be fulfilled.

The right to monitor the work of the employees is an essential and natural part of the catalogue of employer's rights that are inextricably linked to the right to right to instruct, direct and allocate work and the employer's managerial prerogative. The right to instruct can be found in the labour law of all great legal systems: The '*pouvoir de direction*' is key element of the French labour relationship; it's Spanish equivalent is the '*poder de dirección'*, the Italian '*eterodirezione*', the German '*Direktionsrecht*', the British '*power of direction*'.[261] However, this right is bound to collide with a multitude of employee rights and interests[262].

Section 11 LC states:

> '(1) Employers shall be allowed to monitor the behaviour of workers only to the extent pertaining to the employment relationship. The employers' actions of control, and the means and methods used, may not be at the expense of human dignity. The private life of workers may not be violated.
> (2) Employers shall inform their workers in advance concerning the technical means used for the surveillance of workers.'

[259] Breznay, Tibor and Hágelmayer, Istvánné. *A Munka Törvénykönyve és az ítélkezési gyakorlat*. Budapest: Ergonosoft, 1994. 26-30.; Bankó, Zoltán at al. *CompLex Munkajogi e-kommentár. 2012*.; KISS, György. M*unkajog*. Budapest: Osiris, 2005. 171-172; Horváth, István. *Munkajog*. 2. ed. Budapest: Novissima, 2007. 168-170.; Lehoczkiné, Kolonnay, Csilla (ed.). *A magyar munkajog*. I. Budapest: Vince Kiadó, 2002. 169-180.; Gyulavári, Tamás (ed.). *Munkajog. 2*. rev. ed. Budapest: ELTE Eötvös K, 2013. 78-81.; Takács, Gábor, and Kártyás, Gábor. *Az új munka törvénykönyve munkáltatóknak*. Budapest: CompLex K., 2012. 18.

[260] Section 7 LC

[261] Kajtár, Edit. A munkáltatói utasítás helye a 21. század munkajogában. *JURA* 20:(2) 214-224. (2014).

[262] Böröcz, István. A munkahelyi érdek-összeütközés rendhagyó formája: munkavállalók megfigyelése pró és kontra. 55 *Infokommunikáció és Jog* (2013): 99-101.

As we see, the employer is entitled to monitor the employee as far as the employee's employment-related conduct is concerned - without the permission of the employee. Key boundaries are: the provision of previous information of the devices used; and the human *dignity*. Let us take a look at some examples from the case law: The employer cannot require the employees to give detailed account of why they had a break from work (i.e. to use the toilette, to have a cigarette break). Such practice infringes personality rights.[263] The practice of the major who hang the payrolls of the workers on the wall of the pub operated by him was clearly against the most basic data protection principles.[264] The use of 'wall of shame' is also prohibited.

The wording of the LC refers to employment relationship and not to working hours, thus the monitoring of activity outside working hours per se is not prohibited, as long as a link to the employment relationship is present. The employers' actions of control and the means and methods used may not be at the expense of human dignity. The LC does not state that the private life shall not be subject to monitoring, only that it may not be violated. On the other hand, the law does regulate certain aspects of private life when it prescribes for instance public servants to act in a manner that is consistent with the ethos of their profession. The LC obliges the employers to inform their employees in advance concerning the technical means used for the surveillance, which means that employees have to be aware of the possibility of their Facebook account/e-mails/GPS data etc. may be inspected. This in itself does not make monitoring lawful; obviously other requirements of data protection have to be met as well.

[263] ABI–945–2/2011/P
[264] ABI 349/A/2007

VI. Cases and Recommendations from the Hungarian Practice

1. Use of Telephone and Cell Phone at the Workplace

The recommendations of the former data protection officers are still valid. Interception of telephone calls is forbidden, as doing so is considered a disproportionate restriction of privacy. To prevent the employees from leaking out company secrets is no justification. This is understandable as there are many other ways to leak out these secrets (in person, in e-mail, etc.).[265] In one case the employee terminated his relationship because he found out that a tracking software operated on his smartphone without his knowledge. The labour court found the termination lawful and well founded.[266] In another case the call centre of the employer recorded and stored the data related to all phone calls. This practice again was found to be unlawful.[267]

Mobile phones have become working tools that make employees available. In practice, even if they are provided for professional purposes, a reasonable degree of private use is in most cases accepted. Still, the employer is entitled to restrict or completely prohibit private use. A plausible means of monitoring telephone use is to review the list of dialled numbers. However, the legal difficulty arising from this method is that the telephone number of the dialled party constitutes personal data and it is practically impossible to collect such parties' consent to handling their data (in practice this usually does not block employers from reviewing call lists).

Regarding cell phones, the NAIH's adopted practice is as follows:

- For the sake of controlling the usage of the company's mobile phones, the employer needs to indicate the detailed rules of control before the beginning of the control.

---

[265] 158/A/2000

[266] Gera, Dániel. *Balancing the right to employer control with employee privacy concerns.* Available at: http://www.internationallawoffice.com/Newsletters/Employment-Benefits/Hungary/Schoenherr-Rechtsanwlte/Balancing-the-right-to-employer-control-with-employee-privacy-concerns#

[267] 614/K/2003

- It is in the employer's discretionary power to decide for which purposes the company's mobile phones can be used for. The employer, has the legitimate right to demand control of the use of company mobile phones - in particular, that normally the employer pays the bills – provided the employees are notified about the existing provisions beforehand.
- Based on the LC the employer is entitled to inspect the usage and cost of the company cell phones made available for work.
- When accounting extra phone costs employers have to ask for call details in an obscured format at the mobile service company, (i.e. phone numbers or the last digits of the numbers have to appear in an obscured form).[268]

2. CCTV Camera Surveillance

In the case law the *justifications* include valuable working tools, prevention of stealing, health, safety of work (especially work with heavy tools), and monitoring of the work (controlling presence, compliance with working time regulations). From the practice of the *former data protection commissioner the recommendations on CCTV cameras hold true* till today. The essential content of the right to human dignity is affected if the regulation allowing the application of electronic surveillance systems fails to address the respect and protection of privacy. CCTV cameras installed for protection of property cannot be used for other purposes, such as checking the employee's behaviour.[269] The threat justifying CCTV cameras has to be real and direct, *indirect threat does not suffice*. Less intrusive measures include employment of security guards, safe gates with alarm system, and inspectors.

In spite of the detailed regulation on the lawful use of CCTV cameras, the case law

[268] National Authority for Data Protection and Freedom of Information. *Annual report of the Hungarian National Authority for Data Protection and Freedom of Information 2015*. Budapest: 2016. Available at: http://www.naih.hu/files/NAIH-Annual-Report-2015-EN-2016.06.pdf 29
269 ABI–2962/2010/P

highlight *great loopholes* in the practice of the employers.[270] In an infamous case, the employer installed a hidden CCTV camera to find out the reason for the mysterious disappearance of food from the canteen of the enterprise. The chef indeed ate more from the food then necessary, however, the hidden CCTV camera got red light form the commissioner,[271] just like the flower shop owner in another case, who followed how the four employees work with CCTV camera.[272] It was also unlawful to install a system of six CCTV cameras to monitor the fire brigade to ensure protection of property, compliance with health and safety rules as well as effective work. The commander installed a CCTV camera also in the standby room available for fire fighters working on 24 hours shift.[273] With regard to the use of CCTV cameras at a secondary school, the data protection commissioner pointed out that, as general rule, it is not lawful to operate CCTV cameras for property protection at locations where work takes place continuously. It was stated in other cases as well, that CCTV camera surveillance of those sections of the workplace where work takes place (office) can only be justified in exceptional circumstances, e.g. mobbing, harassment[274].

At exceptional cases CCTV camera may be operated when the protection of life and corporal integrity of the persons working at the location or the reconstruction accidents makes it necessary[275].All those location where surveillance with the use of CCTV camera may hurt human dignity, i.e. in changing rooms or wash room, the use of CCTV camera is prohibited. Though interestingly Rácz Réka writes about cases where the employees expressed their wish for instalment of CCTV camera in the kitchen.[276]

Employers shall inform their workers in advance concerning the technical means used for the surveillance of workers.[277] Besides written documents, information has to be

[270] Lukács, Adrienn. A munkavállalók személyiségi jogainak védelme, különös tekintettel a munkahelyi kamerákra. *De Iurisprudentia et Iure Publico* 7.2 (2013): 1-32.
[271] ABI–2323/2010/P
[272] ABI 598/A/2007
[273] 1805/A/2005–3
[274] ABI–97/2010/P
[275] 1744/K/2009–3
[276] Rácz, Réka. A munkaviszony létesítésével összefüggő dokumentumok tartalma a gyakorló ügyvéd szemével. In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 401-413. 403.
[277] Subsection (2) of Section 11 LC

provided in a clear and well-visible format (*warning sign, pictogram*).[278] This is not to say that *hidden CCTV cameras* are always ruled out. In a procedure in front of a court or other authority, finding out of the truth is a public interest, therefore in cases where proof can only be gathered by hidden CCTV cameras, the footage will be used in the procedure as evidence. In these cases the secret CCTV camera is not considered as misuse of rights.[279] In many other Member States (e.g. Germany and France) the practice developed to the opposite: If the evidence is gathered with infringement of personality rights, the court will not take it into account in the procedure.

The *NAIH* has issued *guidelines* and recommendations for internal policies.

- The surveillance must be related to the employer's proper operations.
- The surveillance is allowed only to the extent necessary to protect the employer's rightful interests, and any restriction of employees' privacy must be proportionate.
- Employees must be informed in advance of the possibility of surveillance.
- Employers need to request the opinion of employee representatives (e.g., works councils and trade unions) before establishing policies and methods of surveillance.
- Personal data related to the surveillance must be handled in accordance with the general principles and rules of the Act on Data Protection.

A recent case[280] concerned the planned employee surveillance program of the *municipality of Ózd*. The municipality wished to use handheld CCTV cameras and CCTV cameras built into glasses to record how its public work projects progress and, if necessary apply disciplinary measures against workers not fulfilling their duties properly. One of the declared reasons was monitoring the efficiency of work and the use of working time. Ózd municipality claimed that the CCTV cameras would only be used when the employees' supervisors noticed any irregularity.

---

[278] ABI–2962/2010/P

[279] EBH2000. 296; Kulisity, Mária. Bizonyítás a munkaügyi perben. In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 260

[280] NAIH/2015/3355/5/H

The NAIH's guidance stated that:

- Surveillance systems can primarily be used for the purposes of protecting health and safety, personal freedom, business secrets and assets.
- Surveillance may also cover hazardous establishments and worksites (for instance assembly labs containing heavy machinery, and certain manufacturing processes). In justified cases, employees may also monitor locations necessary for the protection of tools, raw materials and other assets with significant value (primarily storage rooms and the hallways leading to them).
- CCTV camera surveillance, however, cannot be directed to monitor the activities of a single employee, influence employees' behaviour at work, or record work breaks. In line with the principle of data minimization, employers should record a misdeed only if it cannot be documented or proved in another manner and with a device less invasive upon privacy.
- Recording footage to document completed works should not necessarily have to include footage of the employees themselves. In case of suspected crime, recording can only take place if the commission of the crime is a real possibility and evidence cannot be obtained by other means. Primarily the suspected crime and the relevant people should be recorded.
- The employees must receive sufficient (and well documented) privacy notice, independently of their employment contract. The consent of the employees is not necessary, but the notice has to refer to the LC and the legitimate interests justifying the surveillance.
- Additionally, the supervisor has to verbally call to the employee's attention that he/she will record footage of the irregularity. If the recording leads to disciplinary measures, the footage may be stored for 3 years. The footage must be deleted once it has been handed over to an authority or court as evidence.
- Finally yet importantly, it must be ensured that employees can, at any time, view and comment on the recording while the representative of the employer

is present.[281]

3. GPS

Before 2012, the *Data Protection Commissioner's recommendations* gave detailed guidelines on monitoring location-tracking systems in vehicles or mobile phones. The location of a person is his or her personal data, and that of the vehicle is the personal data of the person using it. The employer installing location-tracking systems in vehicles or mobile phones used by employees is considered as data processor. Processing the location data of employees is not authorised by law. The Commissioner pointed out that point a) of Subsection (1) of Section 103 of the former Labour Code does nor provide a suitable legal basis for processing such data. Only the consent of the data subject can provide a suitable basis for data processing. The system can only be used as last resort. Only the location of those employees whose work makes location-tracking necessary can be tracked.[282] 24/7 control is unlawful; tracking has to be limited to working hours. The Commissioner has recommended many times that it should be possible for the employee to switch off any installed location-tracking system.[283]

In its 2015 Report the *NAIH* recommends

- using the GPS application for logistical purposes,
- it needs to serve as a tool that determines the position of the vehicle, rather than to follow the employee.[284]

[281] *Hungary: More Guidance on Employee Monitoring* http://www.cms-lawnow.com/ealerts/2015/08/hungary-more-guidance-on-employee-monitoring (23.07.2016)
[282] Szőke, Gergely László et al. *Privacy In The Workplace Final (Comparative) Report On Hungary and Germany.* 2012. 93-94
[283] Hungarian Data Protection Commissioner 1664/A/2006–3
[284] National Authority for Data Protection and Freedom of Information*: Annual report of the Hungarian National Authority for Data Protection and Freedom of Information 2015.* Budapest, 2016. Available at: http://www.naih.hu/files/NAIH-Annual-Report-2015-EN-2016.06.pdf p. 29.

4. Use of the Internet (Browsing History) and Company Computer

Development of IT influences enjoyment of personality rights in their very core. To what extent classic law institutions may be used for misbehaviour on the Internet is contested.[285]

Employers may regulate, completely ban, or restrict the use of the Internet in the workplace. In practice, restricting access to certain websites, such as social media sites is common, but the employer may also opt for assigning a time frame in which private use is allowed. The employer may only check the websites accessed by the employees if information on this possibility was provided previously.

- The *NAIH* advocates for a pre-emptive approach. In practice this means using filters or limiting the list of sites the employees are allowed to visit to those which are useful for the work.
- If, due to the nature of work the restriction is not feasible, the opened page listing can be monitored only if the employer has informed the employee about the inspection or the possibility of the inspection in advance. In any case, employers have to provide an explicit and detailed regulation on private use of the Internet.[286]

In a *case*[287] concerning processing private data on *company laptop* by the employer, the laptop was thoroughly searched after the suspicion arose that the employee may have had unauthorised contact with competitors. The employee denied access arguing he stored private as well as trade union data on the computer. In the end, he handed over the laptop, but only after deleting a part of the data stored (in the opinion of the employer, not only the personal and sensitive personal data, but also confidential information). To be able to view all the deleted data, the company engaged an IT

[285] Bayer, Judit. Kísérletek a személyiségi jogsértések szabályozására: Mennyiben alkalmazhatóak a klasszikus szabályok az internetre? *Állam- és Jogtudományi Intézet Értesítője* 46.3-4 (2005): 197-216.
[286] National Authority for Data Protection and Freedom of Information: *Annual report of the Hungarian National Authority for Data Protection and Freedom of Information 2015*. Budapest, 2016. Available at: http://www.naih.hu/files/NAIH-Annual-Report-2015-EN-2016.06.pdf 29-30
[287] NAIH/2015/1402/H

specialist, who indeed recovered the erased data. Amongst others nude photos, bank account data, health data, private correspondence and names of trade union members were reanimated. The managing director demanded the employee to declare that he is identifiable on the nude photos so that the photos can be considered as private; if not, the company should disclose these photos as part of the disciplinary procedure. The employee refused to declare this, after which he was dismissed by extraordinary termination.

The NAIH pointed out many flaws of the company´s system:

- For one, the IT policy enabled the private use of company assets as far as such use did not hinder the efficiency of the work. Instead of this general and ambiguous wording, the NAIH suggested a 'yes or no' approach.
- The NAIH also pointed out, that even if private use is not tolerated, and the IT tool belongs to the company, the employer should not access those files which are private. Besides, the IT policy contained prohibition on storing adult content on the company's assets.
- According to the NAIH, general definitions, such as 'inappropriate content' are too vague, and private nude photos may not constitute 'inappropriate content' at all.
- The NAIH also found that the employer's IT policy was not properly disclosed to the employees; it was available on the intranet, however, the employer could not prove that the employers have fully read it, nor could the employer prove that it held a relevant training or sent the relevant policies via e-mail.
- Finally, the investigation infringed the last resource principle, too. The doubt regarding the unauthorized contact with competitors should have been investigated at first by less intrusive methods, e.g. the verification of the print-logger and the e-mail traffic on the company network devices.[288]

[288]See also the analysis here: https://iapp.org/news/a/hungary-hungarian-dpa-suggests-refinements-in-it-policies/

5. E-mail/Messenger

Judicial case law gives the *same protection to e-mails as to traditional mails.*[289] The academic literature distinguishes between e-mails sent within and outside the workplace. In case of the second category both sender and receiver may be a person outside the workplace, thus his or her consent will not be provided.

Employers enjoy a *great degree of freedom* when establishing the rules governing use of professional email addresses. Professional email addresses must be used primarily for professional purposes, but a reasonable degree of private use is usually accepted, as long as this does not interfere with professional use. Employers may prohibit sending or receiving emails to or from specific addresses and may use specific filters to enforce these rules. Employers are allowed to access employees' mailboxes for monitoring and control purposes, provided that the employees are informed in advance (i.e., before the process commences) of the reasons for such access. If possible, it is recommended to allow employees sufficient time to dispose of their private data before accessing their mailbox. Employers may access the contents of messages sent or received by employees in professional matters. However, if a message can be assumed to be private, the employer may not access its contents. [290] After the employment relationship ends, it is practical to send out automated responses to the senders of incoming mail.[291]The former data protection commissioner advised employees to provide information on the data protection measures at the bottom of the e-mails sent out.[292]

The NAIH:

- Repeatedly pointed out that checking e-mails should only be used as last resort, and it should always take place in order to meet a legitimate aim (e.g. to obtain evidence).

[289] Hungarian Data Protection Commissioner 40/K/2006–3
[290] Gera, Dániel. *Balancing the right to employer control with employee privacy concerns*. Available at: http://www.internationallawoffice.com/Newsletters/Employment-Benefits/Hungary/Schoenherr-Rechtsanwlte/Balancing-the-right-to-employer-control-with-employee-privacy-concerns#
[291] Hungarian Data Protection Commissioner 879/A/2005–3
[292] Hungarian Data Protection Commissioner 1393/K/2006–5

- If the e-mail system cannot be used for private purposes, a good quality and highly detailed prior written prospectus should be drawn to the attention of each employee separately.
- When checking e-mails is inevitable, employers need to follow a three step process: first, only traffic data needs to be checked, secondly, only the e-mails sent in the specified time period. The actual content of the e-mails can be checked only if the previous steps were insufficient.
- The NAIH points out that employers cannot be acquainted with the content of private messages, even within the pursuit of their rights.[293]

VII. Cases and Trends around the World

1. Tapestry of Legal Traditions

> 'There is a rich tapestry of legal traditions and cultures at European level that originate in turn different privacy and data protection regimes. These differences are evident mainly by the existence of a gap between the privacy regimes of both civil law and common law. In western countries, civil law privacy developed as a human rights demands grew, and shaped many national constitutional frameworks from the late 1940's in response to the horrors of totalitarian regimes. By contrast, privacy protection in common law systems has been developed mainly within private law, as a legitimate interest protected by national tort law.'[294]

The level of privacy protection afforded depends on *multiple factors*. Roger Clarke identifies a long list of potential influencing factors ranging from philosophical and social to technical ones. *Philosophical and social attitudes to individual freedoms and social control;*

[293] National Authority for Data Protection and Freedom of Information: *Annual report of the Hungarian National Authority for Data Protection and Freedom of Information 2015*. Budapest, 2016. Available at: http://www.naih.hu/files/NAIH-Annual-Report-2015-EN-2016.06.pdf 30.

[294] http://irissproject.eu/wp-content/uploads/2013/04/Comparative-theoretical-framework-on-surveillance-and-democracy-D2.4-IRISS.pdf 24-25.

constitutional matters (e.g. constraints on the competence of the national government imposed by 'the division of powers in a Federation'); *geographic, economic and cultural factors*, such as population concentration, *centralisation of authority, the size of the governmental sector, and the degree of information openness* are also relevant. *The nature of the legal system* inevitably leads to differences (e.g. in the common law system of the UK, the case law will define some areas of law, and will be crucial to the interpretation of others). Also decisive is what legal mechanisms are already in place and what the level of existing protections for information privacy is. It is not hard to see why the last factor, the sophistication of IT is listed.[295] In Central and Eastern Europe, including Hungary, the ideological shift and the transition from a centrally planned to a free market economy had its mark on the development of the legislation.[296]

At the level of internal law sources, *a general data protection act is generally accompanied by sector-related acts* that have regulations relating to data protection. In some states, we can find a labour law specific approach i.e. an act is dedicated specially to regulate data protection in labour law. The advantage of this approach is that it is tailored to the context of labour law, and consequently it responds to the special position of the actors (power imbalance).

In the compared states, monitoring of employees is permitted to varying degrees. Here I will give an overview of the selected countries, searching for common features and national specialties.

[295] Clarke, Roger. The OECD Data Protection Guidelines: A Template for Evaluating Information Privacy Law and Proposals for Information Privacy Law. *Australian National University Unpublished Working Paper Retrieved 22 October* (2013).
[296] Kovács, Erika, Lyutov, Nikita, and Mitrus, Leszek. Labor law in transition: From a centrally planned to a free market economy in Central and Eastern Europe, In: Finkin, Matthew W. and Mundlak Guy (eds). *Comparative Labor Law*, Elgar Publishing, 2015, 403-439.

2. Experiences from Different Parts of the World

a. Austria

In Austria, the main legislation is the Federal Act concerning the Protection of Personal Data (*Bundesgesetz über den Schutz personenbezogener Daten, Datenschutzgesetz 2000*). Regarding labour law, the Works Council Constitution Act (Arbeitsverfassungsgesetz, '*ArbVG*'), and particularly, sections 96 and 96a ArbVG are relevant.

Video surveillance for monitoring of efficiency of the workforce is expressly prohibited. The employer can restrict the employees' use of the *internet* to the 'absolutely necessary' level, and can make sampling to check compliance. It is to be emphasised that the content of private *e-mails* as well as the browsing history cannot be reviewed, even if the Works Council or the employee consented beforehand. Where no works council is established, each employee needs to provide its consent to the video surveillance of its workplace. In practice, employees are instructed to mark personal e-mails as 'private'. The use of spyware is forbidden.[297]

The works council plays a key role in regulating monitoring at the workplace. This is the case even where the employer is actually not carrying out any monitoring, and its duty is the opposite: the implementation of technical measures to prevent any monitoring from taking place.[298]

b. Finland

[297] Grünanger, Josef, and Goricnik, Wolfgang. *Arbeitnehmer-Datenschutz und Mitarbeiterkontrolle. Handbuch*. Wien: Manz Verlag 2014.; Falzone, Elisabeth. *Ortung von Mitarbeitern durch Handy und GPS-Navigationssysteme*. Grin Verlag, 2013.; Sammer, Brigitte. The tension between monitoring employees and preserving privacy from an Austrian perspective. 2015 Available at: http://united-kingdom.taylorwessing.com/globaldatahub/article_austria_employee_privacy.html

[298] Sammer, 2015.

In Finland, more detailed provisions on data protection are laid down in the Finnish *Personal Data Act 523/1999* and the recent *Information Society Act 917/2014*. *Act on the Protection of Privacy in Working Life 759/2004* provides protection especially at the workplace context. We find exceptionally firm limitations on employee monitoring. Compared to the Hungarian regulation (and, in fact, the regulations in all other Member States), Act 759/2004 provides the most strict data protection for employees.

The monitoring of the employee's *internet* browsing is prohibited. Reading the e-mails of the employees, processing identification data in a communication network, or the use of CCTV cameras, drug tests or personality and skill assessments are allowed only after strong, procedural steps have been taken.[299]

As a main rule, all *messages* are confidential unless otherwise provided by law. Even if the employer owns the technical infrastructure, the right to private communication is sacred. Unless provided for in a provision, the employer cannot read the e-mails received or sent by employees. Under strict conditions and procedural rules, the employer may monitor its employees' use of e-mail and the company network.

The *Data Protection Ombudsman* stated that an employer may issue policies on the use of the company networks and regulate under what conditions is web surfing is allowed, but monitoring of this is not possible – not even with the employee's consent. The Ombudsman also underlined that identification data from the employees' web surfing may not be collected, viewed or used by the employer in order to monitor or follow the employees' actions at work. How can the employer enforce its policy? As alternative method employee *training* is suggested.

The employer may not monitor or record an employee's *phone calls* of private nature. However, the employer may monitor or record calls, for example, within the company's regular areas of business as proof of relevant communication. Consequently, the employer may in general record phone calls made to its customer service number without notifying the employee taking the customer calls. The personnel must, however,

[299]http://www.iclg.co.uk/compare#practicearea=employment-and-labour-law&&jurisdictions=finland@@&&questions=915367@@915368@@915369@@915370@@915371@@

be informed of the employer's policies on the recording. Why the recording is made, must be determined in advance, and the recorded personal data must be necessary and accurate with regard to the said purposes. Naturally, the employer may use the data for these purposes only.[300]

c. France

In France the main sources of data protection at the workplace are *Act No. 78-17 of January 6, 1978* on Information Technology, Data Files and Civil Liberties as amended (Loi Informatique et Libertés) and implementing *Decree No. 2005-1309*. Article 9 of the *French Civil Code* (Law No. 70-643, 17 July 1970) guarantees everyone a right to respect of his private life. Article L.120-2 of the *Labour Code* (Law No. 92-1446, 31 December 1992) allows only those restrictions on rights of persons or on their individual or collective liberties that are justified by the nature of the work and proportionate to that end. France was one of the first EU Member States to adopt a data privacy act (Act no. 78-17 of 6 January 1978 on Data Processing).

French employers are entitled to access any office equipment which they have made available to their employees, including *computer, e-mails and phone calls*, but not where they are unambiguously identified as 'private'. Even if the content was not marked, it cannot lead to a disciplinary sanction if it appears that it falls within the scope of the employee's private life.[301] The employers may limit the use of Internet and company e-mails to ensure network security and limit extensive personal use of the IT resources. Employers may have access to professional e-mails of the employees and review the websites visited even in the absence of the employees. E-mails that are clearly identified as 'private' cannot be read even if the private use of company IT tools has been strictly

[300] www.iclg.co.uk/compare#practicearea=employment-and-labour-law&&jurisdictions=finland@@&&questions=915367@@915368@@915369@@915370@@915371@@@

[301] http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/france

banned. An employer may also listen to or record employee telephone calls, for example for training, performance or quality purposes.

GPS in company vehicles may be used to monitoring working time, provided this cannot be achieved by other means, but not to monitor compliance with speed restrictions or to permanently monitor the employee.[302]

Employee representatives must be consulted before implementing monitoring technologies.

d. Germany

For historical reasons Germany has *one of the strongest data protection systems*. The principal piece of legislation is the Federal Data Protection Act (*Bundesdatenschutzgesetz*), in addition, federal states have their own state-level data protection laws and there is a rich body of *case law*.[303] The right to privacy is protected by the *Constitution;* and the *Federal Data Protection Act*[304] limits the employer's use of personal data to specific purposes of the employment relationship. The general rule is that collecting, using and monitoring personal data is prohibited unless the employee consents expressly in writing or the law expressly allows it. Unauthorised monitoring of private communication can be considered a criminal offense.[305]

Permanent monitoring of employees via *CCTV* is usually not permitted, and companies have been fined for doing so. Random monitoring for quality and training purposes (e.g., listening in on customer calls) may be allowed. [306] The supervisory authorities and the specialist literature advice is that the best way to avoid risks of

---

302 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/france

303 Szilágyi, Ferenc. A személyiség magánjogi védelmének dogmatikája a német jogban: Az általános személyiségi jog tana, különös tekintettel a személy becsületének és jó hírnevének védelmére. *In Medias Res* 2.2 (2013): 347-380.; Zakariás, Kinga Az általános személyiségi jog a német Szövetségi Alkotmánybíróság gyakorlatában. *Jogtudományi Közlöny* 68.2 (2013): 73-87.

304 Bundesdatenschutzgesetz – BDSG

305 Article 206 Criminal Code, Article 202 a Criminal Code – StGB

306 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/france

criminal liability for *e-mail monitoring* is adopting proper provisions on the use of corporate e-mail systems.[307] Constant monitoring of employees' e-mails or internet usage is seen as unreasonable method of surveillance for the employee. The employer may, however, restrict the use of the *IT system (including e-mails)* to business purposes only, in which case the employer is entitled to make random and prompt samples of employees' usage and to read e-mails, except they are obviously private. [308]

The case law on monitoring employees` Internet use is inconsistent. To provide guidance, in January 2016t the German *Data Protection Authorities issued privacy guidelines* about using email and the Internet at the workplace.[309] The document recommends informing the employees about monitoring activities, but at the same time states that the employer has the right to check the Internet use randomly, to make sure that its staff uses it for allowed purposes only. A case from 2016 is in line with these guidelines.[310] Here, the employer checked the browsing history of the employee's computer without the employee's consent, after evidence emerged of a significant personal use of the Internet. According to the Regional Labour Court (Landesarbeitsgericht) of Berlin-Brandenburg, the Federal Data Protection Act permits the storage and analysis of historical browsing data of an Internet browser for monitoring abusive usage. The Court highlighted that the employer had no other way of proving the extent of the extensive use of the Internet.[311]

Section 87 Nos. 1 and 6 of the Works Constitution Act (*Betriebsverfassungsgesetz*) requires that the *works council* must be informed about, and agree to, all measures that concern how the employees' behaviour is regulated and whenever technical means to

---

[307] Wybitul, Tim. How to conduct e-mail reviews in Germany. *Compliance Elliance Journal* 2.1 (2016): 59-77. 76.Available at : http://www.qucosa.de/fileadmin/data/qucosa/documents/19917/CEJ%20Winter%202016%20Wybitul.pdf

[308] http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/france

[309] Orientierungshilfe der Datenschutzaufsichtsbehörden zur datenschutzgerechten Nutzung von E-Mail und anderen Internetdiensten am Arbeitsplatz Available at: http://www.baden-wuerttemberg.datenschutz.de/wp-content/uploads/2016/02/OH_E-Mail_Internet_Arbeitsplatz.pdf

[310] 5 Sa 657/15

[311] http://de.orrick.com/EN/Media/News/Pages/Employer-is-entitled-to-check-browsing-history-without-the-employee's-consent.aspx

monitor the employees' behaviour and performance are to be introduced. This process usually takes several months. [312]

e. Italy

Under Italian law, the use of *audio-visual systems or other equipment* as a way of controlling the working activity of the employees at a distance is forbidden. Systems and equipment of control which are needed for organisational or productivity requirements or safety at work, and their use may allow monitoring of the employees, can be installed only with a prior agreement between the employer and the *works councils* or, in the absence of the latter, the internal commission.[313]

Under a recent legislation which entered into force in *September 2015*, employers are no longer required to obtain authorisation for providing employees with equipment to be used to perform their work (typically laptops, cell phones, and computers), even if the equipment is electronic and employers could use it to monitor employees' activities. On the other hand, employers are obliged to regulate the use of this kind of equipment in a *policy*.

f. Portugal

Regarding protection of the employees' e-mail and internet use, the Portuguese law is highly protective. It is debated if the employer can forbid entirely private use of e-mails. According to the majority opinion, such general prohibition would be unrealistic.[314] Detailed regulation is provided by *Law 67/98 of 26 October on Data Protection Act*. The

312 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/france

313 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/italy

314 Gomes, Júlio Manuel Vieira and de Oliveira Carvalho, Catarina. *Labour Law in Portugal.* Kluwer Law International, 2011. 61-62

Portuguese Data Protection Authority gave thorough *recommendations* regarding different forms of monitoring. It is worth discussing these in details.

Starting with *phone calls*:

- The employer shall define the level of tolerance regarding private use and inform about the form of control adopted.
- Only data that is strictly necessary to achieve the purpose of the control shall be processed. In practice this means the user identification, his rank/function in the corporation, the number called, the type of call, i.e. local, regional or international, and the length and the cost of the call).
- Undue access to communications, the use of tapping device, storage, interception and surveillance of the communications is unlawful. In cases of exceptions (a typical example here is recording for training purposes) prior consent of the users or legal provision is necessary.
- Clear and precise rules have to be in place to govern the use of e-mail and Internet access.
- The policy has to be based on principles of adequacy, proportionality, mutual collaboration and reciprocal trust.
- To ensure that the views of both parties are taken into account, the employees and their representatives give their opinion on the policy before it is published.

Regarding the use of *e-mails*:

- The employer can ban the use of e-mails for private purposes, however, even in this case, the control methods have to be non-intrusive.
- The control shall be targeting the areas that present a greater risk for the business; constant monitoring is not allowed.
- In case e-mails have to be opened, e.g. because the employee's long illness, prior notification is necessary.
- The monitoring shall aim principally to guarantee the security of the system. A practical method may be to filter certain files (like mp3 files) that likely to accompany private e-mails.

- The detection of a virus does not justify the reading of the e-mails.
- The access to the employee's e-mail shall be the last recourse, and it should be done in the presence of the employee concerned.
- The access shall be limited (to the addresses of the recipients, the subject, the date and hour).
- The employee may object to the reading by the employer if they are private.

The Portuguese Data Protection Authority also gave recommendations on *monitoring Internet access.*

- A certain level of tolerance shall be granted especially if the employees access the Internet outside working hours.
- Again, permanent and systematic control of Internet access is prohibited, e.g. the employer may processes data about the most acceded websites, but without identifying the place of origin of the access.
- If excessive and disproportionate use is verified, the employee shall be warned.
- The control of the time spent daily on the Internet and the websites used by the employee shall only occur in exceptional circumstances; in particular, when the employee, after the warning, doubts the employer's indications and wishes to confirm such accesses.[315]

Regarding the case law on the use of *GPS,* the Portuguese Supreme Court

- repeatedly stated that GPS shall not be considered a remote surveillance method intended to control the professional performance of the employee, which is, as a general rule, forbidden by the *Portuguese Labour Code* unless it is used for protection and safety of persons and property or when justified by particular circumstances of the business and provided that it is authorised by the Portuguese Data Protection Authority and, if applicable, the work councils are consulted.

[315] Costa, Mónica Oliveira. *Employees' Monitoring of Information and Communication Technologies Private Usage – Guidelines updated in Portugal.* Available at: https://www.privacy-europe.com/blog/employees-monitoring-information-communication-technologies-private-usage-guidelines-updated-portugal/ (07.19.2016)

- In the cases the vehicle concerned was used by the employee only for professional purposes, and the employee was in one of the cases a professional driver for the carriage of dangerous goods, in another case he was a technical sales person.
- Thus the Portuguese Supreme Court concluded that the use of GPS was proportionate, adequate, relevant and not excessive considering the purposes, circumstances and the interests at stake.[316]

Contemplating on the latest development Teresa Moreira Coelho writes:

> 'The monitoring and electronic surveillance create a qualitative jump and we have an electronic control at distance, cold, incisive, surreptitious and seemingly to know everything, becoming possible a total control, or almost total, of all the activities of the workers' life, what makes that the worker becomes transparent for the employers and stops feeling free.'[317]

g. Spain

Article 18 of the Spanish *Constitution* enshrines the right to privacy. The Spanish *Data Protection Act 15/1999* (Ley Orgánica de Protección de Datos, 15/1999, LOPD) is accompanied with *Royal Decree 1720/2007 (RLOPD).* Article 20.3 of Real Decreto Legislativo 2/2015, de 23 de octubre, del Estatuto de los Trabajadores sets out the rules on the control of employees. Monitoring must be lawful, transparent, proportionate and legitimate and any more intrusive means to reach equivalent goals should not exist. Prominent *video* vigilance signals are always a must. The employers may monitor the use of electronic devices, provided these are in their property, and provided that

316 Costa, Mónica Oliveira. *Portugal: While waiting for the Regulator to issue guidelines the Portuguese Supreme Court was already called to decide on the use of GPS in the workplace!* Available at: https://www.privacy-europe.com/blog/portugal-waiting-regulator-issue-guidelines-portuguese-supreme-court-already-called-decide-use-gps-workplace/ (07.19.2016)

317 Moreira, Teresa Coelho. The Protection of Workers' Personal Data and the Surveillance by RFID in Portugal. *GSTF Journal of Law and Social Sciences (JLSS)* 3.1 (2014): 105 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/portugal

information about the monitoring was given in advance. The results of the checks may be used as evidence to sanction the affected employees in the event of an unlawful use. This prerogative of the employer has been confirmed by the Spanish Supreme Court.[318]

Notice is always required. Consent of employees is not needed, since control measures on employees are permitted by law (Article 20.3 of *Estatuto de los trabajadores*), provided that such control measures comply with the above-mentioned principles (transparency, proportionality, legitimacy, and not being intrusive where possible). The employee's boards at companies (*comités de empresa*) must be informed of the existence of CCTV, according to Article 64.2 of Estatuto de los trabajadores. [319]

h. The United Kingdom

In the United Kingdom the *Data Protection Act of 1998* is the key regulation, while *Regulation of Investigatory Powers Act 2000 (RIPA)* covers monitoring of employees. The UK Information Commissioner has issued a wide range of codes covering workplace monitoring e.g. the Employment Practices Code.

In the United Kingdom accessing and reviewing an employee's communications, files, work laptops, etc., is generally prohibited unless the consent of the employee is obtained. Employee monitoring can be conducted in limited circumstances without consent if there are appropriate policies and procedures in place notifying employees that accessing, monitoring or reviewing may take place. Practically this means a separate monitoring/electronic communications policy or a chapter in an employee handbook that clearly defines the nature and extent of potential monitoring. Devices owned by the employee may only be seized by an employer if the prior consent

318 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/spain

319 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/spain

of the owner has been obtained, or a court order allowing the employer to carry out such seizure has been obtained. [320]

The Information Commissioner's Office (ICO) Employment Practices Code[321] provides valuable practical guideance. The key principles are as follows:

- It is usually intrusive to monitor workers. Workers have legitimate expectations that they can keep their personal lives private and that they are also entitled to a degree of privacy at work.
- If employers wish to monitor their workers, they should be clear about the purpose and know that the particular monitoring arrangement is justified by real benefits that will be delivered.
- Workers should be aware of the nature, extent and reasons for any monitoring, their awareness influences their privacy expectations.
- Covert monitoring is justified only under exceptional circumstances. [322]

Labour experts draw attention to the need for impact assessment, a balancing exercise between the purpose of monitoring and the adverse impact for employees or others. If electronic communications are being intercepted the employer must comply with the Regulation of Investigatory Powers Act.[323]

Data protection is taken very seriously, but fraudulent practice is not tolerated. In *City and County of Swansea v Gayle* the British Employment Appeal Tribunal took a fairly robust approach to an employee objecting to being filmed playing squash in a public place at working time, saying, that the employee could not reasonably expectat privacy here, and stating that:

---

320 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/united-kingdom

321 Available at: https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf

322 http://www.parissmith.co.uk/blog/is-there-a-right-to-privacy-at-work-monitoring-employees/ (20.07.2016)

323 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/united-kingdom

> '[A]n employer is entitled to know where an employee is and what they are doing in the employer's time ...'[324]

Employee monitoring is subject to the general requirements of the Data Protection Act of 1998. The RIPA has the potential to cover the interception by an employer of an employee's use of *e-mail, text messaging, instant messaging, telephone and the Internet*. It is generally an offence to intercept any communication without consent, however, the Telecommunications Regulations 2000 allows specific exceptions. Monitoring must always target communications that are relevant to the business.[325]

i. The United States

As we have seen, in Europe, data protection is grounded on human rights and dignity. In contrast, in the US, contextual grounding lies in *civility and emotional well-being*. The European model of (private) data protection, the European Member States' effort to regulate is considered very different from the American model, and is seen 'aggressive' overseas.[326] The positive 'right of informational self-determination' of the continent is contrasted to the negative '*right to be left alone*' of the U.S.[327] Instead of data protection the jurisprudence in the US uses the concept of privacy to deal with monitoring at the workplace. Since the end of the last century the content of privacy evolved to such a direction that today it is closer to a general protection of personality law.[328] *Matthew Finkin* labels the source of data protection law in the US as '*polycentric*'. The system builds on a variety of sources and separate bodies of law, sector-specific federal laws and state laws. There is no one comprehensive, consolidated data protection law. This is in sharp

[324] Holland, James, Burnett, Stuart, and Millington, Philip. *Employment Law*. Oxford Univ. Press, 2016. 177.
[325] http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/united-kingdom
[326] Fromholz, Julia M. The European Union data privacy directive. *Berkeley technology law journal* (2000): 461-484. 461.
[327] Finkin, Matthew. The Acquisition and Dissemination of Employee Data. *Yearbook. Studies in Labour Law and Social Policy/ Studia z zakresu prawa pracy i polityki społecznej. Jagiellonian University, Krakow: Forthcoming* (2015).
[328] Jóri 2005. 16-17.

contrast with the 'monocentric' model in the EU, where monocentric refers to the fact that the EU Data Protection Directive requires at least a rough uniformity and the fine tuning is done by bodies of uniform national law.[329]Finkin summarises the main differences of the two systems in the following chart[330]:

Employee Informational Privacy Law: An E.U.-U.S. Schematic

	E.U.	U.S.
Source of Law	Monocentric	Polycentric
Scope	Omnibus	Targeted
Form	Standards	Rules
Means of Effectuation	Administrative Action Workplace Representation Litigation	Litigation
Conceptual Grounding	Human Rights/ Dignity	Civility/ Emotional Well Being
Valence*	Positive: "Right of Informational Self-Determination"	Negative: "Right to be Left Alone"
Relationship to Freedom of Expression	"Right to be Forgotten"	"Right to be Reminded"

*"Valence," a term borrowed from chemistry, indicates the direction of attractiveness an activity possesses as a behavioral goal; it can be positive or negative.

The general principle of *'at-will employment'* means that private employees have more room to monitor their employees provided they can show a legitimate business purpose. Even if there is no legitimate business purpose, monitoring may be permitted in certain circumstances, after notification and consent.[331] Provided the monitoring of the employee served the employer's business interest, the US court will not find the act unreasonable or offensive as to be tortuous.[332] The employer-friendly legal environment allows the companies 'relatively free reign to monitor employees as they see fit, with the understanding that employees can simply find work elsewhere if they feel their privacy

[329] Finkin 2015.
[330] Finkin, Matthew. The Acquisition and Dissemination of Employee Data. *Yearbook Studies in Labour Law and Social Policy/ Studia z zakresu prawa pracy i polityki społecznej, Jagiellonian University, Krakow, Poland, Forthcoming* (2015).
[331] http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/usa
[332] Finkin 2015.

is being threatened.'[333] Public employees are protected against intrusion of the employer to some extent by the *Constitution*, however, in the private sector only the state statutes remain or the Common law tort of invasion of privacy.[334]

Some U.S. laws require employers to provide notice of *electronic employee monitoring*. Neither notice for other forms of monitoring nor consent is strictly required to monitor employees for a legitimate business purpose. Many employers in the U.S., however, provide notice and obtain consent to their monitoring practices to help ensure that data subjects clearly understand that monitoring is occurring. Notice and consent is typically obtained via an employee policy (e.g., an Acceptable Use Policy or specific monitoring policy) and/or a network login banner.[335]

There is *no* data protection *requirement to notify or consult with works councils, trade unions or employee representatives*. [336]

The lack of federal law directly addressing the employer surveillance of workers in effect means that under federal law, worker surveillance is limitless. Other laws however, may come indirectly to the aid of privacy, such as *laws against discrimination*. Thus, it can be argued that the CCTV camera in question was installed to find out the employee's religion, political opinion, disability or other protected characteristics. The *Americans with Disabilities Act* may for instance provide protection against employee surveillance to discover certain types of disability. However, these laws were designed to afford protection against discrimination and thus cannot be expected to cover all cases of unlawful monitoring. At the *state level* many state constitution include privacy provisions, and generally we can also find specific acts on privacy protection at the

---

[333] Blanchard, Olivia. Employee Privacy In Light of New Technologies: An Ethical and Strategic Framework. (2016). Cornell HR Review Retrieved [10.07.2016] from Cornell University, ILR School site: http://digitalcommon

[334] Ball, Kirstie. Workplace surveillance: an overview. *Labor History* 51.1 (2010): 87-106. , Wilborn, S. Elizabeth. Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace. *Ga. L. Rev.* 32 (1997): 825.

[335] http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/usa

[336] www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/united-kingdom

workplace, however, the academic literature heavily criticizes the level of protection, calling it *inconsistent and inadequate,*[337] *illusory,*[338] *if not Orwellian*[339].

Another alternate approach is to focus on potential *drawbacks, both ethical and strategic*.[340] Considerable amount of academic literature is dedicated now to the ethical[341] and psychological dimension of monitoring. 'While employee monitoring may improve a company's short-term ability to react flexibly to market forces, a heavy-handed reliance on employee surveillance is likely to compromise feelings of honesty, personal accountability, and collaboration within an organization.'[342] At the moment,

> 'what appears to be needed is a consistent omnibus national policy on use of social media and the right to privacy in all spheres of life.'[343]

[337] Fiore, Alexandra and Matthew Weinick. Undignified in Defeat: An Analysis of the Stagnation and Demise of Proposed Legislation Limiting Video Surveillance in the Workplace and Suggestions for Change. *Hofstra Lab. & Emp. LJ* 25 (2007): 525. 527; Ciocchetti, Corey A. The eavesdropping employer: A twenty-first century framework for employee monitoring. *American Business Law Journal*, 48.2 (2011): 285-369.
[338] Finkin 2015.
[339] Anton, Gary and Ward, Joseph J. Every breath you take: Employee privacy rights in the workplace—An Orwellian prophecy come true? *Labor Law Journal* 49.3 (1998): 897-911.
[340] Moussa, Mahmoud. Monitoring Employee Behavior Through the Use of Technology and Issues of Employee Privacy in America. *SAGE Open* 5.2 (2015): 2158244015580168.; Gichuhi, John Kimani, James Mark Ngari, and Thomas Senaji. Employees Response to Electronic Monitoring: The Relationship between CCTV Surveillance and Employees' Engagement. *International Journal of Innovative Research and Development* 5.7 (2016); McDonald, Paula, and Thompson, Paul. Social media (tion) and the reshaping of public/private boundaries in employment relations. *International Journal of Management Reviews* 18.1 (2016): 69-84.
[341] West, Jonathan P. and James S. Bowman. Electronic Surveillance at Work An Ethical Analysis. *Administration & Society* 48.5 (2016): 628-651.; Chory, Rebecca M., Lori E. Vela, and Theodore A. Avtgis. Organizational Surveillance of Computer-Mediated Workplace Communication: Employee Privacy Concerns and Responses. *Employee Responsibilities and Rights Journal* 28.1 (2016): 23-43.
[342] Blanchard, Olivia. Employee Privacy In Light of New Technologies: An Ethical and Strategic Framework. (2016). *Cornell HR Review* Retrieved [10.07.2016] from Cornell University, ILR School site: http://digitalcommon; Inglezakis, Ioannis. Surveillance of Electronic Communications in the Workplace and the Protection of Employees' Privacy. (2016).
[343] Lowenstein, Henry and Norman Solomon. Social Media Employment Policy and the Nlrb: Uniform State Laws as a Solution? *Southern Law Journal* 25.1 (2015): 139.

VIII. A Sensitive Case: Alcohol and Drug Testing

1. Hungary

Hungarian *Labour Code* states that the employee is obliged to appear at the place and time specified by the employer, in a condition fit for work, and be at the employer's disposal in a condition fit for work during their working time for the purpose of performing work.[344] Employees may only perform work in a state fit for work, complying with the rules on health and safety at work.[345] *Fit for work* also means free from alcohol or drugs. In line with the *Labour Protection Act*, it is the employer's duty to ensure that the working environment is safe and it does not jeopardise health.[346]

Regarding *certain types of work,* the law gives explicit permission to testing. The law enforces drug testing for employees performing risk-related activities. In occupations where no alcohol consumption is permitted under legislation or collective agreement, the employee must submit himself to regular tests. Zero tolerance principle applies to teachers, healthcare professionals, army and police bodies and drivers. It is the duty of the employee to cooperate with the employer when the employer orders alcohol or drug tests to be performed.[347] In practice, generally mobile tests are used to test drugs. The data protection commissioner pointed out that voluntary consents of employees are not provided due to the inequality of power and that the mobile tests may lead to a practice that violates privacy, and their efficacy of is not convincing.[348]

[344] Subesction (1) of Section 52 LC.
[345] Section 60 of Act XCIIIof 1993 on Occupational Safety and Health.
[346] Subsection (2) of Section 2 Act on Labour protection.
[347] MK 122.
[348] http://abiweb.obh.hu/abi/index201.php?menu=allasfogl2005&dok=9220

2. International Guidelines

From *the ILO, a specialised code of practice* on management of alcohol- and drug-related issues in the workplace provides guidelines. The organisation emphasises that local circumstances, most of all legal and cultural attitudes towards alcohol and drug use, as well as financial and technical resources, will determine how far it is feasible to follow the recommendations, therefore advises to take into account the differences.[349] And in fact, as we will see in the coming subchapter, the Member States have diverse approaches.

3. Trends and Cases from Other Countries

A recent *research* on the use of alcohol and drugs at the workplace found that most European countries have some type of general legislation or agreement to regulate, prohibit and prevent consumption of alcohol and drugs at work. Testing however is a highly delicate issue. On the one hand, the strong negative correlation between drug and alcohol abuse and job safety and productivity is well known, therefore, especially in safety-sensitive activities and jobs, testing is vital. However, the safeguarding of a worker's right to privacy, the need for their consent to testing and the preventive (instead of sanctioning) character of the tests are equally important issues.[350]

National regulations on testing practices *vary* to a great degree. We find differences related to the source and the extent of regulations. Beside safety-sensitive occupations and sectors, various situations lead to use of alcohol or drug tests. In *Austria,* a company agreement about alcohol or drug testing must be in place in companies with a works

[349] http://www.coe.int/t/dg3/pompidou/Source/Activities/Workdrug/codeofpracticeilo.pdf See also: Guiding principles on drug and alcohol testing in the workplace as adopted by the ILO Interregional Tripartite Experts *Meeting on Drug and Alcohol Testing in the Workplace, 10-14 May 1993, Oslo (Honefoss), Norway*

[350] Corral, Antonio, Durán, Jessica, and Isusi, Iñigo. *Use of alcohol and drugs at the workplace*. European Foundation for the Improvement of Living and Working Conditions, 2012. Available at: http://www.eurofound.europa.eu/sites/default/files/ef_files/docs/ewco/tn1111013s/tn1111013s.pdf

council. In *Finland*, employers can demand testing to reveal whether an employee has used drugs when entering or during work with a stipulation for no drug abuse. In addition, the Occupational Health Service can implement drug tests at any stage if it is necessary to investigate the employee's health, working or functional capacity. In the *UK*, some employers reserve the contractual right to test their staff (for example, in the rail transport system). Some countries, for example *Finland and Germany* allow for *pre-employment testing*. On the other hand, *Portugal and Austria* opted for prohibition of pre-employment tests, except for situations foreseen in the legislation on health and safety at work and in special circumstances.[351]

Collective agreement among social partners at national, sector and company level may be the best way to deal with the problem (examples can be found in *Belgium, Denmark and Germany*). In Belgium, Collective agreement No. 100 concluded on 1 April 2009 at national level, required every company in the Belgian private sector to have a preventive alcohol and drugs policy in place. [352]

The Employment Practices Code issued by the British Information Commissioner deserves to be quoted here. It states:

> 'The collection of information through drug and alcohol testing is unlikely to be justified unless it is for health and safety reasons. Post-incident testing where there is a reasonable suspicion that drug or alcohol use is a factor is more likely to be justified than random testing. Given the intrusive nature of testing employers would be well advised to undertake and document an impact assessment.'
> 'Only use drug or alcohol testing where it provides significantly better evidence of impairment than other less intrusive means.'[353]

In *Whitefield v General Medical Council,* a doctor with a serious history of alcohol problems was required by the General Medical Council to refrain completely from alcohol consumption and to submit to random breath, blood, and urine tests. According

[351] Corral et al.2012.
[352] Corral et al.2012. 29, 44.
[353] Available at: https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf

to the doctor these conditions infringed his right to respect for for his private life. His argument was rejected. The part of reasoning connected to Article 8(2) of the Convention is important for us. This allows for the interference with private life in limited circumstances such as the protection of health or morals. This exception was applied to the compulsory medical tests, which have been held to be in breach of Article 8 of the Convention in other jurisdictions and circumstances.[354]

The US went much further and launched '*war on drugs*'. Various civic and business groups pressure the employers to enforce no drugs with constant controlling[355] in the *US*. Employee and job applicant drug testing is standard procedure, and almost half of the workforce is tested yearly.[356]

[354] Holland, James A. and Burnett, Stuart. Employment Law. Oxford University Press, 2008. 14.
[355] Goldmann, Alvin L. and Corrada, Roberto L. *Labour Law in the USA*. Kluwer Law International, 2011. 149.
[356] Karch, Steven B. (ed.). *Workplace drug testing*. CRC Press, 2016. 2.

PART V: TILL FACEBOOK DO US PART? SOCIAL NETWORKING SITES AND THE EMPLOYMENT RELATIONSHIP, DISCRIMINATION AND PRIVACY ISSUES[357]

I. The Nature of Social Networking Sites

The arrival of social networking sites (SNSs) is perhaps *one of the biggest changes in the workplace over the last decade*. These sites are typical examples of the Web 2.0 sites that enable users to interact with each other in an onlinine community. The idea behind these sites is to connect people like for instance friends or alumni with one another on an informal basis and make communication more effective. Users of SNSs step outside their immediate family circle and enter the realm of *virtual social interactions*; they introduce themselves by sharing information; connect and communicate with each other. SNSs differ from physical places in many respects: they are mediated, and potentially global, searchable, and the interactions may be recorded or copied and also these sites may have invisible audiences or audiences not present at the time of the conversation.[358]

SNSs are products of what the Spanish sociologist and cybernetic culture theoretician *Manuel Castells calls:*

---

[357] This Part builds on the following articles of the author: Kajtár, Edit and Mestre, Bruno. Social networks and employees' right to privacy in the pre-employment stage: Some comparative remarks and interrogations. *Magyar Munkajog: Hungarian Labour Law* 3.1. (2016): 22-39.; Kajtár, Edit. Till Facebook Do Us Part?: Social Networking Sites and the Employment Relationship. *Acta Juridica Hungarica: Hungarian Journal of Legal Studies* 56.4 (2015): 268-280.; Kajtár, Edit. Think it over!: Pre-employment search on social networking sites. In: Vinković, Mario (ed.). *New developments in EU labour, equality and human rights law: Proceedings from the International Jean Monnet Conference 'New Developments in EU Labour, Equality and Human Rights Law'*, Osijek 21 and 22 May 2015. Osijek: Josip Juraj Strossmayer University of Osijek, 2015. 97-106.; Kajtár, Edit. Európai ügyek a Facebook sötét oldaláról: A munkavállalók közösségi oldalakon tanúsított kötelezettségszegő magatartása. In: Horváth, István (ed.). *Tisztelgés: Ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára*. Budapest: ELTE Eötvös Kiadó, 2015. 199-213., Kajtár, Edit. The Dark Side of Facebook: European Cases on the Employee's Misconduct on Social Networking Sites. *Revista De Direito Publico* 6.13 (2015): 6-21.

[358] Boyd, Danah and Nicole Ellison. Social Network Sites: Definition, History, and Scholarship. *Journal of Computer-Mediated Communication 13.1* (2007): 210-230. 210.

'global network society'.

Castells argues that today's societal changes are shaped by globalised flow of information. The power is based on extensive networks and the possession of information. He points out that in contrast to real time, the network society is seeking to compress time and to eliminate the traditional sequencing of time into one hypertext ('timeless time'), and the societal functions no longer rest on physical encounters but on exchanges between electronic circuits ('space of flows'). The guiding principle is 'being online'.[359] The popularity of these sites lies in their social functions. By giving users a forum in which they can create social identities, build relationships and accumulate social capital, Facebook and other SNSs fulfil basic human needs.[360] This explains why in many cases employees and job candidates themselves contribute to invasion of their privacy by oversharing. *Glassey and Balleys* claims that there is a need for brand new sets of ethics relating to social networks. They advocate for a broader perspective, a symmetrical analysis of online and offline activities, and advise us to focus on determining how social norms are translated from one world to the other and how those norms coevolve through well-known social processes.[361]

The placement of SNSs on a 'from private to public' spectrum proves to be difficult. In my opinion - because of their distinctive features - the objectives they serve and the environment they operate in SNSs have *public, semi-public and private aspects at the same time*. Images in academic literature attempting to capture posts with relevance to the employment relationship include 'new water cooler' and 'notice board of the staff canteen'. In the *UK* even if SNS profiles are set to private, there can generally be no expectation of privacy, the posts will be deemed to be public. In other countries the size of the intended audience plays a relevant role. However, even if SNSs posts are intended to be accessible to a limited audience, case law on 'Facebook firings' from in and outside

[359] Castells, Manuel. *The Rise of the Network Society. The Information Age: Economy, Society and Culture.* vol. 1., 2nd edn, Chichester: Wiley Blackwell, 2010. 406.
[360] Grimmelman, James. Saving Facebook. *Iowa Law Review* 94 (2009): 1137, 1206.
[361] Coll, Sami, Olivier Glassey, and Claire Balleys. Building social networks ethics beyond 'privacy': a sociological perspective. *International Review of Information Ethics* 16.12 (2011): 47-53. 50.

the European Union shows that privacy is of relative value. The semi-public aspect is also supported by the fact that these sites operate in a virtual space, thus whatever is put on the platform is relatively easy to search and share. The more limited the audience, the closer the information shared is to being considered private. One-to-one functions such as mail or chat should be treated as private and enjoy legal protection accordingly.

II. Privacy Concerns

1. Regulatory Framework

Due to their inherent characteristics, SNSs pose a challenge on traditional privacy regulations, which are typically concerned with protection of citizens against unfair or non-proportional processing of personal data by the public administration and businesses, and offer only very few rules governing the publication of personal data at the initiative of private individuals.[362]

Within the European context, the legal assessment of a pre-employment Google search and monitoring of SNSs during the employment relationship is shaped by the principles of data protection enshrined in documents such as the already discussed Directive 95/46/EC; the OECD Guidelines on the Protection of Privacy; the UN Guidelines; the Council of Europe's Convention No. 108 as well as the national data protection, employment and criminal law etc. provisions. In Hungary the main law sources are the DPA and the Labour Code. A growing interest is detectable among the scientific community towards the employment law implications of SNSs.[363] For the time

[362] International Working Group on Data Protection in Telecommunications, *Report and Guidance on Privacy in Social Network Services* (43rd meeting, 3-4 March 2008, Rome Italy) 1 https://cbpweb.nl/sites/default/files/downloads/int/opinie_social_network_services.pdf (Last accessed 27.01. 2015).

[363] See for instance Pók, László. A közösség hálójában – Közösségi oldalak munkajogi vonatkozásai. *Infokommunikáció és Jog* 48 (2012): 160-164.; Horváth, Linda and Gelányi, Anikó. Lájkolni vagy nem lájkolni? A közösségi oldalak használatának munkajogi kérdései. 8.43 *Infokommunikáció és Jog* (2011): 60.; Németh, Janka. Az internet nem felejt – közösségi média-használatra alapított munkáltatói és muhnkavállalói

being, due to the absence of consistent jurisprudence the problem is mainly approached on a hypothetical level. For this reason it is beneficial to draw from the practice of other countries.

2. Principles

Below application of the following most important principles are examined: fair and lawful processing (as an overarching principle); data reduction and data economy; permission; purpose; direct collection; access; accuracy and limitation.

The overarching twin principle of fairness and lawfulness is the no. one principle of the UN Guidelines, it is also enshrined in Article 5(a) of the CoE Convention; in Article 6(1)(a) of Directive 95/46/EC. It is a crucial requirement, one that is embodied in numerous specific sub-requirements. It covers but it is not limited to existence of fair and legal ground. Article 7 of Directive 95/46/EC lists six potential options; personal data shall only be processed:

a) based on the data subject's unambiguous consent,
   or processing is necessary for:
b) performance of a contract with the data subject;
c) compliance with a legal obligation imposed on the controller;
d) protection of the vital interests of the data subject;
e) performance of a task carried out in the public interest; or
f) legitimate interests pursued by the controller, subject to an additional balancing test against the data subject's rights and interests.

Naturally, irrespective of the existence of a legal ground, data processing must always comply with all the other general principles. Out of the six grounds, those listed in (a), (b) and (f) appear to be reasonable candidates for justifying search on SNSs. Relying on Article 7(a) is very shaky ground as the genuine nature of consent is always

felmondások. *Infokommunikáció és jog* 10.55 (2013): 96-98. 96. Szőke, Gergely László. (ed.) *Privacy in the Workplace: Data Protection Law and Self-regulation in Germany and Hungary*. Budapest: HVG-ORAC 2012.

questionable due to the power imbalances of the parties. Attaining consent complies with other data protection principles such as transparency as well. Article 7(b) provides a legal ground in situations where 'processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract'. This article covers pre-contractual relations, provided that steps are taken at the request of the data subject, rather than at the initiative of the controller or any third party. However, detailed online background checks are unlikely be considered as necessary steps made at the request of the data subject. This is also true within the employment context.

The employer may also try to rely on Article 7(f). At pre-employment stage: to select the best possible candidate is a legitimate interest. To avoid vicarious liability and 'negligent hiring' claims the future employer has to take reasonable action to examine the candidate's background, to gain relevant information, verify documentations etc. Later on, with relation to the ongoing employment relationship, the employer has various interests to protect as well (effective functioning of the work for example). However, in both cases the employer's interests have to be balanced against the candidate's rights and interests (to express him- or herself freely, right to private life, etc.). The employer is obliged to look for the least intrusive measures available. For instance to check the validity of the statements of the candidate, the employer may (with the consent of the candidate) ask for reference about the former employee or search public databases (classified directory for example). During the lifetime of the employment relationship less intrusive measures include blocking the use of SNSs on company computers during working time.

According to the principle of data reduction and data economy (also called as principle of necessity, non-excessiveness or proportionality by the various data protection instruments) data processing systems must be designed and selected to collect, process and use as little personal data as possible (see e.g. Article 6(1)(c) and Article 7 of Directive 95/46/EC, Article 5(c) of the CoE Convention). This principle is infringed as Facebook reveals a multitude of mostly non-work related information.

In line with the principle of purpose, the purposes for which data is be processed or used must be defined at the time of collection and personal data can only be processed and used in accordance with this purpose (See para 9 of the OECD Guidelines; Principle 3 of the UN Guidelines; Article 5(b) of the CoE Convention and Art 6(1)(b) of Directive 95/46/EC). In our case the purpose is most likely the selection of the best possible candidate and verification of facts stated in the CV.

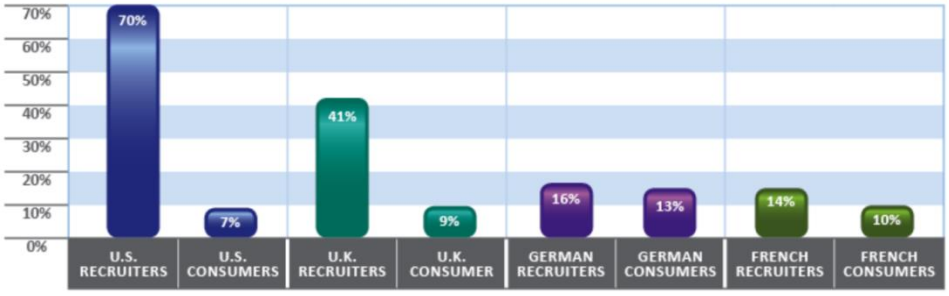
According to the principle of direct collection, personal data must be collected from the data subject, unless an exemption applies by law, or the collection from the data subject would require disproportionate effort and the justified interests of the data subject are not affected. Personal data in our case is not collected from the candidate/employee, and as the collection from the data subject would not require disproportionate effort, the exception rule does not apply either, consequently this principle is violated.

Candidates and employees have the right to know what information is collected about them, for what reason, for how long and how it will be used. The principle of access and openness is violated, because the data subject may not access the information that is stored concerning him or her after the Google search. The principle of accuracy (data quality and correctness) is enshrined in para 8 of the OECD Guidelines; Article 5(d) of the CoE Convention and Art 6(1)(d) of Directive 95/46/EC. Assessing someone's potential employability based on an online profile may produce false results. Profiles do not necessarily provide an accurate and up to date picture of the individual. As it is demonstrated in the French test case cited later on, pre-employment screens are often superficial and thus are very likely to lead to speculative conclusions. The principle of accuracy would require correction of incorrect personal data, however, as the candidate/employee is unaware of the search let alone its result, he or she clearly cannot demand the employer to correct inappropriate data. Finally, the principle of limitation would require the employer to erase the personal data collected from the Internet once it is no longer necessary for the purpose for which it has been collected (i.e. the job is filled). This is generally unlikely to happen in practice.

III. Online Reputation in a Connected World

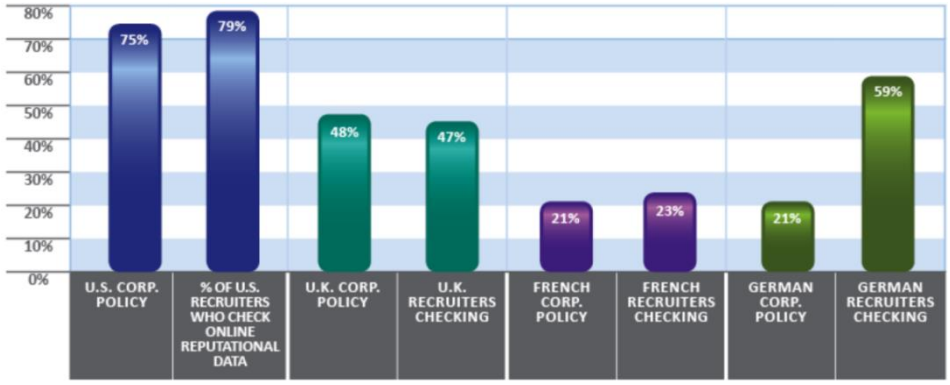
A study entitled 'Online Reputation in a Connected World'[364] demonstrated the increasing role of background searches. In practice, checking the job candidates' profile is an exceptionally widely used tool to confirm statements made in applications and get to know more about applicants' personality. The following charts shows how very often recruiters as well as HR professionals use online information in the recruit processes. The surveyed persons report that their companies have made online screening a formal requirement of the hiring process. The majority of corporate policies of US companies require online reputational checks. 70% of U.S. recruiters and HR professionals surveyed, say they have rejected candidates based on information found online. Although not as frequently, respondents from the U.K. and Germany report the same trend. Recruiters and HR professionals surveyed report being concerned about the authenticity of the content they find. In all countries, recruiters and HR professionals say they believe the use of online reputational information will significantly increase over the next five years. 85% of U.S. recruiters and HR professionals surveyed say that positive online reputation influences their hiring decisions at least to some extent. Nearly half say that a strong online reputation influences their decisions to a great extent. The following charts[365] are tale-telling:

Recruiters and HR professionals who have rejected candidates based on data found online vs. consumers who think online data affected their job search:



[364] http://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf
[365] http://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf

Percent of companies with policies that require review of reputational data vs. percent of recruiters and HR professionals surveyed who seek it:



Percent of recruiters and HR professionals who use these types of sites when researching applicants:

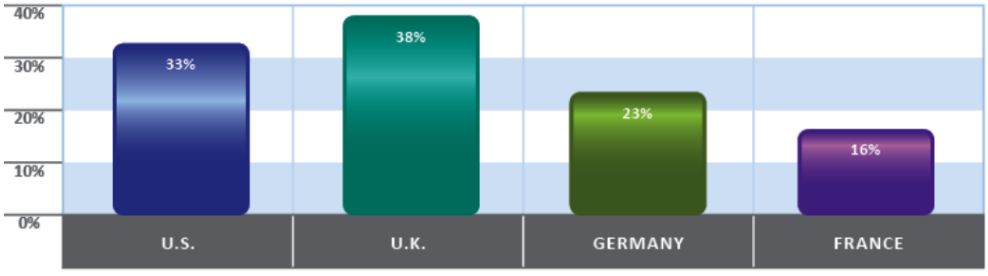
Search engines	78%
Social networking sites	63%
Photo and video sharing sites	59%
Professional and business networking sites	57%
Personal Web sites	48%
Blogs	46%
News sharing sites (e.g. Twitter)	41%
Online forums and communities	34%
Virtual world sites	32%
Web sites that aggregate personal information	32%
Online gaming sites	27%
Professional background checking services	27%
Classifieds and auction sites	25%
None of these	2%

Types of Online Reputational Information That Influenced Decisions to Reject a Candidate

	U.S.	U.K.	Germany	France
Concerns about the candidate's lifestyle	58%	45%	42%	32%
Inappropriate comments and text written by the candidate	56%	57%	78%	58%
Unsuitable photos , videos, and information	55%	51%	44%	42%
Inappropriate comments or text written by friends and relatives	43%	35%	14%	11%
Comments criticizing previous employers, co-workers, or clients	40%	40%	28%	37%
Inappropriate comments or text written by colleagues or work acquaintances	40%	37%	17%	21%
Membership in certain groups and networks	35%	33%	36%	37%
Discovered that information the candidate shared was false	30%	36%	42%	47%
Poor communication skills displayed online	27%	41%	17%	42%
Concern about the candidate's financial background	16%	18%	11%	0%

We can see a sharp contract between these findings of the study and the findings on the perception and behaviour of job candidates. Though most consumers surveyed do manage their reputation at least to some extent, a significant percentage of respondents (between 30% and 35% depending on nationality) do not believe their online reputation affects their personal or professional life; therefore, they do not manage their reputations.[366]

Consumers surveyed who have taken no steps at all in the last six months to manage their online reputation:



[366] http://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf

IV. The Rationale for Background Checks

It comes without surprise that Google search is part of the recruitment process in many workplaces. It is a fast, easy, cost effective and in overall, very convenient way to find information about the job applicants. With a few clicks of the mouse the employer may not only check the candidates' background and verify some of the facts stated in the CV (professional experience, qualifications etc.) but also gets his first impressions on the future employee.[367] Given the wide spread use of social networking sites (SNSs), the Google search will probably lead to a profile such as Facebook or Twitter. (It remains to be seen to what extent will the famous *le droit à l'oubli*, 'right to be forgotten' ruling of the CJEU moderate this tendency[368]). Very often, it is this stage where the important decision whether a candidate will evolve to employee is made. Profiles are tale-telling. Posts full of spelling mistakes speak loud about the lack of written communication skills and most certainly ruin the effect of even the most impressive motivation letter. No matter how nice the recommendations attached to the application are, pictures suggesting drug abuse or extensive use of alcohol, or offensive comments about former company and colleagues will get the application shipwrecked. The employers most certainly look for *red flags* when they type the applicants name in the Google browser, however, the information they encounter (most cases without the authorisation or even previous knowledge of the owner of the profile) is more than warning signs. The posts, comments, pictures, even the music shared reveal a multitude of information on the lifestyle, political and spiritual views, family status or sexual orientation of the candidate. As we can see these data are not work related, on the contrary, they concern the candidate's personal life, often the most private aspects of it.

[367] Victoria R. Brown and E. Daly Vaughn, The Writing on the (Facebook) Wall: The Use of Social Networking Sites in Hiring Decisions [2011] 26 (2) *Journal of Business and Psychology* 219-225. 219.
[368] C-131/12. The CJEU confirmed that EU data protection legislation gives data subjects the right to request search engines to de-index webpages that appear in the search results on their names.

V. A Case for Discrimination

1. A Field Study

To highlight the relevance of the issue I would like to speak of a recent field study conducted by academics of *Université Paris Sud*. During one year from March 2012 to March 2013, the researchers handed in more than 800 applications for real accountant job offers in the greater Paris area. They adjusted the content of Facebook accounts of the candidates to manipulate the perceived origins of applicants (hometown and language spoken). The twist of the experiment was that they only *manipulated the Facebook profiles*, not the application material, this way they could see the impact of pre-employment screening on the number of call-backs received from employers. The test applicant received a third fewer call-backs compared to the control applicant. During the course of the experiment they modified the profiles so that the language spoken by the applicants could only be reached by clicking on a tab. The finding was surprising. In subsequent months, the gap between the two applicant types shrank and virtually disappeared suggesting that the future employers based their hiring decision on a search that only concerned the very surface of the profiles.[369]

2. The US Experience

The push toward the emergence of legal parameters to control the privacy aspects of SNSs in the employment context is a visible trend in the US. Lawyers warn of increasing numbers of 'failure to hire' lawsuits if it can be proved that employers are using SNSs to gather information on the candidate's protected characteristics (such as marital status,

[369] Manant, Matthieu, Serge Pajak and Nicolas Soulié. Online Social Networks and Hiring: A Field Experiment on the French Labor Market. *Social Science Research Network* http://dx.doi.org/10.2139/ssrn.2458468 (Last accessed: 09.08. 2014).

religion, race, sexual identity, political opinion or national origin) as a basis for hiring decisions.[370]

To give an example: In 2007, the University of Kentucky was looking for a founding director for the university's astronomical observatory. C. Martin Gaskell applied for the position and being the best candidate by far, he stood high chances of being hired. Yet, at a certain point along the selection procedure, the hiring committee found his blog that *discussed astronomy and the Bible from a creationist viewpoint*. The same committee that had previously noted that Gaskell was 'clearly the most experienced' candidate and had 'already done everything [the hiring committee] could possibly want the observatory director to do,' recommended another candidate for the position. Gaskell sued for *religious discrimination*.[371]

VI. Possible Responses

The assessment of pre-employment google search depends on the privacy awareness of the given country.

In Hungary, due to the fact that there is no specific regulation, general principles as well as contractual rights and obligations of the parties gain relevance. The Austrian case about the bank clerk who discussed bank secrets on his Facebook wall, discussed later, would be assessed the same way by the Hungarian courts. Employees shall maintain confidentiality in relation to business secrets obtained in the course of their work. Moreover, they shall not disclose to unauthorized persons any data learned in connection with their activities that, if revealed, would result in detrimental

[370] Waring, Renee L. and F. Robert Buchanan. Social Networking Web Sites: The Legal and Ethical Aspects of Pre-Employment Screening and Employee Surveillance *Journal of Human Resources Education, 4.2 (2010):* 14-23, 19.; Pate, Richard L. Invisible discrimination: Employers & social media sites. *WCOB Working Papers* 2012.

[371] *Gaskell v. Univ. of Kentucky*, No CIV.A. 09 -244-KSF, 2010 WL 4867630 (E D Ky Nov. 23, 2010) Cited by Carlson, Kathleen. 'Social Media and the Workplace: How I Learned to Stop Worrying and Love Privacy Settings and the NLRB' [2014] 66 *Florida Law Review* 479, 484 http://www.floridalawreview.com/2014/kathleen-carlson-social-media-and-the-workplace-how-i-learned-to-stop-worrying-and-love-privacy-settings-and-the-nlrb (Last accessed: 28.01.2015); The case was later settled.

consequences for the employer or other persons (Article 8 LC). The employee has to know that control is possible[372]. Former regulation explicitly asked for informed consent.[373] With private use the employee breaches its obligation to perform work with due diligence. Private use against prohibition may serve as ground for extraordinary dismissal.[374]

Consent of the employee must be obtained except if the processing of data on SNSs is ordered by a statute or a local government decree for public interest reasons or the legal ground for data processing is ensured otherwise, based on the DPA. Consequently, one option would be to ask for the permission of the employees. However, it is questionable if such consent would be freely given (the power imbalance argument). The other option is to base monitoring on statute or a local government decree. Based on the above cited sections of the LC no clear-cut answer exists to the question: 'Is the employer authorised to control the social networking accounts of its employees?'. SNSs have half-public, half-private character. The surveillance of the employee's Facebook account per se without any legitimate ground (i.e. just out of curiosity or as a general precaution) infringes both employment and data protection rules. On the other hand; where there is enough evidence or serious suspicion of misconduct (e.g. a co-worker notifies the employer that the employee posted confidential information or harassing comments) the employer acts on lawful ground when he views the SNS. Not to mention those cases where the employers befriend their employees, thus gaining access to the private part of their profiles.[375]

Going below the level of legislation, the social partners could also shape the rules on the use of SNSs. The scope of collective agreements may cover rights and obligations arising out of or in connection with employment relationships (Article 277 LC). Privacy on the Internet (at least certain well-defined aspects of it) can be *an item on the bargaining table*. One obvious example is the regulation of private use of Internet (including use of

372 Hungarian Data Protection Commissioner 570/A/2001.
373 Hungarian Data Protection Commissioner 531/A/2004.
374 Szegedi Munkaügyi Bíróság 4.M.44/2002/28., BH2006. 64.
375 See Kajtár, Edit. Till Facebook Do Us Part?: Social Networking Sites and the Employment Relationship. *Acta Juridica Hungarica: Hungarian Journal of Legal Studies* 56.4 (2015): 268-280.

SNSs) in working time; the private use of IT tools provided by the employer both in and outside working hours; the ground rules of use or possible sanctions. However, in practice the social partners do not bargain for SNSs or other privacy-related issues.

In *Finland* the Data Protection Ombudsman explicitly stated that employers cannot use Internet search engines such as Google to collect background information on job candidates.[376] He said:

> 'According to the Privacy in Working Life Act, employers can only view personal data provided by their employees, and this includes data about job applicants'.

In Finland it is necessary to obtain the applicant's express consent for unofficial (as well as official, i.e. criminal) background checks in advance, except when the employer acquires personal credit data or criminal record data on the applicant in order to establish the reliability.[377]

The response was a lot milder for instance in the *UK*. The Employment Practices Code published by the UK Information Commissioner's Office simply advised employers to:

> '[e]nsure there is a clear statement on the application form or surrounding documents, explaining what information will be sought and from whom' and 'explain the nature of and sources from which information might be obtained about the applicant in addition to the information supplied directly by the applicant.'[378]

[376] McGeveran, William. Finnish Employers Cannot Google Applicants. *Information Law* 15 November 2006. http://blogs.law.harvard.edu/infolaw/2006/11/15/finnish-employers-cannot-google-applicants (Accessed at: 9.8. 2014).

[377] On 1 January 2015, a new Act on Background Checks entered into force, the employer may carry out background checks on employees and job applicants in order to protect important public interests, or on candidates who have access to information that, if revealed, could seriously damage the economy, the functioning of financial and insurance systems or any business essential for the public. The act also entitles the employer to carry out background checks on employees handling tasks relating to essential services (e.g. in the energy sector). http://www.iclg.co.uk/compare#practicearea=employment-and-labour-law&&jurisdictions=finland

[378] Information Commissioner's Office Data Protection. *The Employment Practices Code* [2011] https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf (Accessed 28.01.2015).

The above mentioned reactions came from expert bodies; however, we can also find hard law initiatives. A draft bill on 'Arbeitnehmerdatenschutz' (employee data protection) was produced on 25 August 2010 in *Germany*. The draft prohibited employers from using personal SNSs to screen applicants, but allowed the use of business-focused networks when conducting background checks. The Explanations by the Home Office on Internet searches of the employer highlighted that the employer may, in principle, gather information on an applicant from all publicly available sources (e.g. newspapers or Internet). Regarding online social networks, as far as they serve private use (e.g. Facebook, SchülerVZ, StudiVZ or StayFriends), the employer may not use them to get information. However, the employer may benefit from searching those SNSs that are intended to represent its members professionally (e.g. Xing, Linked In).[379] Due to lack of consensus the draft was rejected in 2013.

The law in the *United States* fails to adequately protect private sector employees from technological monitoring by their employers.[380] The Stored Communications Act of 1986 makes it unlawful to intentionally access without authorisation a facility through which an electronic communication service is provided; or intentionally exceed an authorisation to access that facility and thereby obtain, alter or prevent authorised access to a wire or electronic communication while it is in electronic storage. The protection provided by the act, however, is limited, the SCA provides the greatest protection to employees who place restrictive privacy settings on their Facebook profiles.[381] One of the roads for private sector employees is claiming discrimination. In an Internet-speech related wrongful termination case, as long as the employer has a valid reason to fire an employee the court will seldom rule against the employer. The exception being that the

[379] See *§ 32 Absatz 6 BDSG* http://www.arbeitnehmerdatenschutz.de/Gesetz/32-BDSG-Datenerhebung-vor-Beschaeftigungsverhaeltnis.html (Last accessed: 29.01.2015).
[380] Levinson, Ariana L. Carpe Diem Privacy Protection in Employment Act. *Akron Law Review*, 43.2. (2010): 331-433. 432.
[381] Crane, Catherine. Social Networking v. the Employment-at-Will Doctrine: A Potential Defence for Employees fired for Facebooking, Terminated for Twittering, Booted for Blogging, and Sacked for Social Networking. *Washington University Law Review* 89.3. (2012): 639-672. 624.

employer terminated the employment relationship because (s)he the post was related to the employee's protected characteristic (religion, race, sexual orientation, etc.).[382]

VII. Monitoring SNSs during the Employment Relationship

1. The Other Side of the Coin

Abuse of confidential information; misrepresentation of the views of the business; inappropriate non-business use; posting disparaging remarks about the business or co-workers and harassment: these are the most common threats Facebook, Twitter and other social networking sites pose for the employers.[383]

> 'The Internet has become one of the most important vehicles by which individuals exercise their right to freedom of opinion and expression, and it can play an important role to promote human rights... However, as with all technological innovations, the Internet can also be used to cause harm.'[384]

The words of UN special rapporteur Frank La Rue equally apply to the use of SNSs within the context of the employment relationship. In many cases, social networking sites are used as platforms for unlawful acts such as harassment or libel. As a matter of fact, in these scenarios the tables turn, and the employer becomes the party who needs the protection of the law against the employee's misconduct. This subsection deliberately focuses on the 'other side of the coin': the misuse of Facebook from the employers' perspective. The reader is offered some typical examples where the employees 'overstepped the line'; may follow the arguments of the parties and observe

[382] *Crane* 2012. 650.

[383] Proskauer Rose LLP. *Social Media in the Workplace Around the World 3.0*. 2. 2014. http://www.proskauer.com/files/uploads/social-media-in-the-workplace-2014.pdf (Last accessed: 28.01.2015).

[384] La Rue, Frank. Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. *UN General Assembly Sixty-sixth Session Promotion and Protection of Human Rights*. 2011. http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf Para 78. (Last accessed: 12.02.2015).

the balancing exercise undertaken by the different labour courts and arbitration boards. The cases are not discussed with the aim of shaking anyone's belief in the importance of privacy at workplace; on the contrary, they are to highlight the complexity of this issue and the significance of differentiating between use and abuse of rights.

2. Experiences from Different Parts of the World

a. Austria

The violation of bank secrecy on Facebook led to immediate dismissal in a recent case[385] in *Lower Austria*.[386] A bank cashier was fired after engaging in a discussion on his Facebook wall on the 'reappearance of 15.000 Euro' (a sum that previously, inexplicably went missing from the bank). The Oberlandesgericht Wien (Higher Regional Court, Vienna) pointed out that posting on Facebook equals to publishing a statement in a daily newspaper and that *bank secrecy* may be *violated* on networking sites on the Internet as well. The Oberlandesgericht Wien rejected the cashier's argument that he was unaware of the fact that his statement might reach the public. As seen from this case, certain rights and obligations arising from the employment relationship are not only active within working hours and in the offline environment; the duty to act in line with the principle of loyalty or the duty not to harm the employer's reputation as well as to guard secrets do not end with the working day. Although the default position is that the employee enjoys the right to privacy, this right is not absolute.[387]

[385] OGH 9 Ob A 111/14k (9. 2.2014)

[386] For a description of the Austrian regulation see: Andréewitch, Karolin. Die Privatnutzung von Social Networks am Arbeitsplatz. Die Regelung der Privatnutzung von Social Networks aus arbeitsrechtlicher Perspektive sowie Kontroll- und Sanktionsmöglichkeiten des Arbeitgebers. *Arbeits- und SozialrechtsKartei* (2015): 52-57. 54.

[387] Wittek, Wolfgang H. *Soziale Netzwerke im Arbeitsrecht*. Nomos Verlagsgesellschaft mbH & Co. KG, 2014.

b. France

The access and processing of the employee's or applicants personal information via SNSs is strictly limited by general legal provisions. Asking applicants or employees for information unrelated to the job or their qualifications is prohibited. Before an employer can monitor employees' use of social media, it must inform and consult its works council, and inform the affected employees about the fact that monitoring is to take place and about the reasons why. In addition, the French data protection agency must be informed about the monitoring. If the social media policy contains disciplinary sanctions for non-compliance, the French labour administration has to be consulted as well. [388]

If a French employee uses SNSs during work time, this may justify disciplinary sanction for serious misconduct only if the use is abusive. Connection time, frequency or duration are used as indicators. Outside working hours, insulting or otherwise damaging content may lead to a disciplinary sanction if the employee's account settings did not ensure confidentiality. [389] But overall, with regard to the use of SNSs during working hours the French view is lifelike. In 2001 the Attorney General of the Cour de Cassation voiced that a total prohibition on personal use of a company computer during business hours would be unrealistic; thus employers must tolerate some non-work use of company computers during working hours.[390] The guidelines issued by the expert body called Internet Rights Forum echo this pragmatic approach, however they also underline that the employers interest must be considered, and highlight the potential abuse of freedom of expression.[391]

Privacy settings play a decisive role in determining whether a negative comment posted by the employee about his employer will constitute valid justification for

---

388 Proskauer Rose LLP 2014 5.

389 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/france (Accessed: 17.07.2016)

390 *Nikon France v. Onof*, Cour de Cassation [Cass.], soc., 2 Oct. 2001, No. 4164.

391 Blanpain, Robert et al. *The Global Workplace: International and Comparative Employment Law – Cases and Materials*. Cambridge: Cambridge Univ. Press, 2007. 460-461.

dismissal. The more accessible a comment is, the more likely it will be deemed public. In a case concerning an ex-employee making insulting comments about his former employer the Supreme Court held that the insults were private because the comments were accessible only to persons authorized by him (14 people).[392] A Paris criminal court recently found an employee liable for publicly insulting his employer on Facebook because of the absence of appropriate privacy settings.

Let us take a closer look at another case. Three employees of Alten SIR, a French consulting company, were dismissed due to the degrading comments they posted from their personal home computers on Facebook about Alten SIR managers, including its HR Director. The employees argued that their privacy rights had been violated because the Facebook page was private and not accessible to all Facebook users. They also claimed that the comments were no more than a jest (they used a 'smiley' symbol on the posting). The employer argued that it was not a violation of the employees' privacy to enter the screenshot into evidence because of two reasons. Firstly, the list of Facebook 'friends of friends' included other Alten SIR employees; and secondly, the Facebook page was capable of being read by people outside the company. The French court found that it was not a violation of the employees' privacy to allow the admission of the screenshot into evidence before a tribunal as the Facebook conversation could have been read by people outside of the Company. The Court upheld the discharge of the employees, stating that they abused their right of expression under the French Labour Code Section L.1121. The conversations could be considered as an incitement to rebellion against the Company's hierarchy as well as a disparagement of the company's image, and therefore the behaviour qualified as serious misconduct.[393]

---

[392] *Cass. 1ère civ.*, 10 avril 2013, n 11-19.530, FS-P+B+I. The classification of the comment as public or private was important because according to French law public insults are subject to more severe sanctions than private ones; Proskauer Rose LLP 2014 (n 1): 12.

[393] *Barbera v. Société Alten SIR*; *Southiphong v. Alten Société SIR* (Prud'hommes de Boulogne-Billancourt, Nos. RG-F-/326/343), November 19, 2010. See Joseph, C elia. Discharge is Upheld for Facebook Postings by Employees in France *TLNT* (2010): http://www.tlnt.agileserver.com/2010/12/09/discharge-for-facebook-postings-by-employees-in-france/

c. Finland

Finnish labour lawyers refer to the fact that although the employer may (generally) not restrict the employee's use of SNSs off working hours, the employee is not released from the obligation of loyalty, thus must refrain from acting offensively about the employer all the time. The employee's actions cannot be monitored by the employer, yet, such activity may eventually serve as ground for termination of the employment relationship.[394]

d. Germany

The law does not allow employers to ask employees to disclose their social media account details. According to case law the personal circumstances of an employee may be disclosed only to the extent to which a legitimate, justified and equitable interest of the employer exists in relation to the employment relationship.[395] The employer's ability to use employee data obtained from social media with respect to termination depends on the employer's policy on Internet use in the workplace.[396] The German employer may search generally accessible data on SNSs. Information acquired in this way may only be used to a very limited degree by the employer against the employee. However, according to the Federal Labour Court, grossly insulting an employer on SNS can justify extraordinary or ordinary dismissal. [397] Under German law, remarks on social media

[394]http://www.iclg.co.uk/compare#practicearea=employment-and-labour-law&&jurisdictions=finland (Last accessed: 17.07.2016).

[395] Hagedorn, Falk. *Privacy in the Workplace. National report on Germany* 2011. http://pawproject.eu/en/sites/default/files/page/web_national_report_germany_en.pdf 33-34.; Gola, Peter. Von Personalakten- und Beschäftigtendaten. *Recht der Datenverarbeitung,* 2, (2011): 66-68; Lelley, Jan Tibor and Florian Müller. Ist § 32 Abs. 6 Satz 3 BDSG-E verfassungsmäßig? *Recht der Datenverarbeitung*, 2 (2011): 59-66.

[396] Collins, Erika and Susanne Horne. Social Media and International Employment. In Collins, Erika. (ed.). *The Employment Law Review*. 5th ed. London: Law Business Research Ltd., 2014. 14-20; Reinhard, Hans Joachim. Information Technology and Workers' Privacy: the German Law. *Comparative Labor Law & Policy Journal*, 2 (2002):377-398. 431.

[397]http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/france (Last accessed: 17.07.2016).

which are insulting to the *employer can be a reason for termination e*ven without prior warning. However, any action taken must be proportionate to the remark.[398]

The legal reasoning of the courts in Blokker-like cases (see below) is similar to that of the Dutch courts. Due to the permanent nature of online posts, defamation on Facebook weighs heavier than insulting someone verbally. In a case in front of the Higher Labour Court Hamm[399] an apprentice wrote 'oppressor' and 'exploiter' on his personal Facebook profile under the section 'employer'. The Court qualified these remarks as a relevant offence and emphasised that the use of Facebook made the comment available to the public. A shift of focus is detectable in the case law. The judgements are moving away from the protection of the employee's privacy and right to self-determination regarding personal data toward the employer's rights of ownership (as to their company IT).[400]

e. The Netherlands

Article 10 of the Dutch Constitution states that everyone has the right to respect of his privacy. The employment law consequences of the use of SNSs are governed by employment law provisions and the Personal Data Protection Act (Wet bescherming persoonsgegevens, Wbp) from 2001, the later providing for general guidance but not specific employee rights. The recommendations issued by the Dutch data protection authority emphasise that employers are only allowed to check activities of employees

[398] Action on Misuse of Social Media by Employees 2013.; FORST, G. (2010): Bewerberauswahl über soziale Netzwerke im Internet? *NZA,* 27, 427-433; Oberwetter, Christian. Soziale Netzwerke im Fadenkreuz des Arbeitsrechts. *NJW,* 64.7 (2011): 417-421.

[399] Verdict by the Higher Labour Court Hamm from October 10, 2012 (3 Sa 644/12) cited by Fülbier, Ulrich, and Splittgerber, Andreas. Keine (Fernmelde-) Geheimnisse vor dem Arbeitgeber. Neue juristische Wochenschrift 2012 (2012): 1995-2001. Labor Courts in Germany Extend Employer's Rights to Monitor and Control Employee IT Device. *ORRICK,* 10 30 2012. http://blogs.orrick.com/employment/2012/10/30/labor-courts-in-germany-extend-employers-rights-to-monitor-and-control-employee-it-devices/ (Last accessed: 26.09. 2014)

[400] Fülbier 2012.

on SNSs when there is a legitimate reason and a necessity to do so; and employees need to be informed about the possible screening, for example via internal guidelines.[401]

In the *Blokker* case an employee of Blokker supermarket chain posted a critical remark about his employer on his Facebook page. The warning of the employer did not stop him from repeating this behaviour, and from posting an insulting comment[402] within less than three weeks. Though the post was intended to a limited audience (it could be read only by the 'friends' of the employee), a colleague 'friend' informed the employer. The consequence was dismissal. The Arnhem sub district court held that free speech is limited by the duty of care towards the employer; and that the insulting Facebook posts were not protected on the contrary, they qualified as gross insults. The court also pointed out the relativeness of the private nature of Facebook.[403] Commenting on this case Van Heck argues that posting an insulting remark about the employer on Facebook (irrespective of the limited circle of addressees) is similar to pinning an unfounded and inflammatory notice on the notice board of the staff canteen where all employees as well as visitors can read it. The right to free speech has to be weighed against the duty to refrain from activities that may harm the lawful economic interest of the employer, such as posting comments online that damage the reputation of the company. The right balance depends on the degree of harm, the potential size of the audience, the method of communication and finally the relationship between the employee and the audience. SNS posts are special in many respects. The content is transmitted immediately; the audience irrespective of the user's intentions (and privacy settings) is unlimited, the post is almost inerasable.[404]

---

401 Proskauer Rose LLP 2014. 7.
402 He called Blokker a 'bastard company' and the management, 'incompetent bastards'.
403 *800536 HA VERZ* 12-1038 available at www.rechtspraak.nl; LJN BV 9483 See also by BARENTSEN, B (2012): Think before you post. *Leiden Law Blog.* http://leidenlawblog.nl/articles/think-before-you-post (accessed 26 September 2014)
404 Facebook Posting Not Covered by Right to Free Speech (NL) [2012] 55 *EELC* 21-22

f. Spain

The employer is not entitled to access social networks that have passwords or to simulate a profile in order to be invited by the employee to the social network.[405] While employers may monitor how much time employees spend on SNSs provided that employees were previously *informed* about the monitoring, in most circumstances employers may not monitor the content of the SNS without the consent of the employee or reports from other individuals who have legitimate access to the content.[406] Current case law allows the employers to terminate the employment relationship for insulting the company on social media sites when the insult is clearly offensive. Spanish courts generally do not find the monitoring of employees' Internet use to constitute privacy infringement when the employer has provided written policy in advance.[407] In Spain firm level policies normally address with what limits should the employees use SNSs (for example the duration of access per working day).[408] Court decisions assess severe loss of working time as breach of duty. The employer may access data on SNSs if it is accessible to the public. Even if employees post comments from their own computer outside their working time, their employer is entitled to take disciplinary action. To justify dismissal the following criteria are to be met: the users of SNSs have to be capable of easily identifying the name of the company or supervisors, and the information posted has to cause serious damage to the company, employees or stakeholders. The courts also take into account the time taken by the employee in preparing the comments, videos or images and in transmitting them as an indicator of bad faith on the part of the employee and the employee's position in the company.

---

405 Muñoz Ruiz, Ana Belén Social Networking: New Challenges in the Modern Workplace. *Spanish Labour Law and Employment Relations Journal,* 1-2 (2013): 37-38

406 Proskauer Rose LLP 2014. 7.

407 Aranda, Javier Thibault. Information Technology and Workers' Privacy: The Spanish Law. *Comparative Labor Law & Policy Journal,* 2, (2002): 431.

408 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/spain (Accessed: 17.07.2016)

g. Portugal

The Portuguese Data Protection Authority *expressly bans* any kind of monitoring of social networks or similar even if accessed through the computer at the workplace.[409] Yet, in practice monitoring the employee's use of SNSs on an occasional basis may be acceptable. Stemming from the duty of loyalty, employers may regulate off-duty conduct to the extent that it has a detrimental impact on the employment relationship and in these cases intervention may also be justified.[410]

h. The United Kingdom, with a Glimpse at the US

Regulation of use and misuse of SNSs is a current topic in the United Kingdom. *Crimes involving Facebook and Twitter* are everyday reality, in 2012 around 650 people were charged for offences committed on social media sites ranging from harassment through stalking to racial abuse.[411] When taking action against employees it is imperative that the employer has a clear social media policy on which he or she can rely in order to discipline or dismiss an employee. SNS related cases are governed by different branches of law. The law sources include acts regulating explicitly data protection (Data Protection Act 1998); acts regulating the use of IT (e.g. the Computer Misuse Act 1990 makes provision for securing computer material against unauthorised access or modification and for connected purposes); general human rights acts (e.g. the Human Rights Act 1998 which incorporates the ECHR)[412]; as well as acts regulating the employment relationship (see

---

409 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/portugal

410 http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/portugal (Accessed: 17.07.2016)

411 Whitehead, Tom. Too many Twitter prosecutions could damage free speech, says DPP. *The Telegraph* . (2013): http://www.telegraph.co.uk/news/uknews/law-and-order/9845616/Too-many-Twitter-prosecutions-could-damage-free-speech-says-DPP.html (accessed 16 January 2015)

412 The most relevant articles in relation to SNSs and the employment relationship are: Article 8 ECHR on the right to respect for private and family life, home and correspondence, Article 9 ECHR on the right to freedom of thought, conscience and religion; Article 10 ECHR on freedom of expression.

for instance the Employment Rights Act 1996, especially regulations on prohibition of discrimination and termination).[413]

In cases breaching rules of data protection, including cases involving SNSs, the court may refer to the guidelines of the Information Commissioner's Office.[414] In addition to claiming unfair dismissal, employees increasingly rely on the breach of the Human Rights Act and the Article 8 or Article 10 of the ECHR, especially if they have been dismissed for using SNSs outside working hours. The courts undertake a balancing act between the harm caused and the employer's actions.[415] As the case law points out:

> 'Facebook (...) does not always guarantee confidentiality'.

Provided access is not limited, the message is not protected by 'privacy', and it can be used as evidence in court. Employers may take action against their employees if the latter's online statement is insulting, defamatory or excessive, or encourages other employees to rebellion, or if it has impaired or could have impaired the employer's reputation.[416]

In *Teggart v TeleTech UK limited NIIT*[417] the employee, Mr Teggart posted an obscene comment about the alleged promiscuity of a female colleague on his Facebook page. The post was made off working hours, from his home, from his own computer. The employer was informed by a 'friend' of Mr Teggart and responded with dismissal for harassment. According to the company, Mr Teggart harassed his co-worker and - in mentioning TeleTech - brought the company into disrepute. Mr Teggart claimed unfair dismissal and breach of his rights to privacy, freedom of belief and freedom of

413 Labour Relations Agency *Advice on Social Media and the Employment Relationship.* 2013. http://www.lra.org.uk/copy_of_advisoryguide_social_media_-_september_2013.pdf 3-6. (Last accessed: 28.01. 2015).
414 The Information Commissioner's Office. *Data Protection. The Employment Practices Code.* 2011. https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf (accessed 28 January 2015); Jeffery, Mark. Information Technology and Workers' Privacy: The English Law. *Comparative Labor Law and Policy Journal,* 4 (2002-2003): 301-350.
415 Action on Misuse of Social Media by Employees *Kemp Little Social Media Seminar Section 3.* 2013. http://www.kemplittle.com/cms/document/Social_Media_Seminar_Action_on_Misuse.pdf (accessed 26 September 2014)
416 Action on Misuse of Social Media by Employees 2013.
417 *Teggart v TeleTech UK limited* NIIT 00704/11.

expression under the ECHR. Interestingly the Industrial Tribunal cited a famous American case, *National Labor Relations Board v American Medical Response of Connecticut*. It is worth to devote some lines to the case of Ms Dawnmarie Souza, because it demonstrates well the different approach undertaken by the American court, and also because it highlights how important the content of the comment is. Ms Dawnmarie Souza had been dismissed for the remarks she made on Facebook about her supervisor, similarly to the UK case, in her own time and from her own computer.

> 'Looks like I'm getting some time off. Love how the company allows a 17 to be a supervisor'

– read the post referring to the professional jargon for a psychiatric patient. Lafe Solomon, the National Labor Relations Board's acting general counsel classified the case as a fairly straightforward one under the National Labor Relations Act; and stated that irrespective of the place of action

> 'whether it takes place on Facebook or at the water cooler, it was employees talking jointly about working conditions, in this case about their supervisor, and they have a right to do that.'[418]

The *key difference between the two cases* (and also between the two legal approaches) is that in the United States, if an employee posts critical remarks on his employer on a social networking site with the intention to raise common concern or advance the position of the employees, his action qualifies as concerted activity and generally enjoys protection. The Souza case was settled; the respondent agreed to revise its rules to ensure that they did not improperly restrict employees from discussing their wages, hours and working conditions with co-worker's while not at work and also pledged it would not discipline employees or discharge them for engaging in such discussions.[419] It is also important to point out, that in the US employers using SNSs for employment

[418] Neal, Lauren K. The Virtual Water Cooler and the NLRB. Concerted Activity in the Age of Facebook. *Wash. & LeeL. Rev.* 3 (2012): 1715-1758. http://scholarlycommons.law.wlu.edu/wlulr/vol69/iss3/8 (Last accessed: 28.01.2015).

[419] There was also a separate, private agreement between Ms Souza and the respondent regarding her dismissal which was not disclosed.

decisions may risk crossing the lines of discrimination, infringement on personal privacy, and/or interference with employees' concerted activities protected by US law. Employers not using SNSs may face negligent hiring and damages for improper employee messages posted.[420] However, save for the discrimination charges, performing background check on the candidate without prior consent or knowledge, would not be considered unreasonably offensive by the US courts.[421]

Going back to Mr. Teggart in the UK, his lawsuit had an opposite ending. The Industrial Tribunal found that *the harassment was sufficient to justify a dismissal for gross misconduct*. Irrespective of the limited circle of intended audience, (for instance the female colleague could not view the comment) when Mr Teggart displayed his opinion on his Facebook page, he had *abandoned any right to consider his comments as being 'private'*. The Industrial Tribunal also pointed out that the right of freedom of expression must be exercised responsibly and did not entitle employees to make comments that harm another colleague's reputation and infringed her right not to suffer harassment.[422] As we see, in the UK misuse of SNSs in or outside the workplace may lead to disciplinary procedure up to dismissal. Judging on the fairness of the dismissal the court will take into account the scale of damage or potential damage to the employer's reputation, the principle of proportionality and check if the employer has a clear policy on the use of SNSs.[423]

---

[420] Lam, Helen. Social media dilemmas in the employment context. *Employee Relations* 38.3 (2016): 420-437.
[421] Finkin 2015.
[422] Action on Misuse of Social Media by Employees 2013.; Regarding the belief argument the Court made reference to academic literature Allen, Robin et al. *Employment Law and Human Rights* 2nd ed. Oxford: Oxford Univ. P., 2007. and pointed out that 'belief' does not extend to a belief about the promiscuity of another person and stated that the limits to the concept lie in a requirement of a serious ideology, having some cogency and cohesion ...'.
[423] http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/united-kingdom (Accessed at: 17.07.2016)

VIII. SNS: A Double-Edged Sword. Where Do We Stand Now?

SNSs may very well serve the interest of the employer. Many firms advertise their products or services on their Facebook profile and even encourage their employees to use their social capital[424] and to support them in forms of likes and comments. SNSs may act as a new channel for HR strategy as well; employers may place job advertisements on Facebook or communicate with present employees. In addition, SNSs may provide an informal forum of discussion between management and labour; and an effective way to keep employees informed about the latest developments and receive feedbacks.

Clearly, SNSs have *downsides* as well. Some scholars argue that the birth of social media heralded 'the beginning of the end of privacy'.[425] Monitoring the SNSs may lead to unethical and/discriminatory practices. Obviously, the coin has two sides. The most common threats posed for the employers include misuse of confidential information, misrepresentation of the views of the business, inappropriate non-business use, disparaging remarks about the business or co-workers and harassment.[426]

Regarding pre-employment, a clear-cut solution would be to avoid pre-employment Google search in general (see the Finnish example). On a theoretical level, such a system can be backed up by referring to the very nature of SNSs: these sites operate without pre-edition, or any kind of previous control, therefore enable expression of very diverse and unfiltered opinions. The possibility of background checks may have a destructive impact on the quality of online human interaction, on the long run they may force users to create duplicate profiles, and censor their online activities for fear of being judged by their future employer. The acceptance of unregulated monitoring practice may render a widespread and otherwise useful communication medium dangerous for people to

---

[424] Brooks, Brandon et al. Assessing structural correlates to social capital in Facebook ego networks. *Social Networks 38* (2014): *1-15.*

[425] Sanders, Sherry D. Privacy is Dead: The Birth of Social Media Background Checks *S U L REV* 39 (2012): 243.

[426] Proskauer Rose, LLP, *Social Media in the Workplace Around the World 3.0*. 2014. 2 http://www.proskauer.com/files/uploads/social-media-in-the-workplace-2014.pdf accessed 28 January2015

use.[427] Yet, I think imposing a complete ban on pre-employment screens is not feasible mostly because the invisibility of the search and the benefits it offers for the employer (it is a fast, cheap and easy way to gain many information including red flags). The solution the UK Information Commissioner's Office advocates, that is to notify the candidates about the background checks and document what data is collected, is more realistic. A written policy that specifies what information or sites will be consulted before the decision is made, who will conduct the review, and what records will be maintained helps to prevent possible lawsuits. Before hitting on 'search' it is also advisable that the employer ask him- or herself if the search fulfils the general requirements of processing data or not. Is it reasonable? Are there other, less intrusive measures available? Employees are mostly not rational actors making privacy decisions after a carefully executed balancing test, yet for the time being the candidates (and later on the employees) could protect themselves against invasion against their privacy mainly by being cautious about what information they share online and by choosing their privacy settings wisely. This of course presupposes a certain awareness of one's digital footprint.

As to the adverse effects, the *biggest concern is the issue of how to provide evidence*. Even though in discrimination cases the burden of proof is reversed, employment discrimination can often be difficult to prove. Though, unfortunately candidates are seldom in the position to present a prima facie case for discrimination, successful cases such as the one concerning the job at University of Kentucky give rise for optimism.

Regarding the employment stage: here again, *unreasonable and extensive restriction is likely to motivate the employees to create two profiles*, one official with real name and an anonymous one, and ventilate their critiques through the alias. On the other hand, SNSs are by no means no-man's land where anything goes. As we can see in the cases discussed earlier, neither the online environment nor the privacy expectations of the employee provide shield against actions such as harassment or harming legitimate business interest. These actions may result in disciplinary action including termination

[427] Leigh A. Clark and Serry J Roberts. Employer's Use of Social Networking Sites: A Socially Irresponsible Practice. *Journal of Business Ethics* 95.4 (2010): 507.

just like they would in 'real life'. The employment consequences depend on classic factors (such as degree of harm) but also factors specific to SNSs (e.g. privacy settings).

Regarding both stages: though the current, typical practice (i.e. unregulated and boundless monitoring) goes against the most basic principles of lawful data processing, it is unlikely to change because of two main reasons. For one, the employers too, are tempted by the already-mentioned benefits. For two, while users do not intend their (future) employers to see their posts and pictures on Facebook or Twitter, they make it possible for the public, including employers to access information on their profile. The desire of self-expression, information sharing, networking, etc. is dominant when the profiles are shaped, the opposite desire, the one for clear separation of work and private life, the wish for solitude surfaces later or too late. Employment related search on social networking sites remains in the grey zone of law. For the benefit of all concerned, reasonableness and adoption of a clear policy on SNSs appears to be the best solution.

IX. What Can We Learn from the Cases? Prevention by Regulation

As we can see, employment-related obligations are often breached on SNSs. However, to entirely ban the use of SNSs is obviously not a solution as it constitutes an unlawful and excessive restriction on freedom of expression. The employer has no right to prohibit the use of social media per se. In many countries, the degree to which the employer can discipline the employee on account of the employee's misuse of SNSs depends on the policies that are already in place. A written document may take the form of a separate policy, but regulation in collective agreement is also a possibility. Having a set of written rules is beneficial for many reasons. It gives clear guidelines on the online dos and don'ts; helps to draw a clearer line between private and professional; and also aids compliance with the law on discrimination and data protection.[428]

[428] See also *ACAS Advice A-Z Promoting Employment Relations and HR Excellence* http://www.acas.org.uk/index.aspx?articleid=3375 (last accessed at 28.01. 2015); Kiss, Attila. A privátszférát erősítő technológiák. *Infokommunikáció és Jog,* 56 (2013): 113-119; Szőke, Gergely László and

An example worthy of consideration for employers who decide to draft their code on use of social media is the policy of *Walmart*. The American multinational retail corporation operates a chain of discount department and warehouse stores and warehouse stores and is the biggest private employer in the world with over two million employees. Its policy was revised after a case in front of the National Labor Relations Board and since then it is often cited as example for good internal regulation. The wording and the style of the documents is unmistakably American, however, it does provide us with valuable guidance.

- After acknowledging that 'social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world' the policy warns about the risks and responsibilities the use of social media presents. It advises the employees to keep in mind that any of their conduct that adversely affects their job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of Walmart or Walmart's legitimate business interests may result in disciplinary action up to and including termination.
- It also states: 'Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.'
- The code advises the employees to 'post only appropriate and respectful content', 'know and follow the rules', 'be honest and accurate'.
- It recommends its employees to include a disclaimer such as 'the postings on this site are my own and do not necessarily reflect the views of Walmart.' (In my opinion asking every employee to apply such a disclaimer might not reach the desired effect, on the contrary it directs the visitors attention to the fact that the owner of the profile works for the particular employer.)

Böröcz, István. A beépített adatvédelem (privacy by design) elve. *Infokommunikáció és Jog*, 56 (2013): 120-125.

- The policy also regulates the use of social media at work and advises the employees to refrain from using social media while on work time or on equipment Walmart provides, unless it is work-related as authorized by the manager or consistent with the Company Equipment Policy.[429]

The social media rules need to be clearly worded. They should contain the purpose and the personal scope of the policy; the responsibilities attached; reference and links to other policies (including those on bullying and harassment), examples of what is regarded as gross misconduct (e.g. posting derogatory or offensive comments on the Internet about the company or a colleague); sanctions; monitoring; procedural rules and regulation on review and update. As social networking can be used to increase levels of employee engagement and to promote the organisational brand and reputation, the policy may also include business objectives.[430] Naturally, regular audit enhance legal compliance.[431] It is important to emphasise that there is no one size fits all solution. The position of the employee within the workplace hierarchy[432] as well as the tasks assigned to him or her is likely to influence the level of autonomy in relation to Internet use (to what extent is he or she allowed to use Internet for private purposes during working time, how frequently is the Internet use monitored, if ever).

SNS related issues may also rise after the employment relationship is terminated. The so called *'social media covenants'* curtail the use of social media by the ex-employee and restrict the employee to contact business relation or prohibits the employee to make negative statements about the employer, the employer's business, clients or products via social media.[433]

---

[429] Available at: http://www.theemployerhandbook.com/NLRBThirdReport.pdf (Last accessed 28.01.2015).

[430] See also the recommendations of ACAS.

[431] Szőke, Gergely László. Az önszabályozás, audit és tanusítás lehetőségei és korlátai az adatvédelem területén. *Infokommunikáció és Jog 57.* (2014): 14-20. 14.; Szőke, Gergely László and Böröcz, István: A beépített adatvédelem (privacy by design) elve. *Infokommunikáció és Jog* 56 (2013): 3.

[432] See also Galácz, Anna and Ságvári, Bence. Digitális döntések és másodlagos egyenlőtlenségek: a digitális megosztottság új koncepciói szerinti vizsgálat Magyarországon. *Információs Társadalom,* 2 (2008): 37-52. 39.

[433] How to protect the employer's interests after the termination of employment contracts – aspects of labour law in general and sports law in particular Commission(s) in charge of the Session/Workshop: Employment Law.
Commission IBLC Sports Law Subcommission 14.

X. It is Not Terra Nullius

SNSs are *by no means no-man's land where anything goes*. The cases discussed earlier demonstrate that neither the online environment nor the privacy expectations of the employee provide shield against actions such as disclosure of confidential information, harassment or defamation. On the contrary, these actions may result in disciplinary action including termination just like they would in 'real life'. The employment consequences depend on classic factors (such as degree of harm) but also factors specific to SNSs (e.g. privacy settings, for how long was the post/picture visible). In my opinion the use of social media sites during working time in itself may only serve as ground for dismissal if the employer previously explicitly notified the employee that these activities are prohibited and the nature of the work as well as the content of the employee's conduct justifies such prohibition.

We may use the method of analogy to evaluate the legal situation and ask ourselves: *how would the law react should a certain event took place in the real word?* The Resolution adopted by the UN General Assembly on the promotion, protection and enjoyment of human rights on the Internet states that: 'the same rights people have offline, must also be protected online'.[434] However, at times it is problematic to apply the 'treat online as offline' principle. It is difficult to find *the nearest real life equivalent to a Facebook or Twitter post*.

- Is a virtual conversation provoked by a picture or post similar to a conversation of acquaintances in a pub?
- Can we compare it to talks over business lunch or chats at a large family get-together in the backyard of someone's home?
- Is Facebook the new water cooler?
- A virtual notice board of the staff canteen?
- A statement in a daily newspaper?

[434] General Assembly Resolution on Right to Privacy in the Digital Age, A/RES/68/167, adopted on 18 December 2013, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/68/167 (Last accessed 03.03.2015).

- Or none of these?

The findings and assumptions of classic theories on privacy have to be adjusted to the online world.

When creating content on these sites or when monitoring what someone else has created, general principles such as reasonableness, fairness, prohibition of abuse of rights as well as common sense are our best companions. Employees can be held responsible for work-related misconduct on Facebook irrespective whether the conduct occurs in or outside working hours or whether private or work IT tools are used. The bottom line is that employees are not entitled to use social networking sites to engage in actions that would otherwise be impermissible. The right to privacy cannot serve as shield for abuse of rights.

XI. From Complete Ban to Hand-Crafted Code of Conduct

As we can see the employees can indeed infringe their employment-related obligations on SNSs. However, to ban the use of SNSs entirely is obviously not a legal solution as it constitutes an unlawful and excessive restriction on freedom of expression. The employer has no right to prohibit the use of social media per se. In many jurisdictions, the degree to which an employer can discipline an employee or terminate his/her employment relationship on account of the employee's use (or misuse) of technology will depend on the policies that are already in place.[435] In my opinion, the use of social media sites during working time in itself may only serve as ground for dismissal if the employer previously explicitly notified the employee that these activities are prohibited and the nature of the work as well as the content of the action justifies such prohibition. A written document can help the company to protect itself against liability for the

[435] Collins, Erika and Suzanne Horne. Social Media and International Employment. In Erika Collins (ed), *The Employment Law Review*. 5th ed, London: Law Business Research Ltd. 2014. 14-20. 18.

actions of its workers; gives clear guidelines for employees on what they can and cannot say about the company; helps managers to manage performance effectively and employees to draw a line between their private and professional lives. It also aids compliance with the law on discrimination, data protection and protecting the health of employees.[436]

The employer's social media policy needs to be clearly worded if the employer wishes to be able to rely on a breach of it, and a regular audit enhance compliance.[437] It is useful to apply the *guidelines offered by the Advisory, Conciliation and Arbitration Service* (ACAS).[438] The main suggestions are as follows:

- Employers should give clear examples of what will be regarded as gross misconduct (e.g. posting derogatory or offensive comments on the Internet about the company or a work colleague) and provide information about the possible consequences.
- The policy should specify the following areas: definition and purpose of policy; who it applies to; responsibilities; reference and links to other policies; responsible use of social media (including defining what is considered as acceptable and 'normal' use and acceptable behaviour making reference to bullying and harassment policy; how breaches will be dealt with/complaints procedure and regulation on review and update.
- As social networking can be used internally to promote levels of employee engagement and externally to help promote the organisational brand and reputation the policy may also include business objectives as well.
- There is no one size fits all. The position of the employee within the workplace hierarchy as well as the tasks assigned to him is likely to influence the level of autonomy in relation to internet use (to what extent is he allowed to use

[436] See also ACAS Advice A-Z *Promoting Employment Relations and HR Excellence* http://www.acas.org.uk/index.aspx?articleid=3375 (Last accesse: 28. 01. 2015)
[437] Szőke, Gergely László. Az önszabályozás, audit és tanusítás lehetőségei és korlátai az adatvédelem területén. *Infokommunikáció és Jog* 11 (2014): 14-20. 14.
[438] http://www.acas.org.uk/media/pdf/d/6/1111_Workplaces_and_Social_Networking.pdf

Internet for private purposes during working time, how frequently is the internet use monitored).

When the employer drafts its policy employee involvement and continuous dialogue with the social partners are equally important. The German, French and Dutch systems present fine examples.

PART VI: THE PLACE OF PERSONALITY RIGHTS IN 21ST CENTURY LABOUR LAW

I. Renewal of Labour Law

Throughout its history, labour law has more than once *renewed itself*; its classical boundaries have been reshaped. The big eras have been characterised by different aims, priorities and slogans. The last decade of the 20th century had the ideal of *flexicurity, atypical forms of employment, as well as liberalisation* as its flagships.[439] Flexicurity, an 'integrated strategy to enhance both flexibility and security in the labour market'[440] has been seen as some sort of miracle weapon since the '90s. Its target was to boost competitiveness, employability, but – as Mia Rönnmar puts it – it has also been presented as an appropriate policy response to economic uncertainty and labour market instabilities due to *globalisation and technological change*.[441]

At the turn of the century the need for a new 'paradigm', or a new constituting narrative appeared.[442] It was argued that the problem lies with the field's boundaries: its limited focus on paid work and employer – employee relation.[443] The crisis indeed reshaped the boundaries of employment and labour law. The new policies and legislation led to the re-thinking of the scope of protected persons. We had to (or rather have to) ask ourselves: *Whom and to what extent does or should labour law protect?*[444] *To what*

[439] Supiot, Alain and Meadows, Pamela. *Beyond employment: Changes in work and the future of labour law in Europe*. Oxford: Oxford University Press, 2001., Bankó, Zoltán. *Az atipikus munkajogviszonyok*. Pécs: Dialog Campus, 2010. 13-14., 186.

[440] COM(2007) 359 final 4.

[441] Rönnmar, Mia. The managerial prerogative and the employee's duty to work: a comparative study of functional flexibility in working life. *The International Journal of Human Resource Management* 15.3 (2004): 451-458.

[442] Langille, Brian. Labour Law's Back Pages. In: Davidov, Guy and Langille, Brian (eds.). *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*. Hart, 2006. 13.

[443] Fudge, Judy. Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law. In: Davidov, Guy and Langille, Brian (eds.). *Boundaries and frontiers of labour law: Goals and means in the regulation of work*. Oxford: Hart, 2006. 120-135. 120.

[444] Gyulavári, Tamás. *A szürke állomány, Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán*. Budapest: Pázmány Press, 2014. (Jogtudományi monográfiák; 6.).

extent are certain classic (oftentimes taken for granted) rights and obligations transformed? Distinguished scholars attempted to re-define, re-imagine labour law.[445] In the recently published book, titled, 'The changing law of the employment relationship: comparative analyses in the European context' Nicola Countouris talks about a *never ending quest for defining the scope of labour law* and ensuring protection for all those in need of protection.[446]Kiss György argues in favour of a *new identity for labour law*.[447] 'Labour law has no choice but to utilize the applicability of certain elements of civil law.'[448] Modern labour laws *approximate to civil law,*[449] and the Hungarian Labour Code too explicitly aims at flexibilisation.[450] However, in the realm of personality rights *a parallel tendency, 'constitutionalization'*[451] is also detectable.

---

[445] Simpson, Bob. The Labour Constitution: The Enduring Idea of Labour Law. *Industrial Law Journal* 45.1 (2016): 101-105.; Fudge, Judy. A new vocabulary and imaginary for labour law: Taking legal constitution, gender, and social reproduction seriously. *The Future Regulation of Work: New Concepts, New Paradigms* (2016): 9.

[446] Countouris, Nicola. *The changing law of the employment relationship: comparative analyses in the European context*. Routledge, 2016.

[447] Kiss, György. A napjaink munkajogának textúráját alkotó elemek: A munkajog új (?) identitásmeghatározása. In: Finszter, Géza, Kőhalmi, László, and Végh, Zsuzsanna (eds.). *Egy jobb világot hátrahagyni...: Tanulmányok Korinek László professzor tiszteletére.* Pécs: Pécsi Tudományegyetem ÁJK, Büntetőjogi Tanszék, 2016. 402-413.

[448] Kiss, György. Foglalkoztatás gazdasági válság idején - a munkajogviszonyban rejlő lehetőségek a munkajogviszony tartalmának alakítására (Jogdogmatikai alapok és jogpolitikai indokok). *Állam-és Jogtudomány* 55.1 (2014): 36-76. 71.

[449] Bankó, Zoltán and Berke, Gyula. A Magyar és az európai munkajog - a jogharmonizáció eredményei és dilemmái. In: Tilk, Péter (ed.). *Az uniós jog és a Magyar jogrendszer viszonya.* Pécs: PTE Állam- és Jogtudományi Kar, 2016. 251-282.

[450] Kiss, György. Opportunities and limits of application principles and Civil Code rules in Hungarian labour law: Crisis management with means of civil law. European Labour Law Network, *Working Paper 4*. (2015) 1-25.; Kártyás, Gábor and Gyulavári, Tamás: *The Hungarian Flexicurity Pathway?: New Labour Code after Twenty Years in the Market Economy*. Budapest: Pázmány Press, 2015.; Hajdú, József. Flexibilization of employment relationship in the New Hungarian Labour Code. In: Jakab, Éva and Pozsonyi, Norbert (eds.) *Ünnepi kötet Dr. Molnár Imre egyetemi tanár 80. születésnapjára.* Szeged: Szegedi Tudományegyetem Állam- és Jogtudományi Kar, 2014. 169-182; Göndör, Éva, and Ferencz, Jácint. Chapters from the new Labour Code in: Smuk, Péter (ed.). *The transformation of the Hungarian legal system 2010-2013*. Budapest: Wolters Kluwer – CompLex, 2013. 435-470.

[451] Dukes, Ruth. Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law. *Journal of Law and Society* 35.3 (2008): 341-363.; Bell, Mark. *Constitutionalization and EU employment law. The Constitutionalization of European Private Law (OUP)* (2014): 13-05.; Arthurs, Harry. The constitutionalization of employment relations: Multiple models, pernicious problems. *Social & Legal Studies* 19.4 (2010): 403-422.

The economic crisis had a strong impact on human rights[452] and reinforced the need for reconstruction of labour laws. Experiencing a debt crisis and massive economic contraction after 2008, Hungary imposed severe austerity measures.[453] The serious drawbacks of the flexicurity approach soon became apparent; the 'miracle cure' did not pass the test of the economic crisis.[454] Examining the labour reforms within the different Member States the European Trade Union Institute (ETUI), the independent research and training institute of the European Trade Union Confederation rang the alarm bell and talked about the 'deconstruction' of labour law under the guise of the economic crisis; and warned about the major negative impact of labour law reforms on workers' rights and fundamental social rights. It pointed out that national reforms deregulated already flexibilised labour law regulations and consequently in most cases reduced workers' protection and further strengthened inequalities and insecurity. Together with the complementing reforms of social security, labour law reforms jeopardised the European concept of 'quality employment' as well as the international concept of 'decent work'.[455]

Guy Davidov identifies '*obsoleteness*' as the biggest problem: i.e. the fact that labour laws have not been sufficiently updated in light of dramatic changes in the labour market. The laws are often becoming irrelevant to the actual problems faced by workers, or outdated. *New problems, such as privacy in the age of social media have not been addressed properly* by the legislature.[456] The law of personal data protection in the context of employment is lagging behind technology.

---

[452] Kapuy, Klaus. Enabling social integration through European human rights. *Rivista del Diritto della Sicurezza Sociale* 15.3 (2015): 499-514.

[453] Hastings, Thomas and Jason, Heyes. Farewell to flexicurity? Austerity and labour policies in the European Union. *Economic and Industrial Democracy* (2016): 0143831X16633756.

[454] Ferencz, Jácint. Az atipikus foglalkoztatási formák közpolitikai megközelítése. In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 119-126. 126.

[455] Clauwaert, Stefan and Schömann, Isabelle. *The crisis and national labour law reforms: a mapping exercise. Working Paper 2012.04 9*. Wolters Kluwer, 2016. 16.

[456] Davidov, Guy. *A Purposive Approach to Labour Law*. Oxford: Oxford University Press, 2016. 2-3.

II. Non-discrimination: Need for a More Sophisticated Approach

The aforementioned changes also affect the legislation on prohibition of discrimination. Inclusion of disadvantaged groups is the very essence of anti-discrimination law. Disadvantage may stem from *various sources*. It can be connected to a certain characteristic attached to the employee as a human being (first cluster of protected characteristics e.g. sex, race, age and other classic grounds), but also from the atypical status created by the employees' contract (second cluster of protected characteristics e.g. telework, temporary agency work). Intensified fragmentation of the labour market means that certain groups have more autonomy and independence and are in a stronger position to negotiate the terms and conditions of their own employment.

We can also observe new, peculiar cases of discrimination. These new cases are sometimes connected to the *changes in the interpretation of work ethos* (employee smoking ban), other times they are natural by products of the rapid changes in information technology (*Facebook termination cases*). The various characteristics *interact*, sometimes *they are combined, and at other times they collide* with one another. Finally, at both European and Member State level we can observe competition of protected characteristics as well. The structure of national equality bodies is but one example of the different political hierarchies.

The tree of European anti-discrimination is indeed hundred-pronged and ever growing. The EU Directives use closed lists, however, this by no means indicates complete rigidity. There is room left for judicial interpretation and in fact, the CJEU does play an activist role through its case law. In addition, numerous Member States decided to opt for a more elastic system. What we should not forget is the following: though they grow out from the same trunk, branches are diverse. Each category has its own characteristics, and the inter- and intra-branch differences have to be taken into consideration. The anti-discrimination framework is stretched, but there are limits to the elasticity of it. The use of traditional discrimination argument for the second cluster requires major adjustments.

Regarding the *new twigs (lifestyle discrimination)* the practice of the United States regarding employee smoker bans warns us about the potential negative consequences of stretching the employers' discretionary power too far and provides us with an opportunity to contemplate on the potential meaning of 'tendency undertakings'. The so-called Facebook termination cases are also worthy of our attention. While in Europe these cases are generally viewed within the framework of data protection law, the American academic literature conceives the issue as one of lifestyle discriminations. The combination of these two different approaches provides us with better understanding of the novel, emerging types of discrimination cases.

Many times regulations have to address vulnerabilities specific to some group or sector. Vulnerability may result from various factors. In this book age, especially old age and pregnancy/having children (see: notification duty) was chosen for a more detailed assessment. In both cases the Hungarian legislator made corrections.

III. Digitalisation of Work and Life

> 'The world is being re-shaped by the convergence of social, mobile, cloud, big data, community and other powerful forces. The combination of these technologies unlocks an incredible opportunity to connect everything together in a new way and is dramatically transforming the way we live and work.' [457]

ICT contributes to significant social change.[458] ETUI has recently produced a working paper on digitalisation of the economy and its impacts on labour markets that encourages reflection. They address new forms and aspects of work, the deterioration of the work life balance and the breakdown of the boundaries on work in terms of when and where it takes place. Regarding the processing of the employees' personal data

[457] The quote is from Marc Benioff, American internet entrepreneur. http://thesiliconreview.com/magazines/Special-issue/the-international-leader-and-technology-innovator-delivering-enterprise-mobility-solutions-globoplc (Last accessed: 02.08.2016).
[458] Kelly Garrett, R. Protest in an information society: A review of literature on social movements and new ICTs. *Information, communication & society* 9.02 (2006): 202-224. 202-224. 217.

during monitoring at the workplace, the following principles can be distilled from the law sources examined and the case law of the national courts and data protection offices, CJEU and ECtHR. [459]

- First of all, the employees have a legitimate expectation of privacy at the workplace, this right, however, is not absolute.
- A balance needs to be stuck with the employer's legitimate interest in utilizing surveillance measures.
- These measures have to be legitimate, necessary and proportionate.
- Transparency has to be ensured before and throughout the data processing.
- The proper exercise of the employees' rights may be ensured via data protection audits, code of conducts.
- There are some common features of the national models, e.g. video surveillance is prohibited at the personal areas (e.g., the employee's home, changing room), while in respect of other fields, such as monitoring IT devices, the practice varies.

Having analysed the scientific literature on the influence of technology on the world of labour, Bankó Zoltán and Szőke Gergely destil six tendencies:

1) transformation of the organisational structure;
2) flexible forms of employment from distance work to crowd working;
3) intensified fragmentation of the labour market;
4) blurring boundaries between work and private life;
5) intensification of surveillance of the workforce; and finally
6) emergence of new health problems.[460]

Much has changed at the level of law and policy. The Google decision and the Safe Harbour decision[461] clearly signal a move towards a more protective system. The 'Europeanisation of data protection' is accelerated, and the national data protection laws

[459] See also the analysis of Opre, Ancuţa Gianina and Şandru, Simona. Protection of Employees'personal Data in the Public and Private Sector, in the Context of the New IT Techonologies. *Fiat Iustitia* 1 (2016): 198-208. 207.
[460] Bankó – Szőke, 24-28.
[461] *Case C-362/14 Maximillian Schrems v Data Protection Commissioner*

are likely to be influenced even more in the coming years.[462] At European level, the General Data Protection Regulation will soon be used. Regarding the Hungarian data protection landscape, the NAIH is working with increasing number of cases: in 2015, 7,594 cases were filed with the organisation. The DPA has been modified to the advantage of the employees. As of January 1, 2016, the deadline to respond to a data subject's inquiry is shortened to 25 days.

IV. Personal Data and Privacy under Threat

Privacy is more than a right; it is a *psychological and sociological need for human beings and an economical as well as political necessity for every democratic society*. Regulations aiming to protect employees' privacy should be treated like the core labour law provisions (regulations on health and safety, working time or minimum level of remuneration), that enjoy a privileged position.

The electronic monitoring of employees is *a burning issue*. Computer log-in and activity reports, printer details, video recordings, iris scans, smart cards to access buildings, software taking unexpected screen snapshots, computer programs checking keystrokes, and GPS in employer-owned cars have become almost natural part of the workplace scenery. Efficient surveillance technologies are commonly used to monitor employees. At our times, employees are made more visible, transparent and controllable than ever. Misuse of the employer's right to control has far reaching negative consequences.

> 'Surveillance technologies influence and shape human behaviour and can therefore be seen as tools and practices for social control and social exclusion. Surveillance represents a disproportionate power relationship between the surveyor and the surveyed.'[463]

[462] Lynskey, Orla. *The foundations of EU data protection law*. Oxford: Oxford University Press, 2015. 7.
[463] http://irissproject.eu/wp-content/uploads/2013/04/Comparative-theoretical-framework-on-surveillance-and-democracy-D2.4-IRISS.pdf (Last accessed: 02.08.2016) 14-15.

The NAIH has to deal with an increasing number of cases connected to unlawful use of CCTV cameras, GPS data, and cell information of mobile phones. The NAIH issued recommendations on the essential requirements of using electronic monitoring systems in workplaces including technical devices which are used to inspect employees. The fast speed of technological innovations must be followed by adaptable regulations fit for the employee's protection. These regulations are of utmost importance, as they determine how far employers can restrict employees' activities outside working hours. From the case law we see that practice may go as far as introducing smoking ban, or prohibition to take part in extreme sports.

V. Different Paths

The result of the analysis of the different national and international models of the protection of employees' personality rights shows both *shared and diverging narratives*. How and how effectively these rights are protected depends on a *multiple set of factors*. The first factor is connected to *various conceptions*. The meaning of fundamental concepts such as 'dignity', 'equality', 'privacy' and even 'employment relationship' differs. Whether the legal system is *codified or common law oriented* is a decisive factor. Besides this obvious distinction, it is remarkable how *different approaches to regulation* affect which model of protection of employees' personality rights is used. Some of the key determining factors are *social attitudes to equality* (see Part III –where it was demonstrated how easily age discrimination is accepted and how the protected characteristics vary), *to individual freedom* (see Part IV), and *the acceptance of managerial authority*. The *actors involved* vary as well. Some countries have strong tradition of collective mechanisms, and here it is self-evident that the trade union or the works council has a very strong influence in the enforcement of personality rights of the employees. Though *specialised bodies* exist everywhere (Equal Treatment Authorities, Data Protection Ombudsman, etc.) their actual strength depends on multiple factors ranging from independence and financial background to their relationship to the court system.

Though it is far from desirable, one has to admit, that *economic factors* also influence to what extent personality rights are de facto enforced (see subchapter 'Notification Obligations Regarding Pregnancy'). Yet, it is important to point out that *the future of the EU social model* rests not only on economic recovery, but also on the manner in which social and labour rights are accommodated.[464] Reforms at international, regional, national and workplace level try to revitalise the labour markets. The thoughts from Laborem Exercens may serve as guidance:

> Work is always an 'actus personae' (personal action), in which the whole person, body and spirit, participates.[465]

I believe protection of personality rights has to be at the very heart of the reforms.

[464] Doherty, Michael. Will the Circle be Unbroken? Reconciling Economic Freedoms and Labour Rights in the EU. *the 23rd International Conference of Europeanists*. Ces, 2016.
[465]Pope John Paul II. Laborem Exercens. Encyclical promulgated on September 14, 1981. para 110.

BIBLIOGRAPHY

1. Abrantes, José João. Algumas notas sobre o direito do trabalhador à reserva da vida privada, In: *Estudos Comemorativos dos 10 anos da Faculdade de Direito da Universidade Nova de Lisboa*, *Volume II,* Almedina, Coimbra, 2008. 241-248.
2. Abrantes, José João. *Direitos Fundamentais da Pessoa Humana no Trabalho.* Almedina, Coimbra, 2014.
3. Acquisti, Alessandro, Laura Brandimarte, and George Loewenstein. Privacy and human behavior in the age of information. *Science* 347.6221 (2015): 509-514.
4. Ádám, Antal. *Bölcseletek, vallások, jogi alapértékek.* Pécs: PTE Állam- és Jogtudományi Kar, 2015.
5. Addati, Laura, Naomi Cassirer, and Katherine Gilchrist. *Maternity and paternity at work: Law and practice across the world.* International Labour Office, 2014. http://www.ilo.int/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_242615.pdf
6. Allen, Robin et al. *Employment Law and Human Rights* 2nd ed. Oxford: Oxford Univ. P., 2007.
7. Allinger, Bernadette. *Tackling low pay for part-time workers.* http://www.eurofound.europa.eu/eiro/2013/09/articles/at1309031i.htm
8. Andréewitch, Karolin. Die Privatnutzung von Social Networks am Arbeitsplatz. Die Regelung der Privatnutzung von Social Networks aus arbeitsrechtlicher Perspektive sowie Kontroll- und Sanktionsmöglichkeiten des Arbeitgebers. *Arbeits- und Sozialrechtskartei* (2015): 52-57.
9. Anton, Gary and Ward, Joseph J. Every breath you take: Employee privacy rights in the workplace—An Orwellian prophecy come true? *Labor Law Journal* 49.3 (1998): 897-911.
10. Aranda, Javier Thibault. Information Technology and Workers' Privacy: The Spanish Law. *Comparative Labor Law & Policy Journal,* 2, (2002): 431-470.
11. Arany-Tóth, Mariann. *A munkavállalók személyes adatainak védelme a magyar munkajogban.* Szeged: Bába K. 2008.

12. Arany-Tóth, Mariann. *Személyes adatok kezelése a munkaviszonyban.* Budapest: Wolters Kluwer Kft., 2016.
13. Arthurs, Harry. The constitutionalization of employment relations: Multiple models, pernicious problems. *Social & Legal Studies* 19.4 (2010): 403-422.
14. Ball, Kirstie. Workplace surveillance: an overview. *Labor History* 51.1 (2010): 87-106.
15. Balogh Zsolt György et al. Comparative Report on the Regulation of Workplace Privacy in Germany and in Hungary. In: Szőke, Gergely László (ed.). *Privacy in the Workplace: Data Protection Law and Self-regulation in Germany and Hungary.* Budapest: HVG-ORAC, 2012.
16. Balogh, Zsolt György. Bevezetés az adatvédelem jogába. Magyarország TÁMOP-4.2.2.C-11/1/KONV-2012-0013 *Infokommunikációs technológiák és a jövő társadalma* (FuturICT.hu), Szeged: Szegedi Tudományegyetem, 2014.
17. Bamforth, Nicholas, Malik, Maleiha, and O'Cinneide, Colm. *Discrimination Law: Theory and Context.* London: Sweet and Maxwell, 2008.
18. Bamforth, Nicholas. Conceptions of Anti-Discrimination Law. *Oxford Journal of Legal Studies*, 24. 4. (2004): 693-716.
19. Bankó, Zoltán and Berke, Gyula. A magyar és az európai munkajog - a jogharmonizáció eredményei és dilemmái. In: Tilk, Péter (ed.) *Az uniós jog és a magyar jogrendszer viszonya.* Pécs: PTE Állam- és Jogtudományi Kar, 2016. 251-282.
20. Bankó, Zoltán and Szőke, Gergely. Az információtechnológia hatása a munkavégzésre. *Pécsi Munkajogi Monográfiák*, 5. Pécs: Justis. 2016.
21. Bankó, Zoltán at al. *CompLex Munkajogi e-kommentár. 2012.*
22. Bankó, Zoltán, Berke, Gyula, Kajtár, Edit, Kiss, György, and Kovács, Erika. *Kommentár a Munka Törvénykönyvéhez.* Budapest: CompLex Wolters Kluwer, 2014. (KJK-kiadványok).
23. Bankó, Zoltán. Az atipikus munkajogviszonyok a magyar munkajogi szakirodalomban. In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 35-49.
24. Bankó, Zoltán. *Az atipikus munkajogviszonyok*. Budapest–Pécs: Dialóg Campus, 2010.
25. Bankó, Zoltán. Experiences of the regulation of the status of employees in atypical

employment. *Tudásmenedzsment* 14. 1. (2013I): Special Issue 14-20.

26. Barakonyi, Eszter. *A munkavállalói aktív életkor meghosszabbításának lehetséges eszközei. Ph.D. thesis. Pécs: PTE ÁJK, 2010.*
27. Barakonyi, Eszter. Aktív öregedési stratégiák a munkaügyben – a stratégiák kialakításának lehetséges szempontjai. In: Lőrincz Ildikó (ed.), *XIII. Apáczai Napok 2009: Nemzetközi Tudományos Konferencia: Tanulmánykötet, Kreativitás és innováció – Álmodj, alkoss, újíts!* Győr: NYME Apáczai Csere János Kar, 2010. 406-416.
28. Barakonyi, Eszter. Időspolitika, és az idősek jogai az Európai Unióban. In: Szretykó György (ed.). *Gazdasági kannibalizmus, hátrányos helyzetű csoportok a munkaerőpiacon és az emberi erőforrás menedzsment: A hátrányos helyzetű csoportok munkaerőpiaci helyzetének szociológiai és humánpolitikai aspektusai.* Pécs: Comenius Kft, 2012.
29. Barcsi, Tamás: *Az emberi méltóság filozófiája.* Budapest: Typotex Kiadó, 2013.
30. Barentsen, Barend. Think before you post. *Leiden Law Blog.* (2012): http://leidenlawblog.nl/articles/think-before-you-post
31. Barnard, Catherine. The Changing Scope of the Fundamental Principle of Equality? *McGill Law Journal* 46. 4. (2001): 955-77.
32. Barnard, Catherine. *The Substantive Law of the EU: The Four Freedoms*. Oxford: Oxford Univ. Press, 2004.
33. Barzó, Tímea. A személyiségi jogok. In: Bíró, György and Lenkovics, Barnabás (eds). *Új Magyar Polgári Jog I.-VIII.: Általános tanok.* Miskolc: Novotni Kiadó, 2013. 234-311.
34. Bayer, Judit. Kísérletek a személyiségi jogsértések szabályozására: Mennyiben alkalmazhatóak a klasszikus szabályok az internetre? *Állam- és Jogtudományi Intézet Értesítője* 46.3-4 (2005): 197-216.
35. Bell, Mark and Waddington, Lisa. Reflecting on Inequalities in European Equality Law, *European Law Review* 28. 3. (2003): 349-369.
36. Bell, Mark, Chopin, Isabelle, and Palmer, Fiona. *Developing Anti-Discrimination Law in Europe – the 25 EU Member States compared II.* http://migpolgroup.com/public/docs/21.DevelopingAntidiscrimination-Comparativeanalysis_II_EN_11.06.pdf

37. Bell, Mark. *Anti-discrimination Laws and the European Union,* Oxford University Press, Oxford, 2002.
38. Bell, Mark. *Constitutionalization and EU employment law. The Constitutionalization of European Private Law (OUP)* (2014): 13-05.
39. Berke, Gyula. Az Európai Unió Alapjogi Chartájának alkalmazása munkajogi (szociálpolitikai) ügyekben. *Lex HR Munkajog* 11 (2013): 8-14.
40. Blanchard, Olivia. Employee Privacy In Light of New Technologies: An Ethical and Strategic Framework. (2016). *Cornell HR Review* Retrieved from Cornell University, ILR School site: http://digitalcommon
41. Blanpain, Robert et al. *The Global Workplace: International and Comparative Employment Law – Cases and Materials*. Cambridge: Cambridge Univ. Press, 2007.
42. Bolton, Sharon C. (ed.). *Dimensions of dignity at work*. Routledge, 2007.
43. Bolton, Sharon C. Dignity in and at work why it matters. In Bolton, Sharon C. (ed.). *Dimensions of dignity at work*. Routledge, 2007.
44. Boto, José María Miranda. El nuevo contrato de trabajo por tiempo indefinido de apoyo a los emprendedores. Actualidad laboral 8 (2012): 2.
45. Boyd, Danah and Nicole Ellison. Social Network Sites: Definition, History, and Scholarship. *Journal of Computer-Mediated Communication 13.1* (2007): 210-230.
46. Böröcz, István. A munkahelyi érdek-összeütközés rendhagyó formája: munkavállalók megfigyelése pró és kontra. 55 *Infokommunikáció és Jog* (2013): 99-101.
47. Breznay, Tibor and Hágelmayer, Istvánné. *A Munka Törvénykönyve és az ítélkezési gyakorlat*. Budapest: Ergonosoft, 1994.
48. Brooks, Brandon et al. Assessing structural correlates to social capital in Facebook ego networks. *Social Networks 38* (2014): 1-15.
49. Brownell, Patricia and Kelly, James J. (eds.). *Ageism and Mistreatment of Older Workers, Current Reality, Future Solutions*. Dordrecht, Netherlands: Springer, 2013.
50. Carlson, Kathleen. Social Media and the Workplace: How I Learned to Stop Worrying and Love Privacy Settings and the NLRB. [2014] 66 *Florida Law Review*.
51. Castells, Manuel. *The Rise of the Network Society. The Information Age: Economy, Society and Culture*. vol. 1., 2nd edn, Chichester: Wiley Blackwell, 2010.

52. Cathaoir, Katharina Ó. On Obesity as a Disability. *Eur. J. Risk Reg.* 6 (2015): 145-150.
53. Catholic Church. Pope (1978-2005: John Paul II), Pope John Paul II, and Carlo Caffarra. *Laborem exercens*. Libreria editrice vaticana, 1981.
54. Chopin, Isabelle, and Germaine, Catharina. *A comparative analysis of non-discrimination law in Europe 2015. A comparative analysis of the implementation of EU non-discrimination law in the EU Member States, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey*. Brussels: European Commission, 2016. *http://www.equalitylaw.eu/downloads/3824-a-comparative-analysis-of-non-discrimination-law-in-europe-2015-pdf-1-12-mb*
55. Chopin, Isabelle. *Implementation of EU anti-discrimination law in the Member States: a comparative approach*. http://www.era-comm.eu/oldoku/Adiskri/01_Overview/2011_04%20Chopin_EN.pdf
56. Chory, Rebecca M., Lori E. Vela, and Theodore A. Avtgis. Organizational Surveillance of Computer-Mediated Workplace Communication: Employee Privacy Concerns and Responses. *Employee Responsibilities and Rights Journal* 28.1 (2016): 23-43.
57. Ciocchetti, Corey A. The eavesdropping employer: A twenty-first century framework for employee monitoring. *American Business Law Journal* 48.2 (2011): 285-369.
58. Clarke, Roger. The OECD Data Protection Guidelines: A Template for Evaluating Information Privacy Law and Proposals for Information Privacy Law. *Australian National University Unpublished Working Paper* (2013).
59. Clauwaert, Stefan and Schömann, Isabelle. *The crisis and national labour law reforms: a mapping exercise*. Wolters Kluwer Kft., 2016. (Working Paper 2012.049)
60. Coll, Sami, Olivier Glassey, and Claire Balleys. Building social networks ethics beyond 'privacy': a sociological perspective. *International Review of Information Ethics* 16.12 (2011): 47-53.

61. Collins, Erika and Susanne Horne. Social Media and International Employment. In Collins, Erika. (ed.). *The Employment Law Review*. 5th ed. London: Law Business Research Ltd., 2014. 14-20.
62. *Commentary of the Charter of Fundamental Rights of the European Union* Available at: http://bim.lbg.ac.at/sites/files/bim/Commentary%20EU%20Charter%20of%20Fundamental%20Rights%5B1%5D.pdf
63. Copenhaver, Brian. Giovanni Pico della Mirandola. Edward N. Zalta (ed.). *The Stanford Encyclopedia of Philosophy* (Fall 2016 Edition), forthcoming URL = http://plato.stanford.edu/archives/fall2016/entries/pico-della-mirandola/
64. Corral, Antonio, Durán, Jessica and Isusi, Iñigo: *Use of alcohol and drugs at the workplace*. European Foundation for the Improvement of Living and Working Conditions, 2012. http://www.eurofound.europa.eu/sites/default/files/ef_files/docs/ewco/tn1111013s/tn1111013s.pdf
65. Costa, Mónica Oliveira. *Employees' Monitoring of Information and Communication Technologies Private Usage – Guidelines updated in Portugal.* https://www.privacy-europe.com/blog/employees-monitoring-information-communication-technologies-private-usage-guidelines-updated-portugal/
66. Costa, Mónica Oliveira. *Portugal: While waiting for the Regulator to issue guidelines the Portuguese Supreme Court was already called to decide on the use of GPS in the workplace!* Available at: https://www.privacy-europe.com/blog/portugal-waiting-regulator-issue-guidelines-portuguese-supreme-court-already-called-decide-use-gps-workplace/
67. Countouris, Nicola. *The changing law of the employment relationship: comparative analyses in the European context*. Routledge, 2016.
68. Craig, John D.R. *Privacy and Employment Law*. Oxford etc.: Hart, 1999.
69. Crane, Catherine. Social Networking v. the Employment-at-Will Doctrine: A Potential Defence for Employees fired for Facebooking, Terminated for Twittering, Booted for Blogging, and Sacked for Social Networking. *Washington University Law Review* 89.3. (2012): 639-672.

70. Crenshaw, Kimberlé. Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. *University of Chicago Legal Forum* (1989): 139-168.
71. Croon, Johanna. Comparative Institutional Analysis, the European Court of Justice and the General Principle of Non-Discrimination-or-Alternative Tales on Equality Reasoning. *European Law Journal* 19.2 (2013): 153-173.
72. Czuglerné Ivány, Judit. A szakszervezeti jogok gyengülése az új Munka Törvénykönyvében. In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 51-75.
73. Damamme, Joseph. How Can Obesity Fit within the Legal Concept of Disability-A Comparative Analysis of Judicial Interpretations under EU and US Non-Discrimination Law after Kaltoft. *Eur. J. Legal Stud.* 8 (2015): 147-179.
74. Davidov, Guy, and Langille, Brian. *Boundaries and Frontiers of Labour Law. Goals and Means in the Regulation of Work.* Hart Publishing Limited, Oxford, 2006.
75. Davidov, Guy. *A Purposive Approach to Labour Law*. Oxford University Press, 2016.
76. Deli, Gergely and Kukorelli, István. Az emberi méltóság alapjoga Magyarországon. *Jogtudományi Közlöny* 70.7-8.(2015): 337-347.
77. Diggelmann, Oliver and Maria Nicole Cleis. How the right to privacy became a Human Right. *Human Rights Law Review* (2014): 441-458.
78. Doherty, Michael. Will the Circle be Unbroken? Reconciling Economic Freedoms and Labour Rights in the EU. *the 23rd International Conference of Europeanists*. Ces, 2016.
79. Doolin, Bill and McLeod, Laurie. Information technology at work: the implication for dignity at work. In: Bolton, Sharon C. (ed.). *Dimensions of dignity at work*. Routledge, 2007. 159.
80. Douglas Olsen P. The Ethics of Denying Smokers Employment in Health Care, *American Journal of Nursing* 114. 6. (2014): 55-58.
81. Drs, Monika and Burger-Ehrnhofer, Karin. Berechnung von Wochengeld und Kinderbetreuungsgeld unter besonderer Berücksichtigung der Ausnahmen vom Entgelt-begriff gem § 49 Abs 3 ASVG. In: Aschauer and Brameshuber. *Sozialversicherungsrecht, Jahrbuch*. 2016, 101–112.

82. Dukes, Ruth. Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law. *Journal of Law and Society* 35.3 (2008): 341-363.
83. European Commission. *Age and Employment*. Luxembourg, Publications Office of the European Union. 2011.
84. Evju, Stein. The European Social Charter. *Bulletin of Comparative Labour Relations*, Deventer Then The Hague- (2001): 19-32.
85. Falzone, Elisabeth. *Ortung von Mitarbeitern durch Handy und GPS-Navigationssysteme*. München: Grin Verlag, 2013.
86. Ferencz, Jácint, Kun, Attila, Fodor, T. Gábor, and Mészáros, Katalin Éva: *A munkaviszony létesítése*. Budapest: Wolters Kluwer, 2016. (Munkajogi kiskönyvtár) 10.
87. Ferencz, Jácint. Az atipikus foglalkoztatási formák közpolitikai megközelítése. In: Horváth, István ed. *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 119-126.
88. Fézer, Tamás. Személyiségi jogok. In: Osztovits András (ed.). *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja I. kötet.* Budapest: OPTEN Informatikai Kft., 2014. 249-355.
89. Finkin, Matthew W. and Cutcher-Gershenfeld, Joel et al.: *Multinational human resource management and the law: common workplace problems in different legal environments*. Edward Elgar, cop., 2013.
90. Finkin, Matthew. The Acquisition and Dissemination of Employee Data. *Yearbook. Studies in Labour Law and Social Policy/Studia z zakresu prawa pracy i polityki spolecznej. Jagiellonian University, Krakow: Forthcoming* 2015.
91. Fiore, Alexandra and Matthew Weinick. Undignified in Defeat: An Analysis of the Stagnation and Demise of Proposed Legislation Limiting Video Surveillance in the Workplace and Suggestions for Change. *Hofstra Lab. & Emp. LJ* 25 (2007): 525.
92. Flint, Stuart W. and Jeremé Snook. Disability Discrimination and Obesity: The Big Questions?. *Current obesity reports* 4.4 (2015): 504-509.
93. Foddy, William H. and W. R. Finighan. The concept of privacy from a symbolic interaction perspective. *Journal for the Theory of Social Behaviour* 10.1 (1980): 1-18.

94. Forst, Gerrit. Bewerberauswahl über soziale Netzwerke im Internet? *NZA,* 27 (2010): 427-433.
95. Fritsch, Clara. Data Processing in Employment Relations: Impacts of the European General Data Protection Regulation Focusing on the Data Protection Officer at the Worksite. In: *Reforming European Data Protection Law*. Springer Netherlands, 2015. 147-167.
96. Fromholz, Julia M. The European Union data privacy directive. *Berkeley technology law journal* (2000): 461-484.
97. Fudge, Judy. A new vocabulary and imaginary for labour law: Taking legal constitution, gender, and social reproduction seriously. *The Future Regulation of Work: New Concepts, New Paradigms* (2016): 9.
98. Fudge, Judy. Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law. In: Davidov, Guy and Langille, Brian (eds.). *Boundaries and frontiers of labour law: Goals and means in the regulation of work*. Oxford: Hart, 2006. 120-135.
99. Galácz, Anna and Ságvári, Bence. Digitális döntések és másodlagos egyenlőtlenségek: a digitális megosztottság új koncepciói szerinti vizsgálat Magyarországon. *Információs Társadalom,* 2 (2008): 37-52.
100. Garrett, R. Kelly. Protest in an information society: A review of literature on social movements and new ICTs. *Information, communication & society* 9.2 (2006): 202-224.
101. Garrido Pérez, Eva. El Tratamiento Comunitario de la Discapacidad: desde su Consideración como una Anomalía Social a la Noción del Derecho a la Igualdad de Oportunidades, *Temas Laborales*, No. 59. 2001. 165-192.
102. Gavison, Ruth. Privacy and the Limits of Law. *The Yale Law Journal* 89.3 (1980): 421-471.
103. Gera, Dániel. *Balancing the right to employer control with employee privacy concerns*. Available at: http://www.internationallawoffice.com/Newsletters/Employment-Benefits/Hungary/Schoenherr-Rechtsanwlte/Balancing-the-right-to-employer-control-with-employee-privacy-concerns#
104. Gerety, Tom. Redefining privacy. *Harv. CR-CLL Rev.* 12 (1977): 233-296.

105. Gichuhi, John Kimani, James Mark Ngari, and Thomas Senaji. Employees Response to Electronic Monitoring: The Relationship between CCTV Surveillance and Employees' Engagement. *International Journal of Innovative Research and Development* 5.7 (2016).
106. Glowacka, Marta. Altersdiskriminierung wegen längerer Vorrückungszeiträume am Beginn der Karriere? Alle guten Dinge sind drei Neuerliche Vorlage beim EuGH. *ZESAR* 2016, 150-159.
107. Gola, Peter. Von Personalakten- und Beschäftigtendaten. *Recht der Datenverarbeitung* 2 (2011): 66-68.
108. Goldmann, Alvin L. and Corrada, Roberto L. *Labour Law in the USA*. Kluwer Law International, 2011.
109. Gomes, Júlio Manuel Vieira and de Oliveira Carvalho, Catarina. *Labour Law in Portugal*. Kluwer Law International, 2011.
110. Göndör, Éva and Ferencz, Jácint. Chapters from the new Labour Code. In: Smuk, Péter (ed.). *The transformation of the Hungarian legal system 2010-2013*. Budapest: Wolters Kluwer – CompLex, 2013. 435-470.
111. Göndör, Éva. A nőket érintő felmondási tilalmak munkajogi fejlődéstörténete. In: Horváth, István ed. *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 101-117.
112. Görög, Márta. A magánélethez való jog mint a személyiségi jog újabb, magánjogi kódexben nevesített vonatkozása. In: Balogh, Elemér (ed.). *Számadás az Alaptörvényről: Tanulmányok a Szegedi Tudományegyetem Állam- és Jogtudományi Kara oktatóinak tollából*. Budapest: Magyar Közlöny Lap- és Könyvkiadó, 2016. 51-63.
113. Griffin, James. Human Right to Privacy, *San Diego L. Rev.* 44 (2007): 697.
114. Grimmelman, James. Saving Facebook. *Iowa Law Review* 94 (2009): 1137.
115. Grünanger, Josef and Goricnik, Wolfgang. *Arbeitnehmer-Datenschutz und Mitarbeiterkontrolle. Handbuch*. Wien: Manz Verlag 2014.
116. Gutwirth, Serge, Leenes, Ronald, and De Hert, Paul (eds.). *Reforming European data protection law*. Springer Netherlands, 2015.
117. Gyulavári, Tamás (ed.). *Munkajog. 2*. rev. ed. Budapest: ELTE Eötvös K, 2013.

118. Gyulavári, Tamás and Bitskey, Botond. Age discrimination in employment (chapter on Hungary). In: Malcolm Sargeant (ed.). *The law on age discrimination in the EU*. Kluwer Law International, Alphen aan den Rijn, 2008. 135-158.
119. Gyulavári, Tamás and Hős, Nikolett. Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts. *Industrial Law Journal* 42.3. (2013): 289-297.
120. Gyulavári, Tamás. *A szürke állomány, Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán*. Budapest: Pázmány Press, 2014. (Jogtudományi monográfiák 6.).
121. Gyulavári, Tamás. Age discrimination: recent case law of the European Court of Justice. *ERA Forum* 14.3 (2013): 377-389.
122. Gyulavári, Tamás. Egyenlő bánásmód törvény – célok és eredmények. In: Majtényi, Balázs (ed.). *Lejtős pálya. Antidiszkrimináció és esélyegyenlőség* Budapest: L'Harmattan Kiadó, 2009. 9-26.
123. Gyulavári,Tamás. Az egyenlő bánásmód elvének dogmatikai és gyakorlati jelentősége. In: Kiss, György (ed.). *Az Európai Unió munkajoga.* Budapest: 2001, Osiris, 55–168.
124. Hagedorn, Falk. *Privacy in the Workplace. National report on Germany* 2011. http://pawproject.eu/en/sites/default/files/page/web_national_report_germany_en.pdf
125. Hajdú, József. *A munkavállalók személyiségi jogainak védelme. Az adatvédelem alapkérdései.* Szeged: Pólay Elemér Alapítvány, 2005.
126. Hajdú, József. Flexibilization of employment relationship in the New Hungarian Labour Code. In: Jakab. Éva and Pozsonyi, Norbert (eds.): *Ünnepi kötet Dr. Molnár Imre egyetemi tanár 80. születésnapjára.* Szeged: Szegedi Tudományegyetem Állam- és Jogtudományi Kar, 2014. (Acta Universitatis Szegediensis) (Acta juridica et politica 76.) 169-182.
127. Halmai, Gábor (ed.). *A hátrányos megkülönböztetés tilalmától a pozitív diszkriminációig*, AduPrint-INDOK, Budapest: 1998.

128. Halmai, Gábor. A bírói jogértelmezés elvett szabadsága: A kollégiumi állásfoglalás szerepe a személyiségi jogi ítélkezésben. *Fundamentum* 3-4 (2002): 135-143.
129. Hastings, Thomas and Jason, Heyes. Farewell to flexicurity? Austerity and labour policies in the European Union. *Economic and Industrial Democracy* (2016): 0143831X16633756.
130. Hegedűs, Bulcsú and Kerekes, Zsuzsanna (eds.). *Adatvédelem és információszabadság.* Budapest: CompLex, 2010.
131. Hodson, Randy. *Dignity at work*. Cambridge University Press, 2001.
132. Holland, James A. and Burnett, Stuart. *Employment Law*. Oxford University Press, 2008.
133. Holland, James, Burnett, Stuart, and Millington, Philip. *Employment Law*. Oxford: Oxford Univ. Press, 2016.
134. Hopf, Herbert, Mayr, Klaus and Eichinger, Julia .*GlBG Gleichbehandlung – Antidiskriminierung*. Wien: Manz Verlag, 2011.
135. Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015.
136. Horváth, István and Szladovnyik, Krisztina. *Munka Törvénykönyve 2014: Az Mt. és az új Ptk. munkaviszonyra vonatkozó szabályai.* Budapest: Vezinfó, 2014.
137. Horváth, István. *Munkajog.* 2. edn. Budapest: Novissima, 2007.
138. Horváth, Linda and Gelányi, Anikó. Lájkolni vagy nem lájkolni? A közösségi oldalak használatának munkajogi kérdései. *Infokommunikáció és Jog* 8.43 (2011): 60.
139. Hős, Nikolett. The Role of General Principles and the EU Charter of Fundamental Rights in the Case Law of the European Court of Justice in Relation to Age Discrimination. *Hungarian Labour Law E-Journal* 1.1. (2014): 48-72.
140. http://www.coe.int/t/dg3/pompidou/Source/Activities/Workdrug/codeofpracticeilo.pdf
141. http://www.iclg.co.uk/compare#practicearea=employment-and-labour-law&&jurisdictions=finland
142. http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/france

143. http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/italy
144. http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/portugal
145. http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/spain
146. http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/united-kingdom
147. http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/usa
148. http://www.parissmith.co.uk/blog/is-there-a-right-to-privacy-at-work-monitoring-employees/
149. https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf
150. Huddle, Thomas S., Kertesz, Stefan G., and Nash, Ryan: Health Care Institutions Should Not Exclude Smokers From Employment. *Academic Medicine* 89.6. (2014): 843-847.
151. Ingham, Roger. Privacy and psychology. *Privacy* 35 (1978): 57.
152. Inglezakis, Ioannis. Surveillance of Electronic Communications in the Workplace and the Protection of Employees' Privacy. (2016).
153. Jakab, Nóra. Az Európai Unió szociálpolitikájának alapjai az elsődleges és másodlagos jogforrásokban, avagy az Európai Unió szociálpolitikájának a fejlődése. In: *Publicationes Universitatis Miskolciensis. Sectio Juridica et Politica.* 25/1. tom. Miskolc University Press, Miskolc, 2007. 337.
154. Jakab, Nóra: Megváltozott munkaképességű és fogyatékos személyek a munkaerő-piacon. In: Jakab, Nóra (ed.). *A foglalkoztatás elősegítés és igazgatás joga.* Miskolc: Bíbor Kiadó, 2016. 168-184.
155. Jeffery, Mark. Information Technology and Workers' Privacy: The English Law. *Comparative Labor Law and Policy Journal* 4 (2002-2003): 301-350.
156. Jóri, András. *Adatvédelmi kézikönyv: Elmélet, történet, kommentár.* Budapest: Osiris, 2005.

157. Jóri, András. Az információs társadalom hatása a személyiségi jogokra: Az adatvédelmi jog kialakulása. In: Sárközy, Tamás, and Pázmándi, Kinga (eds.). *Az információs társadalom és a jog átalakulása. Magyarország az ezredfordulón. Stratégiai tanulmányok a Magyar Tudományos Akadémián. Műhelytanulmányok*. Budapest: MTA Társadalomkutató Központ, 2002. 49-74.
158. Jóri, András. Shaping vs applying data protection law: two core functions of data protection authorities. *International Data Privacy Law* 5.2 (2015): 133.
159. Kaiser, Jens. Das Verbot der Altersdiskriminierung in der Rechtsprechung des EuGH. *ZESAR* 13. 11-12 (2014): 473-482.
160. Kajtár, Edit and Bruno Mestre. Social networks and employees' right to privacy in the pre-employment stage: Some comparative remarks and interrogations. *Magyar Munkajog: Hungarian Labour Law* 3.1. (2016): 22-39.
161. Kajtár, Edit and Marhold, Franz. The Principle of Equality in the EU Charter of Fundamental Rights and Age Discrimination: Hungarian and Austrian Experiences. *European Labour Law Journal* 6.4 (2016): 321-342.
162. Kajtár, Edit and Zeller, Judit. A várandósságra vonatkozó tájékoztatási kötelezettségről az Alkotmánybíróság határozata nyomán. *Közjogi Szemle* 7.4 (2014):20-26.
163. Kajtár, Edit. A munkáltatói utasítás helye a 21. század munkajogában. *Jura* 20.2 (2014): 214-224.
164. Kajtár, Edit. Európai ügyek a Facebook sötét oldaláról: A munkavállalók közösségi oldalakon tanúsított kötelezettségszegő magatartása. In: Horváth, István (ed.). *Tisztelgés: Ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára*. Budapest: ELTE Eötvös Kiadó, 2015. 199-213.
165. Kajtár, Edit. Life Outside the Bubble: International and European Legal Framework of Discrimination in Emloyment. *Pécsi Munkajogi Közlemények* 6 (2013): (Special Edition) 5-21.
166. Kajtár, Edit. Miért nem szólt? A várandósságra vonatkozó tájékoztatási kötelezettségről munkajogi szemszögből. *Infokommunikáció és Jog* 9.58 (2014): 92-96.

167. Kajtár, Edit. Please, Climb that Tree! Some Thoughts on the Obstacles that Prevent Members of 'Vulnerable Groups' from Entering the Labour Market, *Pravni Vjesnik* 30.2. (2014): 15-40.
168. Kajtár, Edit. The Dark Side of Facebook: European Cases on the Employee's Misconduct on Social Networking Sites. *Revista De Direito Publico* 6.13 (2015): 6-21.
169. Kajtár, Edit. Think it over!: Pre-employment search on social networking sites. In: Vinković, Mario (ed.). *New developments in EU labour, equality and human rights law: Proceedings from the International Jean Monnet Conference 'New Developments in EU Labour, Equality and Human Rights Law'*, Osijek 21 and 22 May 2015. Osijek: Josip Juraj Strossmayer University of Osijek, 2015. 97-106.
170. Kajtár, Edit. Till Facebook Do Us Part?: Social Networking Sites and the Employment Relationship. *Acta Juridica Hungarica: Hungarian Journal of Legal Studies* 56.4 (2015): 268-280.
171. Kajtár, Edit: Munkaerőpiaci esélyek válság idején: Gondolatok az 'elveszett nemzedék' útkereséséről. *Tudásmenedzsment* 15.2(2014): 43-62.
172. Kapuy, Klaus. Enabling social integration through European human rights. *Rivista del Diritto della Sicurezza Sociale* 15.3 (2015): 499-514.
173. Karch, Steven B. (ed.). *Workplace drug testing*. CRC Press, 2008.
174. Kártyás, Gábor and Gyulaváry, Tamás. Az új Munka Törvénykönyve. A világ legrugalmasabb munkajogi szabályozása? In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 127-142.
175. Kártyás, Gábor, and Gyulavári, Tamás. *The Hungarian Flexicurity Pathway. New Labour Code after Twenty Years in the Market Economy*. Budapest: Pázmány Press, 2015.
176. Kártyás, Gábor. Csorba kiegyenlítés? A kölcsönzött munkavállalók egyenlő bánásmódhoz való joga az új munka törvénykönyve után. *Esély* 3 (2013): 25-47.
177. Kiss, Attila and Szőke, Gergely László. Evolution or revolution? Steps forward to a new generation of data protection regulation. In: Gutwirth, Serge, Leenes, Ronald, and De Hert, Paul (eds.). *Reforming European data protection law*. Springer Netherlands, 2015. 311-331.

178. Kiss, Attila. A privátszférát erősítő technológiák. *Infokommunikáció és Jog,* 56 (2013): 113-119.
179. Kiss, Attila. Az Európai Unió adatvédelmi reformja. In: Belső adatvédelem 2015 http://vtki.uni-nke.hu/uploads/media_items/belso-adatvedelem.original.pdf
180. Kiss, György. A Dominica Petersen ügy tanulságai a kor szerinti diszkrimináció versus igazolt nem egyenlő bánásmód körében - hazai összefüggésekkel, *Pécsi Munkajogi Közlemények* 3.1. (2010): 105-118.
181. Kiss, György. A napjaink munkajogának textúráját alkotó elemek: A munkajog új (?) identitásmeghatározása. In: Finszter, Géza, Kőhalmi, László, and Végh, Zsuzsanna (eds.). *Egy jobb világot hátrahagyni...: Tanulmányok Korinek László professzor tiszteletére.* Pécs: Pécsi Tudományegyetem ÁJK, Büntetőjogi Tanszék, 2016. 402-413.
182. Kiss, György. A rugalmasság és a státuszvédelem egy lehetséges megközelítése. In: Horváth, István ed. *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 215-235.
183. Kiss, György. Alapjogi összeütközések a munkajogviszony teljesítése során a meggyőződés szabadsága és a munkáltatóhoz való lojalitás tükrében, In: Lehoczkyné Kollonay, Csilla and Petrovics, Zoltán (ed.). *Liber amicorum: Studia Ida Hágelmayer dedicata. Ünnepi dolgozatok Hágelmayer Istvánné tiszteletére*. ELTE ÁJK, Budapest: 2005. 271-332.
184. Kiss, György. *Alapjogok kollíziója a munkajogban*. Pécs: Justis, 2010.
185. Kiss, György. Az egyenlőségi jogok érvényesülése a munkajogban *Jura* 8.1 (2002): 48–61.
186. Kiss, György. Foglalkoztatás gazdasági válság idején-a munkajogviszonyban rejlő lehetőségek a munkajogviszony tartalmának alakítására (Jogdogmatikai alapok és jogpolitikai indokok). *Állam-és Jogtudomány* 55.1 (2014): 36-76. 71.
187. KISS, György. M*unkajog*. Budapest: Osiris, 2005.
188. Kiss, György. Opportunities and limits of application principles and Civil Code rules in Hungarian labour law: Crisis management with means of civil law. *European Labour Law Network-Working Paper Series* 2015.4 (2015): 1-25.

189. Kohlbacher, Elisabeth. Diskriminierung durch ungleiches Pensionsantrittsalter wie lange noch? *ZESAR,* (2015): 5, 210-217.
190. Kovács, Erika and Hießl, Christina. 92/85/EEC: Maternity Protection. In: Schlachter, Monika (ed.). *EU Labour Law – A Commentary*. Kluwer Law International, 2015. 283-320.
191. Kovács, Erika and Vinković, Mario. Are older workers second-class? - The case of Croatia and Hungary. In: Timea Drinoczi et al. (eds.). *Contemporary Legal Challenges: EU–Hungary–Croatia*, Faculty of Law Pécs, Faculty of Law Osijek, Pécs, 2012. 671-695.
192. Kovács, Erika, Lyutov, Nikita, and Mitrus, Leszek. Labor law in transition: From a centrally planned to a free market economy in Central and Eastern Europe, In: Finkin, Matthew W. and Mundlak Guy (eds). *Comparative Labor Law*, Elgar Publishing, 2015, 403-439.
193. Krizsan, Andrea, Skjeie, Hege, and Squires, Judith. The changing nature of European equality regimes: explaining convergence and variation. *Journal of International and Comparative Social Policy* 30.1 (2014): 53-68.
194. Kulisity, Mária. Bizonyítás a munkaügyi perben. In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015.
195. La Rue, Frank. Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. *UN General Assembly Sixty-sixth Session Promotion and Protection of Human Rights.* 2011. http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf
196. Lahlou, Saadi. Identity, social status, privacy and face-keeping in digital society. *Social science information* 47.3 (2008): 299-330.
197. Lamm, Helen. Social media dilemmas in the employment context. *Employee Relations* 38.3 (2016): 420-437.
198. Langille, Brian. Labour law's back pages. in Davidov, Guy, and Langille, Brian eds. *Boundaries and frontiers of labour law: Goals and means in the regulation of work.* Oxford: Hart (2006): 13-36.

199. Laulom, Sylvaine. France. In: Malcolm Sargeant (ed.). *The Law on Age Discrimination in the EU*. The Netherlands, Kluwer Law International, 2008. 55-79.
200. Lawson, Anna. *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*. Routledge, 2016.
201. Lehoczkiné, Kolonnay, Csilla (ed.). *A magyar munkajog*. I. Budapest: Vince Kiadó, 2002.
202. Lehoczkyné Kollonay, Csilla. Kezdeti lépések a foglalkoztatási diszkrimináció bírósági gyakorlatában. *Fundamentum* 4. (1998): 91-95.
203. Lehoczkyné Kollonay, Csilla. The significance of existing EU sex equality law for women in the new Member States: The case of Hungary. *Maastricht Journal of European and Comparative Law 1*2.4 (2005): 467-493.
204. Lehoczkyné Kollonay, Csilla: Work and family issues in the transitional countries of Central and Eastern Europe. The case of Hungary. In: Conaghan, Joanne and Rittich Kerry (eds.). *Labour Law, Work, and Family: Critical and Comparative Perspectives*. Oxford: Oxford University Press, 2005. 289-315.
205. Leigh A. Clark and Serry J Roberts. Employer's Use of Social Networking Sites: A Socially Irresponsible Practice. *Journal of Business Ethics* 95.4 (2010): 507.
206. Lelley, Jan Tibor and Florian Müller. Ist § 32 Abs. 6 Satz 3 BDSG-E verfassungsmäßig? *Recht der Datenverarbeitung* 2 (2011): 59-66.
207. Levinson, Ariana L. Carpe Diem Privacy Protection in Employment Act. *Akron Law Review* 43.2. (2010): 331-433.
208. Loosen, Wiebke. Online Privacy as a News Factor in Journalism. In: Trepte, Sabine and Leonard Reinecke (eds.*). Privacy Online: Perspectives on Privacy and Self-Disclosure in the Social Web*. Berlin, Heidelberg, Germany: Springer-Verlag. 2011. 205-218.
209. Lowenstein, Henry and Norman Solomon. Social Media Employment Policy and the Nlrb: Uniform State Laws as a Solution? *Southern Law Journal* 25.1 (2015): 139.
210. Lőrincz, György. I. fejezet. In: Pál, Lajos et al. *Az új Munka Törvénykönyvének magyarázata*. Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2012.
211. Lőrincsikné Lajkó, Dóra. A munkáltatók munkajogi és szociális jogi kötelezettségei a terhes munkavállalók viszonylatában. *Munkaügyi Szemle* 50.1. (2006): 46-50.

212. Luhmann, Niklas. *Law as a Social System,* Oxford: Oxford University Press, 2004.
213. Lukács, Adrienn. A munkavállalók személyiségi jogainak védelme, különös tekintettel a munkahelyi kamerákra. *De Iurisprudentia et Iure Publico* 7.2 (2013): 1-32.
214. Lynskey, Orla. *The foundations of EU data protection law*. Oxford University Press, 2015.
215. Majtényi, László. *Freedom of Information. Experiences from Eastern Europe. Presentation by former Data Protection and Freedom of Information Commissioner of Hungary* (2004). http://www.osce.org/fom/36235
216. Malcolm Sargeant (ed.). *The law on age discrimination in the EU*. Kluwer Law International, Alphen aan den Rijn, 2008.
217. Manant, Matthieu, Serge Pajak and Nicolas Soulié. Online Social Networks and Hiring: A Field Experiment on the French Labor Market. *Social Science Research Network* http://dx.doi.org/10.2139/ssrn.2458468
218. Mantouvalou, Virginia. Work and Private Life: Sidabras and Dziautas v. Lithuania. *European Law Review* 30 (2005): 573-585.
219. Marhold, Franz and Friedrich, Michael. *Europäisches Arbeitsrecht.* 2. Auflage. Wien: Springer Verlag. 2012.
220. Marhold, Franz and Fuchs, Maximilian. *Europäisches Arbeitsrecht.* 4. Auflage. Wien: Verlag Österreich. 2014.
221. Marhold, Franz. *Datenschutz und Arbeitsrecht*. Wien: Signum-Verlag, 1986.
222. Marhold, Franz. Differenzierung nach dem Alter. In: Tomandl, Theodor and Schrammel, Walter (ed.). *Arbeitsrechtliche Diskriminierungsverbote*. *Wiener Beiträge zum Arbeits- und Sozialrecht.* Band 49. Wien: Braumüller, 2005. 83-92.
223. Marlene Schmidt: The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's Mangold Judgment. *German Law Journal* 7.5. (2006): 505-524.
224. Masseno, Manuel David. E depois do… *Acórdão Google Spain - Levando a sério o Direito à Proteção de Dados Pessoais na União Europeia!* Comunicação à 3.ª Conferência Privacidade, Inovação e Internet. Culturgest, Lisboa.

225. McDonald, Paula and Thompson, Paul. Social media (tion) and the reshaping of public/private boundaries in employment relations. *International Journal of Management Reviews* 18.1 (2016): 69-84.
226. McGeveran, William. Finnish Employers Cannot Google Applicants. http://blogs.law.harvard.edu/infolaw/2006/11/15/finnish-employers-cannot-google-applicants
227. Meenan, Helen. Age Discrimination in Europe: Late Bloomer or Wall-flower? *Nordisk tidsskrift for menneskerettigheter, Nordic Journal of Human Rights* 25.2. (2007): 99-118.
228. Menyhárd, Attila. A magánélethez való jog elméleti alapjai. *In Medias Res* 2 (2014): 384-406.
229. Menyhárd, Attila: A magánélethez való jog a szólás- és a médiaszabadság tükrében. In: Csehi, Zoltán, Koltay, András, and Navratyil, Zoltán (ed.). *A személyiség és a média a polgári és a büntetőjogban: Az új Polgári Törvénykönyvre és az új Büntető Törvénykönyvre tekintettel*. Budapest: CompLex Wolters Kluwer, 2014. 177-226.
230. Mestre, Bruno. Comparators and Indirect Discrimination: an Illustration of the Difficulties, *European Law Reporter* 12. (2011): 372-379.
231. Mindle, Grant B. Liberalism, privacy, and autonomy. *The Journal of Politics* 51.03 (1989): 575-598.
232. Mohay, Ágoston. Az uniós egyenlő bánásmód joganyag és implementációja a magyar jogban. In: Tilk Péter (ed.) *Az uniós jog és a magyar jogrendszer viszonya*. Pécs: PTE Állam- és Jogtudományi Kar, 2016. 147-164.
233. Moore, Adam D. Privacy: its meaning and value. *American Philosophical Quarterly* 40.3 (2003): 215-227.
234. Moreham, N. A. Privacy in the common law: a doctrinal and theoretical analysis. *LQR* 121 (2005): 628-656.
235. Moreira, Teresa Coelho. *Igualdade e Não Discriminação–Estudos de Direito do Trabalho*. Coimbra: Almedina, 2013.

236. Moreira, Teresa Coelho. The Digital To Be or Not To Be: Privacy of Employees and the Use of Online Social Networks in the Recruitment Process. *Journal of Law and Social Sciences* 2 (2013): 76-79.

237. Moreira, Teresa Coelho. The Protection of Workers' Personal Data and the Surveillance by RFID in Portugal. *GSTF Journal of Law and Social Sciences* 3.1 (2014): 105.

238. Moussa, Mahmoud. Monitoring Employee Behavior Through the Use of Technology and Issues of Employee Privacy in America. *SAGE Open* 5.2 (2015): 2158244015580168.

239. Muñoz Ruiz, Ana Belén. Social Networking: New Challenges in the Modern Workplace. *Spanish Labour Law and Employment Relations Journal,* 1-2 (2013): 37-38.

240. Murphy, Cian. EU Charter of Fundamental Rights after Kücükdeveci, *Human Rights in Ireland* [academic blog] Jun 7, 2010 http://humanrights.ie/civil-liberties/eu-charter-of-fundamental-rights-after-kucukdeveci/

241. Nacsa, Beáta. Country report. Gender equality. How are EU rules transposed into national law? Hungary. http://www.equalitylaw.eu/downloads/3790-hungary-country-report-gender-pdf-1-mb

242. National Authority for Data Protection and Freedom of Information. *Annual report of the Hungarian National Authority for Data Protection and Freedom of Information 2015*. Budapest: 2016. Available at: http://www.naih.hu/files/NAIH-Annual-Report-2015-EN-2016.06.pdf

243. Nádas, György. Személyiségi jogok sérelme, sérelemdíj a munkaviszonyban. *Hr and Munkajog* 5.10 (2014): 10-12.

244. Neal, Lauren K. The Virtual Water Cooler and the NLRB. Concerted Activity in the Age of Facebook. *Wash. & LeeL. Rev.* 3 (2012): 1715-1758. http://scholarlycommons.law.wlu.edu/wlulr/vol69/iss3/8

245. Németh, Janka. Az internet nem felejt – közösségi média-használatra alapított munkáltatói és muhnkavállalói felmondások. *Infokommunikáció és jog* 10.55 (2013): 96-98.

246. Nienhüser, Werner and Matiaske, Wenzel. Effects of the 'principle of non-discrimination' on temporary agency work: compensation and working conditions of temporary agency workers in 15 European countries. *Industrial Relations Journal* 37.1 (2006): 64-77.

247. Nochta, Tibor. *A kártérítési felelősség alaptanai a 2013. évi V. törvény alapján.* Budapest: Menedzser Praxis Kiadó, 2014.

248. Oberwetter, Christian. Soziale Netzwerke im Fadenkreuz des Arbeitsrechts. *NJW,* 64.7 (2011): 417-421.

249. Olsen, Douglas P. The Ethics of Denying Smokers Employment in Health Care. *AJN The American Journal of Nursing* 114.6 (2014): 55-58.

250. Opre, Ancuţa Gianina and Şandru, Simona. Protection Of Employees'personal Data. In The Public And Private Sector, In The Context Of The New IT Techonologies. *Fiat Iustitia* 1 (2016): 198-208.

251. Pate, Richard L. Invisible discrimination: Employers & social media sites. *WCOB Working Papers* 2012.

252. Péterfalvi, Attila. A személyiségi jogok védelme. In: Török, Gábor (ed.). Polgári jogunk alapvonásai. Budapest: Nemzeti Közszolgálati Egyetem Közigazgatás-Tudományi Kar, 2014. *http://vtki.uni-nke.hu/uploads/media_items/polgari-jogunk-alapvonasai.original.pdf* 21-32.

253. Pethő, Róbert. Az új Munka Törvénykönyve hatása a munkaügyi perek számának alakulására. In: Horváth, István (ed.). Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára. Budapest: ELTE Eötvös Kiadó, 2015. 366.

254. Pók, László. A közösség hálójában – Közösségi oldalak munkajogi vonatkozásai. *Infokommunikáció és Jog* 48 (2012): 160-164.

255. Polyák, Gábor and Szőke, Gergely Lászó. Elszalasztott lehetőség? Az új adatvédelmi törvény főbb rendelkezései. In: Drinóczi, Tímea (ed.). *Magyarország új alkotmányossága*, Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kar, 2015. 155-177.

256. Post, Robert C. Three Concepts of Privacy. *Georgetown Law Journal* 89 (2000): 2087.

257. Proskauer Rose LLP. *Social Media in the Workplace Around the World 3.0*. 2. 2014. http://www.proskauer.com/files/uploads/social-media-in-the-workplace-2014.pdf
258. Prugberger, Tamás, et al. Alkotmányjogi kérdések a munkajogban. *OTKA Kutatási Jelentések* = Questions of the Constitutional law in the labour law. *46436 OTKA Research Reports*. 2009.
259. Rab, Henriett and Zaccaria, Márton Leó. Az Alkotmánybíróság 17/2014. (V. 30.) számú határozatának megítélése a munkajog aktuális tendenciáit meghatározó munkaerő-piaci szempontokra figyelemmel. *Miskolci Jogi Szemle* 10.1 (2015): 52-69.
260. Rachels, James. Why privacy is important. *Philosophy & Public Affairs* (1975): 323-333.
261. Rácz, Réka. A munkaviszony létesítésével összefüggő dokumentumok tartalma a gyakorló ügyvéd szemével. In: Horváth, István (ed.). *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* Budapest: ELTE Eötvös Kiadó, 2015. 401-413.
262. Rácz, Zoltán: A munkavállalók személyiségi jogainak védelme, különös tekintettel az adatvédelemre. In: Csák, Csilla (ed.) *Ünnepi tanulmányok Prugberger Tamás professzor 70. születésnapjára.* Miskolc: Novotni Alapitvány, 2007. 212-231.
263. Reinhard, Hans Joachim. Information Technology and Workers' Privacy: the German Law. *Comparative Labor Law & Policy Journal*, 2 (2002):377-398.
264. Risse, Thomas, Ropp, Stephen C., and Sikkink, Kathryn (eds.). *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge Univ. Press, 1999.
265. Roath, David and Willshire, Andrew. *Is there a right to privacy at work? Monitoring employees.* Blog posted 25th January 2016. http://www.parissmith.co.uk/blog/is-there-a-right-to-privacy-at-work-monitoring-employees/
266. Roessler, Beate, and Mokrosinska, Dorota. Privacy and Social Interaction. *Philosophy & Social Criticism* 39 (2013): 771-791.
267. Rose, Allison, et al. The role of worksite and home smoking bans in smoking cessation among US employed adult female smokers. *American Journal of Health Promotion* 26.1 (2011): 26-36.

268. Rönnmar, Mia. The managerial prerogative and the employee's duty to work: a comparative study of functional flexibility in working life. *The International Journal of Human Resource Management* 15.3 (2004): 451-458.
269. Sajó, András. Érzelmek a jogi intézményekben: a személyiségi jogok és a szégyen kapcsolata. In: Kisfaludi, András (ed.) *Liber amicorum: studia L. Vékás dedicata, ünnepi dolgozatok Vékás Lajos tiszteletére.* Budapest: ELTE ÁJK Polgári Jogi Tanszék, 2009. 249-264.
270. Sammer, Brigitte. The tension between monitoring employees and preserving privacy from an Austrian perspective. 2015. http://united-kingdom.taylorwessing.com/globaldatahub/article_austria_employee_privacy.html
271. Sanders, Astrid. The law of unfair dismissal and behaviour outside work, *Legal Studies* 34. 2 (2014): 328-352.
272. Sanders, Sherry D. Privacy is Dead: The Birth of Social Media Background Checks *S U L REV* 39 (2012): 243.
273. Sargeant, Malcolm. *Age Discrimination in Employment.* Aldershot, Ashgate Gower Pub Co, 2007.
274. Sárközy, Tamás and Pázmándi, Kinga (eds.). *Az információs társadalom és a jog átalakulása. Magyarország az ezredfordulón. Stratégiai tanulmányok a Magyar Tudományos Akadémián. Muhelytanulmányok*. Budapest: MTA Társadalomkutató Központ, 2002.
275. Sayer, Andrew. What dignity at work means. In: Bolton, Sharon C. (ed.). *Dimensions of dignity at work*. Routledge, 2007. 17-29.
276. Schlachter, Monika. Mandatory Retirement and Age Discrimination under EU Law. *International Journal of Comparative Labour Law and Industrial Relation* 27.3. (2011): 287-299.
277. Schmidt, Marlene. The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's Mangold Judgment. *German Law Journal* 7.5. (2006): 505-524.
278. Simpson, Bob. The Labour Constitution: The Enduring Idea of Labour Law. *Industrial Law Journal* 45.1 (2016): 101-105.

279. Sipka, Péter. A személyiségi jogok megsértéséért fennálló munkáltatói felelősség egyes gyakorlati kérdései. *Hr and Munkajog* 6.10 (2015): 6-8.
280. Solove, Daniel J. A taxonomy of privacy. *University of Pennsylvania Law Review* (2006): 477-564.
281. Solove, Daniel J. Conceptualizing privacy. *California Law Review* (2002): 1087-1155.
282. Sólyom, László and Georg Brunner. *Constitutional judiciary in a new democracy: The Hungarian constitutional court*. University of Michigan Press, 2000.
283. Sólyom, László. *A személyiségi jogok elmélete*. Budapest: Közgazdasági és Jogi Könyvkiadó, 1983.
284. Sólyom, László. Adatvédelem és személyiségi jog. In: Péterfalvi, Attila (ed.). *Tízéves az adatvédelmi biztos irodája: Ten years of DPC&FOI Commissioner's Office*. Budapest: Adatvédelmi biztos irodája, 2006. 9-20.
285. Supiot, Alain and Meadows, Pamela. *Beyond employment: Changes in work and the future of labour law in Europe*. Oxford: Oxford University Press, 2001.
286. Szabó, Imre. A személyiségi jogok védelmi rendszere a magyar jogban. *Acta Conventus de Iure Civili* 2 (2008): 43-60.
287. Székely, László and Vékás, Lajos. Személyiségi jogok. In: Vékás, Lajos (ed.). *A Polgári törvénykönyv magyarázatokkal*. Budapest: CompLex, 2013.
288. Székely, László. *A személyiségi jogok hazai elmélete: A forrásvidék*. Budapest: ELTE Eötvös Kiadó, 2011.
289. Szilágyi, Ferenc. A személyiség magánjogi védelmének dogmatikája a német jogban: Az általános személyiségi jog tana, különös tekintettel a személy becsületének és jó hírnevének védelmére. *In Medias Res* 2.2 (2013): 347-380.
290. Szőke, Gergely László (ed). *Privacy in the Workplace: Data Protection Law and Self-regulation in Germany and Hungary*. Budapest: HVG-ORAC, 2012.
291. Szőke, Gergely László and Böröcz, István. A beépített adatvédelem (privacy by design) elve. *Infokommunikáció és Jog*, 56 (2013): 120-125.
292. Szőke, Gergely László et al. *Privacy In The Workplace Final (Comparative) Report On Hungary and Germany*. 2012.

293. Szőke, Gergely László. Az önszabályozás, audit és tanúsítás lehetőségei és korlátai az adatvédelem területén. *Infokommunikáció és Jog 57*. (2014): 14-20.
294. Takács, Gábor and Kártyás, Gábor. *Az új munka törvénykönyve munkáltatóknak*. Budapest: CompLex K., 2012.
295. Tardos, Katalin. *Halmozódó diszkrimináció. Kirekesztés és integráció a munkaerőpiacon*. Szeged: Belvedere Meridionale, 2015.
296. Thomasberger, Martina. *How are EU rules transposed into national law? Country report. Gender equality. Austria. 2015. http://www.equalitylaw.eu/downloads/3805-austria-country-report-gender-pdf-1-01-mb 10-11*
297. Thüsing, Gregor. *European Labour Law*, München: C.H. Beck, 2013.
298. Török, Gábor and Tényi, Géza. *Personal rights in the information society 2009-2010*. K78686 project
299. Trepte, Sabine and Leonard Reinecke. (eds.). *Privacy online: Perspectives on privacy and self-disclosure in the social web*. Springer Science & Business Media, 2011.
300. Victoria R. Brown and E. Daly Vaughn, The Writing on the (Facebook) Wall: The Use of Social Networking Sites in Hiring Decisions. *Journal of Business and Psychology* 26. 2 (2011): 219-225.
301. Wagner DeCew, Judith. The scope of privacy in law and ethics. *Law and Philosophy* 5.2 (1986): 145-173.
302. Waring, Renee L. and F. Robert Buchanan. Social Networking Web Sites: The Legal and Ethical Aspects of Pre-Employment Screening and Employee Surveillance *Journal of Human Resources Education, 4.2 (2010):* 14-23.
303. Warren, Samuel, and Brandeis, Luis. The Right to Privacy. *Harward Law Review* 4.5 (1890): 193-220.
304. West, Jonathan P. and James S. Bowman. Electronic Surveillance at Work. An Ethical Analysis. *Administration & Society* 48.5 (2016): 628-651.
305. Whitman, James Q. The two western cultures of privacy: Dignity versus liberty. *Yale Law Journal* (2004): 1151-1221.
306. Wilborn, S. Elizabeth. Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace. *Ga. L. Rev.* 32 (1997): 825.

307. Wittek, Wolfgang H. *Soziale Netzwerke im Arbeitsrecht*. Nomos Verlagsgesellschaft mbH & Co. KG, 2014.
308. Wybitul, Tim. How to conduct e-mail reviews in Germany. *Compliance Elliance Journal* 2.1 (2016): 59-77. http://www.qucosa.de/fileadmin/data/qucosa/documents/19917/CEJ%20Winter%202016%20Wybitul.pdf
309. Zaccaria, Márton Leó. *Az egyenlő bánásmód elvének érvényesülése a munkajog területén a magyar joggyakorlatban*. Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2015.
310. Zaccaria, Márton Leó. Néhány gondolat a női munkavállalók közösségi szintű védelméről. Debreceni jogi műhely 7.1 (2010): [elektronikus dokumentum].
311. Zaccaria, Márton Leó. The new challenges of equal employment in the European Union. *Procedia - Social and Behavioral Sciences* 62 (2012): 1355-1359.
312. Zakariás, Kinga Az általános személyiségi jog a német Szövetségi Alkotmánybíróság gyakorlatában. *Jogtudományi Közlöny* 68.2 (2013): 73-87.
313. Zeller, Judit. A reprodukciós szabadságról magyar és strasbourgi szemszögből. *Jura* 2. (2013): 150–155.