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POLITICIANS' RIGHT TO PRIVACY ONLINE. POLISH AND INTERNATIONAL PROTECTION STANDARDS. SELECTED ISSUES.

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Introduction

The right to privacy concerns the right to preserve some aspects of one's life in secret. It is currently treated as a personal right and one of the human rights¹. Inherently, it is a right due to a human being, although one could also speak about privacy in the context of legal rights. Therefore, the right is of different importance as protection covers a separate legal subject².

Current European democracies at the level of internal law, as well as the law of the European Union and international law all regulate the matters regarding privacy protection of natural persons. In Polish law this kind of protection is provided by both civil law regulations: construction of personal rights, and administrative or legal regulations as well as protection of personal data and regulated access to public information. Privacy is also subject to protection by penal law in the context of on-going court cases.

The tradition of legal regulations dates back to the turn of the 20th century in the United States. The so-called *right to privacy* concept stood in natural opposition to the freedom of speech.

¹ Cf. The European Convention of Human Rights and Charter of Fundamental Rights. The problematics of privacy as a human right will be presented further.

² For more information, cf. notes to Article 43 of the Civil Code, included in *Komentarz do KC [A commentary to the Civil Code]* by Andrzej Kidyba, Warszawa 2012.

Here, it is worth noting that there is little tradition of settlements of conflicts between the freedom of speech and right to privacy in Poland. Freedom of speech did not exist in Poland before 1989 despite constitutional declarations. The right to privacy was first perceived as a personal right as a result of Poland ratifying the International Covenant on Civil and Political Rights (1977). The first verdict which captures the right to privacy as a personal right dates back to 1984³. Thus, in Poland there is no long-term legal nor judicial culture, tradition of dispute and also well-established entities in the press or media market which benefit from the freedom of speech they are entitled to⁴.

The interest of society in the privacy of other people – including politicians – arose in Poland after 1989, the moment the free uncensored press appeared. At the end of 1990s the literature introduced the phrase 'commercialisation of privacy'. Privacy became a commodity on the media news market.

The end of the 20th and beginning of the 21st century may be called the time of the digital revolution. Instead of traditional, e.g. printed, media, information generated appeared online. As a global and easily accessible medium, the Internet facilitates access to privacy of others⁵. It creates conditions for the

³ Cf. Verdict of the SC of January 18, 1984. I CR 400/83, OSNC 1984, no. 11, pos. 195.

⁴ Post-war Polish legislation concerning the freedom of speech was among others entered into the Constitution passed in 1952. Article 71 of the Constitution features regulations concerning freedom of speech. It has been enumerated next to freedom of assembly, print, marches and manifestations. Therefore, freedom of speech has been listed as a political freedom and placed in the chapter entitled the basic rights and duties of a citizen. Providing the working class with i.e. printing houses, paper, means of communication and other goods was fulfillment of the freedom of speech (section 2). cf. The Constitutional Act of July 22, 1952 Introductory regulations of the Constitution of People's Republic of Poland, Journal of Laws 1952, No. 33 pos. 233. More about the freedom of speech in People's Republic of Poland: A. Bagińska-Masiota, *Problematyka wolności słowa w kontekście uregulowań prawnych dotyczących cenzury w latach 1944-1981 w Polsce* [Freedom of speech in the context of legal regulations of censorship in 1944-1981, in Poland], "Politeja" 2013, issue 25, p. 329-345.

⁵ The new dimension of threats as regards interactive character of the Internet is called Privacy 2.0. It is mainly used in the context of protection of personal data on the Internet. More: J. Kulesza, *Ius Internet, Między prawem a etyką* [Ius Internet. Between the law and ethics], Warszawa 2010, p. 86.

violation of personal rights, also due to anonymity and the spontaneity of expression. These violations result from the dissemination of written statements, but also images (the right to the image) and sounds.

The aim of this article is to present the standards of protection of politicians online, in the context of violation of their privacy understood as a personal right and a human right. The standards will be discussed in the context of regulations and judicature of Poland, international and European law.

The scope of the article does not comprise the administrative protection of privacy of people performing public functions (cf. the Act on Access to Public Information and Protection of Personal Data), nor penal law-related issues.

The pioneers of political application of the Internet appeared in the USA in 1995, during the primary elections of the Republican Party. Further on, their experience was replicated on other continents⁶. At the beginning, American politicians did not use the web to interact with potential recipients of information, treating it rather as a cheap broadcasting channel⁷. Also on the Polish ground, the initially budding presence of politicians online consisted of treating the Internet as a transmission channel, especially for some political parties⁸. The changes in the approach to the Internet (also among politicians) have been related to the transition from the pre-modern Web 1.0 to the second generation Web 2.0. The activity of pre-modern Internet user, as political scientist Mirosław Lakomy rightly notes, came down to *the search and consumption of what the others had uploaded*. Web 2.0 (developed after 2001)

⁶After: M. Lakomy, *Demokracja 2.0 interakcja polityczna w nowych mediach [Democracy 2.0: political interaction in the new media]*, Kraków 2013, p. 196.

⁷After: *Kampania w sieci, analiza wyborów samorządowych w 2000 roku [Online campaigns and analysis of local government elections of 2000]*, ed. J.M. Zajęc and D. Baran, Warszawa 2011, p. 16.

⁸More: M. Nowina-Konopka, *Rola Internetu w rozwoju demokracji w Polsce [The role of the Internet in the development of Polish democracy]*, Kraków-Nowy Sącz, 2008, p. 145-146.

integrates the whole output of Web 1.0 *like a saprophyte – via providing options of active participation in community building, blogging, content sharing and communication in the 'many-to-many' model*⁹. The same author noted that in current politics, the following elements of contemporary Internet are growing in importance: Google search bar, the blogosphere, Twitter, Facebook, YouTube, Flickr, Second Life and exposure-oriented media such as Wikileaks¹⁰.

Among legal acts, the constitutional approach is of primary importance for privacy. Article 47 of the Constitution of the Republic of Poland ensures legal protection of private life for everyone. At the same time, it qualifies it as a personal freedom and right of the so-called third generation. The right to privacy is also a personal right understood as non-property, individual values of the emotional world and psychological state of a human being¹¹. Therefore it is the subject of civil code regulations regarding personal rights (article 23 and 24 of the Civil Code).

As for the functioning of the Internet as press, it is regulated by the Act entitled Press Law. For discussion of judicature of Polish and foreign courts, the period 1989-2014 was taken into account in the area of The Judicature of the Constitutional Tribunal and common courts. In the last twenty years, the Constitutional Tribunal has had numerous times to deal with the conflict (collision) between the discussed right to privacy and the citizen's right to information and transparency of the public life.

According to the authors, violations of personal rights on the Internet share aspects common to all violations of such rights – also committed offline, for instance in traditional printed press; however they also have self-contained

⁹ M. Lakomy, *op. cit.*, p. 45-46.

¹⁰ *Ibidem*, p. 75-76.

¹¹ S. Grzybowski, *Ochrona dóbr osobistych według przepisów prawa cywilnego [Protection of personal rights in line with civil law regulations]*, Warszawa 1957, p. 78.

features. This pertains to e.g. differences in regards to penal qualifications (defamation), but is at the same time out of scope of this article. Other differences stem from specific techniques increasing effectiveness of online communication, which are used only on the Internet. The techniques are *linking* and *framing*. *Linking* in this particular example means that a website without materials violating the personal rights includes a hyperlink to another site with such materials. *Framing* means that a hyperlink is placed on a site, and once the user clicks it another website is displayed in a frame. The Internet user remains on the same website. In regards to violation of personal rights, this leads to the same situation as linking. Content violating personal rights is then treated as a recurring dissemination of the content (not reproduction). Civil liability for violation of personal rights is then borne by the author of the text (supplier of content), as long as they can be identified. If no identification is possible, the possible addressee of civil law claims may be the entity which makes the content available¹².

The legal status of the Internet

The Internet is an internally varied phenomenon, analysed not only by jurists but also political scientists, sociologists, psychologists and economists. It is obvious that each of these scientific disciplines creates a separate language to describe the phenomenon dependant on the subject of study of a given discipline.

From the legal viewpoint, attempts have been made to define the Internet as an institution or already-existing notions, such as press or mass-medium. However, this notion falls outside of the narrow framework of legal

¹² For more about liabilities of particular entities for content published online, cf. A. Wojciechowska, *Naruszenie powszechnych dóbr osobistych w Internecie [Violation of common personal rights on the Internet]*, [in:] *Media a dobra osobiste [Media and personal rights]*, ed. J. Barta and M. Markiewicz, Warszawa 2009, p. 387-395.

language. Thus, legal literature presents a following definition: *The Internet is a technical possibility of providing services of varied character*, consisting of individual communication (e-mail), group communication (discussion boards), and mass communication (sending radio and television broadcasts via the Internet and publication of widely-available data online)¹³. For this article, the most significant research field as regards the Internet is constituted by group and mass communication services¹⁴.

Since the Internet cannot be subjected to rules dictated by press law, a specific part of legal doctrine claims it cannot be fully regulated by press law¹⁵.

The literature qualifies the Internet to be regulated by press law in cases when it distributes press which is also published traditionally¹⁶.

More liberal approaches also qualify periodicals published solely online as regulated by press law, as long as they maintain press characteristics: periodicity, a permanent title, subsequent issues, clearly marked date)¹⁷.

From the information above it appears that the Internet is not press, even though press may be published there. The Supreme Court addressed the

¹³ A. Wojciechowska, *Naruszenie powszechnych dóbr osobistych w Internecie [Chapter VII, Violation of common personal rights on the Internet]*, [in:], *Media a dobra osobiste [Media and personal rights]*, J. Barta and M. Markiewicz (ed.), Warszawa 2009, p. 359.

¹⁴ After: J. Sieńczyło-Chlabicz, Z. Zawadzka, M. Nowakowska, *Istota prawa prasowego w Polsce. Podstawowe pojęcia z zakresu prawa mediów [Chapter I. The core of press law in Poland. Basic notions of media law]*, [in:] J. Sieńczyło-Chlabicz (ed.) *Prawo mediów [Media law]*, Warszawa 2013, p. 32.

¹⁵ Cf. Article 7, section 2, point 1 of the Act - Press Law of January 26, Journal of Laws 1984, No. 5, pos. 24 with amendments. The notion of press has already been described by representatives of press law doctrine. Cf. for instance comments to Article 7 of Press Law (in:) E. Ferenc-Szydełko, *Prawo prasowe. Komentarz [Press Law. A Commentary]*, Warszawa 2013, or older: J. Sobczak, *Prawo prasowe. Komentarz [Press Law. A Commentary]*, Warszawa 2008.

¹⁶ J. Barta, R. Markiewicz, *Postęp techniczny w mediach [Technical progress of the media]*, [in:] J. Barta, R. Markiewicz, A. Matlak, (eds.) *Prawo mediów [Media Law]*, Warszawa 2008, p. 202.

¹⁷ E. Czarny-Drożdziejko, *Dziennikarskie dochodzenie prawdy, a przestępstwo zniesławienia w środkach masowego komunikowania [Journalists' journey to the truth and crimes of defamation in mass media]*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego", issue 90, p. 199.

question of whether an online publication is press in 2008. It stated that the press character of a publication should be decided by its objective. The role and task of press is to distribute social, economic, political, scholarly, and cultural information¹⁸.

Therefore, an assessment of a direct relation between a piece of news distributed via press and public activity of a specific person should each time be submitted to the court's decision, as regards the objective and potential consequences of the distribution. If a piece of news has been distributed via press, the court takes into account among others its functions. These include:

- social control which guarantees openness and transparency of the public life;
- the informative function, which provides the news to the society and constructs the public opinion¹⁹.

Where the Internet cannot be perceived as press, jurists suggest the application of Article 54, letter b of Press Law. The regulations on legal responsibility and proceedings in press-related cases are applied appropriately when the law is violated due to distribution of human thought with means other than press, regardless of the distribution technology. In particular, they apply to nonperiodical publications and other press publications, video and audio broadcasts. With this approach, a cumulative application of press law and the Civil Code is possible for the protection of personal rights online²⁰.

The judicature of the Supreme Court also indicates that the Internet may be perceived as a mass medium described in Article 212§2 and 216§2 of the Penal Code. Thus, defamation and libel crimes may be committed via the

¹⁸Cf. Verdict of SC of December 15, 2010 III KK 250/10, OSNKW 2011, no. 3, pos. 26.

¹⁹ More about the function of press in e.g. J. Sieńczyło-Chłabcz (ed.), *Prawo mediów [Media law]*, Warszawa 2013, p. 40-42.

²⁰ A. Wojciechowska, *op.cit.*, p.362

Internet. In the verdict of the SC of 2008 we read that mass media are understood as all the means of communication which distribute varied content at a mass scale. This includes printed press, online coverage and posters and books²¹.

When analysing the issue violation of privacy of a politician, it would be more appropriate to perceive the Internet from a viewpoint broader than just press law. Violations of the right to privacy occur also outside of press *sensu stricto*, presented online – for instance via blogs, forums etc. Such an approach brings forward important implications.

Entities expressing themselves online will, namely, utilise the freedom of speech, expression of viewpoints, distribution and obtaining of information²², as described in Article 54 section 1 of the Constitution. Freedom of speech plays a key role in a democratic country. It guarantees democracy and pluralism, and thus any limitations imposed thereon must be formalised. The limitations include, pursuant to Article 31 section 3 of the Constitution of 1997, the imperative to set limitations to constitutional rights and freedoms solely via legislative acts. Potential limitations may only be imposed due to an enumeration of rights comprising, among others the so-called public interest: security of the state, public order, the environment, public health, public morality and rights and freedoms of others. Moreover, limitations to constitutional rights and freedoms should occur in line with the rule of proportionality (to the necessary and indispensable extent), and the limitation should not vio-

²¹Cf. Verdict of the SC of May 7, 2008. III KK 234/07, OSNKW 2008.

²²Freedom of expression is wider than freedom of press, and may be exercised via print, oral coverage, the Internet, electronic records, films or in essence any kind of expression which presents viewpoints, stands or ideas, etc. More: P. Winczorek, *Komentarz do Konstytucji RP z dnia 2 kwietnia 1997 r.* [Commentary on the Constitution of the Republic of Poland of April 2, 1997], Warszawa 2008, p. 131.

late the core of the rights²³. Such limitations also pertain to the general limits of freedom of speech online.

The literature rarely presents the viewpoint that the law is not an effective measure of regulation of cyberspace, e.g. blogs, due to for instance jurisdiction-related problems. Thus, according to Joanna Kulesza common ethical standards should be referred to, and effective solutions adjusted to contemporary needs should be worked out on their basis²⁴.

A politician or a public person?

The word 'politician' used in the article title does not come from legal jargon. The notion is utilised by e.g. political sciences, where it describes a person who constantly participates in strategic and tactical political decision making, via direct participation in formal and/or informal meetings or influencing such meetings²⁵.

When describing an activity which may be political, the legal jargon utilises among others the phrase: '**public activity**' and '**a person performing public functions**', '**a well-known person**'.

Article 14.6 of Act – Press Law states as follows: *It is forbidden to publish information and data concerning private life without the assent of the interested party, unless it is directly related to the public activity of a given person.*

²³ More about limitations on constitutional rights and freedoms cf. L. Garlicki. *Polskie prawo konstytucyjne. Zarys wykładu [Polish constitutional law. An introductory lecture]*, Warszawa 2002, p. 104-108.

²⁴ J. Kulesza, *Ius Internet, Między prawem a etyką [Ius Internet, Between the law and ethics]*, Warszawa 2010, p. 214.

²⁵ After: A. Antoszewski, R. Herbut (ed.), *Leksykon politologii [Lexicon of politology]*, Wrocław 2004, p. 328-329.

The interpretation of the notion of public activity may include undertaking actions and tasks for the common good, available to all²⁶. The legal doctrine in the most part interprets the notion quite broadly, applying it not only to the performance of a public function and acting within the entrusted public mandate²⁷. B. Michalski, A. Kopff, P. Winczorek, J. Sobczak and others understand public activity also as writing, journalism, and professional, social, religious and charitable activity which awakens particular interest of the society²⁸.

Judicature also imposes a wide meaning on the 'public activity' notion. In a verdict of 2008, the Supreme Court indicated that people from outside of political circles belong to people conducting public activity – among others, they are such persons whose viewpoints co-shape the notions of the society and who gather around meaningful opinion-forming groups and may thus influence the public affairs²⁹.

Also the judicature clearly marks the difference between public persons (a wider notion) and people performing public activity. What makes the distinction is the wide recognisability of a public person. The catalogue of public persons comprises both people performing public functions and those who do not perform them, also in politics³⁰.

According to the authors, a politician may be both a recognisable public person and a little-known person performing public functions.

²⁶ M. Szymczak (ed.), *Słownik języka polskiego PWN [PWN Dictionary of the Polish language]*, , T.1., T.2., Warszawa 1983.

²⁷ Thus, J. Sieńczyło-Chlabicz, *Naruszenie prywatności osób publicznych przez prasę [Violation of privacy of public persons by press]*, Zakamycze 2006, p. 235.

²⁸ B. Michalski, *Podstawowe problemy prawa prasowego [Basic notions of press law]*, Warszawa 1998, p. 50-51 and J. Sobczak, *Prawo prasowe. Podręcznik akademicki [Press law. An academic handbook]*, Warszawa 2000, p. 296.

²⁹ Verdict of the SC of 24.01.2008. I CSK 341/07. OSNC 2009, no. 3, pos. 45. Also other verdicts provide a wide understanding of public activity. Cf. e.g. Verdict of the SC of 11. 05. 2007, ICSK 47/07, Rejent 2007, no. 5, pos. 173.

³⁰ Verdict of the SC of 24.01.2008. ICSK 341/07, OSNC 2009, no. 3, pos. 45.

The authors maintain that the words politician and celebrity are not interchangeable. Such viewpoint stems from previously quoted judicature of the SC of 2008. According to the SC, a celebrity is a person who becomes widely recognised due to the media image they create for themselves and to the readiness to provide information about their private life. On the other hand, a celebrity or a person accompanying a celebrity cannot be denied the right to privacy. A celebrity decides each time about the extent to which their private life is made public. In this context they may be considered public persons. When describing an activity which may be political, the law utilises, among others, the phrase: 'a widely known person' (article 81, section 2, point 1 of Copyright Law states: no assent is required for distribution of image: 1) of a commonly known person, if the image has been created due to the public, in particular political, social or professional function they perform.

In conclusion, one should note that

- the law conditions the violation of private life on the relation between distributed content and public activity of a given person;
- the relation justifies limitation of protection of these rights.

Right to privacy – an attempt at definition

In Polish literature, the concept of privacy as a personal right which deserves protection appeared about 1972. A. Kopff wrote and published an article in which he defined privacy as *everything that due to justified separation of an individual from the society leads to his or her physical and psychological development, and maintenance of achieved social status*³¹. Following Kopff, private life is divided into two subspheres:

³¹ A. Kopff, *Koncepcja prawa do intymności i do prywatności życia osobistego. Zagadnienia konstrukcyjne* [The concept of right to intimacy and privacy of personal life. Basic notions], "Studia Cywilistyczne", 1972, p. XX, p. 32.

- the intimate life;
- the personal life.

The intimate life is fully protected by law, since it includes personal feelings and experiences of people who do not share them with third parties, and the revealing of which could lead to for example shame, embarrassment and anguish.

Conversely, personal life (news from personal and family life) is not protected by legal regulations to such a high extent. Interference is allowed in particular when it comes to the so-called justified interest of the society factor. This pertains in particular to public persons who play an important role in the social, political or cultural life, and who participate in events drawing public interest.

J. Barta and M. Markiewicz divide the protection of private life into three spheres:

- what is publicly available,
- what is private,
- what is intimate³².

The publicly available information is not protected. This category includes the news on:

- public activity of a specific person,
- public statements and speeches,
- behaviour when performing public functions, for instance of an MP,
- information provided in official communications, e.g. during press conferences.

³² J. Barta i M. Markiewicz, *Dobra osobiste osób fizycznych*. Rozdział II [Personal rights of natural persons. Chapter II], [in:] . J. Barta and M. Markiewicz (ed.) *Media a dobra osobiste [Media and personal rights]*, , Warszawa 2009, p. 76.

The authors qualify information which a given person wants to keep to themselves, or only reveal to those closest to them as private information (called personal life by Koppf). What determines inclusion in this category is not only the content (relation to family, home, social life, neighbours relations, opinions, religious and political sympathies), but also the will of a given person to keep it secret. In this context, violation of privacy will mean secretly taped conversations, phone tapping, revealing a conversation conducted in confidence. Information coming from an individual cannot be distributed on principle, even if it is true³³.

People who have achieved a certain social status and have become recognisable must take into consideration certain limitations of privacy protection. They are:

- persons who perform specific public functions, publicly active;
- public persons, equated with well-known persons;
- people who are subject of general interest.

A politician may in fact belong to each of the above mentioned category, next to athletes, artists, public servants, religious authorities, social activists and famous entrepreneurs.

In conclusion, it is worth noting that a politician has less privacy than other natural persons.

International regulations of privacy protection

The Polish legal system – similarly to other European regulatory systems – is systematically growing more bound to the supranational system to

³³ *Ibidem*, p. 78.

which it belongs. This pertains especially to these legal regulations which are to assure the full exercise of freedoms and rights in confrontation with public authorities. The right to privacy is not only a citizen's but also a human right. Such was the ground for common values shared between various states, based on democracy, lawful government and human rights, and then expressed in international covenants and declarations. As a result, local legal systems grow closer together as regards protection of freedoms – which means both concrete legislative solutions and methods for interpretation of the regulations. Here, judicature of the European Court of Human Rights in Strasbourg is of particular importance, especially in relation to issues which have been neglected by domestic legislation.

The Universal Declaration of Human Rights

One of the most basic sources of human rights, the Universal Declaration of Human Rights, was adopted by the UN General Assembly in Resolution 217, on 10th December 1948³⁴. Already in the preamble the Declaration indicates that human rights stem from the inherent dignity of each individual and are equal and inalienable. It contains a number of both individual and collective rights – citizens', political, economic, cultural and social ones. They complement each other and together form a catalogue of rights of each individual living in a society, and are thus indivisible. Pursuant to Article 12 of the Declaration, *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 interfer-*

³⁴The declaration was adopted by a vote of 48, with 8 abstentions (USSR and other socialist countries, Saudi Arabia and South Africa). Two delegations, from Honduras and Yemen, failed to appear at the meeting.

*ence or attacks*³⁵. Despite the fact that the Declaration did not specify any potential protection of these rights or other legal control mechanisms, as a moral obligation of the signing parties it had a deciding impact on further acts of the General Assembly, including Conventions, multi- and bilateral treaties, national Constitutions and internal legislation.

The International Covenant on Civil and Political Rights

Due to the lack of binding force of the Universal Declaration of Human Rights, the United Nations General Assembly, on December 16, 1966, adopted the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights – precisely to guarantee respect for human rights. The latter Covenant preserves each person's right to privacy, stating in Article 17:

1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks*³⁶.

Similarly to the Universal Declaration, the International Covenant in Article 17 protects two types of personal rights: the private, family and household life together with correspondence, and the good name of an individual. It forbids 'arbitrary or unlawful interference', but does not specify against whose actions an individual should be protected. It also does not indicate in which situations the public authorities may lawfully interfere with citi-

³⁵ Article 12 of the Universal Declaration of Human Rights of 10 December 1948.

³⁶ Article 17 of the International Covenant on Civil and Political Rights of December 16, 1966, www.ms.gov.pl/prawa_czl_onz/prawa_czlow_ICCPR.doc, 26.02.2014.

zens' privacy, and only constitutes the obligation of protection against violations of personal rights³⁷.

A significant novelty in the Covenant, as opposed to the Declaration, is the commitment of the states to respect and guarantee the rights and freedoms in their territories via such legislative solutions which would make it effective³⁸. Despite the doubts concerning the practical application of the Covenants, it is worth underlining that their adaptation was the first stand of the international community on the issue of human rights protection.

The Convention for the Protection of Human Rights and Fundamental Freedoms. The role of the European Court of Human Rights in Strasbourg

The Rome Convention was signed on 4th November 1950, entered into force on 8th September 1953, and was ratified by Poland in 1993. Thus, the European system of protection of human rights established by the Council of Europe – and its accompanying executive mechanism – was adopted. The right to privacy concerns Article 8 of the Convention, which reads as follows:

- 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 well-being of the country, for the prevention of disorder or crime, for the protection of health or*

³⁷ Joanna Braciak, *Prawo do prywatności [The right to privacy]*, Warszawa 2004, p. 65.

³⁸ Very general regulations of the Covenant require detailed legislative normalization within the States Parties in order to guarantee performance of rights and freedoms guaranteed in the Covenant.

*morals, or for the protection of the rights and freedoms of others*³⁹.

The quoted regulation states that local governments have the duty to assure privacy protection against violations and not to interfere with privacy, for instance via penalisation of behaviours belonging to privacy sphere. It is also worth underlining that the Convention in Article 8 differentiates between privacy *sensu stricto* and those privacy spheres which refer to family, home and correspondence⁴⁰. Simultaneously, since the right to privacy is not absolute – it may be subject to certain limitations resulting from local law. For an interference to be in line with the Convention, it must fulfil the following conditions: firstly, the limitation must have been anticipated by already existing local law; secondly, it may be performed only when it protects the closed list of rights indicated in point 2 of article 8; finally the interference is allowed if it is essential in a democratic society⁴¹.

The general guidelines of Article 8 have been developed by the extensive jurisprudence of Strasbourg Tribunal. This institution has assessed diverse cases from the state granting assent to strewn ashes of a deceased person in their garden, to photograph and store photographs of participants in manifestations or penalisation of sado-masochistic practices⁴². Most often, complaints concerning violation of article 8 concern (or concerned) have been the following:

- secrecy of correspondence of prisoners,

³⁹ Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950.

⁴⁰ M. Pryciak, *Prawo do prywatności [The right to privacy]*, p. 219. www.bibliotekacyfrowa.pl/Content/37379/011.pdf, 26.02.2014.

⁴¹ However, the lack of definitions for 'public safety' or 'protection of health and morality' and similar notions may open the door to arbitrary decisions of local authorities, not always in line with the spirit of the Convention.

⁴² D. Ostrowska, *Prawa człowieka. Zarys wykładu [Human rights. An introductory lecture]*, Warszawa 2008, p. 116.

- the problems of phone tapping,
- admissibility of pregnancy termination,
- penalisation of homosexual practices,
- interference with sexual activity of mentally disabled persons⁴³.

One should also note that the bans concerning respect for private life are limited to the extent to which an individual decides to publicly reveal facts from their private life. The problem concerns in particular well-known people, the so-called celebrities, whose presence in mass media is often founded on unlimited provision of information belonging to the privacy sphere.

Among people performing public functions, politicians constitute a special category, as their activity and statements are often assessed and heavily criticised. Therefore their private life is the subject of interest of the society and media, regardless of whether it has any connection to their public activity. Therefore, is the privacy of politicians protected to a lesser extent than that of other citizens? This dilemma has been adjudicated by the Tribunal not without reason, and analysed from the point of view of a conflict of fundamental rights: freedom of speech and the right to privacy. In this context, one of the most important rulings of the Tribunal was the case *Tammer vs. Estonia*⁴⁴. The judges analysed a complaint filed by a journalist because of a fine imposed on them due to unfavourable comments made about the private life of a person active in Estonian public sphere. The accusations concerned very sensitive private matters, namely wrecking a marriage and neglecting a child. The Tribunal stated that the private and family life of a politician is subject to protection. This protection will not be exercised when the private life is related to the po-

⁴³ *Ibidem*.

⁴⁴ Verdict of February 6, 2001, complaint no 41205 in: J. Barta, R. Markiewicz, A. Matlak (eds.): *Prawo mediów [Media Law]*, Warszawa 2005, p. 47.

sition held or when some facts from the private life influence the reliability of the politician. In this case, the Tribunal did not note such a link, thus the media was ordered to be cautious when dealing with the privacy of politicians. No public rights in this case justified the usage of harmful and humiliating statements.

As for the limits of protected privacy sphere of politicians, another verdict brought forward by Caroline, daughter of Prince Rainier III of Monaco was of fundamental importance⁴⁵. The complaint concerned the fact that German tabloids would publish her photographs taken by paparazzi against her will in various private situations (e.g. on holidays, with children), which is a violation of article 8 of the Convention. In its verdict, the Tribunal stated the said article of the Convention had been violated and simultaneously indicated that revealing materials and publication of photographs concerning private life is only permissible when this life is related to a current debate of public importance⁴⁶.

The undoubted input of the Convention in providing privacy protection relates to a control mechanism of observation of its resolutions by Member States, established as the European Court of Human Rights. After Protocol 11 came into force on 1 November 1998, it is the only competent body in regards to dispute settlement⁴⁷. The control is initiated by an individual or internation-

⁴⁵ Verdict in the case *Von Hannover vs. Germany* of June 24, 2004, Ibidem, p. 48.

⁴⁶ Ibidem, p. 48.

⁴⁷ It is worth mentioning that initially the control procedure would engage as many as three bodies: the European Commission of Human Rights, European Tribunal of Human Rights and Committee of Ministers of the Council of Europe. In the first stage of the proceedings, the Commission analysed the permissibility of an individual complaint, established the factual state and encouraged the parties to settle the case amicably. When finishing the works on a given case, the Commission would issue an opinion with the factual state and manner in which the case had been settled. This opinion filed to the Committee of Ministers would open the second stage of proceedings, going either to the Committee of Ministers of the European Tribunal of Human Rights. Within three months, the case could have been sent to the Tribunal, which issued the final and binding ruling after its analysis. If the case had not been turned to the Tribunal within that time period, the final decision would have been taken by the Commit-

al complaint, which is permissible once the domestic remedies have been exhausted. The sentence of the Tribunal is limited to a statement that resolutions of the Convention have been violated (or not), and does not undertake the matter of potential violation of internal rights. Execution of the Tribunal's sentence belongs to the state involved in the dispute. Should the state neglect its function or executes the sentence in a non-satisfactory manner, the Tribunal may intervene again and set out the compensation in a new sentence⁴⁸. In other words, settlements of the Tribunal are of declarative character. In contrast to the Convention they do not modify or even annul acts or sentences, since that belongs to state competencies. However, the fact that the Convention does not obligate Poland to accept the direct effectiveness of the sentence within its legal framework does not mean there is no effect exerted by Tribunal sentences on the legal framework in question. The way in which Poland fulfils such international obligations has been specified in its Basic Law.

Privacy of a public person in the jurisprudence of Polish courts

Remarks presented in sub-chapter 2, 3 and 4 concerning the legal status of the Internet, the issue of who a politician is from a legal viewpoint and privacy as a personal right lead to the following conclusions:

- A politician may be qualified to a broad category of the so-called public persons (persons publicly known). Thus, some of rulings regarding violations of the right of privacy of public persons in press may be applied, respectively.
- Violations of the right to privacy of public persons may be conducted on the Internet understood as press, and also outside of it. Thus,

tee of Ministers. In: Luis Escobar de la Serna: *Manual de Derecho de la Informacion*, Madrid 1997, p. 142-143.

⁴⁸Luis de Carreras Serra: *Regimen juridico de la informacion. Periodistas y medios de comunicacion*, Barcelona 1996, p. 154-155.

some of rulings regarding violations of the right of privacy of public persons via press may be applied, respectively.

Both the Constitutional Tribunal, courts of general jurisdiction and the Supreme Court analyse the issue of privacy in their jurisprudence.

Therein, the following three criteria justify the entrance to the private sphere of people known publicly. They are:

- justified interest⁴⁹,
- the fact that the circumstances are relevant (of significance) to the assessment of functions performed⁵⁰,
- the fact that concealment would harm the public interest⁵¹.

In the above-quoted verdict, the Constitutional Tribunal (CT) stated that the decision of a natural person to perform a public function should be preceded by an examination of potential positive and negative consequences, including specific limitations resulting from interference in one's personal life⁵².

In a separate verdict the CT stated that the citizens' right to information and transparency of public life in a democratic country allows a deeper interference into personal lives of people performing public functions. However, there are limitations to violation of privacy of people performing public functions. They include:

⁴⁹Cf. Verdict of CT of October 21, 1998, K 24/889, OTK 1998, no. 6, pos. 97.

⁵⁰Cf. Verdict of AC in Cracow, of June 14, 1994, I ACr 281/94. After: B.Gawlik, *Dobra osobiste, Zbiór orzeczeń Sądu Apelacyjnego w Krakowie [Personal rights. Collection of verdicts of Administrative Court in Cracow]*, Kraków 1999, p. 129.

⁵¹Cf. Verdict of SC of October 11, 2001, II CKN 559/99, OSNC 2002, no. 6, pos. 82.

⁵²Cf. Verdict of CT of October 21, 1998, *op.cit.*

- the necessity to relate the revealed information with the public activity of a natural person (the functional relation);
- the imperative to respect the dignity of natural persons in case of revealing information from their personal lives;
- the absolute obligation to protect the intimate life of a person performing public functions;
- the prohibition on violations of privacy of third parties, including family members⁵³.

Due to revocation, in 2011 the Supreme Court analysed the issue of violation of personal rights of an expert serving Sejm committees, committed by printed press. The expert has been recognised as a public person by the court of second instance. The court decided that the following circumstances were in favour : the plaintiff was an activist of the Polish Chamber of Liquid Fuels and participant in activities of Sejm committee for biofuels, and reports from the meetings of that committee are open to the public. The Supreme Court, took a different decision than that of the court of second instance. It stated then that the information on due diligence in business activity – including information on debts arising from public receivables – are directly linked to the public activity. Revealing them cannot be treated as unlawful violation of the private life. The court also noted that debts of natural persons do belong to their private spheres, and thus publicly revealing such debts does constitute a violation of personal rights. In case of public persons, however, the private life sphere is subject to less protection than the private life of people who do not undertake such activity, on the condition that the relation of such information with public activity is indicated. According to the court, the fact that

⁵³Cf. Verdict of the CT of July 13, 2007, (K 20/03) OTK -A 2004, No. 7, pos. 64.

a person participating in legislative works has such liabilities is important. When changing the verdict of the court of second instance, the SC ordered that the press statement be changed, and the plaintiff was to a large extent burdened with the legal costs. What is worth noting is the fact that apart from the violation of privacy, the expert also imputed violation of other personal rights – insults and compromising his good name⁵⁴.

Public persons were also concerned by another verdict of the Appeal Court of 2013. The Court examined the appeal of the defendant to the verdict of the Regional Court. The case referred to the printed press (a tabloid) spreading the news from a private holiday trip of a daughter of a well-known politician, and her boyfriend (a famous jazz musician). According to plaintiffs, their privacy and image were violated. They demanded an apology in press and PLN 100,000 (with interest) as compensation for the damage. The Appeal Court in Warsaw stated that both the personal rights and the right to the image were violated – but there were circumstances which diminish the actual damage done to the plaintiffs. One of them has been indicated by the AC as the fact that plaintiffs were public persons. Their professions (journalist, musician) linked them to the media inextricably, and their activity was immanently connected to the media coverage and audience. Plaintiffs need to take the media interest into account⁵⁵.

Also in 2013 the Appeal Court in Warsaw analysed the case of violation of personal rights filed by a well-known journalist against a publishing house of a magazine. The magazine published an article entitled 'The marriage at the brink' and 'He went crazy for a twenty-year-old', illustrated with numerous photographs. It described the journalist's extramarital affair with his assistant.

⁵⁴ Cf. Verdict of the SC of April 20, 2011, ICSK 500/10. As quoted in <http://lex.online.wolterskluwer.pl>, Lex no. 846541.

⁵⁵ Cf. Verdict of the Appeal Court of September 12, 2012, I ACa 234/13. After <http://orzeczenia.ms.gov.pl>, 26.02.2014.

The magazine was widely advertised on television. The appeal court shared the view of the regional court that privacy had been violated. According to the Appeal Court, public persons, such as the plaintiff, on the one hand provoke the media by voluntarily agreeing to publish information about their personal lives. On the other hand, however, they have the right for some of the facts from their personal lives not to be published. Therefore, it cannot be judged that the plaintiff allegedly provided assent to publish information on all the details of his private life. In another part of the justification the court also stated in a response to the allegation of the defendant that personal rights may be violated with the whole content and sense of the publication, and not only concrete sentences. The appeal court also shared the views of the regional court regarding the compensation of damage in the sum of PLN 30,000. The court analysed the following factors: the type of violated right, measure of intensity, duration of negative psychological state of the person whose rights had been violated (damage) and the measure of guilt of the person violating these personal rights⁵⁶.

It is also worth to note the verdict of Regional Court in Gdańsk of 2013 in case on violation of personal rights, issued by the court in case brought by a public person against a publisher of a web portal. The plaintiff is a person well-known in Poland and in the past he used to be – among other public functions – an MP, councillor and president of an association. In 2011 a website published an article about him citing psychological problems, alcoholism and his past as a former secret service agent spying on the Catholic Church. The plaintiff accused the domain owner that his personal rights had been violated: honour understood as good name and human dignity, good opinion among other people, respect of the public opinion and the private sphere. He de-

⁵⁶Cf. Verdict of Appeal Court in Warsaw of April 22, 2013, I ACa 1311/12. Published on: <http://orzeczenia.ms.gov.pl>, 26.02.2014.

manded a statement in a specific form to be published, and a compensation of PLN 200,000 for the damage.

The regional court determined that the website is one of the more popular web portals where actions of public persons operating in widely-understood social life are commented upon. Articles placed online are commented upon by the Internet users. According to the court, due to the publication the personal rights of the plaintiff were not violated. Personal rights should be perceived in an objective, and not relativized manner. Honour, good opinion and respect are in the court's opinion no separate personal rights but simply emanations of a personal right – human dignity, understood as a good name of a person. The justification further states that it is so because the abovementioned qualities refer to the environment in which a given person functions, and are not objective or identical for all people. According to the court, privacy of the plaintiff had not been violated at all. In the court's opinion, privacy encompasses in particular events connected to family and sexual life, health status, the past or material status. Protection may pertain to cases when facts from personal or family life are revealed, the information obtained is abused, information and assessment of intimacy is gathered via private interviews to be published or distributed in other ways. Information published online attributes negative characteristics to the plaintiff which discredit him as a person and a public person. This is a violation of dignity and not privacy.

Additionally, the court stated that the owner of the domain was a publisher in the understanding of Article 7 par. 1 of the Act – Press Law, and therefore was liable for violation of personal rights of the plaintiff resulting from the publication of the article.

Yet, the court did not adjudge the compensation in the amount of PLN 200,000 demanded in the lawsuit; deciding instead on a sum of PLN 40,000, a high sum in the court's opinion. In the justification, the court stated, howev-

er, that the means of communication – the online website where the questioned material had been published, is publicly available and an unlimited number of people may have access to the content of the article from any place⁵⁷.

Yet another verdict seems to incidentally pertain to the considerations of privacy protection for public persons. It is namely related to privacy protection of people accompanying public persons. In one of analysed cases, the Appeal Court in Warsaw judged the artistic manager of a performer to be 'a person accompanying a public person' (the performer). Despite the widely held opinion that such a person should enjoy privacy protection to a lesser extent, the court judged that photographs published online and taken during a private dinner with the performer violate the manager's right to privacy protection. In its argumentation, the court referred to the content of the photographs, recognising that their publication in a web portal is not appropriate as regards the professional position of a manager. Interestingly, the court judged that the manager agreed to be photographed by paparazzi since she accompanied a person in whom the media are interested. The key fact as regards to privacy violation was therefore that she had a specific and responsible job based on good image, which was influenced by provocative photographs published on the paper's website. The court ordered the defendant to publish an apology online and in the daily and remove the article along with all the photographs and comments, as well as photographs featuring the plaintiff. What is worth noting is the fact that the plaintiff accused the press of privacy violation since it distributed her image illegally. However, the court stated that the paparazzi

⁵⁷ Cf. Verdict of the Regional Court of March 12, 2013, XVC1 1795/12. After <http://orzeczenia.ms.gov.pl>, 26.02.2014.

cannot presume there is consent to distribute the photographs since "there was no objection"⁵⁸.

In conclusion, one should note that:

1. The Constitutional Tribunal plays an important role in marking privacy borders of public persons. The citizens' right to information and transparency of public life in a democratic country do not justify each interference into personal lives of people performing public functions.
2. In most of analysed cases settled by the courts, violation of privacy was accompanied by violation of other personal rights and intangible rights (the image).
3. The Supreme Court also plays an important role in marking privacy borders of public persons. In the Court's opinion, the information on due diligence in business activity - including information on debts arising from public receivables – are directly linked to the public activity. Revealing them cannot be treated as unlawful violation of the private life.
4. Courts of higher instances often change the compensation amount for the damage done by the publication, due to the fact that it was done to public persons whose professional activity is inextricably linked to the media.

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⁵⁸Cf. Verdict of Appeal Court in Warsaw of April 25, 2013, I ACa 1381/12. As quoted in <http://lex.online.wolterskluwer.pl> Lex no. 1322776.

Abstract

The article concerns the following issues: legal status of the Internet, considerations concerning the definition of a politician from a legal viewpoint, definitions regarding the right to privacy, international privacy protection regulations and privacy of a public person in the jurisprudence of Polish courts.

PRAWO DO PRYWATNOŚCI POLITYKÓW W INTERNECIE. POLSKIE I MIĘDZYNARODOWE STANDARDY OCHRONY. WYBRANE ZAGADNIENIA

Abstrakt

Artykuł składa się z następujących merytorycznych części, dotyczących zagadnień: statusu prawnego Internetu, rozważań związanych z definiowaniem osoby polityka z punktu widzenia prawa, zagadnień definicyjnych związanych z prawem do prywatności, międzynarodowych regulacji dotyczących ochrony prywatności oraz prywatności osoby publicznej w orzecznictwie sądów polskich.