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The Right to Privacy. Its Value in a Technologically Developed Society

Introduction

The question of the relationship between technological developments and the law is immensely complex, embracing such more specific (and interconnected) problems, as, for instance, that of the *mutual* impact of law and technology (the law can favor or hinder the development of technology, the law must often regulate the proper use of new technologies); of the way in which law itself becomes in the technocratic society a *sui generis* technology or technique, serving the goals of social engineering, i.e., of reshaping the social reality in accordance with some predetermined design; or of the way in which technology changes our mental or behavioral habits and in this – indirect – way influences legal systems or the perception thereof. All these problems, and also other ones (concerning, e.g., the benefits and threats flowing from using specific technologies in public health or other areas), have been thoroughly investigated in the scientific literature, although, as it seems, the last

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one – that of the indirect influence of technology on law (through the medium of changes it effects in our mental habits) – has been somewhat neglected as compared with the remaining ones. In this paper, devoted to the problem of the value of privacy (or: the right to privacy) in an era of developed technologies, this problem will occupy an important place. For, as I will argue, the value of the right to privacy can (and should be) examined from an objective perspective (the question of the value *in se* of the right of privacy) as well as from a subjective perspective (the question of the value *in the minds of citizens* of this right), and precisely this last perspective necessitates making recourse to the analysis of indirect influence of technologies on our mental habits. However, prior to turning to these axiological issues, some preliminary issues must be tackled regarding the very – by no means clear – concept of the right to privacy.

The content of the right to privacy

In his classical paper *Privacy* William Prosser distinguished several different 'interests in privacy'[2]. The first one is *physical privacy*, which is violated if there occurs an „intrusion upon the plaintiff's seclusion or solitude, or into his private affairs"[3]. It can be infringed upon, for instance, by „the unwanted telephone solicitation, the noisy sound truck, the music in elevators, being jostled in the street, and obscene theater billboard, shouted obscenity"[4]. The second one is *informational privacy*, which is violated by "public disclosure of

[2] See W.L. Prosser, *Privacy*, "California Law Review" 1960, vol. 48, no. 3, p. 389. In this paper Prosser strives to precisely identify the content of the right to privacy, presupposing its existence in the common law. The justification of this presupposition was the goal of another classical paper, viz. S.D. Warren, L.D. Brandeis, *The Right to Privacy*, "Harvard Law Review" 1890, vol. 4, no. 5, pp. 193–220; however, the authors of this paper did not clearly distinguish various types of 'privacy interests' protected by this right; hence Prosser's attempt at clarifying this issue.

[3] W.L. Prosser, *Privacy*, *op. cit*., p. 389.

[4] R. Posner, *The Economics of Justice*, Cambridge (MA)–London 1983, p. 272.

embarrassing private facts about the plaintiff"[5]. Here privacy refers to secrecy, anonymity (especially with respect to correspondence, conversation, records), restrictions on access to personal information. The right to privacy thus understood is supposed to protect us against the access to and disclosure of information contained, for instance, in medical, school, adoption, tax, library, financial, or criminal records. It might seem at first blush that physical privacy could be conceptually reduced to informational privacy, but appearances notwithstanding, these two forms of privacy are genuinely different, for even if physical intrusion can yield new information, it does not have to, and, moreover, it is an invasion of a different type (in contrast to intrusions upon secrecy, it is not aimed directly at *information* about the agent). In addition to these two forms of privacy, Prosser also points at the following ones: protection against „publicity which places the plaintiff in a false light in the public eye"[6], and protection against „appropriation, for the defendant's advantage, of the plaintiff's name or likeness"[7]. However, I will discount them in my considerations, since the former seems to be more strictly connected with 'good name' than with privacy, and the latter appears to be a combination of informational privacy and property. Thus, so far I have distinguished (following Prosser, though with some modifications) two forms of privacy, viz. physical (control over access to oneself: physical and mental), i.e., *seclusion*, and informational (control over information about oneself), i.e. *secrecy*. However, one also needs to distinguish the so called 'decisional privacy', i.e. autonomy understood as the right to make choices, without the interference of the state, about 'private' issues, e.g., sex, marriage, reproduction, health care. Some comments regarding this last – 'youngest' – form of the right of privacy, not yet recognized by courts at the time when Prosser wrote his paper, may be in order here.

If we restrict our attention to the US legal system, we will notice that decisional privacy (autonomy) was recognized only in 1965, in *Griswold v. Connecticut* case, in which the Supreme Court overturned convictions (and the state criminal statute on which they

5 W.L. Prosser, *Privacy*, *op. cit*., p. 389.

6 *Ibidem*.

7 *Ibidem*.

were based) of the Director of Planned Parenthood and a doctor of Yale Medical School for dispensing contraceptives, contraceptive related information, and instruction and medical advice to married persons. The constitutional right to privacy (understood as decisional privacy) was held by Justice William O. Douglas to have been created by the Bill of Rights and to be aimed at protecting a zone of privacy covering the social institution of marriage and the sexual relations of married persons. Douglas called it a 'penumbral' right 'emanating' from the Constitution. Even though the Court has been unable to clearly define it, it has come to be viewed as a right protecting one's individual interest in independence in making certain important and personal decisions about one's family, life and lifestyle. This right was also soon invoked to overturn a ban against interracial marriage, to justify the possession of the obscene materials in one's own home, to allow distribution of contraceptive devices to individuals (married and single – *Eisenstadt v. Baird*, 1972), and to justify abortion rights (*Roe v. Wade*, 1973). However, it should be mentioned that the 'deduction' of this form of the right to privacy from the Constitution was widely criticized. For instance, Gary L. McDowell claimed that Justice William O. Douglas (who, as mentioned, played a crucial role in the *Griswold v. Connecticut* decision) did not derive the right to privacy from some pre-existing right or from natural law but created a new right with no foundation in the Constitution or the Bill of Rights[8]. Richard Posner formulated a similar critique, arguing thus:

> *Baird* and *Wade* raise, even more acutely than *Griswold*, the question whether we have a written Constitution, with the limitations thereby implied on the creation of new constitutional rights, or whether the Constitution is no more than a grant of discretion to the Supreme Court to mold public policy in accordance with the justices' personal preferences[9].

[8] See G.L. McDowell, *The Perverse Paradox of Privacy*, [in:] "*A Country I do Don Recognize". The Legal Assault on American Values*, ed. R.H. Bork, Stanford (CA) 2005, pp. 57–84.

[9] See R. Posner, *The Economics of Justice*, *op. cit*., pp. 330–331.

Ruth Gavison, in turn, supported 'restricted access' definition of privacy which includes

> such 'typical' invasions of privacy as the collection, storage, and computerization of information; the dissemination of information about individuals; following, watching, and photographing individuals; intruding or entering 'private' places; eavesdropping, wiretapping, reading of letters, drawing attention to individuals, required testing of individuals; and forced disclosure of information[10].

Gavison argued that once a decisional form of 'privacy' (as autonomy) is accepted, it becomes impossible to give a philosophic account of the concept of privacy that distinguishes it from the concepts of liberty, freedom, and autonomy; in short, by extending the notion of privacy, we risk conflating it with other concepts. However, in opposition to these criticisms, one can argue that privacy has many different senses, or that even if the core elements of this concept embrace seclusion (physical privacy) and secrecy (informational privacy), there is no reason to exclude *a priori* the possibility of the evolution of this concept (even it occurs at the price of making it less distinct); as a result, one can assert that it means sometimes restricted access to people and information (interest in avoiding disclosure of personal matters), and at other times limits on the government regulation of decision making. I do not wish to forejudge that this is the right approach, but in my further considerations, devoted to the value of privacy in an era of technological developments, I will adopt this broad understanding of privacy[11].

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[10] R. Gavison, *Privacy and the Limits of Law*, "The Yale Law Journal" 1980, vol. 89, no. 3, pp. 438–439.

[11] It can also be plausibly argued that all the three forms of the right to privacy are protected by the Polish Constitution: physical privacy above all in art. 50 ("The inviolability of the home shall be ensured. Any search of a home, premises or vehicles may be made only in cases and in a manner specified by statute"); informational privacy above all in art. 49 ("The freedom and privacy of communication shall be ensured"), and decisional privacy above all in art. 48 ("Everyone shall have the right to legal protection of his private and family life, of his honor and good reputation and to make decisions about his personal life").

The objective value of the right to privacy

What is the objective value of the right to privacy in the contemporary – technologically developed – world? One can hardly expect a straightforward value to this question: this right possesses, as we have seen, many aspects, and, to make matters more complicated, the value of these aspects will depend to a large degree upon one's axiological preferences. Accordingly, an in-depth and exhaustive answer to this question can hardly be provided within the bounds of this paper; thus I must restrict myself to proposing only some rather provisional theses or, rather, hypotheses.

The *first thesis* will have a more general character and will concern the issue of the stability of the value which can be ascribed to the right to privacy (or: privacy as a certain fact)[12]. Now, if we look at various philosophical theories of the right privacy, e.g., those saying that privacy is an aspect of human dignity or that it is necessary for developing love, trust and relationship, it will turn out that most of them imply that the value of this right is, so to speak, 'trans-historical', the same in various historical contexts. But is that really so? As was observed, e.g., by R. Posner, in the past privacy – in all its three forms – was often evaluated critically. In the ancient Athens, for instance, the term *idios* (private/nonpublic) was referred to a person not involved in the matters of state; it was therefore hardly a compliment. In his view, the concept of privacy as something positive is a 'Western artefact'[13]. Of course, this is statement of the fact and, as such, does not remain in contradiction with the claim that privacy was always of paramount value but was not always appreciated as such. But one can provide a normative justification of this fact, as, for instance, 'critics of a collectivist persuasion'[14] do, who "rename

[12] However, this distinction, though conceptually fully justified, is not essential for the question posed in this and the next section: little changes whether we ask about the value of privacy (as a certain fact), and or about the value of the right to privacy (as a legal institution serving the protection of this 'fact').

[13] R. Posner, *The Economics of Justice*, *op. cit*., p. 268.

[14] He means, e.g., M. Rotenberg (and his paper *Alienating-Individualism and Reciprocal-Individualism. A Cross-Cultural Conceptualization*, "Journal of Humanistic Psychology" 1977, vol. 17, no. 3, pp. 3–17); R. Wasserstrom (and

privacy 'anxious privatism' and contrast it with traits of openness, candor and altruism allegedly encouraged by a more communal style of living"[15]. Posner disagrees with this collectivist or communitarian justification but adds that this criticism has value in reminding us that privacy is a cultural artefact rather than an innate human need. Furthermore, he stresses that most cultures have functioned tolerably well without either the concept or the reality of privacy in either its seclusion or secrecy senses, and "this fact must be considered before one concludes that privacy is a precondition to valued human qualities such as love and friendship, let alone (as sometimes argued) a prerequisite of sanity"[16]. He also provides a functional (and therefore quasi-normative) explanation of the fact that there was little privacy in primitive societies: he argues that this denial – or at least a low valuation – of privacy was presumably caused by the lack or the weakness of public law enforcement; it was therefore aimed at increasing the probability of crime's detection. On the other hand, this state of affairs had its obvious drawbacks:

> primitive societies are technologically unprogressive because, in the absence of a well-developed system of property rights in ideas, secrecy is an essential method of enabling people to appropriate the social benefits of their ideas. In a society which denies privacy in order to control crime, there will be few incentives to develop new ideas[17].

Accordingly, there may have been some economic pressure to broaden the sphere of privacy. However, too broad a sphere of privacy may, just as too narrow one, hinder economic development, though by way of a different mechanism; as Posner puts is:

> I conjecture that at some point, reached long ago in Western society, further increases in the amount of personal privacy no longer increased

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his paper *Privacy. Some Arguments and Assumptions*, [in:] *Philosophical Dimensions of Privacy. An Anthology*, ed. F.D. Schoeman, Cambridge 1984, pp. 317–332), or M.A. Weinstein (and his paper *The Uses of Privacy in the Good Life*, "Nomoz. Yearbook of the American Society for Political and Legal Philosophy" 1971, vol. 13, pp. 88–104).

15 R. Posner, *The Economics of Justice*, *op. cit.*, p. 273.

16 *Ibidem*, p. 274.

17 *Ibidem*, p. 278.

significantly the incentive to innovate but continued to increase the ability of people to conceal their activities for manipulative purposes[18].

These remarks could be developed in various way, but the general moral to be drawn from them should be clear by now: *it would be fairly implausible to claim that, in all social circumstances, broader privacy is always better than narrow one. In many circumstances it may be in the interest of the society as a whole that a given type of privacy – physical or informational or decisional – become curtailed*; it may also be the case that a sphere of privacy in given historical circumstances is *dysfunctional* or *inadequate* for these circumstances. So this is the first – general – thesis.

The next question concerns the value of privacy in the *contemporary* – technologically developed – world. In my view, and this is the *second thesis*, it is hard to provide good reasons that could justify, *as a kind of general practice or directive*, the curtailment of the sphere of privacy in the case of conflict of privacy with other values, especially as far as the relations between the individual and the state are concerned. For if we take into account the ever growing power of the state, with its access to various means of invigilating and controlling citizens' behavior[19], it should become clear that what constitutes a real social threat is not (as in primitive societies) some kind of social anarchy resulting from weak law enforcement, the threat that could justify and functionally explain the narrow sphere of liberty in these states, but its opposite: the power of the state. The state may often wish to expand its forces playing on people's concern about their own security, and, indeed, in some cases some trade-off between these values, amounting to the sacrifice of some part of privacy, may be justified. Yet it should be the

[18] *Ibidem*, p. 279. By way of digression, it is worth noting that Posner also points at an interesting causal relation between the degree of privacy and the prevalence of defamation, viz. that "in a society in which the sphere of privacy is narrow, in which everything is known about an individual, so that his reputation is not an extrapolation from limited knowledge but the sum of all the facts about him, defamation will not pay, because it will not be believed […]. This implies that defamation is a problem chiefly of relatively modern as distinct from tribal or village societies" – *ibidem*, p. 288.

[19] This thesis applies, *mutatis mutandis*, to global corporations.

rule (with some exceptions) that, when we compare these two values, privacy (or more generally: liberty, of which privacy, in its three varieties, is an instance) should be given priority. This rule can be justified in various manners: by highlighting the fact that privacy is a part of human dignity or a crucial contributor to human flourishing, or, as already mentioned, by pointing at the disproportion of the forces between the state and the individual (which justifies special protection of the latter). The question arises, of course, when exceptions to this rule *can be* justified. One obvious answer is that it is justified when it is possible, at a relatively little cost to privacy, substantially increase the level of social security (many concrete regulations seem to subsume under this rule, e.g., city monitoring or airport control). But the curtailments of privacy may also be justified in the context of 'dyadic' relations between individuals. I will present in more detail one example of such a curtailment, following Posner's considerations. At first blush it could seem that this example serves as a strong counter-argument against my thesis about the particularly high objective value of privacy in the contemporary world, but, as I will try to show, it weakens it only to a small degree.

Posner's analysis of the right to privacy is versatile: he provides a critique of the decisional privacy (its dubious 'deduction' from the US Constitution), as was mentioned in the preceding section; he also makes a very interesting critique of too broad informational privacy (secrecy) in relations among individuals. His critique goes along various paths. First, he claims that people tend to use privacy in order to conceal 'bad' facts about themselves, i.e., in order to mislead or manipulate others for private economic or other gain, which gives them a 'market advantage' over those with whom they deal (e.g., a husband may hide information about his sterility before his wife, an employee may hide information about his health problems before his employer). He stresses the value of accurate – mutual – knowledge – not only on economic but also on moral grounds: he sees in privacy the possibility of manipulation and misrepresentation; as he writes: "We have no right, by controlling the information that is known about us, to manipulate the opinions that other people hold of us. Yet it is just this control that is sought in the name of

privacy"[20]. He also hypothesizes that „the privacy statutes are a response to the pressures of some interest group more compact than the public, or the altruistic public, at large"[21], e.g., of such groups as people with criminal records or with poor credit records. His arguments lead him to the conclusion that: "The law should distinguish between discreditable and non-discreditable private information and should accord much less protection to the former"[22]. Thus, *Posner believes that there is much danger in too much secrecy (informational privacy)*. He considers the possible objection: that such concealment

> may on balance foster efficient transactions, because many of the facts that people conceal (homosexuality, ethnic origins, aversions, sympathy towards communism or fascism, minor mental illnesses, early scrapes with the law, marital discord, nose picking) would, if revealed, provoke irrational reactions by prospective employers, friends, creditors, lovers, and so on[23].

To which he responds:

> this objection overlooks the opportunity costs of shunning people for stupid reasons, or, stated otherwise, the gains from dealing with someone whom others shun irrationally. If ex-convicts are good workers but most employers do not know this, employers who do know will be able to hire them at a below-average wage because of their depressed job opportunities and will thereby obtain competitive advantage over the bigots. In a diverse, decentralized, and competitive society, irrational shunning will be weeded out over time[24].

But even if Posner is skeptical of too much secrecy in economic relationships, he insists that

> the economic case for a right of informational privacy/secrecy against government is stronger than the case against private parties. If creditors, employers, and other private parties who seek information

[20] *Ibidem*, p. 253.
[21] *Ibidem*, p. 301.
[22] *Ibidem*, p. 284.
[23] *Ibidem*, p. 285.
[24] *Ibidem*.

> about potential transacting partners to protect themselves against misrepresentation demand more information than necessary for their self-protection, they will pay price and incur a competitive disadvantage […]. The government is not subject to this market discipline, because in most of its activities it does not face any competition […]. In these circumstances there is no presumption that the government will strike an appropriate balance between disclosure and confidentiality[25].

Thus, Posner admits that there are stronger economic arguments for the right to informational privacy (secrecy) against government than against private parties. He also admits that the disclosure of private information is more justified if it is less publicized – if it reaches only those persons who may enter into interactions with the person whom the information concerns (if it is widely publicized it may reach people who will never come into interactions with her). Furthermore, Posner is, of course, not against all forms of informational privacy. He asserts, for instance, that privacy should be protected when access to information would reduce its value (e.g., letters of recommendation would be less reliable if students had access to them). He also adds that "concealment of information sometimes promotes rather than impedes the transmittal of accurate information"[26] (it would be misleading, as far as the value of accuracy is concerned, if someone knew all my half-formed, ill-considered thoughts). Also innovative ideas should be protected: „privacy of business information should receive greater legal protection than privacy of personal information (e.g., arrest record, health, credit-worthiness, sexual proclivities)"[27], for the latter information "is undeniably material in evaluating an individual's claim to friendship, respect, trust"[28]. As we can see, even if Posner sees the disadvantages of informational privacy at the 'horizontal level' and proposes some restrictions on it, he still places a high value upon it. Thus, even in its original form, Posner's view does not substantially weaken my second thesis (about the high objective value of privacy in the contemporary world). Furthermore, a certain correctio to his

[25] *Ibidem*, p. 301.
[26] *Ibidem*, p. 324.
[27] *Ibidem*, p. 325.
[28] *Ibidem*.

view may be required. Let me recall that he suggests that all discreditable – whether rationally (e.g., tendency to cheat in economic or non-economic relations) or irrationally (e.g., sexual orientation, ethnic origins) – information should be given less protection than non-discreditable information. But he may be over-optimistic regarding the effectiveness of market mechanism in eliminating instances of irrational discrimination (i.e., discrimination on the basis of irrationally discreditable information). Thus, it seems, *contra* Posner, that the strong protection should be extended also to irrationally discreditable information. But, apart from his point, Posner's view is, overall, fairly convincing.

The subjective valuation of privacy

In the previous section I have argued that the objective value of the right to privacy is very high, especially in the vertical relations (between citizens and the state), in the face of the increasing power of the state, with its various means – provided by new technologies – of controlling and monitoring its citizens (as a result, we witness what can be called an 'objective erosion of privacy': for technological reasons, it is much harder to act anonymously than in the past: public areas where we move are scanned by police cameras twenty-four hours a day, host sites on Internet record every page we visit; our bank transaction are tracked by commercial database, etc.). Consequently, when examining *in abstracto* a collision between privacy and security, one ought to give, as a rule, priority to privacy (the rule with some exceptions, for instance those argued for by Posner), even if, in concrete cases, when a relatively small intrusion upon privacy can substantially increase security, security may gain the upper hand. But, given the superiority – *in abstracto* – of privacy over security, the burden of proof should always lie on the adherent of regulations curtailing privacy for the sake of security. This 'ranking' of these two social values is obviously also concordant with the axiology of liberal democracy, based on respect for liberty, of which privacy is a particularly important instance. However, the question arises if citizens of liberal democracies really endorse this ranking,

i.e., if their subjective valuation (those manifesting themselves in actions, not in words) of privacy and of its comparative importance in juxtaposition with security reflects the claim about the particularly high objective value of privacy. It is, of course, very difficult to answer this question in a fully reliable manner; this would require conducting a broad psychological and sociological empirical research. For this reason I will limit myself only to formulating some quite general and provisional remarks, inspired to a large extent by an insightful analysis of the discontents of contemporary societies conducted by Byung-Chul Han in his influential book *The Burnout Society*.

Let me start from observing the uncontroversial fact, viz. that nowadays, in public discourse, including legal discourse (and various legal regulations, e.g., *General Data Protection Regulation*[29]) much stress is put upon guaranteeing effective means of the protection of privacy (in all its three incarnations). However, there are plausible reasons to conjecture that many people do not subjectively value *informational privacy* as much as they should (and as, many of them declare that they do), and that this perception of the value of informational privacy is, to a large extent, caused by the technological developments. I will develop this thought drawing on Byung-Chul Han's analysis. The basic claim of this German-Korean sociologist is that we (citizens of developed states with liberal-democratic forms of government) live in the *achievement of society* (radically opposite to what Michel Foucault termed 'the disciplinary society'), characterized by two main features: permissiveness and pressure for success. These features jointly lead, as Byung-Chul Han stresses, to self-exploitation, multitasking, and the consequent exhaustion (tiredness). Thus, the achievement society is at the same time the society of tiredness – *the burnout society*. In this society we suffer, as Byung-Chul Han puts it, from the 'violence of positivity' that derives from such factors (some of them being direct effects of technological developments) as permissiveness (a great variety of options is likely to overwhelm us), overproduction, overachievement,

[29] That is, 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.

overcommunication, and overstimulation; this type of violence "does not presume or require hostility. It unfolds specifically in a permissive and pacified society. Consequently, it proves more invisible than vital violence"[30]. The typical disorders of the present time are depression, ADHD, the burnout syndrome, which occur when ego 'overheats': "the violence of positivity does not deprive, it saturates, it does not exclude, it exhausts"[31]. Two further points of this analysis are worth mentioning. First, to the question about the causes of the transition from the disciplinary society to the achievement society, Byung-Chul Han responds (controversially, for sure) that it was above all the big business's drive to maximize production: in the achievement society one can produce and sell more; "industrial, disciplinary society relied on unchanging identity, whereas postindustrial achievement society requires a flexible person to heighten production"[32]. Second, in the society of tiredness health rose to an almost divine status, it became a new goddess: "the mania for health emerges when life has become as flat as a coin and stripped of all narrative content"[33]. As a result, we are, according to Byung-Chul-Han, like Nietzsche's 'last man' – a mentally crippled, decadent form of a human being, whose life is flat, stripped of higher ideals, and who is only concerned with his/her own – hedonistically understood – happiness, security, comfort, and health.

Now, if this picture of the mental condition of an 'average' citizen of contemporary liberal democracies is true, it means that he/she would be willing to accept the state's even deep intrusions upon his/her liberty, if it were accompanied by the assurance that it will contribute to increasing his/her well-being and security. It is worth stressing that, relying on Byung-Chul Han's analysis, we should search for the cause of this acceptance not only in the attachment of the 'burnout human being' to the value of health, mere survival, and thereby security, but also in his/her tiredness with liberty (including decisional privacy), which may loom as a burden, because it implies enormous responsibility for one's choices from a plethora

30 B.-C. Han, *The Burnout Society*, trans. E. Butler, Stanford (CA) 2015, p. 6.
31 *Ibidem*, p. 7.
32 *Ibidem*, p. 44.
33 *Ibidem*, p. 50.

of options which permissive society guarantees (and which elicits problems with determining one's identity), and also because it is one of the causes (in addition to technological devices) of 'overstimulation'. In fact, as Byung-Chul Han asserts, this tiredness with liberty manifests not only in readiness to concede to the state's intrusions into it, but also in a tendency to reveal one's private life to others, *via* various social media (this exhibitionist tendency may result from the fragility and weakness of the depressive and at the same time narcissistic 'ego', which has a strong need of attracting attention of others). Thus erosion of privacy has not only an objective dimensions (related to the fact that in many aspects of our life we can no longer act fully anonymously), but also a subjective one: in those spheres of our life in which we would be able to retain our privacy, many of us disclose it: our society, as Byung-Chul Han puts it, is also a society of 'transparency' and 'exposition', which can become a new kind of 'panopticon', in which everybody is controlled and observed by everybody (unlike Bentham's original version of panopticon)[34]. Going beyond Byung-Chul Han's considerations, it bears stressing that this erosion of privacy can also have a negative effect of political life. If we wish to know much about politicians' private lives, and are inclined to evaluate them (as politicians) through the prism of their behavior in private life, this may lead, as noticed, e.g., by Thomas Nagel, "to the kind of defensive hypocrisy and mendacity about one's true feelings that is made unnecessary by a regime of reticence […] the decline of privacy brings on the rise of hypocrisy"[35]. Thus, if we respect others people's privacy, i.e., if we manifest the virtues of civility and reticence, they are not forced to reveal – also falsely – their private matters (another problem here is that our inner life is chaotic – what we reveal may not always truly reveal 'us', our 'true identity', for we may not truly understand ourselves). We

[34] B.-C. Han is, of course, critical of this kind of 'transparency society' (and rightly so, in my view), unlike, e.g., David Brin, who, in his book *The Transparent Society. Will Technology Force Us to Choose Between Privacy and Freedom?* (New York 1998) is, indeed, fearful of surveillance technology being placed in the hands of the few (the elite/the government), but he is enthusiastic about what he calls 'reciprocal transparency', the massive use of such technologies by all citizens, to control each other and also the government.

[35] T. Nagel, *Concealment and Exposure*, Oxford 2002, p. 13.

should therefore, in Nagel's plausible view, reject the evaluation of politicians based on their private lives, since otherwise "the range of available candidates will shrink drastically for reasons having nothing to do with the proper demands of public service"[36].

Concluding thoughts

In this paper I have put forwards three theses: that the objective value of privacy may change in time (as its significance is relative to concrete social context); that in the contemporary world, in which the state's power to intrude upon our liberty, especially into its variety called informational privacy, has become due to technological developments particularly strong, the need for protection of privacy becomes especially urgent (given our attachment to the axiological fundamentals of liberal democracies), and therefore its objective value is very high; and that, in spite of this high objective value of privacy, it does not correspond to its subjective valuation by the 'typical' citizen of contemporary liberal democracies, who, if Byung-Chul Han's picture of our society as 'the burnout one' is correct, has become mentally exhausted by overstimulation and overachievement, and for whom, consequently, the central value has become flatly understood happiness (as material comfort and security), rather than liberty and its constitutive part which is the right to privacy. The third claim is, of course, a hypothesis, which needs further examination, but there seems to be much more than a grain of truth in it. There is one more issue, in fact hinted at in the course of my presentation of Byung-Chul Han's analysis, that would also require a deepened analysis (which goes, however, beyond the scope of this paper), namely: the possible tensions between informational and physical privacy on the one hand, and decisional privacy on the other. The tension are of two different types. The first one (connected with Byung-Chul Han's analysis) is psychological: one of the reasons why contemporary society breeds tiredness, the feeling of being 'burnout', and strong attachment to security (which explains readiness to renounce one's informational and physical

[36] *Ibidem*, p. 23.

privacy), is the fact the society is highly permissive, and thus with a broad scope of decisional privacy, which gives rise to a burdensome (for many) imperative 'be yourself'. It is precisely this imperative, in combination with the pressure for success, that breeds depression and tiredness. The other type of tension consists in possible normative (and thus also legal – decided by legislations or courts) conflicts between these 'aspects' of privacy. For it is clear that the agent's decisional privacy may compromise his/her own informational privacy, and intrude upon other people's physical privacy. It is hard to find some general rule of how such conflicts should be resolved, though it can be observed that there has been a discernible tendency in US courts' decisions, at least in the 60s and 70s of the 20th century to give priority to decisional privacy[37]; as Posner wrote:

> It is as if the Court has become infected with the student radicalism of the late 1960s and early 1970s, with its emphasis on candor at the expense of privacy, its slogans of 'doing your own thing' and 'letting it all hang out'[38].

This issue also relates to the one mentioned in section 2, viz. of whether decisional 'privacy' can be plausible regarded as a legitimate form of privacy (in addition to the traditional and uncontroversial ones – solitude and secrecy).

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[37] For instance, in the case *Erznoznik v. City of Jacksonville* (1975) "the right of movie exhibitors to show nude scenes on drive-in screens visible from the public highways was held to prevail over the right of the user of the higher to prevent such invasions of his privacy and sensibilities"; or in the case *Cox Broadcasting Corp. v. Cohn* (1975) "the right to publicize a dead rape victim's name was held to prevail over the right of the victim's parents to the privacy of their grief" (see R. Posner, *The Economics of Justice*, *op. cit.*, p. 345).

[38] *Ibidem*, p. 345.

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Abstract
The Right to Privacy: Its Value in a Technologically Developed Society

The paper is aimed at defending the following three claims: (1) that the objective value of privacy may change in time (as its significance is relative to concrete social context); (2) that in the contemporary world, in which the state's and global corporations power to intrude upon our liberty, especially upon its variety called informational privacy, has become due to technological developments particularly strong, the need for protection of privacy has become especially urgent (given our attachment to the axiological fundamentals of liberal democracies), and therefore its objective value is very high; and (3) that in spite of this high objective value of privacy, it does not correspond to its subjective valuation by the 'typical' citizen of contemporary liberal democracies, who, if Byung-Chul Han's picture of our society as 'the burnout one' is correct, has become mentally exhausted by overstimulation and overachievement, and for whom, consequently, the central value has become flatly understood happiness (as material comfort and security), rather than liberty and its constitutive part, which is the right to privacy.
Key words: decisional privacy, secrecy, solitude, technology, burnout society