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**LEGAL DISCOURSE SURROUNDING  
THE INSTITUTION OF THE RIGHT TO PRIVACY –  
A COMPARATIVE APPROACH**

**1. General remarks**

The analysis of the issue regarding the right to privacy is of particular importance in the information society era captured by modern and global technologies. The right to privacy and its protection is a contemporary and challenging issue. At the same time, it is an interesting and intriguing problem. It has a contemporary character, since the development of technology, particularly in relation to the collection, processing and dissemination of information means that the interference in people's privacy is becoming more and more effective. The importance of this problem stems from the fact that increasingly the privacy of especially the so-called public people is violated by the media. The media's aggressive and illegal encroachment in the sphere of private life of persons engaged in the widely understood public activities is largely becoming a common phenomenon not only in the so-called tabloid press, but also in the so-called serious press. This applies in particular to politicians, government members and other persons performing public functions, as well as to people commonly known in the spheres of social, cultural, and artistic life, especially actors, singers, television presenters and sportsmen.

Privacy is a concept grown on the basis of the Anglo-Saxon law, established on the American continent. Representatives of the doctrine generally agree that the beginning of its broader discussion and analysis was in 1890, when Samuel D. Warren and Louis D. Brandeis published their article on privacy in "*Harvard Law Review*" entitled "*The right to privacy*".<sup>1</sup>

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<sup>1</sup> S. D. Warren, L. D. Brandeis, *The Right to Privacy*, *Harvard Law Review* 1890, vol. 4, nr 5, p. 193 and following.

The representatives of the doctrine recognized the article as the foundation of the privacy institution in the U.S. and worldwide.<sup>2</sup> The article written by Warren and Brandeis was a response to the excessive and embarrassing attention given by the Boston press “Saturday Evening Gazette” to Warren’s private life, especially to the social gatherings organized by his wife, the daughter of Senator Thomas Francis Bayard. The authors highlighted the fact that technological advances resulted in the increasing danger of invasion into privacy of the individual; they emphasized the need to indicate legal measures in the common law which could be used to protect the value called privacy. The authors examined a number of judgments relating to defamation, intellectual property, implied contract, copyright and found that it was necessary to recognize the existence of the right to privacy. They defined privacy as a *general right of the individual to be let alone*, which protects the inviolable human personality. They emphasized that this right should be treated as an independent and individual tort.

There is an increasing concern of the doctrine representatives for the issue of privacy. According to the U.S. statistics, in 1930 there were about 3–4 articles published annually in law journals which dealt with the issue of privacy. But in the mid 60s a number of published articles on privacy rose to over 30 per year.<sup>3</sup> In Poland, it was only lately that a range of publications concerning the issue of privacy in its different aspects appeared. In recent years there has been a marked increase in the number of lawsuits regarding the violation of privacy by press brought by people exercising a public function. This is reflected by the Supreme Court jurisprudence, as well as by the appellate courts in Poland.

## 2. Concepts regarding the notion of the right to privacy

The concept of privacy has not been included in the rigid definition by the representatives of legal literature or judicature. Undoubtedly, the doctrine and jurisprudence remain certain that such a task is neither possible nor necessary. This view should be absolutely accepted. The right to privacy

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<sup>2</sup> See for example I. P. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, Cath. U. L. Rev. 1990, vol. 39, pp. 703–704; H. Kalven, Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?*, Law & Contemp. Probs. 1966, vol. 31, pp. 326–327.

<sup>3</sup> P. A. Cain, *Symposium article: The right to privacy under the Montana Constitution: sex and intimacy*, Montana Law Review 2003, vol. 64, p. 100.

is a broad concept, formulated by the most general expressions of the general clause character, including several components. Any attempt to create a definition of the right to privacy seems to be ineffective because of the complexity of the concepts and diversity of its components. The legislation of Poland and other states does not define the notion of privacy. This is not an exceptional phenomenon for the establishment of the legal concept meanings is done by a particular legal doctrine and jurisdiction rather than by legislature. Characteristic for the right to privacy is that nobody has a clear idea of what it is.<sup>4</sup> Some representatives of the doctrine argue that privacy is accompanied by a conceptual void<sup>5</sup> and that privacy is a kind of the conceptual chimera.<sup>6</sup> It is a term used in many senses and defined in various ways. It is not possible to identify a proper definition of the concept of privacy due to the fact that literature points to different components of the concept of “privacy”.<sup>7</sup>

### **2.1. Concepts of the right to privacy in the light of the foreign doctrine representatives**

The analysis of the concepts formulated in the foreign doctrine results in the recognition of privacy, particularly as:

- 1) one’s right to be let alone;
- 2) a limited access of others to an individual, eg. protection from the unwanted interference by the third parties;
- 3) control over private information;
- 4) respect for a private secret, eg. not disclosing secret information about themselves to the third parties;
- 5) respect for intimacy.<sup>8</sup>

Warren and Brandeis emphasize that the basis of privacy and its most important element is integrity, invulnerability of the inviolate personality. Protection of thoughts, feelings and emotions, expressed by individual creative and artistic work and consisting in preventing it from a public disclosure, is performed under people’s general right to be let alone. The authors argue that the law which protects literary works and other creations of

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<sup>4</sup> J. J. Thomson, *The Right to Privacy*, Philosophy and Public Affairs 1975, vol. 4, pp. 295–314.

<sup>5</sup> See J. Rubinfeld, *The Right of Privacy*, Harvard Law Review 1989, vol. 102, p. 739.

<sup>6</sup> Compare R. Wacks, *The Protection of Privacy*, London 1980, pp. 10–11.

<sup>7</sup> J. Sieńczyło-Chłabicz, *Naruszenie prywatności osób publicznych przez prasę*, Zakamycze 2006, pp. 74–75.

<sup>8</sup> D. J. Solove, *Conceptualizing privacy*, California Law Review 2002, vol. 90, p. 1094.

the individual and other personal products not against theft or appropriation but against their publication is not the principle of protection of private property. This is a principle of protection of the personal inviolability and individuality.<sup>9</sup> They notice that the value of privacy is not reflected in the right to profits from the publication, but for peace of mind or the relief felt by the individual because of the possibility of preventing one's product from any unwanted publication.<sup>10</sup> Warren and Brandeis observed that interference with privacy usually caused pain and mental suffering of individuals, which was usually much more severe than the injury of the body.<sup>11</sup> The authors emphasized that this type of injury was not subjected to protection under the law of tort. The provisions regulating the institution of defamation protected against attacks on the good name of the individual, while the privacy involved injury caused in the individual emotional sphere which resulted in mental pain and suffering. In those days it was very difficult to explain harm on the basis of the existing law which focused on different property damage cases.

In the case *Olmstead v. United States*<sup>12</sup> Brandeis uttered his famous opinion regarding privacy protection. The Supreme Court held that the use of eavesdropping did not result in violation in the light of the Fourth Amendment to the U.S. Constitution because it was not based on a physical invasion into the dwelling (house) without the owner's agreement. While presenting his opposing point of view, Brandeis highlighted that it resulted in the violation of *the right to be let alone*. The Constitution creators recognized that right as the most extensive and valuable for a civilized society. The position presented by the author had a huge impact on the further development of the right to privacy. U.S. courts often referred to the construction of privacy as the right to be left alone in the case of *Katz v. United States*<sup>13</sup> as well as in many other resolved cases.<sup>14</sup> In the jurisprudence judges expressed their individual opinions by offering a variety of concepts to determine the right to privacy. For example, in the case of *Time, Inc. V. Hill*<sup>15</sup> Fortas, a judge, emphasized that it is the right of individuals to live

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<sup>9</sup> S. D. Warren, L. D. Brandeis, *op. cit.*, p. 205.

<sup>10</sup> *Ibidem*, p. 200.

<sup>11</sup> *Ibidem*, p. 196.

<sup>12</sup> 277 U. S. 438 (1928).

<sup>13</sup> 389 U. S. 347 (1967).

<sup>14</sup> See also *Eisenstadt v. Baird*, 405 U. S. 438, 454 n. 10 (1972); *Stanley v. Georgia*, 394 U. S. 557, 564 (1969).

<sup>15</sup> 385 U. S. 374, 413 (1967).

according to their own choice, without interference and attacks from other subjects, except when there are circumstances justified by a clear social need (public interest) and a reasonable law application. A similar position was taken by the judge Douglas in the *Doe v. Bolton*<sup>16</sup> case, stating that this right includes the privilege of individuals to make decisions about their personal matters, shaping their lives according to their own choice, without any interference of the third parties.<sup>17</sup>

The concept of control of personal information is one of the well-known theories concerning privacy. Several representatives of the doctrine recognize privacy as the authority to control the disclosure of people's matters of a personal character. A. F. Westin is a creator of the classic definition of privacy. In his opinion, privacy is a demand, request of individuals, groups or institutions to determine to what extent information about them is transmitted to the third parties.<sup>18</sup> Consequently, the individual is deprived of privacy when he loses control over the ability to decide when, how and to what extent the information about him is available to others. Westin defines it as a claim (the right to claim or demand a certain behavior from others), or as a psychological state of the individual. According to the author, privacy can also be protected in public places. However, in principle, in such places as shops, hotels, restaurants and other public places one cannot expect solitude, total freedom and a complete lack of observation by the third parties. Nevertheless, this does not mean that individuals can expect a secret surveillance monitoring their behavior at times and in places which usually guarantee a certain standard of privacy, even if they are public places.<sup>19</sup>

Many representatives of the doctrine define privacy in a similar manner. A. Miller argues that "*privacy is defined in terms of control over who has information about or access to the individual*".<sup>20</sup> C. Fried believes that privacy can be interpreted very generally as control over information about the individual. In his view, privacy is not merely the absence of information about us, but it is primarily the individual right to control such information.<sup>21</sup> A similar position was also taken by the U.S. Supreme Court arguing

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<sup>16</sup> 410 U. S. 179, 213 (1973).

<sup>17</sup> D. J. Solove, *op. cit.*, pp. 1100–1101.

<sup>18</sup> A. F. Westin, *Privacy and Freedom*, New York: Atheneum 1967, p. 7.

<sup>19</sup> *Ibidem*, p. 112.

<sup>20</sup> A. R. Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers*, New York 1972, p. 25.

<sup>21</sup> Compare C. Fried, *Privacy*, Yale Law Journal 1968, vol. 77, pp. 482–483.

that privacy is the people's performance of control over the information that relates to them.<sup>22</sup>

T. Gerety believes that privacy should be recognized as the right to autonomy and control over intimacy, identity and individuality of the individual.<sup>23</sup> According to him, *privacy is defined as autonomy and the right to control over the intimate sphere*. T. Gerety recognizes privacy as a sphere of human life that should not be violated<sup>24</sup> or as a form of control.<sup>25</sup> Privacy is closely related to the amount of information about the individual that is known by others. Gerety indicates that information is part of privacy only if it has a private character, that is it relates to intimacy, identity and autonomy of the individual.<sup>26</sup> Violation of privacy occurs when the individuals are deprived of their spiritual and physical intimacy in a manner inconsistent with the generally accepted standards of autonomy.<sup>27</sup> According to the author, specific information falls within the sphere of privacy only if it reveals a personal and private character and, therefore, relates to intimacy, identity and autonomy of the individual.<sup>28</sup>

In the French doctrine, there are three areas of privacy sharing one common center in which the individual is placed. The first area is limited to the most intimate aspects of the individual which are thoughts, beliefs and values. The second area, which can be represented graphically as a wide ring around the individual, includes external characteristics of the individual, as well as intimate aspects of social life which also relate to other people, mainly family and friends. These two areas of privacy should be widely protected for they are very vulnerable when it comes to the interference from outside. The third area (the second ring), whose boundaries are circled less clearly, covers the outside part of private life. It concerns the relationship of the individual with others and, therefore, it also refers to the presence of privacy in public places. This area is a reflection of those aspects of the individuals' private lives which are realized publically and which also benefit from legal protection.

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<sup>22</sup> United States Dep't of Justice v. Reporters Comm. For Freedom of the Press, 489 U.S. 749, 763 (1989).

<sup>23</sup> Compare T. Gerety, *Redefining privacy*, Harvard Civil Rights – Civil Liberties Law Review 1977, vol. 12, pp. 236–237.

<sup>24</sup> See R. Gavison, *Privacy and the Limits of Law*, The Yale Law Journal 1980, vol. 89, nr 3, p. 426.

<sup>25</sup> See R. B. Parker, *A Definition of Privacy*, Rutgers Law Review 1974, vol. 27, pp. 280–281.

<sup>26</sup> See T. Gerety, *op. cit.*, p. 281 and following.

<sup>27</sup> *Ibidem*, p. 236.

<sup>28</sup> *Ibidem*, p. 281 and following.

The French doctrine distinguishes between two dimensions of privacy, namely internal and external dimensions. The first one is formed by the individual and his closest surroundings. This dimension of privacy requires seclusion and isolation of the individual and should be protected from the third parties. However, a complete separation of the privacy external dimension is not fully possible. The second one concerns relationships of the individual with the society, but only those relationships that are necessary to conduct a private life. The external dimension of privacy assumes that the third parties can see and learn only what is visible to others. However, they should not disclose this to the public, unless the individual involved agrees to do so or at least tolerates it.<sup>29</sup>

In the German law, privacy is implemented under the general right of personality and is known as *Schutz vor Indiskretion* which literally means “protection against indiscretion”. Privacy includes protection against the dissemination of truthful information about individuals.<sup>30</sup> The essence of protection against indiscretion, which constitutes the equivalent of Polish privacy, includes protection from entering the sphere of one’s intimate and private life unlawfully by the third parties. It concerns publishing all bits of information that the individual wishes to preserve for oneself and not to disclose them to the surroundings.<sup>31</sup> The Bundesgerichtshof decision dated May 25, 1954, which first acknowledged the existence of a general right of personality, concerns protection against indiscretion.<sup>32</sup> Privacy protection is a direct expression of the self-determination and information autonomy right of individuals and provides a transformation of the constitutional law of self-determination under the art. 2 par 1 GG onto the civil law ground.<sup>33</sup> Privacy protection was formulated by Bundesverfassungsgericht in the decision regarding the case of Lebach.<sup>34</sup> Bundesverfassungsgericht highlighted that the right to one’s free development and human dignity, which are the basic rights guaranteed by the German Constitution (Grundgesetz), are the

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<sup>29</sup> É. Picard, *The Right to Privacy in French Law*, (in:) *Protecting Privacy*, ed. B. S. Markesinis, Oxford University Press 1999, pp. 60–61.

<sup>30</sup> E. Wanckel, *Der Schutz vor Indiskretion*, (in:) *Handbuch des Persönlichkeitsrecht*, ed. H.-P. Götting, Ch. Schertz, W. Seitz, München 2008, p. 332 and following; K. Rehbock, *Die Ausprägungen des allgemeinen Persönlichkeitsrecht*, (in:) R. Damm, K. Rehbock, *Widerruf, Unterlassung und Schadensersatz in Presse und Rundfunk*, München 2001, p. 33.

<sup>31</sup> G. Neben, *Triviale Personenberichterstattung als Rechtsproblem*, Berlin 2001, p. 193.

<sup>32</sup> Decision BGH dated May 25, 1954, I ZR 211/53, NJW 1954, z. 38, p. 1404.

<sup>33</sup> E. Wanckel, *Der Schutz vor Indiskretion*, (in:) *Handbuch der Persönlichkeitsrecht*, red. Götting H.-P., Schertz Ch., Seitz W., München 2004, p. 333.

<sup>34</sup> decision BVerfG dated June 5, 1973, 1 BvR 536/72, NJW 1973, z. 28, p. 1226.

basis for a general constitutional right of personality, which commonly guarantees an autonomous sphere of private life where each individual can shape and protect his individuality. In this area the individual can “belong to himself,” with the exclusion of interference of other persons.<sup>35</sup> The area of privacy is the ability to dispose of one’s image and decide on the disclosure of the circumstances of one’s private life. This is an area where basically everyone should be able to decide independently whether and to what extent he would like to share information about his life as a whole or only about its specific events.<sup>36</sup>

The sphere of privacy includes the circumstances that are classified as private on the basis of their character, and their disclosure is perceived as painful, embarrassing or awkward.<sup>37</sup> Typical examples placed in this area are diary notes<sup>38</sup>, confidential conversations between spouses, matters relating to sexuality<sup>39</sup>, sexual orientation or health status.<sup>40</sup> These events belong to the private sphere because of their content, regardless of the place in which they occurred. Therefore, protection may be granted even if those circumstances appeared in a public place, unless it happened in the way that drew attention of many people. Privacy is also to cover events of religious worship, showing sensitivity towards each other also in public unless it is done in the way that draws attention and aims at provocation. According to the Bundesverfassungsgericht jurisdiction, sexuality belongs to the protected sphere of privacy. Hence, in the civil law aspect reports of events that belong to this sphere are unacceptable. Similarly, speculation and gossip, particularly assumptions about people’s weddings, separations and divorces<sup>41</sup> and relationship between two people (including sexual relationship), do not justify any violation of the right to privacy.<sup>42</sup> Among the protected sphere of privacy the doctrine dominant view includes information about people’s property, earnings, income, debts or other financial problems.

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<sup>35</sup> Decision of BVerfG dated June 5, 1973, 1 BvR 536/72, NJW 1973, z. 28, p. 1226.

<sup>36</sup> E. Wanckel, *op. cit.*, p. 332.

<sup>37</sup> Decision of BVerfG 15 XII1999, 1 BvR 653/96, NJW 2000, z. 14, p. 1021.

<sup>38</sup> Decision of BVerfG 14 IX 1989, 2 BvR 1062/87, NJW 1990, z. 9, p. 563.

<sup>39</sup> Decision of BVerfG 21 XII 1977, 1 BvL 1/75, 1 BvR 147/75, NJW 1978, z. 16/17, p. 807; decision of BVerfG 11 X 1978, 1 BvR 16/72, NJW 1979, z. 12, p. 595.

<sup>40</sup> Decision BVerfG 8 III 1972, 2 BvR 28/71, NJW 1972, z. 25, p. 1123.

<sup>41</sup> Decision BGH 15 XI 1994, VI ZR 56/94, NJW 1995, z. 13, p. 861.

<sup>42</sup> E. Wanckel, *op. cit.*, p. 336.

## **2.2. The right to privacy on the ground of Polish doctrine representatives**

It is not an easy task to construct the notion of the right to privacy on the basis of the Polish doctrine representatives and their views. There is a convergence of views that privacy is a very wide and complex issue. Despite the difficulties involved in constructing its definition on the basis of the civil law, it is possible to point out a number of repetitive elements.

The majority of the Polish doctrine representatives emphasize and develop the American concept of privacy formulated by S. D. Warren and L. D. Brandeis. Some authors only add new elements to it. A. Kopff was the first to make a detailed comment on the right to privacy in Poland. While designing his concept of privacy, the author based it primarily on the American considerations of privacy as a right to be let alone and the German theory of spheres. By the right to protect a private life Kopff understands “rights of the individual to live his own life, arranged in accordance with one’s will where any outside interference is limited to the minimum”.<sup>43</sup> Kopff argues that the sphere of private life is a personal value protected by the personal right, which most accurately can be called the right to seclusion. According to Kopff, “personal value in the form of private life is everything that encourages a person’s physical and psychological development as well as helps to preserve one’s achieved social position as a result of one’s reasonable isolation from the general public”.<sup>44</sup> The isolation of the individual in order to develop his own personality and preserve his social position is a protected value here. According to Koppf, the sphere of private life “includes one’s family and neighborhood life, as well as one’s social life and relations to colleagues at work”.<sup>45</sup> It is very difficult to define the boundaries of privacy and separate it from the sphere of universal accessibility.

In the Polish doctrine, it is possible to differentiate the following ways to approach the right to privacy:

- 1) privacy, understood as the right to be left in peace and the right to freedom from the interference of others;
- 2) privacy as the right to self-determination and personal development;
- 3) privacy as one’s autonomy, especially one’s information autonomy;
- 4) privacy of the human being recognized as a catalog of particular circumstances embraced by the privacy sphere.

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<sup>43</sup> A. Kopff, *Koncepcja praw do intymności i do prywatności życia osobistego. Zagadnienia konstrukcyjne*, Studia Cywilistyczne, Vol. XX, Warszawa – Kraków 1972, p. 30.

<sup>44</sup> A. Kopff, *Ochrona sfery życia prywatnego jednostki w świetle doktryny i orzecznictwa*, ZNUJ Prace Prawnicze 1982, z. 100, pp. 33, 37.

<sup>45</sup> A. Kopff, *Koncepcja praw*, op. cit., p. 34; See M. Reh binder, *Die öffentliche Aufgabe und die rechtliche Verantwortlichkeit der Presse*, Berlin 1962, p. 86.

While discussing this subject, it is necessary to highlight the role of the Constitutional Court jurisprudence which enriches it semantically. Determining the content of the right to privacy, the Court decided that privacy concerns primarily one's personal, family, social, and sociable life and sometimes it is defined as the right to be left in peace. It can also be understood as the right to keep secret information about one's private life. Privacy refers to protecting information regarding a given person and guarantees a certain standard of independence under which the individual can decide on the scope and range of sharing and communicating information about one's private life.<sup>46</sup>

### 3. The right to protect one's sphere of intimacy

Most countries recognize that the sphere of intimacy should be subjected to absolute protection. It does not matter what kind of status the individual has and whether he is a private or public person. The sphere of intimacy of public people is a principle. Nevertheless, it does not offer absolute protection. It is necessary to opt for relative protection of the intimacy sphere.

In light of the American law there are certain circumstances when the publication of intimate details of one's personal life regarding his orientation or sexual preferences is allowed only if:

- 1) it is justified by a legitimate public interest;
- 2) a certain person is unable to exercise a high public office because of the intimate nature of the circumstances;
- 3) the disclosed information was already widely known, and so it has passed from the sphere of intimacy to the public sphere.

In view of the American jurisprudence there is a rule that intimate details of the celebrities' sexual life should not be exposed by the press.<sup>47</sup> It was already more than 100 years ago that Warren and Brandeis pointed out that issues concerning sex and sexuality constitute the sphere of the individual which should be given particular protection.<sup>48</sup> Perhaps it is because

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<sup>46</sup> See the Constitutional Tribunal decision dated 24 VI 1997, K 21/96, OTK 1997, nr 2, position. 23; the Constitutional Tribunal decision dated 19 V 1998, U 6/97, OTK 1998, nr 4, position 46.

<sup>47</sup> See *Diaz v. Oakland Tribune*, 188 Cal. Rptr. 762, 773 (Ct. App 1983).

<sup>48</sup> S. D. Warren, L. D. Brandeis, *op. cit.*, p. 216 – the authors emphasized that the individual relationships with others are one of the issues that should not be published and publicly disclosed; see. also T. Gerety, *op. cit.*, p. 233, 280 – the author stated that the sphere of intimacy is most associated with the human body and human sexuality.

sex has a vital role in the development of individuals' personality, family and society<sup>49</sup>, people are not willing to disclose their sexuality. People protect facts about their emotional relationships, both heterosexual and homosexual.<sup>50</sup> The American courts emphasize the importance and relevance of maintaining such information as secretive.<sup>51</sup> Sexual orientation should be distinguished from the individual behavior. Regardless of the cause of the individual sexual preferences, sexuality lies in one's psyche and will never be disclosed in a manner visible to others.<sup>52</sup> As a rule, American courts decide that the disclosure of the individual sexual preferences is not justified by the public interest protected by the First Amendment to the U.S. Constitution.<sup>53</sup>

There are certain exceptions from the rule according to which public figures should be treated as individuals in relation to the facts regarding their intimate life and sexuality. They particularly concern the disclosure of matters related to one's sexuality in the context of the individual public controversy, or a dispute in which the person is involved. This rule applies in particular to high-ranking officials, whose sexual preference has a major influence on their performance of public functions, public activities, as well as their behavior in the public sphere. For example, a government official who has publicly commented the problems of homosexual people in a disrespectful and contemptuous manner or has introduced a discriminatory program may be the subject of such a disclosure. The apparent hypocrisy in that official's behavior reduces his credibility and calls his honesty into question. Consequently, information on the sexual orientation and preferences of such a person is related to the assessment of his ability to perform public functions.<sup>54</sup> In the case of *Gertz V. Robert Welch, Inc.* The Supreme Court held that a legitimate public interest approves of the press information disclosure concerning not only the assessment of the high state offi-

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<sup>49</sup> See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63, *reh'g denied*, 414 U.S. 881 (1973).

<sup>50</sup> See *Young v. Jackson*, 572 So. 2d 378 (Miss. 1990) – the case involved the information disclosure about the surgery which a certain person underwent; *Y.G. v. Jewish Hosp. Of St. Louis*, 795 S.W.2d 488 (Mo. App. 1990) – the case concerned filming the couple involved in in-vitro fertilization.

<sup>51</sup> See *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984) – in that case the questions asked by the police regarding a sexual life of the individual were acknowledged to be unconstitutional.

<sup>52</sup> For more information see G. M. Herek, *Myths about sexual orientation: a lawyer's guide to social science research*, Law & Sexuality 1991, nr 1, p. 133, 165.

<sup>53</sup> *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 449 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985).

<sup>54</sup> See *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 344–45 (1974).

cials and their functions. It also covers all matters relevant to the ability to be appointed to high positions in the state. The requirement of being “newsworthy” was revealed by the information regarding the homosexual preferences of the high-ranking official in the Department of Defense, who was personally responsible for the policy which excluded homosexuals from the military force.<sup>55</sup>

Among the representatives of the Polish doctrine there is no uniform position on the admissibility and disclosure of the data from the sphere of privacy revealed by the press. Generally, the doctrine can be divided into two positions.

In the light of the first position the sphere of intimate life is always subjected to absolute legal protection. Absolute protection applies to private figures as well as to figures acting in the public sphere. Such an approach has been advocated by A. Kopff, A. Szpunar<sup>56</sup>, S. Rudnicki<sup>57</sup>, and P. Sut.<sup>58</sup> The only circumstance in which the press can act legally are the circumstances in which the person concerned has given his agreement. This was confirmed by the Appeal Court in Rzeszów in the decision dated 17 III 1994<sup>59</sup> stating that the sphere of intimate life is subjected to absolute legal protection, but it was also pointed out that the victim’s consent was one of the circumstances which excluded the unlawfulness of the deed and, consequently, the responsibility of the perpetrator.

Supporters of the second position claim that privacy protection should be highly intensive in the sphere of individual intimacy<sup>60</sup>, however, it is not absolute protection. The rule is to protect the sphere of intimacy for both private and public individuals, but there are several exceptions. The advocates of this position are in favor of the relative protection of the intimacy sphere with regard to public figures. M. Safjan also supports such relative protection. He claims that in certain exceptional circumstances it is necessary to allow the possibility of the press interference in this sphere with

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<sup>55</sup> See B. Gellman, *Cheney rejects idea that gays are security risk*, Washington Post dated 1 VIII 1991, p. A33.

<sup>56</sup> A. Szpunar, *Ochrona dóbr osobistych*, Warszawa 1979, p. 153.

<sup>57</sup> S. Rudnicki, *Ochrona dóbr osobistych na podstawie art. 23 i 24 k.c. w orzecznictwie Sądu Najwyższego w latach 1985–1991*, Przegląd Sądowy 1992, nr 1, pp. 59–60.

<sup>58</sup> P. Sut, *Ochrona sfery intymności w prawie polskim – uwagi de lege lata i de lege ferenda*, RPEiS 1994, nr 4, p. 104.

<sup>59</sup> I ACr 19/94, decision from the database of the Monitoring and Press Freedom Centre.

<sup>60</sup> Compare I. Dobosz, *Tajemnica korespondencji jako dobro osobiste oraz jej ochrona w prawie cywilnym*, Kraków 1989, p. 61.

respect to public figures. Unfortunately, the author does not give details of such circumstances.<sup>61</sup>

Exceptionally, the press interference into the intimacy sphere of public figures may be regarded as permissible, but it should consider only persons holding the highest offices in the State (President, Prime Minister, and leaders of political parties). The boundaries of this intervention should be considered taking into account the following criteria:

1. criterion of the highest public office performance and execution the mandate of public trust in the state;
2. the public interest criterion justifying the publication of information from the intimacy sphere;
  - 2.1. the criterion of one's suitability and ability to perform public functions;
  - 2.2. the criterion of one's direct relation to the performed activities.

#### **4. Infringement of public figures' privacy by media**

Generally, there is a consensus between the Polish and foreign jurisdiction doctrines that public figures are given a greater privacy protection in comparison with private figures. In the world literature and jurisdiction one can distinguish three positions regarding the scope of the protection of the public persons' right to privacy:

- 1) a position according to which both public and private persons should be treated equally in this respect (For example, France advocates this approach);
- 2) a position in the light of which the scope of the right to privacy of public figures is greater in comparison with private figures, but the press intrusion is permissible only under certain specified conditions (eg. Poland and Germany);
- 3) a position according to which it is considered that basically all the facts from public figures' private lives meet the requirement of being "*news-worthy*"; hence they may be disclosed by the press (eg. the USA and the UK).

The most common means of privacy violation are:

- information disclosure regarding one's private and family life, such as information about one's marriages, engagement, partner separations,

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<sup>61</sup> See M. Safjan, *Refleksje wokół konstytucyjnych uwarunkowań rozwoju ochrony dóbr osobistych*, KPP 2002, z. 1, p. 239.

arguments and returns, pregnancy, relationships prevailing in the family, maintaining intimate relationships, sexual preference, leisure activities, and places of one's residence;

- publishing information about one's state of health, illness, addictions, surgeries, especially plastic ones;
- information disclosure concerning the amount and sources of one's earned income, assets, financial status and debts;
- publication of one's personal data and image in connection with the ongoing criminal proceedings.

In recent years, courts of different instances, including the Supreme Court, have given several decisions declaring violation of public persons' privacy resulting from the information disclosure which concerned their private life published in the press and illustrated by their images. The vast majority of cases have been resolved in favor of the claimants and resulted in the award of high gratifications, treated both as a means of compensation and prevention of such violations.<sup>62</sup> These are the examples:

- by the sentence of the Supreme Court of 11 April 2006 (I CSK 159/05) a sportsman and his girlfriend (Agnieszka G. and Mateusz K.) received a total of 75 thousand zł compensation for the dissemination of rumors about their planned wedding and the expected child by the tabloid "Życie na gorąco";

- as a result of the Appeal Court sentence of 29 September 2006 in Warsaw (I ACa 385/06 – the case concerning Edyta G. and her husband) the famous singer and her husband were granted 75 thousand zł for spreading rumors about her personal life and family;

- the Appeal Court gave a decision of 25 January 2007 (VI ACa 809/06) to award an actress (Anna M.) 75 thousand zł for publishing her topless image taken while she was in Egypt; the image was published without her consent;

- the Warsaw Regional Court gave a decision of 6 March 2010 in the case regarding violation of privacy, image and honour (reputation) claimed by a popular journalist and his wife; they were granted a record amount of compensation of a total of 250 thousand zł.

The Supreme Court and lower courts in Poland provide legal protection to popular people in case of publication of the information regarding their private life, illustrated with images of these people published by the press

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<sup>62</sup> T. Grzeszak, *Celebryci kontra tabloidy, czyli o nowych funkcjach zadośćuczynienia*, (in:) *Prawo własności intelektualnej wczoraj, dziś i jutro*, (ed.) J. Barty, A. Matlaka, Prace Instytutu Prawa Własności Intelektualnej 2007, z. 100, p. 128.

and made in public places in the absence of their consent. The examples of such cases include:

- The Warsaw Appeal Court judgment of 20 May 2009, VI A, Ca 1601/08 (the case claimed by a well-known television presenter Magda M. against Alex Springer Poland Ltd. The case concerned publications illustrating the well-known presenter's private and professional life and giving inaccurate information about her life without her consent – for example, rumors regarding her alleged pregnancy; the District Court upheld the claim and found violation of privacy, image and honor of the plaintiff, the Appeal Court agreed completely with the decision of the District Court;
- The Warsaw Appeal Court decision of 13 October 2009, VI ACa 337/09 (the case claimed by Jolanta M., famous for a number of entertainment programs, against Alex Springer Poland ltd.) for the publication of the photographs taken at the plaintiff's ladies night, with her name and offensive comments suggesting improper behavior of the plaintiff and presenting her in an unfavorable light. The District Court upheld the claim for violation of privacy, image and honor; The Appeal Court approved of the decision that the plaintiff's personal interests were violated;
- The Warsaw Appeal Court judgment of 16 October 2009, VI ACa 317/09 (the case claimed by Paweł W., an actor, against Alex Springer Poland Ltd.) for the publication containing information about his personal life, such as relationship with his partner, presenting him in an unfavorable light, using the terms “reveller” and “gadabout”; The District Court upheld the claim for violation of privacy and reputation; the Warsaw Appeal Court shared the decision of the District Court;
- The Warsaw Appeal Court decision of 17 December 2008, VI A Ca 997/08 (the claimed by the actress Joanna B., known for television series, against Alex Springer Poland ltd.) for the publications of the actress and her partner which were published in the period of three years in the tabloid “Fakt”; the published articles related to the actress's personal (intimate) relationships with other actors, including divagations regarding the plaintiff's feelings, her low level of morality, her state of health, life plans, and her body; the District Court upheld the claim of the plaintiff for the privacy violation;

Cases of severe press interference in the lives of well-known people' private lives constitute most of the cases dealt with by the Polish courts. Press publications illustrate an intimidating level of the press entrance into the sphere of private and even intimate life of widely known people through the publication of false, derogatory information concerning their private lives. One of the examples is the case of gossip distribution by “*Życie na gorąco*”

about a famous sportsman Mateusz K. and his partner; the gossips related to their planned marriage and pregnancy of the famous sportsman's girlfriend (the cover of the weekly magazine entitled "Życie na gorąco" published their photo under the titles "soon to be married?" and "Mateusz K. will be a father?"). The magazine published false information about the plaintiff's pregnancy, and the cover of the magazine was advertised 14 times weekly through TV channels such as TVP, TVN and Polsat.<sup>63</sup>

## **5. Closing remarks**

The right to privacy is a dynamic and changing notion, impossible to be grasped in the definition within the normative framework. Certainly, it is neither possible nor necessary to construct such a definition, since the right to privacy is a broad concept of a complex character, usually formulated with the use of general and vague expressions of the general clause character and covering a wide variety of elements. Any attempt to create a definition of the right to privacy will be doomed to failure because there is no way to predict the enumerative catalog of the situations that make up the sphere of private life. Leaving privacy to be an open notion allows for its adapting to the constantly changing and developing needs. It also allows for the protection of the rights which are not expressed and provided directly in the text of legislation. Their protection results from the need of the essential human values protection. This allows for a flexible development of the privacy law range and adapting it to the changes in the system of social relations.

It is necessary to opt for a position of the intimacy sphere relative protection. The doctrine and jurisdiction provide many examples in which disclosing information relating to that sphere is justified because of the overriding public interest. At the same time, right is the view that because of the highly delicate character of the information relating to the intimacy sphere it should be subjected to special protection, which is characterized by greater intensity than the protection of the information belonging to the private sphere of the individual life.

It is generally accepted that the so-called public figures enjoy the right to privacy to a lesser extent than private persons. Even in the U.S. there is a dominant position that well-known people have a right to protect their

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<sup>63</sup> The Supreme Court Decision of April 11, 2006, I CSK 159/05, unpublished judgement.

privacy, but on a smaller scale. The more famous a person is, the smaller the area of privacy is given to him. First of all, courts considering cases concerning the press interference in the privacy of public persons examine the purpose of publication. In addition, they look for the link between the published embarrassing information from one's private life and the significance of the published material. The fact that a person is a public figure does not mean a legal possibility of the interference into his private life. It does not also give a simple and clear answer to what extent a plaintiff is entitled to the protection of private life spheres. Hence, politicians' private matters may be disclosed as being associated with a public assessment of their activities by the society, but at the same time, the question arises, what circumstances of their private life should be published and to what extent? In order to answer this question, American courts apply a test to check whether a certain publication addresses a legitimate public interest. While determining the existence or absence of a public interest, American courts consider the following aspects:

- customs in a given community;
- rules of conduct in a given community.<sup>64</sup>

The basic criterion which guides the Polish and foreign courts while resolving the conflict between freedom of the press and the so-called privacy of public figures is a public interest justifying the publication of the press material of a specific content. In assessing whether the publication of information is in the public interest, a number of circumstances is taken into account, including the content of the press material, information qualification whether it tackles public or private spheres of life, the status of the person, the degree of making the private information public by a person engaged in public activities, the need to verify the attitude of the individual and, finally, the ways of getting information and the results of its publication. The crucial factor is attributed to the content of the press material. Distinction is made between information whose subject contributes to the public debate, and information that provides only information about famous figures' private lives without any meaning and impact on the public debate.

A legitimate public interest speaks in favor of the publication of information relating to private spheres of the lives of politicians, government members and other persons holding a public office to a greater extent than in relation to the so-called celebrities – actors, singers, models and TV presenters. Depending on the impact that the different categories of people

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<sup>64</sup> See *Virgil v. Time, Inc.*, 527 F.2d 1122 (1975).

have on the whole of social life, different is the scope of protection of their privacy: the more “public” a person is, the greater impact on social life he has, the more reduced the scope of protection of privacy he enjoys.

#### S U M M A R Y

The analysis of the problematic of the right to privacy is particularly significant in the era of a society controlled by modern global technologies. The development of technology with relation to gathering, processing and spreading information in particular, means that encroachment into human privacy is increasingly effective. The aggressive and unlawful invasion of the media into private sphere of life of the so-called public figures becomes increasingly frequent not only in the yellow journalism but also in serious press. This problem concerns politicians, members of government and other people holding public offices as well as those commonly known from social, cultural life, artists, especially actors and singers, TV presenters and sportsmen. The right to privacy is a variable, dynamic notion impossible to define precisely. There is a uniformity of opinions, both in the theory of Polish and foreign judicial decisions, that public figures benefit from a limited privacy protection compared to private individuals. The basic criterion by which Polish and foreign courts are guided while settling the conflict between the freedom of the press and protection of public figures privacy is public interest justifying publication of a press article of a definite content. The public interest justification supports, to a larger degree, the publication of information from the private sphere of politicians, members of government and other people holding public offices rather than in relation to the so-called celebrities – actors, singers, TV presenters and sportsmen.