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The right to privacy in the light of case law – selected issues

Abstract

The article presents rudimentary information on how the right to privacy is understood in the doctrine and case law of the European Court of Human Rights, the Polish Constitutional Tribunal, the Supreme Court and common courts. In the first place, the author will discuss protection of the right to privacy in light of the acts of international law and the Constitution of the Republic of Poland. Then, selected judgments linked with the right to privacy in certain aspects will be discussed. The article ends with conclusions on how the right to privacy is understood as well as the observable contemporary threats to its protection.

Key words: human rights, constitutional law, contemporary threats, right to privacy

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Introductory issues

First of all, it should be indicated that the source of rights and freedom in light of the Polish Constitution¹ is inherent and inalienable human dignity. This dignity implies the duty of public authorities to protect rights and freedoms. Moreover, it is rightly assumed that dignity constitutes an axiological foundation for the system of law and is recognised as the supreme value underlying the assessment of individual human rights and freedoms². Moreover, the thesis that both privacy and the right of an individual to exercise it do not have any rigid framework and their boundaries are constantly evolving towards the broadest and most effective possible protection of a concrete sphere of individual's life³.

Protection of the right to privacy in light of the acts of international law

The right to privacy constitutes a value in light of many acts of international law making up the so-called universal system of protection of human rights, which has an impact on the contents of regional and national systems. An example in the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948⁴. Its Art. 12 provides that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference

¹ Journal of Laws No. 78 item 483 as amended.

² Koper (2010).

³ Ibidem.

⁴ URL = <http://libr.sejm.gov.pl/tek01/txt/onz/1948.html>.

or attacks. Moreover, the right to privacy is indicated in the International Covenant on Civil and Political Rights adopted in 1996⁵. Art. 17 (1) and (2) provide that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. It also provides for the right to legal protection against such interferences and attacks.

A key act of international law concerning protection of human rights and political freedoms, ratified by the Republic of Poland, is the European Convention on Human Rights and Fundamental Freedoms adopted in 1950⁶. Art. 8 of the ECHR provides that

everyone has the right to respect for his private and family life, his home and his correspondence.

It is obvious that unlike dignity freedom may be restricted by public authorities. It is also in Art. 8(2) that the ECHR lays down the standards for restricting rights and freedoms. It points out the principle that there

shall be no interference by a public authority with the exercise of this right

and introduces exceptions in cases that are

in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection

⁵ Journal of Laws 1977 no. 38 item 167 as amended.

⁶ Journal of Laws of 1993 No. 61 item 284 as amended.

of health or morals, or for the protection of the rights and freedoms of others.

Moreover, as regards acts of European law mention should be made of Art. 7 of the Charter of Fundamental Rights of the European Union⁷, which also provides for the right to respect for his or her private and family life, home and communications. It is worth underlining the high rank of the Charter of Fundamental Rights, which in accordance with Art. 6(1) of the Treaty on European Union⁸, the same legal value as the Treaties which underlie the functioning of the community of European states – the European Union.

It may be assumed that legal protection of the right to privacy rests mostly on the judiciary body, namely the European Court of Human Rights in Strasbourg, set up under the Convention. It is the case law of the ECHR that defines the limits of interference with the rights and freedoms of an individual, as the basic responsibility of this body of international justice is to consider complaints of citizens signalling irregularities in the functioning of public authorities.

It should be noted that in light of the ECHR case law the scope of protection of freedoms and rights is very broad. The only exception with respect to protection of freedoms and rights has been laid down in Art. 15 of the ECHR. It provides that the contracting parties may take measures derogating from their obligations exclusively in time of war or other public emergency threatening the life of the nation. This solution has been allowed under the condition that such measures are not inconsistent with other obligations under international law.

⁷ Official Journal of the European Union C. of 2007 No. 303, p. 1 as amended.

⁸ Journal of Laws of 2004 No. 90 item 864/30 as amended.

Protection of the right to privacy in light of the Polish Constitution

Also the Constitution of the Republic of Poland confirms the right to privacy. It is one of the rights enumerated in the catalogue of personal freedoms and rights. It is noted that Art. 47 is a novelty in the Polish systemic regulation. The previously binding fundamental laws did not include such regulation. The right to privacy is recognised as a so-called third generation right. Third generation rights became constitutionally regulated only after the end of World War II⁹.

The Polish Constitution does not make a reservation that the right to privacy is to be exercised only by Polish citizens. Therefore, it may be assumed that the rights and freedoms laid down in the Polish Constitution refer to individuals under its jurisdiction regardless of their citizenship.

What is important is that the right to privacy concerns exclusively natural persons. It is assumed that only natural persons are able to have both private and family life, honour and good name. However, the objective scope of the right to privacy refers to many spheres of life – personal and social, and also concerns inviolability of the home, secrecy of correspondence and protection of personal information¹⁰.

It has been in literature that when exercising their right to privacy individuals should be able to freely establish contacts with other people. The possibility of establishing such contacts should be realised according to one's free choice. Additionally, this possibility includes also liberty to make a decision concerning disclosure of one's personal information¹¹.

⁹ Opaliński (2016).

¹⁰ Banaszak (2012): 294.

¹¹ Szczechowicz (2009): 19.

Analysis of case law

Further on, analysed will be selected judgments connected with the right to privacy, a particular focus being placed on how the scope of the right to privacy is interpreted, information autonomy, threats arising from the violation of criminal law and the activity of individuals on the internet. Moreover, discussed will be the conflicts of values occurring in the context of the right to privacy and restriction of the right to privacy due to performing a public function.

The European Court of Human Rights recognised that the right to respect for private life is very broadly understood in light of Art. 8 of the ECHR. This notion is not fully defined. It is assumed that when interpreting this notion the so-called concept of personal autonomy should be employed and several aspects of physical and social identity of a person, e.g. ethnic identity, should be taken into account. However, it seems more important that in Art. 8 of the ECHR it has been recognised that the parties to this act of international law are obliged to refrain from interference with the right to privacy, but also it is their duty to adopt a number of legal measures and effective mechanisms to protect respect for private life of individuals against violations of this right by others. That is why in this context it should be recognised that the obligations of the state as regards respect the right to privacy are not exclusively of a negative character, but there may also be obligations of a positive character¹².

¹² Judgment of the ECHR of 15 March 2012, 4149/04, AKSU v TURKEY.

The ECHR also pointed out that the subjective scope of Art. 8 of the Convention embraces all individuals subject to the jurisdiction of a given state and not only its citizens¹³.

It is rightly pointed out that the sphere of the right to privacy is characterised by a large degree of generality. It is not a phrase that does not require profound interpretation on the example of a concrete factual situation. It should be considered correct that the very assessment as to whether the sphere of the right to privacy has been encroached requires interpretation, which takes into account a number of circumstances characterising the situation of an individual. It is indicated that the sphere of private life covers *inter alia* events and circumstances associated with personal and family life. However, the very fact of disclosing information on private life of a given person does not mean that there has been interference with private life and violation of privacy. The assessment will depend on both the evaluation of the entire context and circumstances of the case as well as the fact what kind of information has been disclosed and to whom.¹⁴

The right to privacy but also protection of the secrecy of communication is associated with an eternal and continuously topical conflict of values between the rights and freedoms of an individual and providing the enforcement bodies with effective means to combat crime. Crime is a negative phenomenon of a kind and affects both observance of the rights and freedoms of individuals in the state as well as citizens' security. It should be noted that protection of the rights and freedoms of individuals in the state against infringements by other individuals, which occurs as a result

¹³ Sudere (2013): 12.

¹⁴ Judgment of the Supreme Court of 28 April 2004, III CK 442/02.

of many offences, as well as ensuring security for citizens is the duty of the state. The above is explicitly laid down in Art. 5 of the Polish Constitution.

Pursuant to case law it should be assumed that Art. 47 of the Polish Constitution and Art. 8 of the ECHR is of a guarantee character and has an impact on the interpretation of the norms of criminal procedural law when resolving conflicts of values typical of the criminal procedure. In the case of evidence which is confidential and entering the sphere of the rights and freedoms of an individual with the use of such measures as e.g. surveillance and procedural tapping, regulated in Art. 237 et seq. of the Code of Criminal Procedure¹⁵, the court is of the opinion that the norms regulating the use of evidence collected through tapping should be interpreted in accordance with the constitutional guarantees referred to *inter alia* in Art. 47 of the Polish Constitution and Art. 8 of the ECHR¹⁶.

What is important is that it is indicated that the same constitutional value, namely the sphere of privacy, is protected by Art. 47 and Art. 51 of the Constitution. One of the key elements of this private sphere of human life is informational autonomy, which consists in making an autonomous decision as regards disclosure of one's personal information to third parties. Moreover, information autonomy includes exercising control over this information which are in the possession of that individual and other people¹⁷. It is also pointed out that Art. 51 of the Constitution lays down the mechanism

¹⁵ Journal of Laws of 2021 item 534.

¹⁶ Judgment of the Court of Appeal in Katowice of 24 November 2017, II AKa 363/17.

¹⁷ Judgment of the Constitutional Tribunal of 19 February 2002, U 3/01.

for protecting the right to privacy by providing that the obligation to disclose personal data may be imposed exclusively by a statute and introducing a condition of necessity in a democratic state ruled by law" of the information on citizens which is acquired, collected or made accessible by public authorities¹⁸.

It should be noted that in case law the right to privacy is considered as the right of each person to dispose of their personal information. Additionally, a person is exclusively authorised to make a decision what happens to their data. First of all, a person makes a decision whether they remain anonymous or allows for their data to be made available to third parties. Additionally, the telecommunications secrecy is considered in the framework of the right to privacy. This secrecy covers a number of aspects of communication by an individual and it embraces the secrecy of conversations, identity of the communicating parties, and – what is important – also billings, that is data processing and disclosure¹⁹. In the above context, it is also pointed out that legal protection is extended not only as regards confidentiality of conversations, but also identity of the communicating parties, their phone numbers, e-mail addresses, as well as information as to the very fact of making such conversation, its duration, call attempts and contents, that is the data included in billings²⁰.

Additionally, it is pointed out that the right to privacy implies the need to protect other areas of an individual's life.

¹⁸ Judgment of the Constitutional Tribunal of 12 November 2002, SK 40/01.

¹⁹ Judgment of the Court of Appeal in Białystok of 20 September 2018, I ACa 379/18.

²⁰ Judgment of the Court of Appeal in Warsaw of 26 April 2013, I ACa 1002/12.

It is indicated that a manifestation of the right to privacy is the freedom to communicate, which covers not only the secrecy of correspondence, but also all types of interpersonal relations²¹.

What is important, legal practitioners notice also technological development and trends to use means of distance communication ever more frequently. And it is in this context that it is specified what information about a person affect the understanding of their right to privacy. It is noticeable that the boundaries of the right to privacy become extended in the times when electronic means of communication become ever more popular. In judicature, it is pointed out that anonymity on the Internet is frequently only apparent. It is reflected that nowadays the Internet provides a media forum to present contents that violate human dignity, honour and good name. That is why it is concluded that in the situations when the IP number indirectly allows to identify a concrete natural person, it should be recognized as a personal data protected under the Personal Data Protection Act of 1997. It is noted that adopting a different interpretation would be contrary to the axiology of the Constitution, in particular the norms concerning human dignity and the right to privacy²².

It is emphasized in case law that disclosure of personal data must be connected with guarantees of respect for an individual's private life. It is correctly noted that personal data should be disclosed only when it is permissible under a specific law and if the data are available in accordance with the provisions regulating access to information in the public

²¹ Judgment of the Constitutional Tribunal of 20 June 2005, K 4/04.

²² Judgment of the Supreme Administrative Court of 19 May 2011, I OSK 1079/10.

sector. However, it is pointed out that in certain cases it is permissible to recognise that personal data, which in certain circumstances could have been considered sensitive, e.g. with respect to political affiliation, political opinions and religious beliefs, cannot be subject to protection envisaged for sensitive data. This concerns the data of people performing public function, which are stored by appropriate public institutions. Disclosing such personal data is aimed at improving transparency of public life, which may contribute to protection of the rights of third parties²³.

Moreover, holding or running for public offices results in the fact that there are certain limitations as regards the right to privacy of such persons, called justified interest. It is pointed out that a person running for a public office must consider potential interest of public opinion. This interest may be manifested e.g. by the desire to get extensive information on the private life and the past of such person. The fact of collaborating with the state security authorities is quoted as an example²⁴.

It is rightly pointed out that the right to privacy is also manifested in the freedom from interference with private, family and home life, regardless of whether it concerns indifferent or embarrassing facts. Privacy of an individual is violated upon a given action of the party interfering with the sphere of the private life of the aggrieved person. Such action may consist in making a recording or taking a photograph, preserving the voice and image, respectively, of a person.

²³ Judgment of the Constitutional Tribunal of 20 March 2006, K 17/05.

²⁴ Judgment of the Constitutional Tribunal of 21 October 1998, K 24/98.

It is pointed out that the evaluation of the gravity of a violation of the right to privacy is influenced not only by the very content of the materials produced as a result of an unauthorised interference with the privacy of the aggrieved person, but also how the violation has been effected. The frequency of such violations is not immaterial, either²⁵.

Moreover, it has been noticed that the substance of the right to privacy is interpreted when analysing the attributes of offences in a way that actually penalises negative behaviours of the culprit, which infringe on the sphere of privacy of an individual. An example of such offence is e.g. stalking, which is referred to in Art. 190a of the Penal Code²⁶. It is pointed out in case law that this aspect shows a connection between the attribute of perseverance of stalking and the significance of the violation of the right to privacy. In case law, it is pointed out that it is difficult to picture a situation whereby stalking, which involves interfering with privacy, would not constitute a significant violation of the right to privacy²⁷.

Conclusion

The following conclusions may be drawn from the analysis of case law. The right to privacy is understood very broadly. Moreover, specified is a number of obligations of the state as regards protection of the right to private life in a negative and positive aspect. Additionally, it is noted that the right to privacy is defined in very general terms and depending

²⁵ Judgment of the Supreme Court of 12 January 2016, IV KK 196/15.

²⁶ Journal of Laws of 2020 item 1444 as amended.

²⁷ Judgment of the Supreme Court of 12 January 2016, IV KK 196/15.

on the facts it requires to be interpreted according to the circumstances. What is important is that a broad spectrum of the subjective scope of the right to privacy is indicated.

It is correctly noted that the right to privacy is connected with the eternal and still topical conflict of values in the case of using secret forms of surveillance of the citizens by public authorities for the needs of pending criminal proceedings or in order to acquire information through operational control. Of key importance is the fact that the sphere of privacy, protected under Art. 47 of the Constitution, is linked with information autonomy of an individual and the mechanism of protection of the right to privacy, provided for in Art. 51 of the Constitution.

Also the right to dispose of one's own data and the relationship between the right to privacy and the extent of the confidentiality of communication have been provided for. It is of no lesser importance that a manifestation of the right to privacy is also protection of correspondence and all interpersonal relations as well as the fact that technological development exerts an ever greater impact on the understanding of the extent of the right to privacy. This is seen in the problem of anonymity of an individual on the Internet and protection of their personal data.

Despite extensive protection of the right to privacy and personal data there are exceptional cases when this protection is limited with a view of a specific data subject. Such subject may be a person performing or running for a public office, to whom the so-called "justified interest" in their private life is applicable.

In the context of criminal law it is noted that the right to privacy may be violated by the perpetrator of a specific offence. Infringement of the right to privacy may be a recoding

or a photograph of the aggrieved person. Moreover, it is noted that the right to privacy may be closely related to certain deeds penalised under the Penal Code. For example, as it follows from case law, the right to privacy is analysed in the case of stalking, referred to in Art. 190a of the Penal Code.

Summing up it should be pointed out that nowadays the right to privacy constitutes a legally protected value in light of many acts of international law making up the so-called universal, regional and national system of protection of human rights. Having in mind continuous technological development and the fact that many spheres of private life are transferred to the Internet, the right to privacy is ever more frequently interpreted in reference to information autonomy of individuals and in the context of providing the broadest possible protection during all interpersonal communications, including protection of confidentiality of correspondence, and online. Moreover, noticeable is a number of threats to the right to privacy in the aspect of infringing the norms of criminal procedural law or utilising secret means of surveillance by public authorities in order to combat crime.

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