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Criminal Law Protection of Personal Secrets in Hungary

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Abstract. The study analyses in detail and from a wide perspective the criminal law regulation applicable to the protection of personal secrets in Hungarian law. The author presents the historical development and comparative law context of the criminal substantive legal norms which defend personal secrets, especially in view of persons whose occupations or professions require handling such privileged information. Several norms applicable to specific professions (the clergy, the medical profession, and attorneys at law) as well as their implications in the light of the provisions of criminal and civil procedural law are also explored. The author concludes that it would be advantageous to use the expression 'occupation' in a wider sense and that the Hungarian Criminal Code should exemplify the secrets which often occur in everyday life and the exposure of which fits into the offending behaviour. Also, criminal and civil procedure should use the same rules for the exemption of persons bound by secrecy from having to testify as witnesses.

Keywords: personal secret, criminal law, privacy, clergy, medical profession, attorneys, privileged information, breach of secrecy

1. The Object of Inquiry

The scope of criminal acts related to secrets is widely defined both on the level of laws and legal science. The common basis for these delinquencies is constituted by personal secrets, the definition of the conceptual features of which is generally accepted. One example for this is that the information constituting the basis for personal secrets is only known in a narrow circle and also that the owner has a legitimate interest in preserving this information. Of course, these criteria should also be met with regard to the further types of secrets that are generated from personal secrets in order to be able to define them as criminal acts.

My study focuses on perhaps the most ancient type of secrets, i.e. the question of *personal secrets*, as well as on the analysis of the concepts of the three ways of their manifestation, which include *confessional secrets*, *medical secrets*, and *attorney–client privileged information*. The reason why I have undertaken this task is perhaps that the statutory regulation of the three above-mentioned categories is rather incomplete, the content-related criteria of these have mostly been defined by legal science and judicial practice in recent decades. Thus, the study of the question may primarily be based on case-law solutions, but I strongly believe that further references regarding the above categories would be necessary on the level of the Hungarian Criminal Code (hereinafter referred to as: the Btk.) and the Hungarian Criminal Procedures Act (hereinafter referred to as: the Be.) alike, taking into account the frequency of the situations that they affect as well as the legal disadvantages arising from the violation of these types of secrets.

2. Introduction. The History of the Regulation and the Dogmatic Implications of the Violation of Personal Secrets (Section 223 of Btk.)

2.1. Comparative and Historical Overview

In criminal law enforcement, quite a number of types of secrets are familiar: personal data,[1] special personal data, the privacy of letters, the secrets related to the secrecy of elections and referendums, business secrets, classified data, bank secrets, securities secrets, etc.[2] Some of them are mentioned in the Btk., while the interpretation of some other types of secrets only becomes clear from judicial practice or different positions of jurisprudence. I do not venture into analysing all the concepts of various secrets from a dogmatic and practical point of view in one single study, but what I am striving for instead is to present the forms of manifestation of personal secrets, which, in my view, are the ones that mean the basis for these other categories and which require the most complex interpretation.

The violation of personal secrets is indicated as a statutory definition in the criminal code of nearly all EU Member States. From these, I would like to highlight the German and Austrian statutory rules as these are the systems that by their nature most resemble the Hungarian legislative solutions.

1 The development of the legal protection of personal secrets chronologically precedes the emergence of the protection of personal data, and the subject of regulation is also a narrower group of data and facts (a personal secret of a private individual always qualifies as a personal data at the same time). Jóri 2009.

2 Tóth 2005. 57–58.

Pursuant to the provisions set out in the German Criminal Code, those who disclose any data related to another person without being authorized to do so commit a crime. In law, the scope of those persons who, as special subjects, may commit such crimes, is defined. This group includes medical doctors, dentists, pharmacists, psychologists, attorneys, patent agents, public notaries, financial advisors, tax advisors, auditors, marriage counsellors, social workers, employees of insurance companies, public servants, experts, etc. Thus, it is defined by the German law in which occupations or activities it is possible to violate personal secrets. Such behaviour is sanctioned more severely if the person engages in it with the aim of gaining benefits.[3]

The Austrian Code also limits the punishability of the act of divulging professional secrets: pursuant to this, those who disclose any of the data obtained in the course of exercising one of the professions defined in the law commit the crime of 'violating professional secrets'. In the law, healthcare, social security, and official sectors are specifically mentioned, based on which:

> […] those who communicate or utilize any data on another person's health status commit a crime if such data was entrusted to them, or such data became accessible to them during exercising their profession related to curing patients, the supply of medicine, the management of the medical institution, or the performance of social security-related tasks, and the disclosure of such secret causes a violation of interests [Section 121(1)]. A crime will be committed by any experts appointed by the court or another authority as well if they disclose the secret obtained in their capacity as experts [Section 121(3)].[4]

As regards the Hungarian regulation, the idea of the unlawfulness of violating secrets emerged as early as in the so-called Csemegi Code: the source of law, as the 'forerunner' of personal secrets, provided for professional secrets, the obligors of which included public officials, lawyers, physicians, surgeons, pharmacists, and midwives.

2.2. The Concept of Personal Secret in Hungarian Criminal Law

A *personal secret as a concept of criminal law* first emerged in the ministerial justification of Act V of 1961. This explanation of the law regarded it as a primary goal to define the subjective scope in the regulation of violating personal secrets. In the justification, the scope of the applicability of the crime was extended as

3 There is no such element of statutory definition in the Hungarian law as this belongs to the conceptual scope of another crime. Belovics–Molnár–Sinku 2015. 281.

4 Id. 281–282 (transl. by the author).

compared to the earlier criteria by having formulated the secrecy obligation for all the persons who exercised a profession in general. [The legal protection ensured by the earlier BHÖ (the Official Compilation of Criminal Rules), however, only extended to those types of secrets whose disclosure jeopardized the reputation of a family or a person. It is obvious that the current definition excluded quite a number of such factors from the scope of secrecy, in the case of which confidentiality would have been highly desirable for the offended party].

When examining the concept of personal secrets, first of all, it will be necessary to clarify the legal literature standpoints on the definition of secrets. The criterion – according to which in this case we are talking about an item of data, a fact, or a circumstance that is known to a rather narrow group of persons and that can become known to a limited range of persons – can be regarded as a 'common denominator' to a certain extent. Thus, the subject of legal protection is not the secret itself but one of its external forms of manifestation.[5]

Busch thinks that 'the criminal law protection of personal secrets is built on that in our society, any and all persons can be required to keep personal secrets who come in possession of such secrets in any way whatsoever'.[6] Törő states that we can only talk about secrets as long as only a narrow group of persons is familiar with a fact or an item of data, as long as it is possible to keep such secrets. Public disclosure, however, should always be interpreted in relative terms.[7]

The concept of personal secrets has not been defined by any of our criminal codes. This is also missing from the Criminal Code currently in force (the Btk., i.e. Act C of 2012) as well. However, the definition of a personal secret as all such confidential facts, circumstances, or data familiar only to a narrow group of persons and keeping them secret, which is a legitimate interest of the person concerned,[8] the disclosure of which will involve a violation of the interests of the offended party (judicial decision, i.e. BH No 2004: 170), can still be regarded as one that has governing effect. Such data may include the personal, family, pecuniary situation, the health status of a passive subject or any other knowledge of their personal habits. However, there are specific statutory provisions referring to the cases of violating financial secrets, business secrets, and classified data.

Personal secrets may affect a high number of the passive subject's interests: besides the protection of personality, I would also list the interests of uninterrupted participation in primary and secondary communities in this category as, through violating personal secrets, the family and social connections of the offended party are also damaged or jeopardized.

5 Busch 2011. 39.
6 Busch 2011. 39 (transl. by the author).
7 Törő 1979. 434.
8 Busch 2011. 40.

There are several positions taken in legal literature regarding setting up the categories of personal secrets, from which I would like to highlight Kereszti's attempt at classification:

> Based on its form of manifestation, personal secrets can be so-called notional secrets (they are only fixed in the minds of the insiders), material secrets (they are fixed in some tangible form such as facts or data written down, photographed, or recorded as an image or audio recording). As regards their content, they may be of a personal or moral nature (such as the offended party's illness, mental or physical defect, as well as other circumstances that involve family, moral or social judgment), or related to property or substance (like the offended party's pecuniary position, debts, creditability, bank or savings deposits, etc.).[9]

2.3. The Delinquent Behaviour and the Offender

The *delinquent behaviour* is the disclosure of the personal secret. The concept of this includes all such acts as consequence of which the information that constitutes the subject matter of the personal secret becomes known. Accordingly, the delinquent behaviour may be both active and passive, so the criminal act can be committed by action or default (omission, inaction). It holds no relevance either how many persons become familiar with the personal secret in question.[10]

However, the facts of the action can only be established if the delinquent behaviour is undertaken without a well-substantiated reason. Also, it is a well-established regulatory practice that, based on certain interests, the criminal codes allow the disclosure of data, facts, circumstances, etc. that otherwise qualify as personal secrets: among others, those cases can be listed here during which the apparent wrong-doers meet their legal obligations to supply data[11] or to notify the authorities.[12] The case of approval by the offended party can also be listed in this category. Based on the above line of thought, the punishability of the act is excluded if it does not pose a danger to society.

Busch states:

> [T]he witness to the crime is in a peculiar situation regarding this criminal act. The witness is not obliged to testify if they are obliged to secrecy and if they have not been exempted from their secrecy obligation. If, however,

9 Horváth–Kereszti–Maráz–Nagy–Vida 1999. 172–173.

10 Those who secretly record the content of a conversation conducted with them do not commit a crime, not even if this is done in another person's private household (judicial decision no BH 2014. 134).

11 E.g. reporting exculpatory evidence, giving a testimony.

12 E.g. the obligation to report bribery in the case of public officials.

> the witness testifies, they will not commit a crime, as in such a case, the unlawfulness of the action is missing, as the exploration of the criminal act qualifies as a substantiated reason.[13]

Belovics thinks that the above-mentioned case is in the conceptual scope of the permission in the law, as the Be. 'leaves it to the witness whether they would like to use their right to refuse giving testimony. If the witness testifies despite their not having been exempted from their obligation of secrecy and they disclose the personal secret before the authority, the witness will not commit a crime, with regard to the permission in the law.'[14]

The crime is a delictum proprium, i.e. it can only be committed by a person who has the necessary personal qualifications: based on this, the requirements of this statutory definition can only be met by those who gain possession of secrets through their occupations or public mandates (judicial decision no BH 2004: 170). I would like to note that if the offender is a public official at the same time, then their act will qualify as official misconduct if the disclosure of the secret is coupled with the purpose of gaining unlawful advantages or causing unlawful disadvantages.

Occupation is defined as all such regularly performed activities which are pursued by the offender in exchange for a consideration; however, it holds no significance whether the legal relationship is regulated by the rules of civil law or labour law. Public mandates include such activities which are performed by the offender for some public or social organization without receiving any consideration. No personal qualification is required for the participants of committing the crime, i.e. the crime can be committed by anybody in the capacity of an instigator or accomplice.

From my point of view, I believe that it is unnecessary to make a distinction between the concepts of occupation and public mandates in the law as both cases suggest an activity aimed at performing work. It is irrelevant from the aspect of statutory definitions what institution the offender performs the activity in question for or in exchange for what consideration they do so or whether they perform the activity for free or not. This means that it would make sense to simplify the wording of the law in the following way: a criminal act is committed by a person who *discloses a secret that they became aware of during practising their profession, without a substantiated reason*.

Personal secrets *can only be violated intentionally*, where both *dolus directus* and *dolus eventualis* may come up. Accordingly, the offender must be conscious of that a) the secret that they possess is a personal secret and that b) the circumstance that justifies its disclosure is not well substantiated. Regarding the latter, although

13 Busch 2011. 40.

14 Belovics–Molnár–Sinku 2015. 282–283.

the possibility of a mistaken assessment of the threat of the action to society may come up as a reason for exclusion from punishability but only if the offender had good reason to make such a mistake. The criminal act has no negligent form.

The establishment of the *realization phase of the criminal action* is adjusted to whether the offending behaviour is demonstrated verbally or in a written form. In the case of verbal statements, one cannot talk of attempts as the criminal act is completed by communication in the presence of another person and by the other person becoming aware of such information. In the case of a written offence, however, an attempt will become possible if the offender does his/her best to expose the information, but the result, i.e. the other party's becoming aware of such information, is not achieved for some reason. Consequently, an attempt at violating a personal secret can be established if a letter containing a personal secret is posted by mail and if it does not reach the addressee for some other reason, etc.[15]

The *causing of a material breach of interest* is regulated by the Btk. as a classified case: in such cases, the offender will be held liable even if it is only their negligence that extends to the current result. The following can, for example, be regarded as a material breach of interest: negative points occurring in the passive subject's career, moral acknowledgement, or family relationships, but all those financial advantages as consequence of which the offended party loses their job or any other source of income can also be listed here.[16]

The number of *crimes committed depends on the number of passive subjects*. If the offending behaviour is demonstrated with regard to several personal secrets concerning the same passive subject, then these acts should be regarded as a natural unit. Such crimes are exclusively punishable following a private motion.

3. The Canonical Law and Criminal Law Aspects of the Concept of Confessional Secrets

As regards *the secrecy obligation*, there is no considerable difference between canonical law and secular law: both types of cases require absolute secrecy from the clergymen conducting the holy confession. 'In the holy confession, […] it is important that the priest be aware of the weight of his task and to be appropriately prepared and qualified to perform his task […]. He should be fully aware of what he may allow himself and his penitent in this position of confidentiality.'[17]

Based on the Codex Juris Canonici (hereinafter referred to as: CIC), holy confessions can be made before all such members of the clergy who are entitled to perform the activity of confession. However, Háda points it out that a holy

15 Belovics–Molnár–Sinku 2015. 283.
16 Id. 196.
17 Háda 2012. 8.

confession to priests of another rite 'requires a very high level of experience from the confessor, as the faculties given to the confessors may be different'.[18] However, the freedom of the penitents to choose the clergyman that they would like to confess their sins to cannot be denied. This rule of the canon law puts extra emphasis on the importance of the confidential relationship between the worshipper and the priest, thus indirectly suggesting the importance of secrecy as well.

It is expressed in Canon 220 of the CIC that 'no one is entitled to unlawfully damage any other person's reputation, nor can the universal right to the protection of privacy be breached'.[19] As regards the importance of this principle, there is some overlap at the level of international treaties, as Article 12 of the Universal Declaration of Human Rights provides that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks'.[20] Thus, the regulatory principles of canonical law and international law can be considered homogeneous based on the above.

The *importance of keeping confessional secrets* is also emphasized in the rules set out in foreign canon law. Münsterischer Kommentar explains all this by the preservation of the authenticity of ecclesiastical preaching: 'if a servant of God loses his authenticity, this may also lead to his dismissal from service'.[21]

Kanonisches Recht approaches these questions from the aspect of personality rights: it expressly describes confessional secrets as an aspect of the right to reputation and the right to privacy. All this means that respecting such rights is justified not only in the case of the believers but also in the case of all persons who perform holy confessions.[22]

Géza Kuminetz states as follows:

> [T]he basis of this right is the human person himself and his dignity. More precisely, the basis is the interiority of the person, i.e. respect for the forum of conscience, which has a double dimension: on the one hand, a person will disclose his own inner world to a person that he finds worthy for it, a person that he would like to share this with. On the other hand, a person will always protect himself from those who would like to find out the secret of his personality unlawfully. This is what is protected by the virtue of modesty. Respecting the latter is what we call ontological respect […]. It is this ontological respect that reputation is built on, which indicates a

18 CIC, Canon 991, see Háda 2012. 41.
19 Cf. CIC, Canon 220 and CCEO, Canon 23, see Háda 2012. 42.
20 Háda 2012. 42.
21 According to Lüdicke 1987. 220/2 in Háda 2012. 42.
22 Aymanns–Mörsdorf 1997. 109 in Háda 2012. 42.

> person's honour in society. The basis for this, on the other hand, is moral respect, and this is what the law safeguards.[23]

The author also makes distinction between the right to reputation and the right to privacy. 'Although the right to reputation and the right to privacy are very similar, they are not equivalent. The right to reputation is meant to protect external honour, while the right to the respect of privacy protects internal honour, so that no one finds it out unlawfully. Such items of information may gravely damage a person's reputation, i.e. his honour as well.'[24]

Anyway, the 'private autonomy of canon law' has been expressed in several areas in the past few centuries besides the holy confession as, for example, in: the so-called private penitence, the sacramental seal, the freedom of choosing the confessor, the scope of procedural rules regarding the confession priests, the mail secrets, or the secrecy obligations of ecclesiastical archives.

In summary, it can be stated that the confessor is the primary obligor of confidentiality, and it is only the penitent who can exempt him from such obligation. 'The permission of the penitent should be express and given absolutely freely so that the confessor can freely use this permission outside the confession'.[25] The secondary obligors of the confessional secret are all those who may obtain any kind of information from the holy confession.

As regards *the rules of secular law*, one can only find very scarce references to the protection of confessional secrets as personal secrets. The definitions 'confession – holy confession' fundamentally belong to the conceptual apparatus of the Roman Catholic Church, which is why the terminology used by secular law should extend the legal evaluation of those actions during which the penitent shares the information qualifying as personal secrets to a clergyman of his or her own choice to a broader scope. The use of the expressions 'clergyman' or 'information concerning personality rights' may prove to be an appropriate way to do so. The relevant laws completely follow this method of solution: pursuant to the provisions set out in Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and on the Legal Status of Churches, Religious Denominations and Religious Communities, a clergyman will not be obliged to share the information affecting personality rights that he has become aware of during his religious service with any public authority.[26]

A fundamental regulatory discrepancy can be observed in the case of the rules on the obstacles of hearing witnesses in our procedural system as the information that constitutes the subject of confessional secrets is viewed as an absolute

23 Kuminetz 2010. 283 (transl. by the author).
24 Kuminetz 2013, in Háda 2012. 43 (transl. by the author).
25 Császár 1944. 117 in Háda 2012. 10–11 (transl. by the author).
26 Section 13(3).

obstacle to witness hearing by the provisions set out in Act XIX of 1998 on the Rules of Criminal Procedure (Be.), while the same is considered only a relative obstacle to witness hearing by Act III of 1952 on the Rules of Civil Procedure (hereinafter referred to as: the Pp.). Based on this, a clergyman and a member of an organization performing religious activities who performs religious rituals as his profession cannot be heard as a witness according to the provisions of the Be. as these persons have a secrecy obligation with regard to these items of information by virtue of their occupation.[27] The grammatical interpretation of this provision of the law suggests that such persons shall not even be summoned as witnesses.

However, from the grammatical interpretation of the Pp., one can conclude that the clergyman is free to decide during the procedure whether he would like to give a testimony or he refuses to do so with reference to reasons of conscience or canon law or by quoting the lack of exemption received from the owner of the secret. The text of the rule says that those persons who are obliged to keep secrets by virtue of their occupation (see e.g. clergymen) may refuse to give a testimony if they would breach their secrecy obligation by testifying, except if they were exempted from this obligation by the affected person.[28]

It also becomes obvious from the above that by using the expression 'clergyman', the Be. contains a specific reference to the relationships affecting the privacy of the church and the worshippers, while the Pp. fails to do so as it exclusively provides on persons 'who are obliged to secrecy through their occupation'.

I think that this regulatory conflict in itself does not run counter to the provisions set out in the Fundamental Law of Hungary; still, the homogenization of our procedural codes would be necessary with regard to the definition of the obstacles to giving a testimony and the legal consequences thereof.

4. The Appearance of Medical Secrets as Personal Secrets in the Healthcare Acts of Hungary

'One of the characteristics of medical activity is that it definitely affects personality rights, the medical doctor inevitably restricts these rights by recording the concrete medical history. This is why trust, reliance, the sincere disclosure of the medical history and the symptoms are required, but these may be misused by both sides. Thus, trust has a higher ranking ethical requirement in this situation.'[29] The definition in Act XLVII of 1997 on the Management and Processing of Patient Data (hereinafter referred to as: the Eüak.) says that medical secrets include the healthcare and personal identification data that the data manager becomes aware of

27 Section 81(1), point a).
28 Section 170(1), point c).
29 Lomnici 2013. 22 (transl. by the author).

during the medical treatment; furthermore, any other data regarding the necessary medical treatment, one that is in progress or has been completed as well as those that have been shared with regard to the medical treatment [Section 3, point d)].

Based on the secrecy obligation, healthcare workers as well as any other persons who have a legal relationship aimed at work with the healthcare provider are subject to a secrecy obligation regarding any and all data and facts on the health status of the patient as well as any other data and facts that they have become aware of during the provision of healthcare services, without any time limitation, irrespective of whether they have become aware of these data directly from the patient – during their examination or medical treatment – or indirectly from the healthcare documentation or in any other way. The secrecy obligation does not refer to those cases where the patient has given exemption from this or if the data supply obligation is prescribed by law (for example, in a criminal procedure).[30]

The health service provider, except for the affected person's elected GP and the forensic medical expert, is also bound by the secrecy obligation towards the health service provider which was not involved in the medical examination, the establishment of the diagnosis, the medical treatment or the performance of the surgery, except if the communication of the data was necessary for setting up the diagnosis or the further medical treatment of the affected person.[31]

As long as the healthcare documentation on the patient also contains data that affect the right of another person to a personal secret, the right of review can only be exercised with regard to the specific part that refers to the patient.

Both the data manager and the data processor are obliged to keep the medical secret, except if the interested party or their statutory representative has given their written consent to the forwarding of the healthcare data and the personal identification data, with the restrictions specified therein; furthermore, if the obligatory forwarding of the healthcare data and personal identification data is required by law.[32]

Act CLIV of 1997 on Healthcare (hereinafter referred to as: the Eütv.) contains a high number of procedural rules which are directly related to the importance of the (legal) institution of medical privacy. First of all, it should be highlighted that the persons involved in the provision of healthcare services are only entitled to communicate any and all healthcare and personal data that they have become aware of during the provision of the healthcare services to the eligible persons, and subsequently they will also be obliged to treat these data confidentially. In my opinion, it is this 'patient right' that can be regarded as one of the starting points

30 Getting familiar with the healthcare documentation. Information on the data managed during the provision of healthcare services and the rights of the affected persons. http://www.tesz.co.hu/static/media/files/2016/eu_dok_megismerese_borito_0328_v5.pdf (accessed: 10.03.2017).

31 http://kmmk.hu/wp-content/uploads/2016/01/Az-egeszsegugyi-es-a-hozzajuk-kapcsolodo-szemelyes-adatok-vedelmerol.pdf (accessed: 10.03.2017).

32 Eüak. (Act XLVII of 1997 on the Management and Processing of Patient Data), Section 7(1).

for medical privacy. The patient is also entitled to make a statement on who they would like to give information to on their condition, the expected outcome of their disease, and whom they would like to exclude from the partial or complete knowledge of their healthcare data.

The limitation of the persons who are present in medical situations also belongs to the conceptual scope of the confidentiality regarding medical treatments and patient care. The keeping of medical secrets may be jeopardized in lack of listing this in the law. It is not a coincidence that both the Eütv. and the Eüak. contain cogent rules regarding the right to be present.

The Eütv., quite rightly, specifically provides on the circumstances of conducting the examinations as well: as a general rule, the medical treatments should be performed in such a way that no other person could see or hear these without the patient's consent (except if this is unavoidable in an emergency situation). Thus, according to the law, the patient, as a general rule, is entitled to a situation where only those persons are present during their examination and medical treatment whose participation is necessary for administering the healthcare service or to the presence of whom they have previously given their consent.[33]

The above rule is also confirmed by the Eüak., based on which, besides the doctor who administers the medical treatment and other healthcare provider staff members, it is only those persons to whose presence the patient has given their consent to who may be admitted during the medical treatment.[34] Healthcare information, which, if not disclosed, may result in the deterioration of the patient's condition, may be communicated to the person who provides further patient care and medical care without the consent of the affected patient.

The information that falls within the scope of medical secrets can be used in criminal proceedings whenever the need for this emerges. These data may be related to the accused person, the victim, or the witness alike.

Data are usually gathered as early as in the investigation phase: after ordering an investigation, in order to explore the facts of the matter, the prosecutor or, with

33 Eütv. (Act on Healthcare), Section 25(5).

34 By respecting the human rights and dignity of the patient, another person may be present without the consent of the affected party if the regime of the medical treatment requires that several patients be treated at the same time; a professional staff member of the police may be present if the medical treatment is administered to a detainee; a member of the penitentiary institution in a service relationship as long as the medical treatment is administered to a person who is serving his sentence involving imprisonment in the penitentiary institution and this presence is necessary for ensuring the security of the person providing the medical treatment as well as for preventing the patient's escape; these persons may also be present if this is made necessary by the patient's personal security from the interest of prosecution and the patient is in a condition that does not allow them to make a statement; those persons who earlier treated the affected person for a medical condition or who was permitted by the head of the institution or the person responsible for information security to do so for a professional-scientific purpose (except if the affected person has expressly protested against this), Eütv. (Hungarian Act on Healthcare), Section 25(5).

the prosecutor's approval, the investigation authority may request data supply on the suspect (on the reported person or the person who can be accused of having committed the act) from the healthcare organization and the related data management unit, according to the rules on inquiries, if this is made necessary by the nature of the case. Providing such data cannot be refused.[35]

Pursuant to the provisions set out in the Be, the court, the prosecutor as well as the investigation authority may contact any and all healthcare institutions maintained by the state or the municipality for requesting information, data, or asking for documents to be delivered to them. For these, the relevant authority may set a deadline of a minimum eight days and a maximum thirty days. The contacted party will be obliged to restore any data that have been coded or incomprehensible in any other way to their original condition preceding delivery or communication and to make the content of the data cognizable to the inquiring party. The contacted institution will be obliged to perform the data supply, which includes especially the processing, the written or electronic capturing, or the forwarding of the data, free of charge, as well as to perform the task or to communicate the obstacle to such performance within the prescribed deadline.

If the request refers to the communication of personal data (i.e. medical secrets), this may only concern such and as many items of personal data as are absolutely necessary for fulfilling the purpose of the request. In the request, the exact purpose of the data management and the scope of the requested data should be indicated. If, as a result of such request, an item of data that is unrelated to the purpose of the inquiry becomes known to the requesting party, the data should be deleted.[36]

The legal obtaining of data that constitute medical secrets cannot only take place through requests but also through other official coercive measures. Based on these, a search may also be conducted at the healthcare institution if the statutory conditions defined by the Be. are met. However, if such coercive measures are aimed at finding a document that contains healthcare data, then it is exclusively the court that will be entitled to order such a search, and the procedural activity can only be performed in the prosecutor's presence.[37] It is also only the court that can order the seizure of documents containing healthcare data which are kept at the healthcare institution.[38]

35 See *Footnote 32*.

36 If the organization contacted fails to fulfil the request within the prescribed deadline or unlawfully refuses to fulfil the request, a disciplinary penalty may be imposed [Be., Section 71].

37 Be., Section 149(6).

38 Be., Section 151(3).

5. Interpreting Attorney–Client Privileged Information as Personal Secret Based on the Hungarian Criminal Procedures Act (Be.), the Act on Attorneys at Law (Ütv.), Ethical Rules on Attorneys' Activities, and International Case-Law

In Hungary, it is *attorney–client privileged information* that is governed by the most complex sets of rules. This is not without a reason since ethical rules governing attorneys' activities are of a constitutional significance. Rule 1/2011 (III. 21.) on Ethics for Attorneys stipulates that:

> [I]n a society based on respecting the principle of constitutionality, attorneys have a special role. Their duty goes beyond duly performing their assignment within the legal framework. Attorneys shall serve justice and represent the interests of those whose rights and freedoms they have been mandated to guarantee and protect; their duty is not merely to represent a client in a case but also to act as a consultant for this client. Respecting attorneys' profession is an essential condition of constitutionality and democracy in society. (1. 1)

In the view of Tamás Sulyok, the primary function of regulations on attorney–client privileged information is the protection of public confidence.[39] By virtue of Act XI of 1998 on Attorneys at Law (hereinafter referred to as: the Ütv.), as a general rule, attorneys shall keep confidential any data or facts acquired in the course of exercising their profession. This obligation is irrespective of the existence of the power of attorney relationship and is retained even after the termination of the attorney's activity. The confidentiality obligation also governs other documents made and possessed by the attorney if these include any facts or data in the scope of confidentiality. In the course of the inquiry conducted at the attorney's offices, the attorney shall not disclose documents or data with reference to their client but shall not hinder the inquiry either.

The client, the client's legal successor as well as the client's authorized representative may grant exemption from the confidentiality obligation. At the same time, even in the case of exemption, the attorney shall not be interrogated as a witness about facts or data he acquired as a defender.

The confidentiality obligation duly governs attorney-at-law offices and their employees, the organs of the attorney's profession and the officials and employees of the latter as well as natural and legal entities engaged in storing, archiving, and guarding electronic or printed documents containing confidential data or

39 Sulyok 2013. 132.

processing the data contained therein. To me, from the teleological interpretation of this provision, it follows, among others, that the attorney shall communicate data that are relevant for the essence of the case to his employees only with his client's approval, i.e., in principle, the confidentiality obligation is retained also with reference to the employees of the attorney's office until the client gives exemption from this.

The Ütv. allows to end the attorney's confidentiality obligation with reference to disciplinary proceedings only: on the basis of this, in disciplinary, investigative, and inspection cases launched by the Bar Association, in cases where the access to data in the scope of attorney–client privileged information is essential for the proceedings to be successful, the attorney shall be exempted from the confidentiality obligation before the administering Bar Association organs and the court, in relation to the subject of the case.[40]

Attorney–client privileged information involves not only obligations but entitlements as well. Accordingly, both in criminal and civil proceedings, there are legal arrangements established ensuring the attorney's independence in exercising his activity and guaranteeing the implementation of certain professional aspects. Consequently, being an attorney is an absolute obstacle for interrogation in the case of defence lawyers (i.e. in criminal cases)[41] and a relative obstacle in that of legal representatives (i.e. in civil cases).[42] As was outlined above, the lack of uniform regulations is unfortunate since the Ütv. clearly stipulates a confidentiality obligation for all types of cases and, considering the above regulation, the legislator creates a contradicting situation for the attorney's profession.

In the criminal proceedings, specifically identified guarantees must be implemented in the course of the investigation. The most important factor is compliance with the principle of proportionality, the essence of which is that neither interests related to investigation nor those related to attorney–client privileged information may be violated. Thus, the Be. must specifically and individually stipulate in the case of all legal institutions that may come into question in this context the scope as well as the content of intervention by the authorities. A good example for this is that, when specifying the norms of the conduct of a search, legislators state that with reference to attorney's offices this may be ordered by the court and executed in the presence of a prosecutor exclusively.[43] It raises concerns at the same time that the act restricts the

40 Sections 8(1)–(5).

41 The Be. stipulates that counsels for the defence may not be heard as witnesses on issues which have come to their cognizance or which they communicated to the defendant in their capacity as a counsel for the defence [Section 81(1)].

42 The Act on Civil Procedures (Pp.) stipulates that the attorney may refuse to be interrogated as a witness if his confidentiality obligation was violated by a witness testimony, except where exempted from this obligation by the interested party [Section 170(1)].

43 Section 149(6).

implementation of this rule exclusively to the case where the investigative action concerned aims to locate some document containing professional secrets.

It is a disputed question at the same time if the defender has an information obligation at all and, if he has, at what point this becomes applicable. I believe that this may be applicable only in extremely exceptional cases to be governed by the law by all means. In this scope, the actual relationship (authorization or delegation) is certainly not relevant. What is much more relevant is the attitude towards the attorney's role that an attorney may never assign himself the role of the defendant's 'accomplice'.

The essence with reference to attorney–client privileged information is, I believe, that any information (meaningfully) communicated between the defendant and the defender with reference to the criminal case concerned is strictly confidential. This confidentiality feature must primarily be implemented in the defendant's mind, who should regard the defender not as part of the official machinery but as his supporter. In order that the above aspects be implemented it is important that the defender commit in the service agreement in writing to keeping attorney–client privileged information confidential. In my opinion, introducing legal provisions for any form of such a written commitment for delegated defenders as well should also be considered.

The scope of data constituting attorney–client privileged information is relatively difficult to define; there are no exhaustive or exemplificative lists in relation to this issue in the Ütv. either. While it is clearly impossible to pass exhaustive provisions in this scope, with reference to the nature of certain kinds of secret, certain categories could be introduced (e.g. attorney–client privileged information constitutes especially information communicated between the defender and the defendant in speaking areas, the contents of electronic communication between the legal representative and his client, etc.). Beyond these, the act should specify that attorney–client privileged information shall only be information that qualifies as meaningful for the consideration of the defendant or the case. It should also be stipulated that the confidentiality obligation does not arise at the moment of signing the service agreement but from that of the first oral communication; what is more, the premises of the latter (e.g. public area, a court building, an attorney's office) are totally irrelevant for the obligation to arise. Whether the power of attorney is free of charge or not has no significance likewise. From all these, it can be concluded that describing the concept of attorney–client privileged information still requires legislative efforts.

As regards the *ECHR case-law in relation to interpreting attorney–client privileged information*, the number of cases before the Court can be considered significant, and decisions clearly move towards the implementation of the widest possible protection of secrets.

The court ruled against Germany in a case where authorities seized, on the basis of a judicial decision, various documents at an attorney's office. The decision maker assigned special significance to the personal (confidential) relationship between the attorney and his client as well as to the fact that the execution of the search negatively affected the attorney's professional prestige.[44] The decision ruled that the intervention implemented was not proportionate to its purpose. Sharing the view of Sándor Papp, I am of the opinion that in Hungarian regulations a house search should be prohibited where 'the disadvantages involved in the house search exceed the benefits attainable from the measure'.[45]

In the case *Domenichini v. Italy* (1996), the Court ruled that the right to private and family life was violated since the detainee's letters were inspected by the administering authority. Simultaneously, Article 6(3)(b) of the Convention (to have adequate time and facilities for the preparation of the defence) was violated by the fact that the applicant's letter to his lawyer including the justification required for submitting the cassation appeal was opened and returned to him only after the ten-day deadline of submitting it to the Court of Cassation had expired (and the attorney was able to submit it missing the deadline).

In the case *Kopp v. Switzerland* (1998), the Court also established the violation of the Convention because telephone conversations had been tapped at the applicant lawyer's office. The same conclusion was made by the Court in the case *Petra v. Romania* (1998) as well, where the essence of the legal violation was that the detainee's correspondence with the European Court of Human Rights was inspected.[46]

6. Closing Thoughts

The law currently in force lists as many as eleven statutory definitions regarding the violations of confidentiality besides the violation of personal secrets, which may lead to the difficult terrain of 'overregulation' in the future: mail fraud (Section 224 of the Btk.), criminal offences with classified information (Section 265 of the Btk.), criminal offences against public records and registers recognized as national assets (Section 267 of the Btk.), violation of confidentiality related to the judiciary (Section 280 of the Btk.), breach of seal [Section 287(1), Points c)–d) of the Btk.], criminal offences related to elections [Section 350 (1), Point f) of the Btk.], breach of trade secrecy (Section 413 of the Btk.), breach of business secrecy (Section 418 of the Btk.), illicit access to data (Section 422 of the Btk.),

44 Bérces 2014. 98.
45 Papp 1997. 31 (transl. by the author).
46 Fenyvesi 2002. 110.

covert information gathering without authorization (Section 307 of the Btk.), and unlawful integrity test (Section 308 of the Btk.).[47]

In my view, the violation of personal secrets may be regarded as the basic statutory definition of all the secrecy-related crimes. In my study, I have made an attempt at analysing such types of personal secrets regarding which there are no meaningful requirements set by either the Btk. or the Be. It is obvious that confessional, medical secrets as well as attorney–client privileged information are recognized as personal secrets; however, regarding their content-related features, one can exclusively rely on the requirements set out in other laws or in the ad-hoc decisions that become familiar through judicial practice.

The near future will see the dominance of actions running counter to the law on illicit access to data.[48] According to the ministerial justification, 'the new statutory definition is based on the international laws, and its place in the law is justified by its connection to computer-related crime'.[49] This statutory definition is special because of the mode of committing this act; however, it also protects the right to privacy, and so the legal policy reasons underlying its introduction are similar to those of the breach of personal secrets.[50]

As regards the statutory definition of the invasion of privacy (Section 223 of the Btk.), I have the following regulatory proposals:

1. In the statutory definition, it would make more sense to use the expression 'occupation' instead of the unnecessary distinction between professions and public mandates.

2. The Btk. should make references to those types of secrets, as examples, which often occur in everyday life and the exposure of which fits into the offending behaviour set out in the above-mentioned statutory definition (e.g. attorney–client privileged information, medical secrets, notary public secrets, etc.).

3. The sets of rules laid out in the Be. and the Pp. should be integrated with regard to the standardization and legal consequences of the obstacles to hearing witnesses. In my view, the Pp. should follow the system of the Be. (i.e. this quality should be stipulated as an absolute obstacle to witness hearing in the case of clergymen, medical doctors, and attorneys as well).

47 Verebics 2013. 5.

48 See crimes against information systems, the Hungarian Criminal Code, Chapter XLIII, Section 422.

49 László 2013.

50 The offending behaviours are defined rather broadly: 1. covertly searching the home or other property, or the confines attached to such, of another person; 2. monitoring or recording the events taking place in the home or other property, or the confines attached to such, of another person, by technical means; 3. opening or obtaining the sealed consignment containing communication which belongs to another and recording such by technical means; 4. capturing correspondence forwarded by means of electronic communication networks, including information systems, to another person and recording the contents of such by technical means.

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