WARREN, BRANDEIS AND THE BIRTH OF THE RIGHT TO PRIVACY

Joanna Braciak[1]

Abstract

In spite of the established and popular opinion, the terms of privacy and right to privacy (or right of privacy) had been present long time before 1890, when the famous article of American lawyers Warren and Brandeis was published. The author tries to find the origins of the formation of the idea of private life protection in American and English doctrine, as well as in views of German or French lawyers. There is no doubt any more that the concept of the right to respect private life has been developing differently in particular countries, depending on several factors: the role and invention of judicature, the concepts reported in the science, the provisions of the regulation and, most of all, the flexibility of interpretation of the law. As a conclusion the author claims that not every state has to ensure the protection of the same values to fulfill social postulate to protect a private sphere. The review of the main issues related to the evolution of the right to privacy allows to make the statement that – as the Judge L. Brandeis said – the right to privacy is "the most comprehensive of rights, and the right most valued by civilized men."

Key words: liberty, autonomy, privacy, the right to be let alone, the right to privacy, common law

Introduction

The idea of the right to the protection of the private sphere was shaped differently in different countries depending on the role and creativity of judicature, the concept reported in the science, the provisions of the regulation and the flexibility of interpretation of the law. Spheres of life in which

[1] The General Tadeusz Kościuszko Military Academy of Land Forces in Wrocław.

there is an interest known as privacy, are determined very subjectively. The sensitivity of particular human and social groups has been changing under the influence of times, culture and reception of other societies' standards. This leads to a conclusion that privacy is a dynamic value[2]. As the consequence of the mentioned circumstances not every country should ensure the protection of the same values to fulfill social postulate to respect privacy. There are different catalogues and hierarchies of values and rights, which are expected to be protected in particular societies, as well as diverse legal institutions used in different systems to ensure the protection of these values. Before the concept of the right to privacy appeared in the legal vocabulary of all countries, groups of legal institutions protecting some of its aspects had functioned in the legal systems of particular states.

The origin of the right to privacy – the United States of America

It is known that the US are the cradle of the right to privacy. This is certainly a consequence of the fact that this year marks 135th anniversary of the publication of the famous article by Warren and Brandeis establishing foundations for the development of the idea of the private sphere protection[3]. Although it is only a short period in the history of human thought, nevertheless this idea[4] has found itself well grounded not only in the science of

---

[2] L. Kański, "Prawo do prywatności, nienaruszalności mieszkania i tajemnicy korespondencji," in *Prawa człowieka. Model prawny*, ed. R. Wieruszewski (Wrocław 1991); S. Foster, *Human Rights & Civil Liberties* (Harlow: Longman, 2011), 569 ff; R. Youngs, *English, French & German Comparative Law* (London-New York: Routledge, 2014), XVI ff, 256 ff; J. Wagner DeCew, "Privacy, definition of," in *Encyclopedia of Privacy* ed. W. G. Staples, Volumes 1 & 2 (Westport, Connecticut-London: Greenwood Press, 2007), 393 ff. The confirmation of this thesis can be seen even in deliberations on a completely different time range, cf. e.g. M. Carucci, "Visualising ancient privacy in the Roman house," in *Revealing Privacy*. *Debating the Understandings of Privacy*, ed. M. Carucci (Frankfurt am Main: Peter Lang, 2012), 52. See also A. Sarat, "Whither Privacy? An Introduction," in *A World Without Privacy*. *What Law Can and Should Do*, ed. A. Sarat (New York: Cambridge University Press, 2015), 2 ff.

[3] W. Szyszkowski, "Prywatność w Stanach Zjednoczonych, jej ochrona i realizacja," in *Prawa i wolności obywatelskie w państwach kapitalistycznych*, ed. W. M. Góralski (Warszawa, 1979), 224. See also K. Motyka, *Prawo do prywatności i dylematy współczesnej ochrony praw człowieka* (Lublin, 2006), 56 and literature cited there.

[4] It must be noted, however, that the concept of the right to the protection of the private sphere – as already was mentioned above – combines many globally recognized ideas, and the concept of 'privacy' has many meanings. Cf. I. Dobosz, *The secret correspondence as a personal right and its protection in civil law* (Krakow, 1989), 59 and literature cited there.

law and other social sciences, but also in culture and politics[5]. There was the need to guarantee such protection in international regulations of enormous scope and importance[6].

In 1890, Samuel D. Warren, a Boston lawyer and industrialist[7], for reasons that probably we will never know[8], published an article "The Right

---

[5] I. Dobosz, "Przesłanki cywilnoprawnej ochrony przed podsłuchem," *Zeszyty Naukowe Uniwersytetu Jagiellońskiego MLXII*, no. 58 (1992): 85 ff.

[6] It's all about the Universal Declaration of Human Rights of 1948 and the Human Rights Pacts of 1966.

[7] In fact he was only an industrialist at that time, because after his marriage to the daughter of Senator T. F. Bayard, he abandoned his law practice and took care of family business. Cf. E. J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," in *Privacy. International Library of Essays in Law & Legal Theory*, vol. II: *Privacy and the Law*, ed. Wacks R. (Aldershot, Hong-Kong, Singapore, Sydney, 1993), 93 ff. See also W. L. Prosser, "Privacy," in *Privacy*, ed. Wacks, 47 ff.

[8] It is not sure what was the real reason for the publication (R. Barron, "Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890): Demystifying and Landmark citation," *Suffolk University Law Review*, no. 13 (1979): 891-894). Some argue that it was a publication in tabloids about Warren daughter's wedding (W. L. Prosser says even that the right to privacy was "a most marvelous tree to grow from the wedding of the daughter of Mr. Samuel D. Warren," "Privacy," *California Law Review*, no. 3 (1960): 423. This claim was repeated also in H. Kalven, Jr., "Privacy in Tort Law – Were Warren and Brandeis Wrong?," *Law and Contemporary Problems 31* (1966): 341, footnote 82). Others say that the article was written due to the information about breakfast for Warren's cousin and her new husband – D. L. Zimmerman, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis Privacy cake," *Cornell Law Review*, no. 68 (1983): 296. Similarly, Sarah Parsons (S. Parsons, "Privacy, photography, and the art defense," in *Revealing Privacy*, ed. Carucci, 105, 107) believes that it were photographs from the wedding, published in the press, what directly inspired the article. In other studies on this topic we can find out that the reason for Warren's indignation were critical press releases about his father in law (Barron, "Warren and Brandeis," 904-907). From the same source we learn that Warren's daughter, whose marriage and information about it had to be the direct cause of that article, was nine years old at that time. It was very likely, unless we assume that it concerned another child born out of wedlock. Brandeis' biographer, although he gives no mention of the reasons for writing the article, places the date of its publication in relatively short period of time after the wedding. From that source it can also be applied, that the above-mentioned assumptions concerning indications of the publication can be false (see M. Urofsky, *Louis D. Brandeis. A Life*, (New York: Pantheon Books, 2009), 258 ff). Leebron (D. W. Leebron, "The Right to Privacy's Place in the Intellectual History of Tort Law," *Case Western Reserve Law Review*, no 41 (1991): 153), however, quotes two facts about a similar subject. The first is press interest in the private lives of units, preceding the article a little bit and known by its authors. It was the judgment of June 1890 on *Manola vs Stevens*, as well as the letter published in the *Nation* written by a reader, who was presumably a lawyer ("The Photograph Nuisance," *Nation*, no. 50 (1890): 153 ff). A similar view, looking for possible inspiration of Warren and Brandeis article in other people's views, has Anita Allen (Anita Allen,

to Privacy"[9] together with his partner of law firm Louis D. Brandeis, who was the greatest American lawyer of his generation, as well as the future judge of the Supreme Court. The article was frequently described as "the most famous and certainly the most influential law publication, which has ever appeared."[10]

Warren and Brandeis's view on the respect for privacy in practice were analyzed in details not only in the American legal doctrine. It is not surpri-

---

"Coercing Privacy," *William & Mary Law Review*, no. 40 (1999): 756 ff) who states that such an impact could have articles by E. L. Godkin in *Scribner's Magazine* of July 1890. ("The Right of the Citizen: That His reputation"). See also E. L. Adams, "The Right to Privacy and Its Relation to the Law of Libel," *American Law Review*, no. 39 (1905): 37.

[9] Samuel D. Warren, Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review 4*, no. 5 (1890): 193 ff.

[10] Cf. e.g. M. Nimmer, "The Right of Publicity," *Law and Contemporary Problems 19* (1954) 203. Similarly, R. A. Reilly, "Conceptual Foundations of Privacy: Looking Backward Before Stepping Forward," *Richmond Journal of Law & Technology 6*, no. 2 (1999). Similarly, though in a completely modern context, M. Vistilä F. Ruokonen, "Social networking sites and privacy as contextual integrity," in *Revealing Privacy*, ed. Carucci, 119 ff. See also Zimmerman, "Requiem for a Heavyweight," 292, who considers that this article was a part of the revolution in the development of the common law. More about the importance of the publication of Warren and Brandeis, see: F. R. Shapiro, "The Most Cited Articles Law," *California Law Review 73* (1985): 1540, who states that this article was the most frequently quoted publication in the period up to 1947. In another discussion of the most influential legal literature (F. R. Shapiro, "The Most-Cited Law Review Articles Revisited," *Chicago--Kent Law Review 71*, no.3 (1996)) he noticed, however, that the number of citations of literature within the social sciences before 1956 must be based on extrapolation of subsequent citations. Using this method, Warren and Brandeis article is placed in the top ten most cited articles of all time. It should be noted that the extrapolation method adopted by Shapiro met criticism and disbelief undermining the correctness of the results – see W. M. Landes, R. A. Posner, "Heavily Cited Articles in Law," *Chicago -Kent Law Review 71*, no. 3 (1996), as well as J. M. Balkin, S. Levinson, "How to Win Cites and Influence People," *Chicago -Kent Law Review 71*, no. 3 (1996). See also H. H. Kay, "In Defense of Footnotes," *Arizona Law Review 32* (1990): 419, 426. However, a visible sign of the vitality of theses presented in Brandeis and Warren article is at least that it was quoted by most of judges, both who agreed with the ruling and who were against, in *Bartnicki vs. Vopper* (532 US 514, 2001), concerning the disclosure of a private telephone conversation. Although judges were not able to agree on the verdict of the case, everyone seemed to accept the fact that it is important to quote the sentence of Warren and Brandeis in his opinion (see. M. Rotenberg, "Brandeis, Louis D. (1856-1941)" in *Encyclopedia of Privacy*, ed. Staples, 73. Also in publications on the right to privacy in an era of technological development and the growing importance of social networks the importance of Warren and Brandeis, and their "congruence" to a changing world is underlined – see even J. Rosen, "The deciders: Facebook, Google, and the Future of Privacy and Free Speech" in *Constitution 3.0. Freedom and Technological Change*, eds. J. Rosen, B. Wittes, (Washington, DC: Brookings Institution Press, 2011), 69, particularly 76.

sing that many interpretations emerged in this matter and they differ strongly even in respect of the most fundamental issues[11]. For the purpose of this study it is sufficient to say that the authors have accepted the need to protect privacy against abuses of the press and referred to the whole range of British and American court decisions. The various actions that can be considered as encroachment into the sphere of private life, were judged by the American and British courts on different legal bases: trespass[12], breach of secrecy, breach of implied contract[13], etc. In conclusion courts argued, that their rulings were based on a common foundation, an autonomous value: the right to privacy, whose function is to protect the "inviolable personality[14]." This idea was accepted favorably in the literature[15], and numerous precedent sentences have contributed to its development[16].

---

[11] Cf. the views of W. L. Prosser, "Privacy," *California Law Review 48*, no. 3 (1960): 392, who argues that for Warren and Brandeis privacy meant a "freedom of publicity" and E. J. Bloustein, "Privacy as an Aspect of Human Dignity. an Answer to Dean Prosser," *New York University Law Review 39* (1964): 971, who believes that their views were rather about a "freedom from violations of human dignity ".

[12] I.a. *the Duke of Queensberry vs Shebbear* (1758), *Gee vs Pritchard* (1818), *Bartlett vs Crittenden* (1849), *Prince Albert vs Strange* (1849), *Jeffreys vs Boosey* (1854), *the Woolsey vs Judd* (1855), *Parton vs Prang* (1872), *Kiernan vs Manhattan Quotation Co.* (1876) – cf. Warren, Brandeis, "The Right to Privacy," 199 ff.

[13] E.g. *Yovatt v. Winyard* (1820), *Abernathy v. Hutchinson* (1825), *Folsom v. Marsh* (1841), *Morison v. Moat* (1851), *Pollard v. Photographic Co.* (1888) – cf. Warren, Brandeis, "The Right to Privacy," 207 ff.

[14] Warren, Brandeis, "The Right to Privacy," 205. See also Z. Mielnik, „Prawo do prywatności (zagadnienia wybrane)," *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, no. 2 (1996): 29.

[15] The scope of response, which it reached in the literature is rarely found. See examples cited by Leebron, "The Right to," 158, notes 94-96, concerning only publications before 1900.

[16] It is often said that the views of Warren and Brandeis had to wait a long time to be reflected in case law (see Prosser, "Privacy," 384 – as indeed it is commonly repeated in the literature), while only a few months after release of the article, in September 1891 in *Schuyler v. Curtis*, the court relied heavily on their findings (Leebron, "The Right to," 159 ff.), but above all at a much earlier judgment in *the Prince Albert vs Strange*. In 1893, in *Marks v. Jaffa*, court decision was influenced by both the article of Warren and Brandeis and an article by E. L. Godkin, "The Rights of the Citizen. IV – It His Own Reputation," *Scribner's Magazine*, no. 8 (1890): 58 ff.. Godkin incidentally, defined dignity as a concept very closely related to privacy, as he wrote, "[p]ersonal dignity is the fine flower of civilization, and the more of it there is in a community, the better off the community is [...] But without privacy its cultivation or preservation is hardly possible "(p. 67 of the article, quoted in Allen, "Coercing Privacy," p. 757). Perhaps the opinion about the difficulties with adoption of the "privacy" concept is the result of often presented in literature, Judge Parker's categorical statement in 1902 case *Roberson vs Rochester Box Holding Co*. that there is no

England

"Privacy" is therefore the concept that grew out of the Anglo-Saxon law. However, some authors studying British law think that unlike other areas of this law, this idea was founded on the American continent and was taken over by British law[17]. This argument is not entirely convincing, for two

---

general right to privacy ("[t] here is no precedent for a dry an action to be found in the Decisions of this court [...] Mention of dry and [privacy] right is not to be found in Blackstone, Kent or any another of the great commentators upon the law "- L. E. Rothenberg, "Re-thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law is the writing and Reasonable Expectation of Privacy in the Public Space," *American Law Review*, no. 49 (2000): 1134; cf. J. K Weeks, "Comparative Law of Privacy," *Cleveland Marshall Law Review 12* (1963): 485; L. P. Carnegie, "Privacy and the Press: The Impact of Incorporating the European Convention on Human Rights in the United Kingdom," *Duke Journal of Comparative & International Law 9* (1998): 315. On the margin it may be noted that the assertion of J. Parker is not entirely true. In a Blackstone's commentary remarks on privacy could be found, although his statements on this matter are limited. He discusses only the inadmissibility as evidence of testimony of persons of special trust, e.g. consultants, lawyers, etc., in regard to the facts concerning the private life which they can acquire as a person of special trust; cf. *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States, and of the Commonwealth of Virginia, […] with an Appendix to Each Volume, […]* by St. George Tucker (Philadelphia 1803), Chapter XXIII: *Of the Trial by Jury*, 349 ff, detailed 267, http://www.constitution.org/tb/tb-0000.htm). Indeed, this is confirmed in an appendix to Volume I of Blackstone's Commentary by St. George Tucker (cf. Note C of the Constitution of Virginia, to Vol. I, http://www.constitution.org/tb/t1c.htm). As far as James Kent commentary is concerned, it actually does not notice the right to privacy as an independent value, but it lists and describes several categories of goods, which certainly could be put in the sphere of privacy, even if it is quite narrowly understood. Cf. his discussion of the right to personal security and comments relating to defense against defamation, slander and libel (J. Kent, *Commentaries on American Law* (New York 1826), especially Lecture *XXIV*, concerning absolute personal rights; http://www.constitution.org/jk/jk_000.htm). Anyway, in 1905, fifteen years after the publication of "The Right to Privacy", the majority of state legislatures had already introduced the right to privacy into the legal system. Usually in the literature it is assumed that the immediate cause of the flourishing of legislation was the decision of the state court of Georgia in *Pavesich v. New England Life Ins. Co.* (E.g. it is a view of Y. Akdeniz, *First Report on the UK Encryption Policy. Reply to the DTI Consultation Paper on Licensing of Trusted Third Parties for the Provision of Encryption Services*, Cyber-Rights & Cyber-Liberties (UK), http://www.leeds.ac.uk/law/pgs/yaman/yaman.htm), where the right to privacy has been recognized by the judge Cobb as derived from the natural law. See C. G. Haines, *The Revival of Natural Law Concepts. A Study of the Establishment and of the Interpretation of Limits on Legislatures with special reference to the Development of certain phases of American Constitutional Law* (Cambridge 1930), 211.

[17] S. Strömholm, "Right of Privacy and Rights of the Personality. A Comparative Survey. Working Paper prepared for the Nordic Conference on Privacy organized by the

completely different reasons. The first and more important reason (taking into account the deliberations held in this article) refers to the sphere of ideas. Ie. it concerns the attempts to conceptualize the right to privacy in the English doctrine[18]. The second one, rather marginal in terms of this article, applies to the way how the right to privacy was introduced into the British legal system. It was not the result of the influence of the American jurisdiction achievements, although such attempts were made with no doubt[19], but the incorporation of the European Convention on Human Rights into domestic law of the United Kingdom[20]

As for the English concepts of the right to privacy, it should be noted that the very use of the term "privacy" in the British sentence in *Prince Albert vs Strange* of 1849 which was cited by Warren and Brandeis, certainly is not sufficient to conclude that the British doctrine recognized the right to privacy as part of the *common law*. However, if we try to sum up the speech of English jurists cited not only by these authors[21], it is difficult to make such hard assessment[22], at least when it comes to the theory. This is good opportunity to remind Sir James Fitzjames Stephen[23], who two decades before Warren and Brandeis in a polemic with the views of J. S. Mill said that recognition of the existence of a personal autonomy "right" implied the existence of a right to privacy. In his opinion, the right to personal auto-

---

International Commission of Jurists, Stockholm, May 1967," *Acta Instituti Upsaliensis Jurisprudentiae Comparativae VIII* (Stockholm 1967): 26. In Polish literature he is quoted by Kański, *Prawo do prywatności, nienaruszalności mieszkania*, publication of R. Wacks, *The Protection of Privacy*, (London 1980), p. 4 has been cited as well.

[18] See e.g. D. Vincent, *I Hope I Don't Intrude. Privacy and Its Dilemmas in Nineteenth--Century Britain,* (Oxford: Oxford University Press, 2015)*, passim,* who analyzing the idea of privacy in English conditions, goes back to even mid-15th century (Vincent, *I Hope I Don't Intrude*, 38). Cf. also D. Webb, *Privacy and Solitude in the Middle Ages*, (London--New York: Hambledon Continuum, 2007), IX ff.

[19] Widely about this: Carnegie, "Privacy and the Press," *passim.*

[20] Cf. *Human Rights Act* which was passed only on 9.11.1998 (sic!). See G. Phillipson, H. Fenwick, "Breach of Confidence as a Remedy in the Human Act Era," *The Modern Law Review 63*, no 5 (2000): 660 ff.

[21] See P. Winfield, "The Comparative Law of the Right to Privacy," *Law Quarterly Review 47* (1931): 23 ff.

[22] Use of the term "privacy" is probably not, moreover, necessary to identify elements of the right to privacy in the statement of Judge Yates, on *Millar vs Taylor* (even in 1769): "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right that judge whether he will make them public, or commit them only to the sight of his friends "(Leebron, "The Right," 153).

[23] James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Cambridge 1960), 160. 1st ed. 1873.

nomy, no matter how it is understood, always includes a right to privacy[24], but strict definition of the privacy is impossible[25]. However, privacy should be respected, both by legislators and by the public and lack of definition should not be an obstacle. By Stephen, the remedy for this problem is an intuition[26]. This is an extremely subjective vision of the law. But we are not allowed to say that it is not frequent also nowadays[27]. It changes nothing that J. F. Stephen was a pioneer in defining the right to privacy. Everyone is convinced that Warren and Brandeis were the first, and so it has been.

English courts, loyal to practice of precedents, have shown a high ability to adapt to the needs of life as they also additionally used provisions of obligation rights and copyright, although it was considered as a serious breach of the *common law*. In general they managed to protect private sphere effectively. But we should notice that the English jurisprudence has never recognized the existence of a right to privacy as an independent value[28]. It is surprising that even certain elements of the private life pro-

---

[24] „There is a sphere, none the less real, because it is impossible to define its limits" (Stephen, *Liberty, Equality, Fraternity*, 162).

[25] By Stephen (Stephen, *Liberty, Equality, Fraternity*, 160) that inability stems the fact that "privacy is too associated with the experience and history to give up precise and abstract analysis".

[26] Stephen, *Liberty, Equality, Fraternity*, 150.

[27] Cf. the rule created by Judge Potter Stewart in *Jacobelis vs Ohio* (378 US 184, 197 [1964]), when it came to finding what the so-called hard pornography was: "I shall not today attempt further to define the kinds of material I understand to be embraced within that short hand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*…". (cited in Gerety, "Redefining Privacy," *Harvard Civil Rights – Civil Liberties Law Review 12* [1977]: 210 [emphasis added]). The existence of such a rule in court is also noted by L. Denniston, "From George Carlin is Matt Drudge: The Constitutional Implications of Bringing the Paparazzi America," *The American University Law Review 47* (1998): 1256.

[28] Cf. e.g. the case of *Malone vs Metropolitan Police Commissioner* (No. 2) 1979 (2 All ER 620) and *Kaye vs Robertson*, 1991 (FSR 62 [Eng. CA]). In the first case, Judge Sir Robert Megarry expressly noted that "English law does not take into account the complaints of invasion of privacy, until this violation is not synonymous with recognized cases of tort or violation of the principle of equality" (D. Feldman, *Civil Liberties & Human Rights in England and Wales*, (Oxford, 1993), 385-386). This statement was confirmed in the proceedings at the European Court of Human Rights in the case *Malone vs United Kingdom* (7 Eur. Ct. HR, Series A, No: 82 at 14, the judgment of 2. 08. 1984; quoted in Carnegie, "Privacy and the Press," 315). In the second case the court ultimately ruled out the possibility of removal of the right to privacy from the *common law* and held that only the parliament is competent to initiate a legislative action in this regard. See statement of the judge Glidwell: „It is well-known that *in English law there is no right to privacy* and accordingly there is no right of action for breach of a person's privacy. The facts of the present case

tection appeared in English law as early as in 14th century. For example, the regulations of the law on justices of the peace dated in 1361 provided arrest for "voyeurs" and "eavesdroppers"[29]. Similar reasons underlies the domestic peace institutions, which are firmly embedded in the English tradition[30]. Particularly noteworthy are sentences connecting privacy with the right to property. Already in 1741, in *Pope v. Curl*, concerning the publication of Mr Pope's letters from well-known personalities in the literary world (including Alexander Pope and Jonathan Swift) by the bookseller, Lord Chancellor, recognizing that words were the property of the writer, stated that the dissemination of correspondence without the agreement of the author violated his privacy[31].

In 1820 ruling in *Yovatt vs Vineyard*, the court extended the protection of property rights also to prevent the disclosure of personal secrets. The situation was as follows. Winyard, who had used to be an assistant to Yovatt, a vet, decided to become independent and opened his own practice. The claim based on the fact that Winyard acquired formulas of drugs used in the treatment as well as rules for their use in an unauthorized manner, ie. copying them from a personal notebook of Yovatt. The judgment stressed in particular that the actions were Vinyard infringement of the principle of trust and secrecy. It follows that the acts that now we would perceived as unfair competition, plagiarism or an invasion of privacy, were then deemed as infringement of ownership[32].

The third case that is cited several times is 1849 ruling in *Prince Albert vs Strange and Others*. The case is now famous because it opened a discussion on Warren and Brandeis' right to privacy. In its time it was rather high-

---

are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals…", Feldman, *Civil Liberties*, 386 (emphasis added).

[29] Cf. J. Michael, *Privacy and Human Rights. An International and Comparative Study, with Special Reference to Developments in Information Technology* (Dartmouth, 1994), 15.

[30] D. Banisar in this context quoted the statement of William Pitt the Elder: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow though it; the storms may enter; the rain may enter – but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement," D. Banisar, S. Davies, W. Madsen, M. Kassner, R. Breckheimer, S. Van Dongen, *Privacy & Human Rights 2000. An International Survey of Privacy Laws and Developments*, http: //www.privacyinternational. org / overview.html.

[31] M. Chlopecki, *The Property Rights Origins of Privacy Rights,* „Liberty Heaven", http://www.libertyhaven.com/personalfreedomissues/privacyorencryption/originsprivacy.html (after: „The Freeman" 1992, vol. 42, no 8).

[32] M. L. Ernst, A. U. Schwartz, *Privacy. The Right to Be Let Alone,* New York 1962, p. 6-12.

-profile case because Prince Albert was the husband of Queen Victoria, and even the Queen herself found to be a victim of William Strange's actions. Mr Strange was a printer who was selling reproductions of engravings made by the royal couple while their cataloging and printing took place without a permission. Although the right to privacy was not yet acknowledged at that time, plaintiffs used arguments decisively from this area, claiming that it was their right to maintain the privacy of the works they had created for their personal use, and that "privacy is the essence of the property and its loss puts end to property". As the court, just as in earlier jurisdiction, protected the right to ownership, and not privacy as an unconditioned value, Mr Strange defense emphasized this distinction, saying that "The concept of privacy is completely different from the concept of ownership." However, the ruling was in favor of Prince Albert. In the explanation, we can read that "every man has the right to have its own sentiments, if so he wishes. It has certainly a right to decide whether he would make public use of them, or keep them only for his friends. In this state of things a manuscript constitutes, in every sense, a special property; and no one can – without authorization – take it away or make any use of it, without the recognition of having infringed the property.[33]"

German-speaking countries

In the literature, particularly German-speaking one, the claim[34] that victor's palm, if one can use that term, should belong to German science could be found quite often. It is true that at the turn of the 18th and 19th century we can meet in German doctrine a series of publications dedicated to the category of rights known as the "right of personality"[35]. The names of Gereis, Gierke[36]

---

[33] *Ibidem*, p. 14-22.

[34] See S. Strömholm, *Le droit moral de l'auteur, en droit allemand, français et scandinave, avec un aperçu de l'évolution internationale, étude de droit comparé*, vol. 1: *L'évolution historique et le mouvement international*,, (Stockholm: Norstedt & Söners förlag, 1966), 243 ff.

[35] Cf. Strömholm, "Right of Privacy," 28-29.

[36] O. Gierke, *Deutsches Privatrecht, Erster Band: Allgemeiner Teil und Personenrecht*, (Leipzig, 1895), 702 ff., especially 711 ff, however, with regard primarily to issues of protection of honor. He cites in this regard the earlier findings of Kohler (J. Kohler, "Das Autorrecht, eine zivilistische Abhandlung, zugleich ein Beitrag zur Lehre vom Eigenthum, vom Miteigenthum, vom Rechtsgeschäft und vom Individualrecht," *Jahrbücher für die Dogmatik des deutschen und heutigen römischen Privatrechts XVIII* [Iehrings Jahrbücher], nF. VI (1880), especially pp. 260 ff). More information F. Rigaux, "La liberté de la vie privée," *Revue internationale de droit compare 43*, no.3 (1991): 539 ff., especially 545 and ff.

and Kohler[37] are called most often in this context. There is no doubt that the ideas proclaimed by them were the inspiration for the "right to free development of personality"[38], what is, simplifying, another recognition of the right to privacy. It should be noted, however, that "privacy", understood as freedom to dispose of information on personal topic appeared only in the work of Joseph Kohler in 1907[39], and only with regard to the secrecy of correspondence. The privacy was described a bit more wider in the doctoral dissertation of Hans Giesker[40], although he called it the realm of secrecy. His undoubted achievement is to separate in this area the sphere of internal experiences of an human being (Innenleben), where no one can access, and distinguish it from the sphere of social interaction (Aussenleben[41]). Carrying out this division would not be satisfactory, primarily because Giesker is not very consequent in what he writes, and moreover he always remains in the circle of secrecy of information. That what he calls "inner life" of man, for others means "external life". This is understandable but not always it happens like that. If entity A acquired (consciously or unconsciously) an

---

[37] J. Kohler, *Urheberrecht an Schriftwerken und Verlagsrecht* (Stuttgart, 1907). See also J. Kohler, *Kunstwerkrecht*. Gesetz vom 9. Januar 1907 (Stuttgart, 1908); Kohler, "Das Autorrecht," 129 ff.; J. Kohler, *Das Recht an Briefen* (Berlin, 1893); J. Kohler, "Das Recht an Briefen," *Archiv für bürgerlichen Recht VII* (1894): 94 ff.

[38] Detailed description about the birth of the doctrine, see. K. Ch. Führer, "Skandal, Moralität und die "Ruhe der Familie". Sensationspresse und Zensur im vormärzliehen Hamburg (1815-1846)," *Zeitschrift des Vereins für Hamburgische Geschichte 81* (1995): 75 ff. Cf. also M. Lijowska, "Koncepcja ogólnego prawa osobistości w niemieckim i polskim prawie cywilnym," *Kwartalnik Prawa Prywatnego*, no.4 (2001): 714 ff., 728 ff., as well as K.-L. Ruppel, *Persönlichkeitsrechte an Daten? Deliktsrechtlicher Datenschutz nach § 823 Abs. 1 BGB zwischen informationeller Selbstbestimmung, Rechtsgüterschutz und Eingriffstypisierung*, (Diss. Würzburg, 2001), 45 ff.

[39] Kohler, *Urheberrecht*, 441 ff. – The author of this work uses (perhaps for the first time in German literature) the term "private life"; but it is also noticeable that to justify his arguments he refers to rulings of the English courts, which were cited seventeen years erlier by Warren and Brandeis – eg *Millar vs Taylor* and *Prince Albert vs. Strange*; See also Kohler, *Kunstwerkrecht*, 137 ff., 157 ff. Strömholm (*Right of Privacy, op. cit.*, p. 30), referring to the earlier work of Kohler on copyright (Kohler, *Das Autorrecht*, 129-478) notes in his works a "general right of personality", an expression which are various rights with a narrower range, i.a. right to a "sphere of intimacy", but neither the terms "Intimität" or "Privatheit" directly in the text do not appear. Strömholm, "Right of Privacy," 30.

[40] H. Giesker, *Das Recht des Privaten an der eigenen Geheimsphäre. Ein Beitrag zu der Lehre von den Individualrechten*, (Diss. Zürich, 1904).

[41] Giesker, *Das Recht*, 4 ff. In earlier works German authors referred only to the realm of mental processes of the individual, which could be called the sphere of intimacy. In addition, it was restricted only to the privacy of information. Cf. even Kohler, *Recht an Briefen*, 16.

information from the field "inner life" of entity B, this information would become a part of "inner life" of unit A[42]. The sphere of social contacts, which can be covered by secrecy, was not even narrowed by Giesker. He includes in this sphere, apart from the wider area of interpersonal communication (secret of correspondence as well), also the issues of family life, and even professional activities. However, only in case of violation of domestic peace he goes beyond the "privacy of information", thus he recognizes that the infringement of privacy may go beyond "declassification" of messages from the "inner life" of the individual.

Thus the claim that German lawyers may feel disappointed that precedence was assigned to their colleagues from overseas, especially that the whole American concept of privacy came from a single article[43], is rather exaggerated. Even if we acknowledge the high level of the achievements of the German doctrine, we can not fail to notice that they were only theoretical ones. Their practical implementation could not begin until the end of the World War II.

France

Among the other doctrinal views we should stop for a moment on the French contribution to the legal protection of the private sphere. Not because of the importance of theoretical achievements, which were based in the large part on adopted German concepts of "right of personality" (*droits de la personnalité*)[44], but the role of judicial decisions, as well as due to the simplicity of the applied protective structure.

Until the second half of 19th century, the problem of the private sphere was not properly noticed, excluding *I. de S. et ux. vs W. de S.* dated 1384. It was the first documented sentence concerning violation of one of the elements of privacy – the inviolability of the apartment[45]. The court bazed fully on the provisions of articles 675[46] and 1382[47] of the Napoleonic Code. The jurisdiction developed on the basis of these regulation, which were

---

[42] Giesker, *Das Recht,* p. 6 ff.

[43] See Strömholm, "Right of Privacy," 28.

[44] See L. J. Constantinesco, *Die Persönlichkeitsrechte und ihr Schutz im französischen Recht,"*Archiv für die civilistische Praxis", no 3/4 (1960): 320 ff.

[45] W. J. Wagner, *The Development of the Theory of the Right of Privacy in France*, "Washington University Law Quarterly" 71 (1971): 46.

[46] "One of two neighbors cannot without the consent of the other form in the partition--wall any window or aperture, in any manner whatsoever, even a fanlight."

[47] "Every action of man whatsoever which occasions injury to another, binds him through whose fault it happened to reparation thereof."

interpreted very flexibly, enabled the effective protection of personal rights, including those belonging to private life. Generalizations formulated on the basis of the judicature allows a conclusion that protection virtually covered the entire range of goods linked with the concept of the right to privacy. These include eg. the right to personal inviolability, the right to the name, image and to the protection of honour, the right to freedom of choice of residence, freedom of marriage, the inviolability of the domestic sphere, freedom of opinion and the right to preserve the sphere of personal life intimacy in the strict sense. The last includes in particularly the right to demand that no one could disclose the facts about private and family life of the individual or the secrecy of correspondence.[48]

The expression "private life" has been used in France quite long ago, because already in 1819 (*Vie privée murée* – private life behind the walls) by Pierre Paul Royer-Collard[49] (during the discussion on the press law[50])[51]. However starting in 1909[52] many publications on this subject appeared in French science, but the judiciary in this country has been behaving in the same way. The courts in their judgments do not reflect on the theoretical constructions of private life – action was illegal, there is a damage, so it has to be redressed.

Why Warren and Brandeis?

One can wonder about the reasons for such a comprehensive developing concept of S. D. Warren and L. D. Brandeis[53]. Certainly there are many, but two of them deserve special attention.

---

[48] W. J. Wagner, *The Right to One's Own Likeness in French Law*, "Indiana Law Journal" 46, no 1 (1972): 1 ff; Strömholm, "Right of Privacy," 27 ff.

[49] About this relatively unknown French philosoph see: M. A. Phillippe*, Royer-Collard. Sa vie publique, sa vie privée, sa famille, Michel Lévy Fréres,* (Paris, 1857)*,* https://books.google.pl/books?id=WUUBAAAAQAAJ&pg=PA3#v=onepage&q&f=false.

[50] *Archives parlementaires*, 2e série, tome XXIV, 71-73, 27 avril 1819.

[51] W.J. Wagner, "The Development," 47. See also J.-L. Halpérin, "Defamation, Public Life and Private Life in France from 1789 to 1944," *Droit et cultures. Revue international interdisciplinare 65* (2013): 145 ff.

[52] Ie. starting with publication by J. Perreau'a, "Des droits de la personnalité," *Revue de Droit Civil trimestrielle* (1909): 501 ff.

[53] The authorship of "right of privacy", understood as the "right to be left alone (to himself)" ("right to be let alone") can be debatable. Warren and Brandeis refer to the statement of T. Cooley, *A Treatise on the Law of Torts*, 2nd ed., 1888, p. 29 (second edition – as it is clear from the preface – did not differ substantively from the first one dated 1879): „The right to one's person may be said to be a right to complete immunity: to be let alone". It should

The first of them is undoubtedly the result of historical and political experiences of the last century. Two world wars and totalitarian systems which negated human rights and minimized the role of a human being to the object, not a subject of law, have a result that the concept postulated by the end of the 19th century has achieved so profound social resonance. It became a refuge, a search for the possibility of re-valuing a human being.

The second condition is associated with the unprecedented technical progress in the 20th century and exactly with its negative consequences. Many inventions, which exploded in this century in medicine, transportation, communication, created unquestionably better than ever living conditions. At the same time, these inventions have brought together more signs of dehumanization, uprooting human from the circle of privacy, exhibiting him unprecedently for a public view, destroying a number of values rooted in humanity. Using natural desire for individuals to being among humans (*homo est animal sociale*), the innate need for isolation, separation, peace, concentration and relaxation alone was forgotten. Today's man, tired of "being with others" has less chance to meet these needs in a free manner without disturbing him by anyone. Therefore, the idea of protecting the private sphere is so attractive, as a possible concept of providing human comfort to meet these needs.

References

Adams E. L., *The Right to Privacy and Its Relation to the Law of Libel*,"American Law Review", no. 39 (1905).

Akdeniz Y., *First Report on the UK Encryption Policy. Reply to the DTI Consultation Paper on Licensing of Trusted Third Parties for the Provision of Encryption Services*, Cyber-Rights & Cyber-Liberties (UK), http://www.leeds.ac.uk/law/pgs/yaman/yaman.htm.

Allen A., *Coercing Privacy*,"William & Mary Law Review", no 40 (1999).

Balkin J. M., Levinson S., *How to Win Cites and Influence People*, "Chicago-Kent Law Review" 71, no 3 (1996).

Barron J. H., *Warren and Brandeis, the Right to Privacy*, „4 Harv. L. Rev." 193 (1890): Demystifying a Landmark Citation,"Suffolk University Law Review", no 13 (1979).

Bloustein E. J., *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, in: *Privacy. International Library of Essays in Law & Legal Theory*, vol. II: *Privacy and the Law*, ed. Wacks R. (Aldershot, Hong-Kong, Singapore, Sydney, 1993).

---

be noted that inside the doctrine there are statement that the views presented by Warren and Brandeis are not allowed the claim that they identify the "right to privacy" with the "right to be left in peace," but rather treated the former concept as a special case of the latter (eg. Gavison, "Privacy and the Limits of Law," *The Yale Law Journal 89*, no. 3 (1980): 145.

Bloustein E. J., *Privacy as an Aspect of Human Dignity. an Answer to Dean Prosser*,"New York University Law Review" 39 (1964).

Carnegie L. P., *Privacy and the Press: The Impact of Incorporating the European Convention on Human Rights in the United Kingdom*, "Duke Journal of Comparative & International Law", no 9 (1998).

Carucci M., *Visualising ancient privacy in the Roman house*, in: *Revealing Privacy*. *Debating the Understandings of Privacy*, ed. M. Carucci (Frankfurt am Main: Peter Lang, 2012).

Constantinesco L. J., *Die Persönlichkeitsrechte und ihr Schutz im französischen Recht*, "Archiv für die civilistische Praxis", no 3/4 (1960).

Davies S., Madsen W., Kassner M., Breckheimer R., Van Dongen S., *Privacy & Human Rights 2000. An International Survey of Privacy Laws and Developments*, http://www.privacyinternational.org/overview.html.

Denniston L., *From George Carlin to Matt Drudge: The Constitutional Implications of Bringing the Paparazzi to America*, "The American University Law Review, no 47, (1998).

Dobosz I., *Przesłanki cywilnoprawnej ochrony przed podsłuchem*,"Zeszyty Naukowe Uniwersytetu Jagiellońskiego" MLXII, no 58 (1992).

Dobosz I., *Tajemnica korespondencji jako dobro osobiste oraz jej ochrona w prawie cywilnym,* (Kraków, 1989).

Feldman D., *Civil Liberties & Human Rights in England & Wales,* (Oxford, 1993).

Foster S., *Human Rights & Civil Liberties*, (Harlow: Longman, 2011).

Führer K. Ch., *Skandal, Moralität und die "Ruhe der Familie". Sensationspresse und Zensur im vormärzliehen Hamburg (1815-1846)*, "Zeitschrift des Vereins für Hamburgische Geschichte", no 81 (1995).

Gavison R., *Privacy and the Limits of Law*, "The Yale Law Journal" 89, no 3 (1980).

Gerety R., *Redefining Privacy*,"Harvard Civil Rights – Civil Liberties Law Review", no 12 (1977).

Gierke O., *Deutsches Privatrecht, Erster Band: Allgemeiner Teil und Personenrecht,* (Leipzig, 1895).

Giesker H., *Das Recht des Privaten an der eigenen Geheimsphäre. Ein Beitrag zu der Lehre von den Individualrechten,* (Diss. Zürich, 1904).

Godkin E. L., *The Rights of the Citizen. IV – To His Own Reputation*, "Scribner's Magazine", no 8 (1890).

Haines C. G., *The Revival of Natural Law Concepts. A Study of the Establishment and of the Interpretation of Limits on Legislatures with special reference to the Development of certain phases of American Constitutional Law* (Cambridge, 1930).

Halpérin J.-L., *Defamation, Public Life and Private Life in France from 1789 to 1944*, "Droit et cultures. Revue international interdisciplinare", no 65 (2013).

Kalven H., Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?,* „Law and Contemporary Problems" no 31, 1966.

Kanski L., *Prawo do prywatności, nienaruszalności mieszkania i tajemnicy korespondencji*, in: *Prawa człowieka. Model prawny*, ed. R. Wieruszewski (Wroclaw: Ossolineum 1991).

Kay H. H., *In Defense of Footnotes*, "Arizona Law Review", no 3 (1990).

Kohler J., *Das Autorrecht, eine zivilistische Abhandlung, zugleich ein Beitrag zur Lehre vom Eigenthum, vom Miteigenthum, vom Rechtsgeschäft und vom Individualrecht*, "Jahrbücher für die Dogmatik des deutschen und heutigen römischen Privatrechts" XVIII [Iehrings Jahrbücher], nF. VI (1880).

Kohler J., *Das Recht an Briefen*, "Archiv für bürgerlichen Recht", no VII (1894).
Kohler J., *Das Recht an Briefen* (Berlin, 1893).
Kohler J., *Kunstwerkrecht. Gesetz vom 9. Januar 1907* (Stuttgart, 1908).
Kohler J., *Urheberrecht an Schriftwerken und Verlagsrecht* (Stuttgart, 1907).
Landes W. M., Posner R. A., *Heavily Cited Articles in Law*, "Chicago-Kent Law Review" 71, no 3 (1996).
Leebron D. W., *The Right to Privacy's Place in the Intellectual History of Tort Law*, "Case Western Reserve Law Review, no 41 (1991).
Lijowska M., *Koncepcja ogólnego prawa osobistości w niemieckim i polskim prawie cywilnym*, "Kwartalnik Prawa Prywatnego", no4 (2001).
Michael J., *Privacy and Human Rights. An International and Comparative Study, with Special Reference to Developments in Information Technology* (Dartmouth, 1994).
Mielnik Z., *Prawo do prywatności (zagadnienia wybrane),*"Ruch Prawniczy, Ekonomiczny i Socjologiczny", no 2 (1996).
Motyka K., *Prawo do prywatności i dylematy współczesnej ochrony praw człowieka* (Lublin: Verba, 2006).
Nimmer M., *The Right of Publicity*,"Law and Contemporary Problems", no 19 (1954).
Parsons S., *Privacy, photography, and the art defense*, in: *Revealing Privacy*. *Debating the Understandings of Privacy*, ed. M. Carucci (Frankfurt am Main: Peter Lang, 2012).
Perreau J., *Des droits de la personnalité*, "Revue Trimestrielle de Droit Civil", 1909.
Phillippe M. A., *Royer-Collard. Sa vie publique, sa vie privée, sa famille* (Paris: Michel Lévy Fréres, 1857).
Phillipson G., Fenwick H., *Breach of Confidence as a Remedy in the Human Act Era*,"The Modern Law Review" 63, no 5 (2000).
Prosser W. L., *Privacy*, "California Law Review" 48, no 3 (1960).
Reilly R. A., *Conceptual Foundations of Privacy: Looking Backward Before Stepping Forward*,"Richmond Journal of Law & Technology" 6, no 2 (1999).
Rigaux F., *La liberté de la vie privée*,"Revue internationale de droit comparé " 43, no 3 (1991).
Rosen J., *The deciders: Facebook, Google, and the Future of Privacy and Free Speech*, in: *Constitution 3.0. Freedom and Technological Change*, eds. J. Rosen, B. Wittes, (Washington, DC: Brookings Institution Press, 2011).
Rothenberg L. E., *Re-thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space*,"American Law Review", no 49 (2000).
Ruppel K.-L., *Persönlichkeitsrechte an Daten? Deliktsrechtlicher Datenschutz nach § 823 Abs. 1 BGB zwischen informationeller Selbstbestimmung, Rechtsgüterschutz und Eingriffstypisierung* (Diss. Würzburg, 2001).
Sarat A., *Whither Privacy? An Introduction*, in: *A World without Privacy. What Law Can and Should Do*, ed. A. Sarat (New York: Cambridge University Press, 2015).
Shapiro F. R., *The Most Cited Law Articles*,"California Law Review", no 73 (1985).
Shapiro F. R., *The Most-Cited Law Review Articles Revisited*, "Chicago-Kent Law Review" 71, no 3 (1996).
Stephen, J. F., *Liberty, Equality, Fraternity* (Cambridge 1960) (1st ed. – 1873).
Strömholm S., *Le droit moral de l'auteur, en droit allemand, français et scandinave, avec un aperçu de l'évolution internationale, étude de droit comparé*, vol. I: *L'évolution historique et le mouvement international* (Stockholm Norstedt & Söners förlag, 1966).

Strömholm S., *Right of Privacy and Rights of the Personality. A Comparative Survey,*Working Paper prepared for the Nordic Conference on Privacy organized by the International Commission of Jurists, Stockholm, May 1967,"Acta Instituti Upsaliensis Jurisprudentiae Comparativae" VIII (Stockholm, 1967).

Szyszkowski W., *Prywatność w Stanach Zjednoczonych, jej ochrona i realizacja*, In: *Prawa i wolności obywatelskie w państwach kapitalistycznych*, ed. W. M. Góralski (Warszawa, 1979).

Urofsky M., *Louis D. Brandeis. A Life* (New York: Pantheon Books, 2009).

Vincent D., *I Hope I Don't Intrude. Privacy and Its Dilemmas in Nineteenth-Century Britain* (Oxford: Oxford University Press, 2015).

Wacks R., *The Protection of Privacy* (London, 1980).

Wagner DeCew J., *Privacy, definition of*, in" *Encyclopedia of Privacy* ed. W. G. Staples, Volumes 1 & 2 (Westport, Connecticut-London: Greenwood Press, 2007).

Wagner W. J., *The Development of the Theory of the Right of Privacy in France*, *Washington „*University Law Quarterly" 45 (1971).

Wagner W. J., *The Right to One's Own Likeness in French Law*,"Indiana Law Journal" 46 (1972).

Warren S, Brandeis L., *The Right to Privacy*,"Harvard Law Review" 4, no 5 (1890).

Webb D., *Privacy and Solitude in the Middle Ages* (London-New York: Hambledon Continuum, 2007).

Weeks J. K, "Comparative Law of Privacy," *Cleveland Marshall Law Review 12* (1963).

Winfield P., "The Comparative Law of the Right to Privacy," *Law Quarterly Review 47* (1931).

Youngs R., *English, French & German Comparative Law* (London-New York: Routledge, 2014).

Zimmerman D. L., "Requiem for a Heavyweight: A Farewell to Warren and Brandeis Privacy Tort," *Cornell Law Review*, no. 68 (1983).