

The Hart-Fuller Debate on Law and Morality Within the Prism of the Legal Foundation of the Right to Privacy in its Earlier Jurisprudential Interpretations in German Case-Law

Anatoliy A. Lytvynenko

<https://orcid.org/0000-0001-7410-5292>

PhD student at the Department of International Law

at Ivan Franko National University of Lviv

MRes/PhD student at the Department of Law

At Robert Gordon University of Aberdeen

PhD student at the Department of Law

At Baltic International Academy, Riga

LLM/postgraduate student at

Lviv International Academy of Personnel Governance

Email: anat.lytvynenko@gmail.com

The 1950s debate between the British and American legal philosophers, Lon Fuller and Herbert Hart, has been a clash between the positivist and natural theories of origination of law and jurisprudence, with the former method primarily suggesting that law and morality are not necessarily interconnected, though may coincide in some occurrences, while the latter sticks to development of law that is based upon the mores and values related to human nature, which creates the standards that society should follow in order to function properly. The former approach, as it is argued, is not actually deprived of moral factors. To examine how these debates could work on practice, I decided to choose the early developments of the general right to privacy as an example of “penumbral” rights and to review the positions of various courts within adjudicating cases in respect with the general right to privacy.

Keywords: law and morality, right to privacy, German law, Reichsgericht, medical confidentiality, history of law, data privacy.

Harto ir Fullerio diskusija dėl teisės ir moralės, nagrinėjant ją per senesnėje Vokietijos teismų praktikoje pagrįstos ir interpretuotos teisės į privatumą prizmę

Praėjusio šimtmečio penktojo dešimtmečio britų ir amerikiečių teisės filosofų Lono Fullerio ir Herberto Harto diskusijos buvo ginčas tarp pozityvistinės ir prigimtinės teisės teorijų ir taikomosios jurisprudencijos atšakų. Pirmoji teorija remiasi vizija, kad įstatymas ir moralė nebūtinai yra susiję, nors tam tikrais atvejais gali sutapti. Antroji teorija teigia, kad teisės raida yra grindžiama nuostatomis ir vertybėmis, susijusiomis su žmogaus prigimtimi, kuriomis visuomenė turėtų vadovautis kaip standartais, kad galėtų tinkamai veikti. Pirmoji vizija iš tiesų nėra visai nutolusi nuo moralinių veiksmų. Norėdamas pažinti šios diskusijos taikomąją reikšmę, autorius nusprendė pasirinkti ankstyvąją bendrosios teisės į privatumą raidą kaip „penumbraliųjų“ teisių pavyzdį ir apžvelgti įvairių teismų pozicijas sprendžiant bylas dėl bendrosios teisės į privatumą.

Pagrindiniai žodžiai: teisė ir moralė, teisė į privatumą, Vokietijos įstatymai, Reichsgericht, medicinos konfidencialumas, teisės istorija, duomenų privatumas.

Received: 16/01/2021. Accepted: 17/03/2021

Copyright © 2021 Anatoliy A. Lytvynenko. Published by Vilnius University Press

This is an Open Access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

Introduction: The Hart-Fuller debate

The foundations of Anglo-American and Continental legal systems are different. The jurisprudence (or case-law) of the latter originates by an interpretation of codes in a definite claim, while in common law, there is no strict necessity to establish a court judgment upon a certain statute. Precedents are frequently used in both systems of law, but the codes in Continental law are a product of the intellectual labor of lawyers and legal academics and are adopted by respective legislatures. At common law, the judge-made law is a product of century-aged precedents, absorbing the mores and customs of the those-days society, which are reflected in respective judgments. Obviously, century-aged precedents that are still referred to in modern-day case law could be found in civil law jurisdictions as well, but even those would reflect the interpretation of those-days legislation by courts. However, nothing suggests that such decisions are deprived from morality.

The debate between Lon Fuller and Herbert Hart basically laid in the vaults of the legal system themselves. Being a positivist, Hart believed that law and morality are not necessarily connected, though he did not contend that the law and morality are polar to each other or are not anyhow interconnected. He discussed the views of Austin and Bentham – legal philosophers of the 18th and 19th century who were the godfathers of Utilitarianism and critics of natural law ideas. Citing the two scholars' parity of "the law as it is" and "the law as it ought to be", Hart did not disagree that the development of legal systems is, in fact, influenced by the mores of the society where this legal system was developing. Nor did Austin or Bentham say that law and morality have no interconnections, instead calling it an "intersection". They claimed that the development of legal systems was strongly influenced by a moral opinion, and at the same time, the moral standards were conversely impacted by the then-existing laws. However, the authors cited by Hart called this a "frequent coincidence". At the same time the approach Hart favored did not also deny that the moral principles could be incorporated into the legal system or impact constitutional provisions: as an example of Bentham, the power of a legislature could be restricted by the state's constitution, and upon his views, the moral principles could generate the content of the said constitutional restraints (Hart, 1958, p. 593, 598–599). At the same time, Hart had himself put a very tricky dilemma. Firstly, if some law violates the standards of morality, then *it does not stop being a law*. At the same time, it would not mean that a rule which is morally desirable becomes a rule of law. Adhering to the position of American writers, Hart reiterated that the development of jurisprudence displayed that this jurisprudence is basically what actually exists; despite that it may not be ideal, it is not the law which ought to be but what it is (meaning what it was as of the date he wrote the article) (Hart, 1958, p. 599–600). Upon Hart, the law consists in two types of "rules" which he has designated as "commands". The commands are laws designing how are the citizens obliged to act or abstain from action in order not to be sanctioned. These laws have to be of general nature and have to be communicated by the authorities. Next, Hart believed that there had to be laws (or rules – especially, for the common law states) that allowed to adjudicate disputes properly. He also discarded the method of the so-called "mechanical" case-law, earlier applied by Austin and Bentham in the past centuries, who repeatedly used to criticize judges for not adjudicating disputes with a consideration of the growing needs of society (Hart, 1958, p. 612) and henceforth not developing common law to the then-contemporary societal situation which generated disputes. However, a purely "mechanical" decision is, shortly speaking, a big evil. "Penumbral" questions which arise in legal disputes are brought before the courts, which, as he contended, are adjudicated in an "intelligent" method in the light of aims, purposes and existing policies, but even these are not necessarily guided by any moral principles. He did not disagree that there were morally bad laws, which were sinister and, I would say, dangerous

for the general community. To solve similar problems, he did not discard that there has to be some moral influence of it upon the legal system, but not much for sure. Complicated legal disputes, upon the view of Hart, have to be adjudicated by the principles of legal interpretation – practically, this is what precedent law is for, and the moral factors are surely to be considered (Hart, 1958, p. 610 ff.).

Fuller demonstrated a completely different point of view relying on the theory of natural law, which beholds and observes the foundation of a legal system based on age-developing mores and thus depicts the law as a mean to achieve a harmonic social order by regulating human behavior. He denoted that fundamental rules, upon which the laws are built, are more seemingly (in his view) a breed of morality, not of law, which derive their efficiency from an overall acceptance which lies upon a generalized perception that such rules are correct and necessary. On the other hand, he said, these “fundamental rules” are applied as ordinary rules of law in the course of an everyday legal system operation. Fuller did not suggest that the term “intersection” used by Hart was correct to display merging the law and morality (Fuller, 1958, p. 630, 639). He also emphasized that Mr. Hart left a very tricky issue untouched: what is the nature of the rules that make this law possible itself? Fuller paraphrased Hart’s contentions in the parity between “order” and “good order”. Good order, upon Fuller’s view, is the law which corresponds to the demands of justice, or (at least) morality, or the notions of what the law should be. The “order”, he contended, is also not a literally any public order that can ever exist – it has to be considered good enough by some standard. So, Fuller seemed to derive the foundation of the legal system as a mirror of some wholly-accepted rules, which were later not once codified, developed and expounded in jurisprudence. He also paid attention to the necessity to publish all the legal regulations, condemning “secret laws” of the Nazi-era Germany (Fuller, 1958, p. 638–639, 650–651). When speaking about the Nazi regime in Germany, he emphasized that they disregarded even their own laws if it was necessary for them. Upon the other conclusions of L. Fuller, the laws have to be prospective and comprehensive, as well as being durable through time, be changed the lesser the better, as well as being as little retroactive as it is possible, and would not be impossible to be applied as well as being followed by the administrative bodies with a congruence between what (law, bylaw etc.) has been promulgated, and what has been done (Fuller, 1958, p. 650 ff.). Peter P. Nicholson calls these principles of Fuller as “desiderata” and suggests designating them as the factors embracing the “internal morality of law” (Nicholson, 1974, p. 308 ff.). The external morality of law, upon Fuller, refers to the actual content of the rules of law which are applied by courts to resolve appropriate disputes (Tucker, 1965, p. 270, 272). Fuller has developed two additional sets of morality. He categorized them as a “morality of duty” and a “morality of aspiration”, whereas the former demands just a minimum for the citizens to support the society to work properly, without which the “ordered” society is impossible to subsist, the latter concept is connected to a desired norm of the citizen’s conduct that would promote his best interests (See., e.g., such interpretation by Tucker, 1965, p. 272–273 and Nicholson, 1974, p. 308–309). In overall, Fuller has definitely rejected a fully-positivist approach to law.

In order to behold how the moral dilemma of positivism and naturalism was reflected in the law, let us take the vaults of the legal system both Hart and Fuller had referred to – the law of Germany. Their referral to German law however did not feature an extensive review of the civil legislation and jurisprudence of the courts of Germany prior to Nazi period, or after their reign collapsed. Thus, the article is aimed to display how did the concept of “good morals” was elaborated in old German law, and what was it about in general. The author has selected privacy law (or simply, the evolvement of the right to privacy) as one of “morally-associated” rights in order to depict the courts’ view on what good morals should constitute. As the paper would proceed, the selected case-law will display that the issue of good morals will expand not only to right to privacy, but to a right to free employment or a

right to conduct entrepreneurship freely, as well as some others. The issue of professional secrecy in the 19th and early 20th century case-law is also covered by the given article, which had been superficially discussed in academic literature in relation to German law. In this paper, the author chose to discuss the vaults of “good morals” interpretation, as the historical case-law foundation of “good morals” is essential to serve a basis for the current understanding of the moral principles of the legal system applied within it, especially if speaking about privacy law.

The Concept of Morality in Earlier German Privacy Law through the Right to Privacy: Breach of Good Morals, Insult, Professional Secrecy, Right to One’s Image and Copyright

1. General statement of issue: unfair competition, a right to conduct business, the Supreme Court’s concept of patient’s right to self-determination and academic views of the German-bred right to privacy

Let us admit – in their debate, both Hart and Fuller represented the problem of the theory of law in Anglo-American law. Their references to the Nazi-era laws of Germany of the 1930s or 40s are not anyhow a reflection of the Germanistic attitude to the interconnection of law and morality in German law as such. To see how it worked (if it did), I have chosen to illustrate the development of the right to privacy as a “penumbral” right – at least from the view of the United States Supreme Court¹, but in German law. It is a pity that both Hart and Fuller left the issue of good morals untouched from the side of German law, especially from its historic side. And this side is superficially known. To my regret, I have not noticed the two splendid scholars to discuss what is morality in the legal sense of the older German law. I am not speaking about demagogical aspects of the interconnection of law and morality. I am speaking about what was the position of the courts towards this aspect, as of the precedent law, or the *Rechtsprechung* in German. If we turn to precedent law of the 19th and 20th centuries in Germany, as well as the states, which later merged to German Empire, we may find that the courts have developed a very interesting and a firmly utilitarian approach towards what is a *breach of good morals*. I do not believe that the old German positivism actually banned the moral ends of law, like Fuller contended (Fuller, 1958, p. 659). It rescheduled them to a practical purpose which encloses more down-to-earth, but various practical problems of citizens. To begin with, the definition and embrace of good morals had not been precisely elucidated before Reichsgericht came up with it in its 1901 judgment, where the court said that the standard of “good morals” is “the decency of all who think fairly and justly”, which, however, referred to unfair competition². In a decade, in a 1909 case where the plaintiff sued his wife, her relatives and the family doctor for having submitted a medical report claiming that he is mentally ill and has to be declared incapable (especially in the light of family and inheritance disputes between plaintiff on one hand, and the wife and her relatives on the other), the court said concerning the “good morals” the following: “What good morals require can be inferred from the prevailing popular consciousness, from the decency of all those who think fairly and justly, taking into account the peculiarities of [each] individual case”. The Reichsgericht acknowledged that the doctor not only acted with gross negligence (in fact, the plaintiff claimed he had never been examined by defendant physician, and the forensic doctor quickly acknowledged that the diagnosis was false) but has also violated

¹ *Griswold v. Connecticut*, 381 U.S. 479, 483–485 (1965).

² *Reichsgericht*, Urt. v. 11.04.1901, Az.: Rep. VI. 443/00, Sec. VI (para. marg. Nr. 22)

good morals. The doctor had to be aware how much legal disadvantages his report could cause. If the physician submitted his report without proper documentation – then this was not only negligence, but a violation of good morals as well, said the Supreme Court. Even the plaintiff’s assumption that the defendant physician had never conducted an examination of him violated them. Moreover, he was aware of the said disputes between the plaintiff and his wife and her family. The court found for the plaintiff, remanding the case to the appellate court³. Besides, the Court’s interpretation of a physician’s duty to inform the patient concerning the anticipated treatment and any other medical procedures, though a bit paternalistic to date, deserves a review as well⁴. It is stunning that the Reichsgericht has expressly recognized the right of the patient to refuse medical treatment, outpacing the US doctrine of *Schloendorff*⁵ in two decades⁶, though not without restrictions⁷. The wording of the Reichsgericht in both 1894 and 1913 judgments outstrips the doctrine of patient’s autonomy for many decades, and it may sound, I would say, *futuristic* to recognize the patient’s right to self-determination and body integrity by the dates I have outlined above. If we take the former judgment, the Court said: “... And with the moment of such a refusal [of treatment] by the sane patient or his legal representative, the physician’s authority to treat, and mistreat a certain person for healing purposes also expires”⁸. In a different situation, concerning the application of Art. 254 of the Civil Code, the Court held the following: “The application of Section 254 (2) BGB. on the physically injured person, of whom the person liable for damages claims [plaintiff decorator had sued the defendant physician for a careless treatment of his wounded finger after which a carbolic acid gangrene developed] that he was able to regain his lost or reduced earning capacity through an operation, the fundamentally recognized right of the injured one is opposed to it, [the person] is free to determine at its own discretion, of whether or not he wants to submit to an interference with the external integrity of his body, which is also what the operation is”⁹. Obviously, the wording should not be read isolated from the entire judgment, but the sense is apparent: the court definitely recognized the patient’s right to autonomy, at least to a certain extent. However, only the second judgment involved a situation where the patient, damaged by defendant’s negligent treatment, refused to undergo an operation. But even if so, this was already quite progressive. In fact, the issue of consent to medical interventions was very rare in then-day jurisprudence, but still some artifacts come to the view¹⁰. This issue had been earlier brought before Swiss courts, at least dating back to 1882¹¹.

Despite some cases that were adjudicated by the Reichsgericht in the early 20th century, where plaintiffs alleged a violation of good morals, could be more or less classified as a violation of right to privacy¹², the majority of those were closely connected with an alleged violation of the right to free employment, mainly in a concurring corporation after termination of contract with a corporation con-

³ *Reichsgericht*, Urt. v. 15.11.1909, Az.: Rep. VI. 382/08, Sec. Grunde (para. marg. Nr. 2 and 3); ERG Ziv. S. Bd. 72, S. 175, 176

⁴ *Reichsgericht*, Urt. v. 01.03.1912, Az.: Rep. III. 231/11 = ERG Ziv. S. Bd. 78, S. 432, 433–434 (para. marg. Nr. 8–9).

⁵ *Schloendorff v. New York Hospital*, 105 N. E. 92; 211 N.Y. 125, 130 (1914)

⁶ *Reichsgericht*, III Strafsenat, Urt. v. 31.05.1894, Rep. 1406/94 = ERG St. S. Bd. 25. S. 375, 380–382.

⁷ *Reichsgericht*, Urt. v. 27.06.1913, Az.: Rep. III. 30/13 = ERG Ziv. S. Bd. 83, S. 27, 29–31 (para. marg. Nr. 5–6)

⁸ *Reichsgericht*, III Strafsenat, Urt. v. 31.05.1894, Rep. 1406/94 = ERG St. S. Bd. 25. S. 375, 381–382

⁹ *Reichsgericht*, Urt. v. 27.06.1913, Az.: Rep. III. 30/13 = ERG Ziv. S. Bd. 83, S. 27, 29–30 (para. marg. Nr. 5)

¹⁰ *OLG zu Braunschweig* (1 Sen.), Urt. v. 13.02.1893, Sauffert’s Arch. Bd. 48 S. 413 (Sache No. 262)

¹¹ *In Sache des Karl Schulze*, Strafgericht des Kantons Basel-Stadt, Urt. v. 14.06.1882, L. Oppenheim, *Das ärztliche Recht zu körperlichen Eingriffen an Kranken und Gesunden*, Benno Schwabe, Verlagsbuchhandlung, Basel, 1890, p. 43.

¹² *Reichsgericht*, Urt. v. 29.05.1902, Az.: Rep. VI. 50/02, Sec. I (para. marg. 1–3) [blacklisting of workers]; *Reichsgericht*, Urt. v. 13.01.1927, Az.: IV 489/25 = ERG Ziv. S. Bd. 115, S. 416, 416–419 (para. marg. 1–2) [publication of information on the plaintiff’s criminal convictions by a credit reporting agency].

ducting a similar type of business, or an inhibition by a certain legal entity to conduct the plaintiff's activity in a specific region of the state¹³, or referred to unfair competition, where defendant had used a trademark name closely similar to what of plaintiff's¹⁴. It was not uncommon for factory clerks to be contractually bound not to enter into competitive business for a considerable time lapse (e.g., for some years) in the 19th century¹⁵. I have to say "blacklisting" of factory employees, debtors, or merchants was not alien to the 19th century realities, which caused litigation upon grounds of defamation¹⁶. The publication of private facts concerning one's debts (including false information, e.g., publishing a larger sum than the debt had actually been) caused defamation lawsuits¹⁷.

The general right to privacy, not necessarily speaking about data protection, has been of relatively recent (if speaking about history of law) origin. Some courts claimed that it was literally "unknown" to earlier common law, if speaking about the Anglo-American legal system¹⁸. In this paper, I propose to move to civil law states so as to conduct an analysis of the legal positions of the courts in the continental legal system, which are far less investigated and commented upon. It is suggested that the German legal concept of privacy seemingly did not emerge before the middle or end of the 19th century (See for example Ruppel, 2001, S. 45–46). Some authors also claimed that the *Personlichkeitsrecht* could emerge from various legal doctrines of the 18th and 19th centuries from the scholarships of the *Pandektists* (von Schmadel, 2009, S. 12–15; Scheyhing, 1959/1960, S. 503, 506 ff.), or deriving from various legal-philosophic views of those-days scholars. I would not call myself a disciple of Pandectistics, but rather an adept of classical jurisprudence – if a right has been violated, not matter how it is called, then there has to be some redress for it: as the *Reichsgericht* said in the case of Otto von Bismark's deathbed photographs: "It is incompatible with the natural sense of justice that someone should keep unchallenged what he obtained through an unlawful act and withdrawn from what was violated in his rights by the same"¹⁹. But at the same time, law in theory and law on practice is not the same at all. Thus, jurisprudence shows the application of laws by the courts (i.e. the *Reichsgericht* if we are talking about the said court), and the courts may not apply theories as someone would like them to. As *Lehman* denoted, the theoretical background of the German privacy law was laid down by Otto von Gierke (von Gierke, 1895, S. 703–704)²⁰, who suggested that an interference into one's private affairs should be an

¹³ See., for instance, *Reichsgericht*, Urt. v. 15.10.1911. Az.: Rep. VII. 231/12, Tatbestand, (para. marg. Nr. 2).

¹⁴ For instance, see the case of *Salamander: Reichsgericht*, Urt. v. 11.01.1927, Az.: 166/26, (para marg. 1–3 as to facts); 5–13 (as to the grounds of the ruling).

¹⁵ See e.g. Schütt g. Lunß u. Comp., Königlich-Bayerischen Handelsappellationsgericht, Urt. v. 20 mai. 1868, Sache No. 81 (LXXXI), Sammlung Wichtiger Entscheidungen Des Königlich-Bayerischen Handelsappellationsgerichtes Bd. 2 (1870), S. 214, 215 ff.

¹⁶ See, for instance, a Canadian judgment on the said subject: *Wolfenden v. Giles*, 2 B.C.R. 279, para. 17–21 (1892) (see facts, blacklisting of an indebted person).

¹⁷ Quite an interesting Canadian judgment has recently come into my view: female plaintiff sued two merchants and a collector of debts for a libel. Plaintiff was indebted for 24 Dollars for dry goods, but the defendant merchants gave the third defendant an account against her, claiming she had been indebted for 59. After a threatening letter the third defendant had made a poster advertising a number of accounts for sale, including plaintiff's one, which was pinned in various public places where she lived. She sued for damages. The court held that such publication was libellous, since plaintiff had brought evidence certifying the real sum of damage. The court said the publication could only be justified by the truth of the fact, which the defendants did not establish by their publication. Therefore, the court held the defendants to be liable for damages: *Green et ux v. Millet et al.*, High Court of Justice of Ontario (Queen's Bench Div.), Feb. 27, 1892; The Ontario Reports Vol. 22 (XXII) 177, at p. 178–181; 189–192. (*Green v. Milles*, 22 O.R. 177, 178–181, 189–192 (1892).

¹⁸ *Melvin v. Reid*, 112 Cal.App. 285, 290 (Cal. App. Ct. 1931).

¹⁹ *Reichsgericht*, Urt. v. 28.12.1899, Az.: Rep. VI. 259/99, Sec. II, para. marg. 7

²⁰ At the same time, Gutteridge claimed that Gierke was far not the only person to deal with the prototype concept of privacy (Gutteridge, 1931, 203, 204 ff.). At the same time, nothing suggested that the named authors dealt with these concepts on basis of any actual case law.

actionable wrong (Lehman, 1968, p. 106, 108–109). Gierke has claimed that the right to privacy was not requested [by a prospective claimant] or not consciously recognized in Roman law (von Gierke, S. 704). The scope of what he had proposed, had been broader than the actual right to privacy, though encompassing it (Lehman, 1968, p. 108). Von Gierke did not cite any judgments from German courts which approved that courts have adjudicated a case on basis of any privacy rights. It is indeed hard, however, to find any judgments relating to a “classic” breach of privacy, such as an unauthorized use of a photograph, revealing one’s private facts, surveillance, or anything similar. One of those featured an indictment of a photographer, who reproduced the photos of the Bavarian king Ludwig II and the Duchess Sophie, made by the royal family photographer without the latter’s permission. But neither the king, nor the queen were litigants²¹.

2. Professional secrecy

My own archival examination shows that such sphere of (usually) privileged communications, such as secret patient-physician communications as well as facts of medical examination had been used as testimony in private law litigation, e.g., ones relating to repayment of a life insurance policy to the heir of the deceased insured²². Concerning medical evidence, earlier German jurisprudence displays that physicians could be released from their duty of confidentiality in order to testify, and the courts found they had better not testify unless released from their duty of secrecy. For instance, in one of such cases, in a divorce trial from early 1900s, the appellate court of Hamburg compelled a husband (defendant) by an interim judgment to release his physician from his duty of confidentiality so that the medical witness could testify concerning defendant’s condition of health affected by syphilis, which the defendant had likely to have contracted several years after having married with plaintiff, thus casting a substantial suspicion in his adultery. Upon the said judgment, once the physician is released from confidentiality, he may not refuse to testify²³. In 1885, the Reichsgericht has delivered a landmark judgment on medical secrecy: a doctor being in a tavern, revealed the content of a bill featuring facts of a sexually-transmitted ailment of a woman, whose husband filed a criminal complaint against him. In this judgment the Reichsgericht ruled against defendant and has delivered a substantial doctrinal background of medical secrecy. The right to file a criminal complaint for a secrecy breach, upon Reichsgericht, does not necessarily lie in the injured person itself, but in the wife’s husband, the head of the family, as well as a guardian of an aggrieved party²⁴. Medical evidence has been definitely used in criminal proceedings in the XIX century jurisprudence of Prussia and states which merged to German Empire: for instance, in the trial of *Gensler*, where the defendant was accused in poisoning his wife, the medical history of the victim and the forensic reports were submitted to the jury which apparently contained quite a lot of sensitive medical information²⁵.

The admissibility of medical evidence, as it may be displayed by “archival” decisions, depended upon the rules of civil and criminal procedure, but divulgence of medical facts was punishable upon the

²¹ *OGH Bayern*, Urt. v. 29 Feb. 1868, Sache XLIII, Sammlung Wichtiger Entscheidungen des k. bayer. Kassationshofes, Bd. 2 (1869), S. 116

²² *Handelappellationsgericht Nürnberg*, Urt. v. 15.05.1871, Samm. Ob. Ger. Bayern & H.G., Bd. 1 (1873), Nr. 33, S. 187, 188–189.

²³ *Ehefrau Anna Th. M. B geboren N. in Hamburg gegen ihren Ehemann den Comptoirboten B.H.B in Hamburg*, OLG Hamburg I v 14 Juni 1901, Hanseatische Gerichtszeitung Bd. 22 (1901) S. 269, 270–271.

²⁴ *Reichsgericht*, III Strafsenat, Urt. v 22 Oktober 1885 g. B. Rep. 2421/85, ERG St. Bd. 13, S. 60, 61–64.

²⁵ *Oberster Gerichtshof (Appellationshof) Bayern*, 13 Februar 1854, Zeitschrift für Gesetzgebung und Rechtspflege des Königreichs Bayern, Bd. I (1854), S. 94, 94–96, Sache 21 (XXI)

provisions of the acting criminal code. In the 19th century, codes of civil and criminal procedure in the states of pre-German Empire or the kingdoms of the German Empire contained provisions upon which a person which had been entrusted a professional secret, could legitimately refuse to testify upon these (*and only these!*) facts. Had such a person refused to testify in a court *in general*, he could be found criminally liable for refusing to testify as such. A decent example could be found in a judgment by the Bavarian Supreme Court of 1875, where a priest, called to testify concerning a theft, *completely* refused to testify, and he had not told to the court *what* he was actually entrusted to know, or had he actually acquired these facts by exercising his professional capacity as a clergyman: as the court said, only in case a witness clergyman declares before the judge he obtained the facts *sub sigillo confessionis*, only then he may be exempt from testifying in court. The priest was prosecuted and subsequently fined for refusing to testify, his appeal against the judgment of the lower court was found to be inadmissible²⁶. The court report provided an extended discussion concerning the rules of criminal procedure upon which a certain category of people could be exempt from testifying (including priests), in case such a person declared before the judge that the requested facts had been confidentially obtained in the course of exercising his profession, attributed to privileged communications. At the same time, the exemption from testifying (and only concerning the facts that have been confidentially obtained, not obviously from testifying in general) was, in fact, a *right* of such person. Was, however, a priest, or a physician absolutely free to testify on confidential facts – in case he had chosen to testify? There is no clear response to this question, but the appellate court of Hamburg in its 1901 judgment mentioned that the person entrusted to confidential facts has to be cautious about testifying on them, and thus it would be correct to release such person from confidentiality. The wording of this court is the following: “...the doctor cannot be expected to decide whether or not he should speak comfortably according to the circumstances [of the case], without being released from the obligation of confidentiality imposed on him by the law [Article 300 of the German Criminal Code] – absolutely and without distinctive restrictions and [thus] [he] can provide information”. Therefore, release from confidentiality upon an interim court order seems to be a correct solution²⁷. Technically, as of the those-days case-law of the German courts, an action to compel a person to testify concerning some confidential facts related to a dispute between plaintiff and another party, was an “intervening” dispute. It was not that seldom to encounter such “intervening” disputes within divorce trials²⁸.

However, the moral extent for codifying a breach of medical secrecy as a (usually minor) offense, if we are speaking in general, is certainly arguable. For instance, if we take the decision of the French Court of Cassation in the judgment of *Watelet* (1885), where a doctor was prosecuted for publishing a letter containing the details of the illness and demise of a famous French artist Jules Bastien-Lepage (who died of cancer at age 36) at a local magazine *La Matin*, the Court reiterated the position of the Correctional Court of Seine, which said that “The Art. 378 [of the Napoleon Penal Code] aims to protect, in the interest of public order, the safety, honor and delicacy of the individuals and their families against the indiscretions [meaning revelations] of persons holding secrets by their state or their profession...”.

²⁶ *Kooperator Anton Poschl*, OGH Bayern, 22.05.1875, Sammlung von Entscheidungen des Obersten Gerichtshofes für Bayern in Gegenständen des Strafrechtes und Strafprozesses Bd. 5, S. 182, 187–188. (Sache No. 51).

²⁷ *Ehefrau Anna Th. M. B geboren N. in Hamburg gegen ihren Ehemann den Comptoirboten B.H.B in Hamburg*, OLG Hamburg I., v 14 Juni 1901, Hanseatische Gerichtszeitung Bd. 22 (XXII) (1901) S. 269, 270.

²⁸ *Bl. Contra Prediger L. in Sachen des Bl., wider seiner Ehefrau, Beklagte*, late 1844 – early 1845 (date of the judgment has not been precisely reported in the courtbook), Oberappellationsgericht zu Lubeck, Sammlung von Entscheidungen des Oberappellationsgerichts zu Lubeck in Lubecker Rechtssachen, Bd. 2 [Publ. 1858] S. 437, ff., Sache 242 (LVII).

The abovesaid term “interest of public order”, upon the wording of the correctional court, is definitely not an abstract phrase: “The obligation of [professional] secrecy has been established [reference to Chaveau & Helie book on criminal law omitted] in a general interest, its violation does not only injure the person who has confided the secret [to defendant in this case], it hurts society as a whole, because it robs professions on which the society relies, of the confidence that should surround them...”²⁹. Despite the obligation definitely has a legal foundation in statute, as well as in older case-law, its origination comes, upon Jean Domat (Domat, 1777, p. 129–130), in Roman law, and it definitely cannot be claimed to be deprived of moral sense. But nobody, even Hart, has said that the positivist-created law is deprived of it. At the same time, the position of professional secrecy (as a constituent of the right to privacy) deriving from natural law could be found in Charles Muteau’s (1870) outstanding work on professional secrecy, which I admire a lot. As he says in the introduction: “Anyone, who freely accepts a secret thereby assumes the moral obligation to keep it; also, in all times, the violation of secrets was precisely the object of universal disapproval, it was considered contrary to the natural law...” (Muteau, 1870, p. IX). As a person, who has devoted quite a lot of effort into researching the history and then-applicable case-law in terms of medical secrecy (Lytvynenko, 2020, p. 100–134), I may say that it may be really hard to define the actual origination of such specimen as professional secrecy owing to its ancient origination.

If we go to older French cases, we may find quite a lot of vintage judgments. One of such was the case of *Fournier*, adjudicated by the Grenoble Court of Appeals, probably the first well-recorded judgment in relation to medical confidentiality. The plaintiff, a woman filed a legal separation suit claiming that the husband contracted her with syphilis. However, the physician, who was one of the witnesses for plaintiff, refused to testify on how he treated the plaintiff, and consequently, he could easily reveal the husband’s state of health. Dr. Fournier was sued and lost the suit at the trial court, but later he won the appeal, as the Grenoble Court of Appeals chose to adhere to an absolute concept of medical confidentiality, finding that it should prevail over the plaintiff’s interests even in case the physician was a witness for plaintiff, concluding that Dr. Fournier “has demonstrated his respect for the law, the morals and for public order”, exempting him from testifying³⁰. The many privacy derivatives, such as insight to medical records of the patient were still not known, or were not accepted in civil law jurisdictions in the first part of the 20th century: for instance, in a 1936 case brought before the Austrian Supreme Court, a woman (the plaintiff) desiring to produce the copy of her medical record in order to file an action against the doctor for prescribing dangerous pills or the pill manufacturer (as the plaintiff had been treated from poisoning in a private sanatorium) did not prevail in her action: the Supreme Court did not allow the production of the medical record copy in a *private law* claim. As the court said the legislation allowing the courts to request medical records, did not result in the patient’s entitlement to communicate her the copy of her medical record. The court claimed that the production of such medical record could also not be derived from the contract between physician and patient. Moreover, the court found that plaintiff had enough knowledge concerning her condition of health from the sanatorium chief physician and nothing deprived her to litigate against the physician or the pills manufacturer, or bring the chief physician of the sanatorium where she had been treated as a witness³¹. What is also

²⁹ *Watelet et Dallet, gerant du journal Le Matin, C. Min. publ., Cour de Cass., Cham. Crim, 19 dec. 1885, Jurisprudence Royaume (Daloz), Dall. Per. 1886 I 347, p. 347–348.*

³⁰ *Fournier c. Remusat, Cour d’Appel de Grenoble, 23 aout 1828, Sirey 1828 I 318, 319–320; Dall. Per. 1828 II 237, 238*

³¹ *Oberster Gerichthof, Entscheidung von 17 November 1936 (Nr. 189), 3 Ob 984/36, EOG Bd. XVIII (78) S. 534, at p. 536–538.*

peculiarly interesting: some old-time authors claimed that protection of medical secrecy should not be observed to having its roots in the right to personality (Liebmann, 1890, S. 33).

3. The recognition, or quasi-recognition of the right to privacy

Still, the general right to privacy was not recognized as such in the case-law of German courts in the first decades of 20th century or earlier. In the case of *Nietzsche letters* the Reichsgericht has ascertained that the “general” personal right does not actually exist in overall terms, despite that legally recognized personal rights do: “A general, subjective right of personality is alien to the applicable civil law. There are only special, legally regulated personal rights, such as the right to a name, the right to trademarks, the right to one’s own image, the personal rights components of copyright law”³². At some point, it is quite hard to say whether the right to privacy in general was known to earlier German law, or it was not. If speaking about academic scholarship, I would distinguish *Joseph Koller*, one of the fewer legal scholars who has devoted his attention to the collection and explanation of domestic and foreign case-law on various civil law litigation, which also involved privacy violations. 2 years prior to von Gierke, Kohler published a work concerning the inviolability of letters. In one of the chapters of his work, Kohler has conducted a great analysis of French and Belgian case-law from the beginning to the peak of the 19th century (Kohler, 1893, S. 6–11, 41–49). I support this approach, as the right to privacy is multi-component and, in those days, it was probably not possible to reflect all its aspects in case-law and its contemporary doctrine, but he still did remarkable work covering the issues of inviolability of letters not only in the doctrine, but with a substantial case-law background.

This does not, however mean that the Reichsgericht did not recognize a right to privacy as such: it did, but only in the scope of already existing rights. For instance, in the case of “*Fraulein G.Sch.*” a young unmarried woman was photographed in a swimsuit at a swimming pool by a pair of photographers (a husband and a wife) in the town of Cranz (now Zelenogradsk in the Kaliningrad oblast), which was later exhibited. Upon the findings of the trial court, the insult to honor (under Article 185 of the Criminal Code) consisted of the impression that the depicted person allowed herself to be photographed this way and having agreed for this photograph to be displayed and offered for the purchase that “would cast a shadow over the lady’s feelings of decency and morality and severely injured her in the reverence of others”, and concluded that such actions were a deliberate insult to honor. The Reichsgericht had affirmed the judgment³³. *Harry Krause* while commenting upon the early development of German privacy law, has also denoted that the actual right to privacy had never been recognized as such – if the case was decided for plaintiff, it was decided upon another legal foundation (Krause, 1965, p. 481, 485–486).

The case of *Otto von Bismark* photographs decided by Reichsgericht³⁴ was, in fact, a prelude to codification of the legal protection of one’s image. Similar cases could be found not only in the archives of the Supreme Court. In a 1900 judgment by the Higher Land Court of Hamburg in the case of *Martha T.*, which was a typical privacy case of the old epoch, the right of legal protection against an unauthorized disposal of a photograph depicting plaintiff was invoked. Plaintiff, Martha T., sued a detective agency and its agent for harassing her with intrusive observations. The agent of the aforesaid legal entity has followed and photographed plaintiff by means of a pocket camera. It was undoubted that defendant’s agent acted as a subordinate and had been commanded to do so upon the order of an unnamed third party. She filed an injunction action against abovementioned defendants,

³² Reichsgericht, Urt. v. 07.11.1908, Az.: Rep. I. 630/07, para. 7 = ERG Ziv. Sachen, Bd. 69, S. 401, 403.

³³ Reichsgericht (II Strafsenat) vom 29.11.1898, D 4093/98, VIII 8145.

³⁴ Reichsgericht, Urt. v. 28.12.1899, Az.: Rep. VI. 259/99, marg. para. Nr. 7.

who unsuccessfully made an appeal to the Hamburg Higher Land Court, which affirmed the judgment of the first-instance court. Concerning the legal foundation of the violation of the plaintiff's rights the appellate court said that: "[...] it does not seem appropriate to oppose the claim made by the applicant to a general right to personality existing alongside with the codified one"; the court doubted whether Art. 823 (1) of the Civil Code protects the plaintiff's right of honor. The appellate court, however, came to a conclusion that the violation of such type is an *insult* (Art. 185 StGB). The appellate court affirmed the verdict of the first-instance court³⁵.

4. The cases of Count Zeppelin and the case of the "convicted businessman"

The new law "On the copyright in works of the visual arts and photography" was adopted in January 1907. The jurisprudence arrived soon, coining probably the most famous privacy-related judgment in German law ever known. Moreover, the plaintiff was a celebrated nobleman *Ferdinand von Zeppelin* (1838-1917), known as the inventor of rigid airships. So, the facts were the following. In October 1906, the defendant registered a wordmark *Graf Zeppelin*, and later, in November 1907, the trademark featuring the plaintiff's picture combined with the words "Graf Zeppelin". All the said trademarks were registered for tobacco goods of various kinds, including cigars and cigarettes. Both of the registrations were made without plaintiff's notice. What is more, plaintiff's agent permitted another company to use the plaintiff's name and image for one of their cigar brands in Oct. 1907. Zeppelin sued defendant claiming that the use of his name and image is not authorized by him, to consent to the deletion of the abovesaid trademarks and to refrain from using plaintiff's name and image to designate their goods and packages of goods. Both first and second instance court found for Zeppelin, so did the Reichsgericht. The legal foundations were the following:

1. Unauthorized use of plaintiff's name (Art. 12 BGB). The court clearly denoted that a violation of the abovesaid provision includes the use of a foreign name for advertising purposes, such as denoting goods, and the plaintiff's interest of protection is not necessarily bound to property or family law. As the Court said: "Rather, the general principle must be established that no one has the right to have someone else's name registered as a trademark without their knowledge and will". Such entry, upon the court's view, creates an obstacle for the bearer of the name to register the name as a trademark for himself, or for a family member. The interest of the person to insist that his name should not be used for advertising purposes by others (or at least to the extent he approves it himself), upon the court, is "natural" and "justified". And people who are celebrities are not an exception to this rule: "Even famous men who enjoy great popularity enjoy name protection no less than anyone else, and if they regularly do not intervene against the use of their name, this does not apply to anyone else's right to control an abuse of his name"³⁶.

2. Article 22 of the 1907 law "On the copyright in works of the visual arts and photography". Upon the said provision, the images may only be distributed or publicly displayed with the authorization of the depicted person (i.e., plaintiff in the concrete case). The exception to this provision, contained in Article 23 (1) of the 1907 law concerned portraits from the field of contemporary history. Using the wording the Court: "This provision is justified with the consideration that the exploitation of the portrait of persons who are in public life or who arouse a general interest in art and science cannot simply be linked to the approval of the person portrayed, rather, according to the natural conditions of social and

³⁵ *Martha T. in Hamburg gegen den Privatdetektiv FDP und dessen Agenten K in Hamburg*, OLG Hamburg, 26.11.1900, Hanseatische Gerichtszeitung Bd. 22 (1901), S. 25, 27.

³⁶ Custom translation from German.

historical life, a certain journalistic right to free representation of such persons should be granted”³⁷. Article 22 of the law, goes on the court, applies as well in case the display or the distribution of the said image violates a legitimate interest of the person depicted on it and the same considerations apply analogously with the interest of a non-use of one’s name. As, again, of the witty wording of the court: “Not everybody would fancy seeing his image emblazoned on the goods of any merchant...”. Concerning the registration of the portrait of the person belonging to contemporary history, the owner of the trademark should obtain the authorization of exclusive use within certain limits and the exclusive authorization for the purpose of Article 23 (1) of the 1907 law.

The Court affirmed the judgment of the appellate court, finding for plaintiff³⁸. Despite the court did not speak about any general right to privacy, plaintiff’s rights were definitely protected upon the legislative provisions relating to one’s name (the Civil Code) and image (law on copyright in the works of visual art and photography). Despite someone may contend that the German approach by recognizing a right to one’s name in the civil code and the right to one’s image upon copyright law is not the general recognition of right to privacy, I would not say it is inefficient. Another RG judgment dating to 1927, involving a “breach of good morals”, was directly a case involving a violation of the right to privacy. An entrepreneur in his mid-40s, born in 1883, had a substantial criminal record. In 1907, plaintiff was imprisoned for various offenses: an inducement to perjury, an attempted fraud, embezzlement, and some other crimes for a period of three and a half years but was pardoned 8 months after of his imprisonment. Plaintiff then turned to be a pious citizen and has conducted business thereafter. The defendant credit agency included the abovementioned facts into the reports it has delivered to its customers concerning plaintiff. He filed an injunction action to forbid the defendant credit reporting agency to mention his convictions in the reports. The first-instance court dismissed his complaint. Before the appellate court plaintiff has repeated the claim and filed an auxiliary motion where he asked to inhibit defendant to mention his conviction in other way that “in 1905/1906 he got involved in business that brought him into conflict with the criminal law”. This request had been upheld by the court of second instance, which replaced the words “1905/1906” using “at a young age” instead. The defendant’s appeal to the Supreme Court was unsuccessful. This court recognized that a preventive injunction which presupposed an a) unlawful interference with plaintiff’s legal interest; b) the risk of repetition which have been established, was justified. The truthfulness of the facts concerning the conviction of plaintiff, has also been established by the court of appeal. The court had to determine whether the defendant had breached the “good morals” in the sense of Art. 826 of the German Civil Code. The Court claimed, that since the communicated facts were truthful, then the assessment of an alleged immorality should be the following: “Since the facts communicated corresponded to the truth, the immorality of their communication can only be assumed and derived from them in the presence of special circumstances [reference omitted by the author][...] These circumstances must be of such a nature, that the decency of the just and equitable, thinking, average person rejects the communication in the chosen harsh form...”. The court assessed the publication from the view of the significance of the facts to the customers. The court agreed that the information concerning some merchant’s conviction might be important for the customers, but it is not acceptable that the credit agency would leave it up to the customers to decide of whether such facts do constitute any commercial significance for them. The court, instead, adopted a very high moral position regarding the given dispute, which could considerably anticipate the doctrine of a “right to be forgotten” (in the extent of the right of expungement

³⁷ *Ibid.*

³⁸ *Graf Zeppelin*, Reichsgericht, Urt. v. 28.10.1910, Az.: Rep. II. 688/09, ERG Z. Bd. 74 S. 308, 310–313; marg. para. Nr. 5–7.

of criminal records maintained by the law enforcement agencies³⁹): “For it actually corresponds to today’s views, which have become the moral norm, as expressed in particular in the law of April 9, 1920 [reference to the publication gazette omitted], that a punishment, albeit a severe one, especially a one-off punishment suffered at a young age, must not be carried over to the convicted person for life, but that he must be helped to make up for the misconduct through impeccable social behavior, and to start a new economic life build up and regain its social standing”. The Court has also recognized that the credit agency should also respect this principle, emphasizing that a communicator (i.e., the defendant) should be diligent to examine the information (which it provides to its customers), whether or not such communication with the customers could hinder regaining plaintiff’s reputation. The question arises, said the court, of whether the communication of the details of the plaintiff’s offenses and imprisonment are necessary in the interest of the customers. If the omission of the fact of plaintiff’s convictions is impossible, said the court, it is questionable whether such a rough disclosure is actually in need, and whether a milder form of communication protects the plaintiff enough. So, if the defendant violated the abovesaid assumptions, then there had been a breach of morals. Reviewing the appellate court’s decision, the Reichsgericht held that the 2nd-instance court assumed that the legal interests of the defendant’s customers would be satisfied in case the communication would be provided as the appellate court had said. The context of the motives of the appellate court’s decisions, emphasized the Reichsgericht, implied that the defendant was expected to be convinced that the mentioning of the plaintiff’s conviction was not necessary. However, the defendant ignored these assumptions. The defendant’s appeal was dismissed⁴⁰. *Therefore, we may deduce that the stigmatization of a previously convicted man is impermissible in a mature society with high moral values.*

Inferences

The debate between Hart and Fuller is, generally speaking, a clash between the comprehension of what is law and how it is constructed (here, we may implement a variety of auxiliary interrogations, such as “what ought to be the law” or “when is the law deemed to be legitimate (from the moral side of view)?”, or “is such thing as morality known to old civil law?”) and how the law is interconnected with morality. They both represented quite different views, one defending positions of American positivism, while the other adhering to the ideas of naturalism. At the same time, the moral side of German civil law of the older times (the debate itself traces back to 1958) remained nearly untouched, as scholars have discussed only aspects of the totalitarian reign of 1933–1945. I attempted to discuss the moral side of German law within the prism of the early foundations of the right to privacy as well as the legacy on medical confidentiality. The analysis displayed that courts were reluctant to recognize a general right to privacy but adjudicated the dispute on basis of other rights – the plaintiffs could succeed on other grounds. Despite it being quite apparent that German law is influenced by positivism, it may not be denied that the abovementioned judgments were deprived of any moral considerations. The concept of “good morals” was frequently used by German courts of the 19th and early 20th century in diverse civil litigation, covering issues from unfair competition to the right of free employment, entrepreneurship, right to privacy, and professional negligence.

Concerning the development of right to privacy in German law, the stages of its development should look as follows:

³⁹ See, for instance, my latest paper concerning the given topic: Lytvynenko, 2019, p. 379–389.

⁴⁰ *Reichsgericht*, Urt. v. 13.01.1927, Az.: IV 489/25 = ERG Ziv. S. Bd. 115, S. 416, 416–419 (para marg. 1–5).

1. The conceptualisation of privacy rights deriving from professional secrecy or a casuistic interpretation of offences, such as an insult (mid-to-late 19th century);
2. The interpretation of the civil code provisions by the courts (as well as the Supreme Court) involving “personal rights” (from the 1890s to the early-to-mid-20th century). The right of personality, however, upon later views of the German Supreme Court, received legal protection on basis of other existing rights; at the same time, the overarching “personality right” did not exist in the legal system as such in those days⁴¹.
3. The recognition of the general right to privacy by the Supreme Court of Germany (Bundesgerichtshof) in the second part of the 20th century⁴².

List of references

Court judgments

Griswold v. Connecticut, 381 U.S. 479.

Reichsgericht, Urt. v. 11.04.1901, Az.: Rep. VI. 443/00.

Reichsgericht, Urt. v. 15.11.1909, Az.: Rep. VI. 382/08; ERG Ziv. S. Bd. 72, S. 175.

Reichsgericht, Urt. v. 29.05.1902, Az.: Rep. VI. 50/02.

Reichsgericht, Urt. v. 13.01.1927, Az.: IV 489/25 = ERG Ziv. S. Bd. 115, S. 416.

Reichsgericht, Urt. v. 01.03.1912, Az.: Rep. III. 231/11 = ERG Ziv. S. Bd. 78, S. 432.

Schloendorff v. New York Hospital, 105 N. E. 92; 211 N.Y. 125 (1914).

Reichsgericht, III Strafsenat, Urt. v. 31.05.1894, Rep. 1406/94 = ERG St. S. Bd. 25. S. 375.

Reichsgericht, Urt. v. 27.06.1913, Az.: Rep. III. 30/13 = ERG Ziv. S. Bd. 83, S. 27.

OLG zu Braunschweig (1 Sen.), Urt. v. 13.02.1893, Sauffert's Arch. Bd. 48 S. 413 (Sache No. 262).

In Sache des Karl Schulze, Strafgericht Kanton Basel-Stadt, Urt. v. 14.06.1882, L. Oppenheim, Das ärztliche Recht zu körperlichen Eingriffen an Kranken und Gesunden, Benno Schwabe, Verlagsbuchhandlung, Basel, 1890, p. 43.

Reichsgericht, Urt. v. 15.10.1911. Az.: Rep. VII. 231/12.

Reichsgericht, Urt. v. 11.01.1927, Az.: 166/26.

Schütt g. Lunß u. Comp., Königlich-Bayerischen Handelsappellationsgericht, Urt. v. 20 mai. 1868, Sache No. 81 (LXXXI), Sammlung Wichtiger Entscheidungen Des Königlich-Bayerischen Handelsappellationsgerichtes Bd. 2 (1870), S. 214.

Wolfenden v. Giles, 2 B.C.R. 279 (1892).

Green et ux v. Millet et al., High Court of Justice of Ontario (Queen's Bench Div.), Feb. 27, 1892; The Ontario Reports Vol. 22 (XXII) 177.

Melvin v. Reid, 112 Cal.App. 285 (Cal. App. Ct. 1931).

Reichsgericht, Urt. v. 28.12.1899, Az.: Rep. VI. 259/99.

OGH Bayern, Urt. v. 29 Feb. 1868, Sache XLIII, Sammlung Wichtiger Entscheidungen des k. bayer. Kassationshofes, Bd. 2 (1869), S. 116.

Handelappellationsgericht Nurnberg, Urt. v. 15.05.1871, Samm. Ob. Ger. Bayern & H.G., Bd. 1 (1873), Nr. 33, S. 187.

Ehefrau Anna Th. M. B geboren N. in Hamburg gegen ihren Ehemann den Comptoirboten B.H.B in Hamburg, OLG Hamburg I v 14 Juni 1901, Hanseatische Gerichtszeitung Bd. 22 (1901) S. 269.

Reichsgericht, III Strafsenat, Urt. v 22 Oktober 1885 g. B. Rep. 2421/85, ERG St. Bd. 13, S. 60.

Oberster Gerichtshof (Appellationshof) Bayern, 13 Februar 1854, Zeitschrift für Gesetzgebung und Rechtspflege des Königreichs Bayern, Bd. I (1854), S. 94, Sache 21 (XXI).

Kooperator Anton Poschl, OGH Bayern, 22.05.1875, Sammlung von Entscheidungen des Obersten Gerichtshofes für Bayern in Gegenständen des Strafrechtes und Strafprozesses Bd. 5, S. 182 (Sache No. 51).

Ehefrau Anna Th. M. B geboren N. in Hamburg gegen ihren Ehemann den Comptoirboten B.H.B in Hamburg, OLG Hamburg I., v 14 Juni 1901, Hanseatische Gerichtszeitung Bd. 22 (XXII) (1901) S. 269.

Bl. Contra Prediger L. in Sachen des Bl., wider seiner Ehefrau, Beklagte, late 1844 – early 1845 (date of the judgment has not been precisely reported in the courtbook), Oberappellationsgericht zu Lubeck, Sammlung von Entscheidungen

⁴¹ *BGH*, Urt. v. 25.05.1954, I ZR 211/53 = *BGH Ziv. S. Bd. 13*, S. 334, 336–337.

⁴² *BGH*, Urt. v. 14.02.1958, I ZR 151/56 = *BGH Ziv. S. Bd. 26*, S. 349, 353–355.

- des Oberappellationsgerichts zu Lubeck in Lubecker Rechtssachen, Bd. 2 [Publ. 1858] S. 437, Sache 242 (LVII). *Watelet et Dallet, gerant du journal Le Matin, C. Min. publ.*, Cour de Cass., Cham. Crim., 19 dec. 1885, Jurisprudence Royaume (Daloz), Dall. Per. 1886 I 347.
- Fournier c. Remusat*, Cour d'Appel de Grenoble, 23 aout 1828, Sirey 1828 I 318, Dall. Per. 1828 II 237.
- Oberster Gerichthof*, Entscheidung von 17 November 1936 (Nr. 189), 3 Ob 984/36, EOG Bd. XVIII (78) S. 534.
- Reichsgericht*, Urt. v. 07.11.1908, Az.: Rep. I. 630/07, para. 7 = ERG Ziv. Sachen, Bd. 69, S. 401.
- Reichsgericht* (II Strafsenat) vom 29.11.1898, D 4093/98, VIII 8145.
- Martha T. in Hamburg gegen den Privatdetectiv FDP und dessen Agenten K in Hamburg*, OLG Hamburg, 26.11.1900, Hanseatische Gerichtszeitung Bd. 22 (1901), S. 25.
- Graf Zeppelin*, Reichsgericht, Urt. v. 28.10.1910, Az.: Rep. II. 688/09, ERG Z. Bd. 74 S. 308.
- Reichsgericht*, Urt. v. 13.01.1927, Az.: IV 489/25 = ERG Ziv. S. Bd. 115, S. 416.
- BGH*, Urt. v. 25.05.1954, I ZR 211/53 = BGH Ziv. S. Bd. 13, S. 334.
- BGH*, Urt. v. 14.02.1958, I ZR 151/56 = BGH Ziv. S. Bd. 26, S. 349.

Academic literature

- Hart, H. L. A. (1958). Positivism and the Separation of Law and Morals. *Harvard Law Review*, 71(4), 593–629.
- Fuller, Lon L. (1958). Positivism and Fidelity to Law: A Reply to Professor Hart. *Harvard Law Review*, 71 (4), 630–672.
- Nicholson, Peter P. (1974). The Internal Morality of Law: Fuller and his Critics. *Ethics*, 84(4), 307–326, <https://doi.org/10.1086/291928>
- Tucker, Edwin W. (1965). The Morality of Law, by Lon L. Fuller. *Indiana Law Journal*, 40(2), 270–279.
- Ruppel, K. L. (2001). *Deliktrechtlicher Datenschutz Nach 823 Abs. 1 BGB zwischen Informatieller Selbstbestimmung, Rechtsguterschutz und Eingriffstypisierung*. Dissertation, Frankfurt.
- von Schmadel, J. (2009). *Rechte im österreichischen und deutschen Filmrecht unter besonderer Beachtung der Rechte des Filmschauspielers*. Disseration, Wien.
- Scheyhing, R. (1959/1960). Zur Geschichte des Persönlichkeitsrechts im 19. Jahrhundert. *Archiv für die civilistische Praxis Bd. 158*, H. 5/6.
- von Gierke, O. (1895). *Deutsches Privatenrecht Band 1: Allgemeiner Teil u. Personenrecht*, Leipzig [u.a].
- Gutteridge, H.C. (1931). The Comparative Law of the Right to Privacy, 47 *L.Q. Rev.*
- Lehman, Jon A. (1968). The Right to Privacy in Germany, Note, 1 *N.Y. Univ. J'l of Int'l L. & Politics*.
- Domat, J. (1777). *Le Droit Publique et Legum Delectus*. Paris: Tome Second.
- Muteau, C. (1870). *Du Secret Professionnel: Traite Theoretique et Practique*. Paris: Marescq Aine, Libraire Editeur.
- Lytvynenko, A. A. (2020). Data privacy in the sphere of medical confidentiality: the historical and contemporary case-law of the United States, the European Court of Human Rights and Selected Continental Europe states. *Topical Problems of State and Law*, 83, 100–134.
- Liebmann, J. (1890). *Pflicht des Arztes zu Bewahrung anvertrauer Geheimnisse*. Berlin: Verlag von Otto Liebmann.
- Kohler, J. (1893). *Das Recht an Briefen*. Berlin: Carl Heymann's Verlag.
- Krause, H. D. (1965). Right to Privacy in Germany – Pointers for American Legislation? *Duke Law Journal*, 3, 481–530.
- Lytvynenko, A. (2019). The application of the right to be forgotten in the context of criminal records expungement: the case law of the European Court of Human Rights and the case law of the US courts. *Law Review of the Kyiv University of Law*, 4, 379–389, <https://doi.org/10.36695/2219-5521.4.2019.67>

The Hart-Fuller Debate on Law and Morality Within the Prism of the Legal Foundation of the Right to Privacy in its Earlier Jurisprudential Interpretations in German Case-Law

Anatoliy A. Lytvynenko

(Baltic International Academy, Department of Law sciences)

S u m m a r y

The paper is dedicated to display the foundation of the German-originating right to privacy in jurisprudence as a spin-off discussion of the Hart-Fuller debate considering law and morality. Since these authors did not reflect the historical foundation of the issue of morality in German law, especially connecting it to some certain right, I chose to reflect the actual position of German courts (both the Reichsgericht and the lower-instance courts) within the prism of recognition

of the right to privacy as well as the violation of good morals upon the provisions of the Civil Code. As the older case-law shows, the right to privacy was protected by a “violation of good morals” to a certain extent, though it frequently was connected with unfair competition or the right to conduct business freely. Despite the Reichsgericht not recognizing a general right to personality, it granted redress upon the existing civil rights as a copyright, a right to one’s name or image, or a violation of good morals. Apart of the Reichsgericht judgments, my archival work allowed to assess the position of lower-instance courts of the Prussian lands (early 19th to 20th centuries) regarding such issues as professional (especially medical) secrecy, covering both testimonial and extrajudicial revelations. The existing case-law of the said period displays that the issue of good morals in one way or the other has never been alien to German law and was sufficiently determined and applied by the courts.

Harto ir Fullerio diskusija dėl teisės ir moralės, nagrinėjant ją per senesnėje Vokietijos teismų praktikoje pagrįstos ir interpretuotos teisės į privatumą prizmę

Anatolijus A. Lytvynenko

(Baltijos tarptautinė akademija, Teisės mokslų katedra)

S a n t r a u k a

Straipsnyje siekiama apibūdinti teisės į privatumą pagrindimą Vokietijos teismų praktikoje kaip Harto ir Fullerio diskusijos, kurioje svarstoma apie teisę ir moralę, atspindį. Kadangi šie autoriai neatskleidė istorinių moralės klausimo ištakų Vokietijos teisėje, nesusiejo jos su tam tikra teise, nusprendžiau išsiaiškinti faktinę Vokietijos teismų (tik Reichsgericht, tiek žemesnės instancijos teismų) poziciją šiuo klausimu, pažvelgęs per teisės į privatumą pripažinimo ir Civilinio kodekso nuostatų dėl geros moralės pažeidimo nustatymo teisme prizmę. Senesnė teismų praktika rodo, kad teisę į privatumą iš dalies saugojo „geros moralės pažeidimo“ norma, nors toks pažeidimas dažnai buvo susijęs su nesąžininga konkurencija ar teise laisvai verstis verslu. Nepaisant to, kad Reichsgericht nepripažino bendrosios teisės į tapatybę, jis sugrąžino esamas pilietines teises, tokias kaip autorių teisės, teisė į savo vardą ar atvaizdą, arba pašalino geros moralės pažeidimus. Be Reichsgericht sprendimų, mano archyvinis darbas leido įvertinti Prūsijos žemių (XIX–XX a. pradžios) žemesnės instancijos teismų poziciją tokiu klausimu, kaip antai profesinis (ypač medicininis) slaptumas, apimantis ir parodymus teisme, ir neteismines kalbas. Esama minėto laikotarpio teismų praktika rodo, kad vienaip ar kitaip geros moralės klausimas niekada nebuvo svetimas Vokietijos teisei, sąvoka buvo pakankamai apibrėžta ir taikyta teismų.

Anatolij A. Lytvynenko is a PhD candidate and teaching assistant at the Ivan Franko National University of Lviv, a PhD candidate at the Faculty of Law of the Baltic International Academy in Riga, and a PhD candidate at the Robert Gordon University of Aberdeen. In 2021 he will be defending his doctoral thesis *The Concept of Sensitive Personal Data: A Comparative Analysis of National and International Case-Law*. In 2018, he began his PhD studies at the department of Law at RGU University of Aberdeen, Scotland under the specialty of medical law. His forthcoming doctoral thesis work’s preliminarily title is *Could Various Rights of the Patients be Summoned under the Umbrella of the Right to Autonomy?*. His main research interests include medical law, data privacy law, history of law, bioethics law, and banking law.

Anatolijus A. Lytvynenko yra Lvovo Ivano Franko nacionalinio universiteto doktorantas ir dėstytojas, Baltijos tarptautinės akademijos Rygos teisės fakulteto doktorantas ir Aberdino Roberto Gordono universiteto doktorantas. 2021 m. jis gins daktaro disertaciją „Slaptų asmens duomenų samprata: lyginamoji nacionalinės ir tarptautinės teismų praktikos analizė“. 2018 m. įstojo į doktorantūrą Aberdino Roberto Gordono universitete, Škotijoje, pagal specialybę „Medicinos teisė“. Jo doktoranto darbas preliminariai vadinamas „Ar įvairios paciento teisės gali būti surinktos po teisės į autonomiją skėčiu?“. Pagrindinės autoriaus mokslinių tyrimų kryptys yra medicinos teisė, duomenų privatumo teisė, teisės istorija, bioetikos teisė ir bankų teisė.