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# THE RIGHT TO PRIVACY IN THE LEGAL SYSTEM OF THE UNITED STATES OF AMERICA

## ABSTRACT

The article presents a historical aspect of development of the right to privacy in the American legal system. The considerations bring closer the most significant issues concerning the privacy protection presented among U.S. case-law and doctrine.

**Key words:** privacy, case-law, right to privacy, common law, human rights, personal goods

## 1. INTRODUCTION

Scientific and philosophical discourse around the issue of privacy has been going on for a long time. It is not easy to define the term because that affects the inner, very often even intimate spheres of human life. In recent times, one can see a marked increase in interest in the subject of privacy. This is due to the transformations resulting from the development of technologies connected with acquiring, processing and sharing information. Unlimited access to Internet resources, the ever-growing popularity of social networking, processing of personal data, newer measures of surveillance... This is the reality of the information society, which obviously puts people in a completely new light on the issue of protection of one of the fundamental human rights – the right to privacy.

For modern citizens of democratic societies, privacy is a notion naturally associated with legal system. However, if you take into account the history of the right to privacy, it turns out that many relevant regulations have emerged quite recently. The purpose of this publication is to present the development of privacy protection in the legal system of the USA. There are many reasons why the achievements of the American doctrine and case law should be discussed. To start with, let us take into consideration the historical point of view – it is the country from where, as many says, the global discussion on privacy originated. Secondly, the

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achievements of the U.S. doctrine and jurisprudence is extremely rich in this area. It shall also be emphasized that the American legal and philosophical thought still has a significant influence on the legislation of the old continent. Therefore, the historical approach will be enriched with analysis of the selected case law and main doctrine opinions.

## 2. THE RIGHT TO PRIVACY – BIRTH OF A NEW CONCEPT

The assumptions of the concept of the right to privacy were created by Samuel D. Warren and Louis D. Brandeis. In 1890 *The Harvard Law Review* released their joint article entitled *Right to Privacy*. The publication was a reply to the excessive interference of the press in the sphere of Warren's private life. The *Boston Saturday Evening Gazette* magazine reported on the details of social events organized by the wife of Judge Warren, daughter of Senator Thomas F. Bayard (Sieńczyłło-Chlabicz, 2006, p. 26). The authors postulated the necessity of recognition the violation of privacy as a separate tort in the American legal system. They also pointed out that the development of technology increases the possibility of infringement of that personal good, which is why, it shall be subjected to special legal protection.

The theses contained in the article were created as a result of a thorough analysis of the case law among the common law system countries – the U.S. and UK. Decisions analyzed by Warren and Brandeis to differentiated legal issues. These included the judgments in famous *Prince Albert v. Strange*<sup>2</sup>, *Yovatt v. Winyard*<sup>3</sup> and *Abernethy v. Hutchinson*<sup>4</sup> cases. The first one concerned the usage of etchings documenting the life of Queen Victoria and her husband without prior consent of the plaintiff. The copies were shown at the exhibition and published in the separate catalogue. *Yovatt v. Winyard* case related to theft and use by an employee of recipes for veterinary medicines. In *Abernethy v. Hutchinson* the defendant was a student intending to publish other people's lectures in the famous *Lancet* medical journal.

The authors showed that the basis of judgments were regulations protecting various goods and interests, such as property, honor or likeness of a person. Regardless of the fact, Warren and Brandeis pointed out that the norms were related to the right to privacy, which is their common denominator. They also pointed out that due to the recent development of technology the individuals have become more exposed to the breach of their private sphere than before. As the authors said: "The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual" (Warren & Brandeis, 1890, p. 3) In turn, the role of the law has to face the needs of society, resulting from the political, social and economic change. "That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail there cognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." (Waren& Brandeis, 1890, p. 3). Thus Warren and Brandeis called for recognition of the right to privacy, as a separate legal category. It was a derivative of

<sup>2</sup> *Prince Albert v Strange* [1849] EWHC Ch J20.

<sup>3</sup> *Yovatt v. Winyard* [1820].

<sup>4</sup> *Abernethy v.Hutchinson* [1825] 3 L.J.Ch. 209.

the right to life and the right to enjoy this life as its integral part, evolving in the right to be let alone. (Warren & Brandeis, 1890, p. 2)

The concept of the right to be let alone was created by the English judge T. Cooley. In 1880, within the famous *Treatise on the Law of Torts*, he presented a classification of personal rights. Among them, Cooley listed the right to *personal immunity* defined as the right of complete immunity, which he summarized as right to be let alone. He noted that an assault of commit battery entail injuries in the mental sphere of the potential victim.” The right to one’s person may be said to be a right of complete immunity: to be let alone. The corresponding duty is, not to inflict an injury, and not, within such proximity as might render it successful, to attempt the infliction of an injury[...]. There is very likely a shock to the nerves, and the peace and quiet of the individual is disturbed for a period of greater or less duration. There is consequently abundant reason in support of the rule of law which makes the assault a legal wrong.” (Cooley, 1906, p. 29).

Expanding Cooley’s theses, Warren and Brandeis stated that not only material sphere of life of individual, such as property or integrity, should be protected but also the immaterial sphere of informational and emotional autonomy of the individual needs an adequate protection. In conclusion, there is impossible to protect the right to be let alone without legal guarantees given to the right of privacy. (Warren, Brandeis, p. 2; R.C. Post, p. 651)

### 3. RIGHT TO PRIVACY IN THE CASE LAW

In the initial phase, Warren’s and Brandeis’s views remained unnoticed in American judicature, despite the significant publicity. The breakthrough came in an interesting judgment on *Roberson v. Rochester Folding Ford Company*.<sup>5</sup> The plaintiff, whose image was used on the packaging of products without obtaining her consent, demanded the recognition of violation of the right to privacy and the compensation on the basis of common law. The judges decided against the plaintiff at the same time presenting an important argument concerning the right to privacy. The judgment did not questioned the fact of violating the sphere of private life but pointed out that the abuse of the image rights is not governed under New York common law regulation. Application of the theory of Warren and Brandeis was considered too progressive, but at the same time the judges headed to the legislature a request for regulating such violations and to fill a gap in the system of civil law. This doctrinal and jurisprudential discussion led to joining of the new provisions protecting the use of the image for advertising or commercial purposes to the New York Civil Law.<sup>6</sup>

Critical position to the judgment in *Roberson* was taken by The Supreme Court of Georgia in *Pavesich v. New England Life Insurance Co.*<sup>7</sup> One of the judges, Cobb, found that the lack of substantive law to protect interest does not mean its absence. Furthermore, it does not mean that there is no need to protect it. Pointing to the natural origins of privacy rights, he criticized the ruling on *Roberson* considering it to be too conservative. Like Warren and Brandeis, Cobb stated that despite that lack of direct reference to the right to privacy in the earlier rulings, it served as the common denominator for many cases related to violations

<sup>5</sup> 171 NY 538, 64 N.E.442 New York Court of Appeals, June 27 1902.

<sup>6</sup> New York Civil Rights Law, NY.Code Section 50, 51.

<sup>7</sup> 50 SE 68 Supreme Court of Georgia, March 3 1905.

of property rights or abusing of contractual obligations. Relying on the above, the Court recognized the right to privacy as a natural consequence of the individual's right of freedom.<sup>8</sup>

In the following years, the right to privacy was accepted in the legal systems of particular states. Among the first were: Alaska (1926), California (1931), Colorado (1932), Montana (1935), North Carolina (1937), Oregon (1941). Other states continued to discuss the recognition of privacy for the interest protected by the law. For example, in 1951, the Superior Court of Massachusetts ruled against the plaintiff in the case which undoubtedly concerned violation of the right to privacy. The applicant, Norma Yoeckel, claimed that by making a photograph of her in a restaurant toilet and showing it to the guests, the defendant infringed her right to privacy. The court dismissed the suit due to the lack of adequate precedent in the law of the state and the lack of adequate protection on the basis of the legislative.<sup>9</sup>

#### 4. THE CONCEPT OF W.L. PROSSER

Meanwhile, in 1960, *California Law Review* published a breakthrough article touching upon the problem of privacy. "*Privacy*", which is how this dissertation was called, is authored by W. L. Prosser – the Dean of the College of Law at UC Berkeley. Referring to the thesis of Warren and Brandeis, Prosser analyzed a very broad jurisprudence on the right to privacy, consisting of up to three hundred judgments. As a result, he determined four different torts connected to the right of privacy, claiming that this issue is more complex so as to rely on one only:

- a) *intrusion* – an illegitimate interference in seclusion and private matters of a given person,
- b) *public disclosure* – showing embarrassing facts concerning a given person in public,
- c) *false light publicity* – publicity which places a person in a false light in the public eye,
- d) *appropriation* – usurpation of name or likeness of someone else for benefit. (Prosser, 1960, p. 389)

According to the assumptions, the torts shall protect various legal interests. The one and only link between the torts, is their connection to the right, described by the judge Cooley, as the *right to be let alone*. As the Prosser says "The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represent an interference with the right of the plaintiff in the phrase coined by Judge Cooley "*to be let alone*." (Prosser, 1960, p. 389)

Thanks to the article, the discussion on the right to privacy was moved in the new direction and that is why it became so important. However unquestionable is the fact that Warren and Brandeis are the leaders when it comes to the protection of privacy, their thesis was rather descriptive, emotional and intuitive. R. C. Post described it as, so called, *descriptive privacy*. (Post, 1991, p. 261). Main feature of their model is its high level of generality while trying to pinpoint the subject of protection by bringing down its existence merely to the feelings and emotions of an entity. Meanwhile, Prosser decided to use more normative attitude,

<sup>8</sup> 50 SE 68 at 70 "A right to privacy... is therefore derived from natural law".

<sup>9</sup> Yoeckel v. Samoning, 272 Wis 430, 75 N.W., 2d 925 (1956); 0cited K. Motyka, *Prawo do prywatności*, Zeszyty Naukowe Akademii Podlaskiej w Siedlaczach, No 85, 2010, p. 13.

focusing on the problem of unifying the contents of the right to privacy. The representatives of the American doctrine show that his article was as much revolutionary when it comes to its influence on the given matter as the famous publication of his predecessors. (Kalven Jr, 1966, p. 331).

## 5. RECOGNITION OF THE RIGHT TO PRIVACY IN THE STATUTE LAW

An intensive discussion concerning the right to privacy, ultimately resulted in its establishment in 1965. It is crucial to underline that, as in the case of *common law*, the privacy has already been protected by the constitution of the United States. Although not *expressis verbis*, multiple Amendments to the Bill of Rights of 1789, regulated a wide scope of important issues dealing with this matter. The doctrine focuses on the First, Third, Fourth and Fifth Amendments. The First Amendment guarantees the freedom of religious beliefs, freedom of assembly and freedom of association. The Third Amendment places restrictions on the quartering of soldiers in private homes without the owner's consent. The Fourth Amendment prohibits unreasonable searches and seizures of people and protects their physical integrity. The Fifth Amendment forbids to deprive a person of life, freedom and property without a due trial. All of the aforementioned Amendments have been serving the courts as the basis to render judgments concerning the right to privacy.<sup>10</sup>

Judge Douglas established an unambiguous presence of the right in the federal statute law during the process hereinafter referred to as *Griswold v. Connecticut*.<sup>11</sup> This case dealt with a notice of appeal put forward by Estelle Griswold and C. Lee Buxton, the founders of *Planned Parenthood League of Connecticut*. Mrs. Griswold was the executive director of the company while Dr Buxton, as a professor and dean of the Department of Obstetrics, Gynecology & Reproductive Sciences at Yale, performed as the medical director. They were both arrested and obliged to pay 100\$ fine for their advisory activity concerning conscious planning of pregnancy among married couples. Up to that moment, the law had not allowed to use any method or device of fertility control. The usage of such methods and devices had been treated as a crime and sanctioned fine or imprisonment (60 days to a year).<sup>12</sup> Griswold and Buxton, as the advisors in this matter, were convicted for complicity in crime. The Supreme Court of the United States found the judgment unconstitutional appealing to the right to marital privacy. In support of his decision, judge Douglas, stated that privacy is a natural law and has always been protected, as may be seen throughout the history of jurisprudence. As for the federal law, it recognized the right to privacy as a penumbra of the Amendments I, III, IV, V and IX.<sup>13</sup>

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<sup>10</sup> See *Hester v. United States* 265 U.S. 57 (1924), *Katz v. United States* 389 US 347 (1967), *Safford Unified School District v. Redding* 557 U.S. 364 (2009) (citing Motyka, 2010, p. 16).

<sup>11</sup> *Griswold v. Connecticut* 381 U.S. 479, U.S. Supreme Court, June 7 1965.

<sup>12</sup> § 5 3–32 and 54–196 General Statutes of Connecticut (1958 rev.).

<sup>13</sup> "We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.", see *Griswold v. Connecticut*.

The judgment was crucial to the further development of protection of privacy in the US doctrine and making of judicial decisions. Moreover, as stipulated by prof. Motyka, it contributed to the expansion of the right to privacy (Motyka, 2010, p. 17) The fact that the turn of the 60s and 70s in the United States was also a beginning of social and cultural revolution is, certainly, not without significance. While hippy people appeared on the streets, liberal and freedom trends began to show their influence on American jurisprudence. The construction of the right to privacy enabled making of such decisions as legalization of the right of mere possession of obscene materials for personal purpose in 1969<sup>14</sup> and, in 1972, during the *Eisenstadt v. Baird* case<sup>15</sup>, allowed to extend the Griswold formula to unmarried couples. Judge Brennan, in the opinion of the majority, stipulated that: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." and it is hard to not agree with his words. Such legal attitude led to legalization of woman's right to abortion in the first trimester of the pregnancy in the landmark U.S. Supreme Court decision in *Roe v. Wade*.<sup>16</sup>

In the subsequent years, American courts began to treat the matters of the right to privacy in a more and more liberal way. Further decisions broadened the view on the central institution of a new, liberal society. Among others, privacy concerned: the decision in the case of *Goodridge v. Department of Public Health*<sup>17</sup>, where state prohibition of homosexual marriages was invalidated and claimed unconstitutional; landmark decision *In Re Quinlan*<sup>18</sup> acknowledging that the right to privacy justifies the claims of parents of three year old girl to pull the plug from the machine supporting her life; decision in the case of *McIver v. Krischer*<sup>19</sup> legalizing, in accordance with the principles of state constitution and basing on the rules of the right to privacy, assistance in suicide of people suffering from HIV and the whole spectrum of decisions in the famous case of *Terri Schiavo*.<sup>20</sup>

## 6. CONCLUSIONS

It is obvious that the acquisition of the American doctrine and jurisprudence dealing with the right to privacy is much more complex. Careful analysis of this matter could become a fascinating subject of a separate elaboration. In this paper, due to its limited form, it was only possible to approximate the most significant issues. In order to sum up, the attention should be focused on two crucial facts carrying the tumultuous history of the right to privacy in the legislation of the United States.

First of all, the approach to the issue of privacy in American jurisprudence is probably the most sensitive barometer of liberal society and *vice versa*. The public opinion serves as the

<sup>14</sup> *Stanley v. Georgia*, 394 U.S. 557, U.S. Supreme Court, April 7, 1969.

<sup>15</sup> *Eisenstadt v. Baird*, 405 U.S. 438, U.S. Supreme Court, March 22, 1972.

<sup>16</sup> *Roe v. Wade*, 410 U.S. 113, U.S. Supreme Court, January 22, 1973.

<sup>17</sup> *Goodridge v. Department of Public Health*, 798 N.E. 2d, Massachusetts Supreme Judicial Court, November 18, 2003.

<sup>18</sup> *In Re Quinlan*, 70 N.J. 10, New Jersey Court of Appeal, March 31, 1976.

<sup>19</sup> *McIver v. Krischer*, 697 So. 2d 97 (Fla. 1997).

<sup>20</sup> *Bush v. Schiavo*, 885 So. 2d 321, Florida Supreme Court (2004), *Schiavo v. Greer*, No. 05-CV-522 (2005), *Bush v. Schiavo*, 543 U.S. 1121 (2005).

best measure of the quality and validity of judgments given in relation to privacy. Problems encountered by the American legal system underline a very complicated nature of the matter we have to deal with.

On one hand, privacy sets boundaries between state power and an individual. On the other hand, the public expects to settle the „gray area” of moral attitudes, feelings and intimacy while respecting differences and individual freedom ... Is it possible to create a uniform rule of law covering such a broad spectrum of problems? History of the right to privacy in the U.S. gives a lot to think of to the researchers of continental regulations struggling with the problem of a certain rigidity of the rules of positive law.

Another important issue is the fact that since the publication of the Prosser's *Privacy* in the American law doctrine there was no equally groundbreaking concept. The present dispute over the issue of the right to privacy has still a dichotomous nature. Representatives of the various currents of thought are either inheritors of Warren's and Brandeis's concept or followers of the idea of Prosser. Some of the authors postulate to extract one separated tort connecting violation of the right to privacy. This position is represented by E.J. Bloustein who indicates the integrity of the personality of the individual as a good protected by this right (Bloustein, 1964, p. 964).<sup>21</sup> He shares similar view with L. Henkin (Henkin, 1964, p. 1410, 1415) who describes privacy as a natural consequence of individual freedom of thoughts, actions and decisions. J. Rubinfeld (Rubinfeld, p. 737) stands in opposition to these attitudes and calls for a clear clarification of the content of the right to privacy by the norms of positive law. The same opinion is shared by R.C. Post and H. Kalven (Kalven Jr, p. 331). They also support the Prosser's typology and tend to distinguish different torts subjected to separate regulations.

As previously mentioned, the American doctrine and jurisprudence still have a significant influence on the European theories concerning the right to privacy. This is due to the mutual exchange of the ideas between particular legal systems of both continents. In consequence, the theses presented above are also characteristic for discussion in European science of law. To end this dispute, we should first respond to the basic question: "What is privacy?". However, the discussion forces us to deal with a very mysterious and complicated issue. Privacy, as Paul Chadwick says, is "the quietest of our freedoms [...] best measured as it drains away. Privacy is most appreciated in its absence, not its presence". (Chadwick, 2006, p. 495).

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<sup>21</sup> Citing Mednis, 2006, p. 57.

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