

WHAT IS PRIVACY? THE HISTORY AND DEFINITION OF PRIVACY

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Abstract

The protection of privacy cannot be separated from technological development: nowadays, due to the development of science and technology, the possibility to intrude into someone's privacy has increased. The law has to react to these changes, ensuring the legal protection of privacy. However, in order to ensure this protection, first of all it is necessary to determine the subject of this protection: privacy.

Privacy itself is as old as mankind, however, it was not always a legally protected right. What is considered to be private and what is legally protected as private can differ. One of the most important issues concerning legal privacy protection is that - according to several privacy scholars and the European Court of Human Rights - it is not possible to give an exhaustive legal definition of the subject of privacy protection. The importance of privacy can be related to the fact that privacy has a very close connection with human dignity, freedom and independence of the individual, and it is more and more challenged in the age of the rapid technological development of the information society. The aim of the study is to present the historical development of privacy in order to better understand the concept of privacy and to find a solution to how privacy can be effectively protected in the information society. First, I am going to discuss the short history of privacy, then its already existing definitions, then the way international - especially European - legal regulations regulate the protection of private life, and finally I am going to outline the current challenges posed by the information society. As a result of my study, I will make some recommendations about how the existing regulations should protect privacy nowadays.

Keywords: the right to privacy, history of privacy, information society

1. Introduction and aims

Privacy has known a long development throughout history; it is as old as mankind. However, what is considered to be private differs according to the era, the society and the individual. Also what is considered to be private and what is legally protected as private can differ [1]. A very important step was the creation of the modern privacy notion, which first appeared in the famous study (The Right to Privacy) written by Louis Brandeis and Samuel Warren in 1890. In this paper the authors defined the right to privacy as "the right to be let alone". Since then, the right to privacy has become widely known and acknowledged, started to evolve and became a fundamental human right in occidental societies. In spite of the fact that legal systems ensure the protection of privacy, there is no consensus on the question: what exactly has to be protected, what is privacy? Several great jurists made attempts to create a definition of privacy, but due to its inconceivability, the on-going changing of the elements belonging to the private sphere of the individual, most of these definitions only highlight an aspect of it.

My aim is to point out that in spite of the long history of privacy and legal scholars dealing with it for centuries, privacy is still a key issue and raises a lot of questions to be answered. I will also give a solution to how the lack of definition of privacy can be handled, and what international legal regulations should be taken into consideration in order to effectively protect privacy in the era of the rapid technological development of the 21st century.

2. Early history of privacy and the right to privacy

In spite of the fact that privacy only became a generally accepted right in the 19th-20th century, privacy had existed long before this era. Privacy has a very long history, it has its origins already in the ancient societies. Even the Bible has some passages where the violation of privacy appeared in its early form, where shame and anger followed the intrusion into someone's private sphere. It is enough to think of Adam and Eve, who started to cover their bodies with leaves in order to preserve their privacy [2]. From a legal point of view, the Code of Hammurabi contained a paragraph against the intrusion into someone's home, or the Roman law also regulated the same question [3]. The idea of privacy traditionally comes from the difference between "private" and "public" [4], which distinction comes from the natural need – as old as mankind – of the individual to make a distinction between himself/herself and the outer world [5]. Of course the limits between private and public differ according to the given era and society [6], which will cause the on-going change throughout history of what people consider private [7].

For lack of space, I will just highlight some of the most important eras of history. In the ancient societies people had a relatively limited possibility for self-determination as their (private) lives were strongly influenced by the state. *Plato* illustrates this phenomenon in his dialogue the *Laws*, where the complete life of the individual was determined by the state and its aims, there was no place for individual freedom and autonomy. Thus the book describes a very extreme state (which in totality was never realised), some elements of it came true in ancient societies, and the life of the individual was strongly influenced by the public interests. In the Medieval Age there was no privacy as a societal value in today's sense, the individual existed as a member of a community, so his/her private life was affected by the constant "monitoring" conducted by other members. The appearance of "real" privacy relates to the transformation of these small communities: the appearance of cities. During the 19th century the new changes in the economy and in the society led to the transformation of the way people lived and these new changes had consequences for privacy too, as physical and mental privacy were separated and started to evolve in two different ways. Due to urbanization, the population of cities started to grow and it led to the physical loss of privacy as people in cities had to live in crowded places. On the other hand, citizens could experience a new "type" of privacy, as they ceased to live under the always watching eyes of their village neighbours and the constant moral control set up by them [8]. Another very important change was the appearance and growth of (tabloid) newspapers, which were a fertile area for gossip and photojournalism [9]. It was *Samuel D. Warren* and *Louis D. Brandeis* who first recognized the threats to privacy caused by the technological and societal developments in their famous article *The Right to Privacy* in 1890.

2.1 Warren and Brandeis: *The right to privacy*

Warren's and Brandeis' *The Right to Privacy* (published in the Harvard Law Review in 1890) became a famous article among legal scholars; "unquestioned 'classics'" [10], the "most influential law review article of all" [11]. In their study the authors argued that as political, social and economic changes occur in the society, the law has to evolve and create new rights in order to "meet the demand of society" and ensure the full protection of the person and the property [12].

They recognized two phenomena that posed a threat to privacy: technological development (namely instantaneous photographs) and gossip, which became a trade in newspapers [13]. Considering these changes, they were the first to demand the recognition of the right to privacy (which they defined as "the right to be let alone") as a separate and general right, as a right which ensured protection against not the violation of property rights, but the mere emotional

suffering [14]. Warren and Brandeis defined an already existing common law right as a stepping stone to the right to be let alone, such as the right to determine to what extents the thoughts, the sentiments and emotions of the individual shall be communicated to others. The principle of this right was the “inviolate personality” [15]. The right to be let alone basically ensured protection against the unwanted disclosure of private facts, thoughts, emotions, etc. [16]

The Right to Privacy influenced the law especially in the US, where this article is regarded as the origin of the four privacy torts that emerged from the US case law [17]. This huge success can be also due to the societal and technological changes that made the public opinion in favour of accepting the idea of privacy [18]. The article also influenced jurisprudence as numerous attempts to define privacy followed [19]. Europe started to examine the right to privacy after the US, and created a different kind of protection [20].

2.2 How to define privacy?

In spite of the several attempts that have been made to define privacy; no universal definition of privacy could be created. Despite the fact that the claim for privacy is universal, its concrete form differs according to the prevailing societal characteristics, the economic and cultural environment [21]. It means that privacy must be reinterpreted in the light of the current era and be examined in the current context.

There are several factors that affect what people consider private. There are huge differences between particular societies and cultures, or scientific development can also lead to a different, urging need for ensuring the protection of privacy [22]. It depends on the concrete situation, on the context: sharing the same information in different situations might be considered private differently [23]. American law professor *Alan Westin* established three levels that affect privacy norms: the political, the socio-cultural and the personal level [24]. The individual also plays a central role: privacy can be understood as a quasi “aura” around the individual, which constitutes the limit between him/her and the outside world [25]. The limits of this aura change from context to context and from individual to individual, so from all this individualized and changing context an average standard, must be found and this standard can be legally protected. Besides this always changing context, numerous attempts to define privacy have been made during the last 120 years. However, there is a problem with all these definitions, which *Daniel Solove* explained in one of his articles: their scope is either too narrow or too broad. He emphasizes that it does not mean that these concepts lack of merit, the problem is that these authors use a traditional method of conceptualizing privacy, and as a result their definitions only highlight either some aspects of privacy, or they are too broad and do not give an exact view on the elements of privacy [26]. He created six categories for these definitions according to which privacy is (1) the right to be let alone, (2) limited access to the self, (3) secrecy, (4) control of personal information, (5) personhood and (6) intimacy [27]. I will present a few definitions from each category, in order to point out how many types of privacy definition exist and how many ways it can be interpreted. As already presented, *Warren and Brandeis* defined privacy as “the right to be let alone” [28]. According to Israeli law professor *Ruth Gavison* “our interest in privacy [...] is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention.” [29] American jurist and economist *Richard Posner* avoids giving a definition but states “that one aspect of privacy is the withholding or concealment of information.” [30] From among the authors who consider privacy as a control over personal information, *Alan Westin* and American professor *Charles Fried* must be mentioned. Westin defined privacy as “the claim of an individual to determine what information about himself or herself should be known to others” [31] while Fried stated that „privacy [...] is the control we have over information about ourselves.” [32] American *Edward Bloustein*

argued that intrusion into privacy has a close connection with personhood, individuality and human dignity [33]. American professor *Tom Gerety* understands privacy as “the control over or the autonomy of the intimacies of personal identity” [34]. I hope to succeed in pointing out in how many different ways privacy can be interpreted and how many aspects of privacy exist. As all these definitions state something very important about what we should consider private, it is an extremely hard task to attempt to create a uniform definition of privacy.

In my opinion one of the definitions that best describes what privacy is is the one created by *Máté Dániel Szabó*, Hungarian jurist, who argued that “privacy is the right of the individual to decide about himself/herself” [35]. This concept might involve a lot of aspects of what we consider as private, as almost all the above mentioned definitions can be categorized into it. According to my current opinion these headings defined by Solove can be understood as the main elements when it comes to the content of privacy, as knowing all these definitions, it gives us a clue what areas of life does privacy cover, and it can help us to broaden and to improve our instincts on privacy. So in my opinion, combining Szabó’s definition with Solove’s categories and not forgetting about the on-going change of context brings us the closest to the concept of privacy. However, even with Szabó’s definition, the concept of privacy still remains too vague and abstract for defining the object of the legal protection of the right to privacy. Adding the characteristic that privacy must be interpreted according to the current societal-economic structures, the task of creating an exhaustive legal notion of privacy seems impossible. In spite of these uncertainties, several international legal documents acknowledge the right to privacy. However, the question arises: how (and whether) an effective legal protection can be ensured when the subject of the protection cannot be determined exactly?

3. The legal regulation of the right to privacy

From the second part of the 20th century several international legal documents acknowledged the right to privacy as a first generation fundamental human right, which protection then appeared in the national legislations of the countries adopting these documents. These documents do not give further guidance on what privacy is, it is the case law of courts safeguarding these regulations which defines the exact content of privacy and the aspects of life which can be considered private. In my study I will focus on the international regulation, especially on the European norms. After the appearance of computers in the 70s, it was questioned whether the right to privacy is capable of ensuring the protection of private life, and this technological change led to the appearance of a separate right whose subject is also the protection of private life: the right to data protection.

Several international human rights conventions have dispositions concerning the right to privacy both at the universal and at the regional level. Article 12 of the *Universal Declaration of Human Rights* (United Nations, 1948), Article 17 of the *International Covenant on Civil and Political Rights* (United Nations, 1966), Article 8 of the *European Convention of Human Rights* (Council of Europe, 1950) and Article 7 of the *Charter of Fundamental Rights of the European Union* (2000) state that the right to privacy is a fundamental human right and everyone has the right for his/her private and family life, home and correspondence to be respected, and they have the right to protect themselves against such unlawful interference. However, these dispositions are very brief and they do not give detailed guidance on what privacy is or what aspects of privacy must be legally protected. It is the case law, the decisions of the courts that monitor the application of these conventions that can provide answers for these questions. Two regional organisations have to be mentioned, both of them having an elaborate system and regulation: the Council of Europe (hereinafter referred to as CoE) and the European Union. It is the Council of Europe’s European Court of Human Rights (hereinafter referred to as ECtHR) and the European Union’s European Court of Justice (hereinafter referred to as CJEU) which created a

detailed case law that I will present in the next part of my paper. First, the practice of the CoE will be discussed, as the European Convention of Human Rights was accepted decades before the EU's Charter of Fundamental Rights.

The *European Court of Human Rights* created a very important case law regarding private life. The European Convention of Human Rights (hereinafter referred to as ECHR) states in Article 8 that:

“Right to respect for private and family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

The ECtHR examines two conditions in its decisions: (1) whether there was an interference with the right to respect for private life under Paragraph 1 of Article 8; (2) was the interference legitimate according to Paragraph 2? I will focus on the first issue because it will give us the answer what aspects are considered to be private in general [36]. The ECtHR stated that no exhaustive definition of private life can be stated, as Article 8 covers very broad areas of life [37]. Also, the technological and scientific developments that appeared after the adoption of the ECHR encouraged the ECtHR to create a flexible interpretation of private life under the current circumstances [38]. The ECtHR stated in its case law that interference in the following conditions of life fell under the scope of Article 8 (and further examined whether the interference was legitimate or not as it is not an absolute right): access to personal data [39], telephone interception [40], choice or change of name [41], sexual life [42], profession or domicile [43], protection against environmental nuisances [44], the right to establish and develop relationships with others [45]. It must be emphasized that this is not an exhaustive list. In addition, the preamble of the ECHR declares not only the maintenance of these fundamental rights, but also their development [46]. It implies that with the always changing societal-economic conditions, what falls under the scope of Article 8 changes also. In my opinion the ECtHR succeeded in creating a flexible case law regarding the content of privacy.

The *European Court of Justice's* judgement is strongly influenced by the ECtHR for several reasons. The wording of Article 7 of the Charter of Fundamental Rights was based on Article 8 of the ECHR, the CJEU refers many times intentionally to the practice of the ECtHR [47], and Article 52. 3. of the Charter states that concerning the rights which also appear in the ECHR the meaning and scope of the right mean the same in the Charter too. The result is the fact that the content of privacy can be derived from the case law of the ECtHR [48].

Throughout the history of privacy it could be seen that its development cannot be separated from the innovations of technology. From the 70s, due to the new technologies, it was obvious that the ECHR had some serious limitations. These limitations consisted especially in the uncertain scope of the application, as there was no definition of privacy, and that it protected the individual against the state interference, not providing horizontal effect and providing no protection for ordinary data [49]. This led to the appearance of the right to data protection, which aims to protect the individual in the age of the information society. The CoE addressed several times the issue of data protection invoking Article 8 of the ECHR [50] and in 1981 it adopted the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (Convention 108), while within the EU the *data protection directive* [51] and the *data protection regulation* [52] were adopted.

It is not the aim of this study to present a detailed distinction of these two rights, I would like to draw attention only to the most important facts about them. In spite of the formal distinction between these two rights, when it comes to their content there are overlaps, meaning that data protection is wider and narrower than privacy and vice versa. Data protection is wider, as the data protection regulation applies to all kind of personal data processing, even when privacy is not infringed. It is also more specific as not all data processing is related to the private sphere of the individual. Privacy is also wider and more specific, as it might apply to the processing of not personal data, but still influencing privacy; but its regulation does not apply to all data processing, as it does not apply to processing which does not interfere with the individual's privacy [53]. Another very important difference is that while privacy is a more abstract right, the right to data protection has a detailed regulation, with definitions, principles, dispositions etc.

4. Recent challenges of privacy protection

In spite of the existing legal regulation and the appearance of the right to data protection, privacy protection meets new challenges constantly. We live in a world where privacy is threatened by many ways in our everyday lives. It is enough to think of Internet use, smartphones, social networks, drones, biometric identification, the Internet of things – where were all these innovations at the time of the creation of the existing regulation? *Solove* states that it is almost impossible today to live without any record being taken of us [54]. Why does monitoring have such an importance to our privacy? Monitoring always existed; it is a socially accepted phenomenon, which was already present in small communities when people watched their neighbours all the time exercising moral pressure, enforcing the moral norms of the community [55]. Nowadays the significant difference in monitoring is that we are not only being watched, but the information obtained about us is recorded, stored, and more and more aspects of our lives are recorded this way (e.g. security cameras, paying with credit cards, buying airplane tickets, etc.) [56]. The development of computer technology also makes it possible to store information without limits to the amount, to the scope of analysis or to the duration of its storage. The collected information can be organized in a systematic order, be transferred instantly, etc. [57]

Nowadays we live in the era of the information society, which has a huge impact on our lives. According to *Szabó*, this phenomenon has several impacts on privacy, too. On the one hand, the private sphere of someone becomes more open, as the new developments make more intrusion into it, more and more aspects of private life can be reached or touched through technologies. On the other hand, the individual becomes more closed in the offline world as people tend to withdraw, their relationships become less personal, as more areas of life are conducted online. Due to the technological development and the new possibilities brought by it, it is even possible to have a complete life online: to work, have friends, do the shopping etc. As a consequence, in the society the individual is determined not by himself/herself, but it is the information obtained about him/ her that determines him/her. The individual becomes virtual, as he/she does not exist in his/her real physical integrity to a lot of his/her relations, but he/she is a group of data, from which the recipient identifies the individual. In spite of this virtualization, the individual still stays a real being, but in the outside world he/she is identified as a set of data, and the outside world finds it difficult to accept that this online person they interact with is a real individual in the offline world [58].

In the light of these new developments I would like to draw attention to the shortcomings of the current regulation and make some recommendations to solve the problem. One very important issue is the non-existence of the definition of the subject of protection. I argue that no exhaustive legal definition of privacy can be created. However, without knowing what privacy is, it is hard

to ensure an effective legal protection against infringements. The other issue concerning privacy protection is that the existing privacy regulations protect the individual against the state or the public institutions better than against other individuals or private sector institutions [59]. In the era of Internet use, not only the traditional way of communication has completely been transformed – people can share the most intimate moments of their (or others’) lives without almost any limits (it is enough to think of the extreme popularity of social networks) – but the monitoring by private institutions for profit oriented reasons is also very common and severe. This results in the fact that a huge part of privacy problems and monitoring are created not only by the state or its institutions, but by business entities, other users or – the newest aspect of the problem – by the individual himself/herself. There might exist national legislations which regulate the question of privacy protection better, still, due to the importance of the subject in the era of globalisation and rapid technological developments, national legislation is not enough, an effective international regulation is also needed.

According to my current opinion the solution is three-fold. The first element is keeping the flexible interpretation of privacy and accepting that no exhaustive definition can be made. Still, some core elements of privacy must be defined. In my opinion combining Solove’s method of conceptualizing privacy with Szabó’s definition and adding the ECtHR’s flexible and contextual interpretation can bring us the closest to the concept of privacy. I suggest understanding privacy as the control over the autonomy of the individual. This control means especially the right to be let alone, to decide about our accessibility to others, to withhold or conceal information, to control the information related to the individual, to preserve our personhood and to control the intimacies of personal identities, interpreted in the light of the actual context, namely the traditions, customs and norms. The second element is to acknowledge the responsibility of businesses and individuals. By that I mean introducing privacy infringements caused by private entities or businesses into the regulation (horizontal effect) and emphasizing the responsibility of the individual by educating them or raising their awareness. I agree with *David Flaherty*, who emphasizes the responsibility of the individual in this technologically advanced world, where there are a lot of devices that *might* pose [60] a threat to privacy. He says: “[y]ou have to be your own privacy commissioner. And you have to decide, in your own life, to the extent that you can do it, where you want to draw the line between openness and candour; or, to what extent you want to control your personal privacy. You reflect on it: all of us protect our personal privacy day in and day out by various strategies that we have developed.” [61] This brings us to the third element of the solution: taking into consideration the technology itself, and the user’s responsibility. The education of users about technology is a key issue, as in many cases privacy infringement is caused by the lack of knowledge regarding the use and effects of new technologies [62]. So while the regulation itself should remain technology neutral, attention should be paid to the popular devices either by adopting special regulations (and by strengthening the principle of privacy impact assessment or privacy by design) or by educating the users themselves on informatics, on how these new devices work and can be used. Despite the serious doubts whether users are capable to control their own privacy [63], in my opinion educating them on basic informatics and raising their awareness are still very important. I believe that by introducing all these dispositions, we can contribute to the better protection of privacy in the 21st century.

5. Conclusion

Despite the very long history of privacy, after several centuries it is still a very topical question. Legal scholars were very interested in defining privacy and the right to privacy, then international and regional legal human rights conventions also regulated the question. However, some problems concerning privacy protection still exist and there are still a lot to do: it is

especially the lack of the definition of privacy and the lack of horizontal effect which should be revised in the light of the innovations of the 21st century. As a result of my study I found that the possible solutions may be the following. First, a flexible interpretation of the notion of privacy is needed. Second, protection should be guaranteed against not only the state but also business entities and/or individuals. And third, technology itself must be taken into consideration, still staying technologically neutral at the level of the regulation, but enforcing principles like privacy impact assessment, and giving more importance to the education of the users.

References and notes

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- [46] Pettiti, Decaux, Imbert 1995. p. 308.

- [47] See for example: C-400/10 PPU. J. McB. v L. E.. [2010] ECR 2010 I-08965 par. 53; “The wording of Article 8(1) of the ECHR is identical to that of the said Article 7, except that it uses the expression ‘correspondence’ instead of ‘communications’. That being so, it is clear that the said Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights [...]”
- [48] Gellert, R., Gutwirth, S.: *The legal construction of privacy and data protection*. Computer Law and Security Review Vol. 29, No. 5. (2013) p. 524.
- [49] De Hert, P.: *Privacy and Data Protection Concepts in Europe*. Computers Freedom & Privacy, 2004, 20-23 April 2004 Berkeley. p. 4.
- [50] *Manuel de droit européen en matière de protection des données*. Agence des droits fondamentaux de l’Union européenne, 2014, Conseil de l’Europe, 2014. p. 16.
- [51] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
- [52] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
- [53] Gellert, Gutwirth 2013. p. 526.
- [54] Solove 2011. p. 2.
- [55] Lessig, L.: *A privat szféra architektúrája*. Információs Társadalom 2, 2005. p. 56.
- [56] Lessig 2005. p. 61.
- [57] Nissenbaum 1998. pp. 576-577.
- [58] Szabó 2005. p. 47. Solove describes this phenomenon in his book *The Digital Person. Technology and Privacy in the Information Age*. According to him the digital person signifies a person whose complete life is captured in data and stored in digital dossier on electronic networks. (p. 1.) See more: Solove, D. J.: *The digital person. Technology and privacy in the information age*. New York University Press, New York and London, 2004
- [59] Institute for Prospective Technological Studies: Security and Privacy for the Citizen in the Post-September 11 Digital Age: A Prospective Overview. Report to the European Parliament Committee on Citizens Freedoms and Rights, Justice and Home Affairs (LIBE), July 2003, EUR 20823 EN, pp. 10-11.
- [60] Technology changes all the time, and it will be shown in practice how a new technology will be used, will it really be a threat to privacy. Source: Flaherty, D. H.: *Some Reflections on Privacy and Technology*. Manitoba Law Journal Vol. 26, No. 2. (1999) p. 224.
- [61] Flaherty 1999. p. 233.
- [62] Institute for Prospective Technological Studies: Security and Privacy for the Citizen in the Post-September 11 Digital Age: A Prospective Overview. Report to the European Parliament Committee on Citizens Freedoms and Rights, Justice and Home Affairs (LIBE), July 2003, EUR 20823 EN, p. 14.
- [63] On this subject see more: Solove, D. J.: *Introduction: Privacy Self-Management and the Consent Dilemma*. Harvard Law Review, Vol. 126, No. 7. (2013) pp.1880-1903.

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