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Professional secrecy of legal and economic public trust professionals in selected jurisprudence of the Polish Constitutional Tribunal

Tajemnica zawodowa przedstawicieli prawniczych i ekonomicznych zawodów zaufania publicznego w wybranych orzeczeniach polskiego Trybunału Konstytucyjnego

Профессиональная тайна представителей юридических и экономических профессий, обладающих общественным доверием, в избранных решениях Конституционного трибунала Республики Польша

Професійна таємниця представників юридичних та економічних професій, які користуються публічною довірою, у вибраних рішеннях Конституційного Суду Польщі

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Abstract: The analysis of selected judgments of the Constitutional Tribunal has led the author to formulate the thesis that professional secrecy does not constitute an autonomous constitutional value. Its observance, however, contributes to the protection of constitutional values such as the right to privacy, the secrecy of communications, and informational autonomy. Its content and scope are shaped by the legislator, who enjoys broad regulatory discretion, albeit limited by the necessity to respect overarching constitutional norms. The article indicates that any limitations on professional secrecy must satisfy the requirements of clarity and proportionality (Article 31 (3) of the Constitution) and must be assessed in the context of safeguarding other constitutional goods, in particular the right to privacy (Article 47), the secrecy of communications (Article 49), and an individual's informational autonomy (Article 51 (2)). Professional secrecy thus plays a vital role in fostering citizens' trust in the state and the law, as well as in ensuring the proper performance of the duties of public trust professions in a democratic state governed by the rule of law.

Keywords: professional secrecy, public trust professions, constitutional values, right to privacy, confidentiality of communications, informational autonomy, proportionality test

Streszczenie: Analiza wybranych orzeczeń Trybunału Konstytucyjnego pozwoliła autorowi na postawienie tezy, że tajemnica zawodowa nie stanowi samodzielnej wartości konstytucyjnej. Jej przestrzeganie przyczynia się jednak do ochrony wartości konstytucyjnych, takich jak prawo do prywatności, tajemnica komunikowania się i autonomia informacyjna. Jej treść i zakres kształtuje ustawodawca, który dysponuje szeroką swobodą regulacyjną, ograniczoną koniecznością poszanowania nadrzędnych norm konstytucyjnych. W artykule wykazano, że ograniczenia tajemnicy zawodowej muszą spełniać wymogi jasności i proporcjonalności (art. 31 ust. 3 Konstytucji), a także podlegać ocenie pod kątem ochrony innych dóbr konstytucyjnych, zwłaszcza prawa do prywatności (art. 47), tajemnicy komunikowania się (art. 49) i autonomii informacyjnej jednostki (art. 51 ust. 2). Tajemnica zawodowa pełni zatem istotną rolę w budowaniu zaufania obywateli do państwa i prawa oraz w zapewnieniu prawidłowego wykonywania zadań przez zawody zaufania publicznego w demokratycznym państwie prawnym.

Słowa kluczowe: tajemnica zawodowa, zawody zaufania publicznego, wartości konstytucyjne, prawo do prywatności, tajemnica komunikowania się, autonomia informacyjna, test proporcjonalności

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Резюме: Анализ отдельных решений Конституционного трибунала Республики Польша позволил автору выдвинуть тезис о том, что профессиональная тайна не является самостоятельной конституционной ценностью. Однако ее соблюдение способствует защите конституционных ценностей, таких как право на частную жизнь, тайна переписки и информационная автономия. Ее содержание и объем определяются законодателем, который обладает широкой свободой регулирования, ограниченной необходимостью соблюдения высших конституционных норм. В статье показано, что ограничения профессиональной тайны должны соответствовать требованиям ясности и пропорциональности (ст. 31 п. 3 Конституции), а также подлежать оценке с точки зрения защиты других конституционных благ, в частности права на неприкосновенность частной жизни (ст. 47), тайны переписки (статья 49) и информационной автономии личности (статья 51, пункт 2). Таким образом, профессиональная тайна играет важную роль в укреплении доверия граждан к государству и праву, а также в обеспечении надлежащего выполнения задач профессиями, обладающими общественным доверием, в демократическом правовом государстве.

Ключевые слова: профессиональная тайна, профессии, обладающие общественным доверием, конституционные ценности, право на неприкосновенность частной жизни, тайна переписки, информационная автономия, тест пропорциональности

Анотація: Аналіз низки рішень Конституційного Суду дав підстави автору стверджувати, що професійна таємниця не становить самостійної конституційної цінності. Водночас її дотримання сприяє захисту таких конституційних благ, як право на приватність, таємниця спілкування та інформаційна автономія особи. Її зміст та обсяг визначає законодавець, який володіє широкою свободою регулювання, обмеженою необхідністю дотримання вищих конституційних норм. У статті показано, що обмеження професійної таємниці мають відповідати вимогам чіткості та пропорційності (ст. 31, п. 3 Конституції), а також підлягати оцінці з позицій захисту інших конституційних благ, зокрема права на приватність (ст. 47), таємниці спілкування (ст. 49) та інформаційної автономії особи (ст. 51, п. 2). Отже, професійна таємниця відіграє ключову роль у формуванні довіри громадян до держави та права, а також у забезпеченні належного виконання функцій професіями, пов'язаними з публічною довірою, у демократичній правовій державі.

Ключові слова: професійна таємниця, професії, пов'язані з публічною довірою, конституційні цінності, право на приватність, таємниця спілкування, інформаційна автономія, тест пропорційності

Introduction

Public trust professions were highly valued by the framers of the Polish Constitution of 1997 in a democratic state governed by the rule of law. The importance of professional self-governing bodies representing individuals practising these professions is emphasised in Article 17 (1) of the Constitution. This provision, located in Chapter I of the Fundamental Law, titled *The Republic*, holds fundamental constitutional significance. Professional secrecy, an element intrinsically linked to the essence of public trust professions, has been the subject of numerous doctrinal and judicial debate. However, its status as a constitutional value has never been explicitly determined. On one hand, the Constitution does not directly mention professional secrecy. On the other hand, one cannot overlook the role of this institution in protecting other constitutional values. For these reasons, this article analyses the institution of professional secrecy in the context of the issue at hand. The scope of legislative discretion

in regulating professional secrecy will be examined, along with the constitutional standards for reviewing legal acts that modify professional secrecy, which should be assessed in light of their compliance with the Constitution.

The principal aim of this article is to determine whether the professional secrecy of certain professions constitutes a distinct constitutional value. The other aims are: to establish the status of professional secrecy as a constitutional value, to define the scope of the legislature's discretion in regulating it, and to identify the standards of constitutional review applied to legal norms that modify its scope. The analysis is conducted exclusively on the basis of the jurisprudence of the Polish Constitutional Tribunal and focuses on professional secrecy in relation to legal and economic public trust professions in Poland, in particular through corporate statutes and the internal acts of professional self-governing bodies. Moreover, the article examines the protective functions of professional secrecy with respect to the right to privacy, the secrecy of communications and the informational autonomy of the individual, as well as establishes which constitutional requirements – including clarity, proportionality, and respect for superior constitutional norms – any limitation must meet. The analysis thus demonstrates how the Constitutional Tribunal interprets the limits of legislative interference and what constitutional standards it applies when assessing the conformity of such limitations with the Constitution.

In the present article the primary material of analysis is formed by the judgments of the Polish Constitutional Tribunal, regarded as acts of constitutional and legislative authority, which offer essential insight into the manner in which constitutional values are applied in practice to the institution of professional secrecy. It is the Tribunal's case law – via its reasoned decisions, the limits of legislative intervention, and the standards of review adopted – that constitutes the backbone of the study, enabling an assessment of the extent to which professional secrecy is respected, modified, or restricted under the Constitution.

1. Public trust professions in the Polish legal system

The institution of public trust professions constitutes one of the fundamental structural solutions introduced by the 1997 Constitution of the Republic of Poland.[1] This

[1] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dziennik Ustaw] 1997 no. 78, item 483 as amended.

concept is a distinctive creation of the Polish constitutional legislator.[2] An essential characteristic of public trust professions is their quasi-missionary nature, as their representatives do not act solely for commercial purposes but also in the public interest.[3]

Article 17 (1) of the Constitution provides: "By way of law, professional self-regulatory bodies may be established to represent individuals practising public trust professions and to oversee the proper performance of these professions within the limits of the public interest and for its protection."

The constitutional provision defines two fundamental tasks of professional self-regulatory bodies: representing individuals practising a public trust profession and overseeing the proper performance of the profession. The fulfilment of these tasks must be done "within the limits of the public interest and for its protection," meaning that the activities of professional self-regulatory bodies cannot serve solely the particular interests of the members of the profession but must be directed towards protecting values of general societal importance.[4] However, not every free profession, even if its characteristics resemble those of a public trust profession, compels the legislator to establish a professional corporation.

The functioning of professional self-regulatory bodies is based on the constitutional principle of subsidiarity. According to this principle, state activity should be limited where citizens and social groups can act efficiently and effectively. This principle is of particular importance in the case of public trust professions, because their self-regulatory bodies assume supervisory and regulatory functions from the state.[5]

The Constitution does not provide a legal definition of a public trust profession, leaving this task to the legal doctrine and judicial interpretation. A key judgment for determining the content of this concept is the ruling of the Constitutional Tribunal of 7 May 2002, SK 20/00, in which the Tribunal defined a public trust profession as: "a profession involving the provision of services to meet personal human needs,

2 P. Antkowiak, *Polskie i europejskie standardy wykonywania wolnych zawodów*, Przegląd Politologiczny 2013, vol. 1, p. 135.

3 W. Wołpiuk, *Zawód zaufania publicznego z perspektywy prawa konstytucyjnego*, in: Senat Rzeczypospolitej Polskiej, *Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu*, eds. S. Legat, M. Lipińska, Warszawa 2002, p. 22. For other issues concerning public trust professions in Poland, see also *Zawody zaufania publicznego a interes publiczny*…, passim.

4 J. Smarż, *Samorządy zawodowe jako wspólnota osób wykonujących ten sam zawód*, Studia Prawnoustrojowe 2024, no. 65, https://czasopisma.uwm.edu.pl/index.php/sp/article/view/10327 [access: 21.07.2025].

5 Biuro Rzecznika Praw Obywatelskich [Office of the Commissioner for Human Rights], *Kiedy prawo staje się obowiązkiem, a uprawnienie przymusem*, pp. 2–3, https://bip.brpo.gov.pl/pliki/12324458440.pdf [access: 15.06.2025].

connected with the reception of information concerning personal life, and organised in such a way as to justify public confidence in the proper use of this information for the interests of the individual by those providing the services."[6]

In its judgment of 7 May 2002, SK 20/00, the Constitutional Tribunal identified the fundamental characteristics that determine whether a given profession qualifies as a public trust profession. Firstly, these are professions involving the provision of services aimed at meeting personal human needs, which entails receiving information about an individual's personal life and structuring professional activity in a manner that justifies public confidence in the appropriate use of that information. Secondly, the practice of a public trust profession is governed by professional ethical standards, often codified in the form of ethical codes. Thirdly, these professions are subject to supervision by professional self-regulatory bodies, as stipulated in Article 17 of the Constitution of the Republic of Poland.[7]

In its judgment of 24 March 2015, K 19/14, the Constitutional Tribunal expanded this list and identified additional characteristics of a public trust profession, including:

a) the necessity to ensure the proper and public-interest-compliant practice of the profession, due to the significance that a given field of professional activity holds in society;
b) the provision of services and the engagement of representatives of the relevant professions in contact with individuals in the event of a potential or actual threat to goods of a special nature (e.g. life, health, liberty, dignity, reputation);
c) the diligence and care exercised by representatives of the discussed professions for the interests of individuals using their services, concern for their personal needs, as well as ensuring the protection of subjective rights guaranteed by the Constitution;
d) the requirement of special qualifications to practise such professions, including not only appropriate formal education but also acquired experience and the guarantee of proper and public-interest-compliant performance of the profession, considering the specific ethical norms of the profession;
e) the collection of personal and private life information about individuals using the services of representatives of public trust professions; such information constitutes professional secrecy, and its disclosure may occur only under the conditions

6 Judgment of the Constitutional Tribunal of 7 May 2002, SK 20/00, OTK 2002, no. 3A, item 29, thesis 24.

7 Ibidem, thesis 24–25.

specified in the provisions of the Act of June 6, 1997 – Code of Criminal Procedure (Journal of Laws no. 89, item 555 as amended);

f) the relative autonomy in practising the profession.[8]

The cited judgment is particularly significant because the Tribunal refused to recognise urban planning as a public trust profession. This ruling confirms that not every regulated profession can qualify as a public trust profession – it is necessary to meet all the criteria identified by the Constitutional Tribunal.

The list of public trust professions is closed and limited by the criteria specified in Article 17 (1) of the Constitution of the Republic of Poland.[9] The Polish legal system distinguishes several public trust professions, which, owing to the particular nature of the tasks performed and the social significance of the services provided, are subject to a special legal regime.[10] An analysis of the constitutional foundations, the jurisprudence of the Constitutional Tribunal, and the relevant statutory regulations reveals a complex normative structure, aimed at ensuring the high quality of services provided by representatives of these professions, while simultaneously protecting the interests of those who receive them.

2. Professional Secrecy as a Characteristic of a Public Trust Profession

In the context of the issue discussed in this article, the key element is the intrinsic obligation to maintain professional secrecy, as emphasised in the jurisprudence of the Constitutional Tribunal. It is a fundamental component in building trust between public trust professionals and their clients. As the Tribunal emphasised in its judgment of 2 July 2007, K 41/05: "The essence of the advocate's professional secrecy… is **the bond of trust** that must exist between the client and the advocate."[11]

In preparing this article, regulations concerning professional secrecy for representatives of legal and economic professions were taken into account, including: advocates (*adwokat*), legal advisers (*radca prawny*), notaries (*notariusz*), bailiffs

8 Judgment of the Constitutional Tribunal of 24 March 2015, SK 19/14, OTK 2015, no. 3A, item 32, thesis 91–97.

9 M. Pawłowska, *Zawody zaufania publicznego na rynku pracy*, in: *Rynek pracy wobec wyzwań przyszłości. Ewolucja i współczesne uwarunkowania*, eds. A. Siedlecka, D. Guzal-Dec, Biała Podlaska 2022, p. 201, https://bibliotekanauki.pl/chapters/12602283 [access: 21.07.2025].

10 A. Krasnowolski, *Zawody zaufania publicznego, zawody regulowane oraz wolne zawody*, in: Kancelaria Senatu, *Opracowania Tematyczne*, no. 6, Warszawa 2010, p. 14.

11 Judgment of the Constitutional Tribunal of 2 July 2007, SK 41/05, OTK 2007, no. 7A, item 72, thesis 129.

(*komornik sądowy*), patent attorneys (*rzecznik patentowy*), tax advisers (*doradca podatkowy*), and statutory auditors (*biegły rewident*). In the analysed cases, professional secrecy serves a dual function. Firstly, it guarantees the client the real possibility of maintaining the confidentiality of entrusted information, which, in the case of legal professions, directly supports the realisation of the right to defence and the right to a fair trial. Secondly, it serves as a normative barrier against state interference in the sphere of privacy and individual autonomy in legal and financial relationships. Thus, professional secrecy not only plays a protective role but is also constitutive of the very nature of the given profession. The sources governing the duty to maintain professional secrecy in the examined professions are two-tiered. The first level consists of statutory acts, the so-called "professional corporations' laws." The second level comprises corporate legal acts, such as codes of ethics and resolutions adopted by professional self-regulatory bodies.

The contemporary Polish legal framework contains numerous provisions establishing professional confidentiality obligations across various sectors. In most cases, the legislature explicitly characterises these duties as "professional" in nature, thereby distinguishing them from other forms of confidentiality, such as state secrets or trade secrets. This proliferation of confidentiality norms reflects the increasing specialisation of professional services and the growing recognition that effective professional-client relationships depend fundamentally on trust safeguarded by legally enforceable secrecy obligations.[12]

The dual structure of the normative sources reflects the constitutionally guaranteed autonomy of professional self-regulatory bodies and allows for the flexible adaptation of confidentiality standards to changing technical, legal, and social conditions. In all the professions examined, professional secrecy exhibits both permanent and fundamental characteristics.

Firstly, the obligation to maintain secrecy is indefinite, meaning it does not cease with the termination of the profession, the dissolution of the client relationship, or even upon the client's death. This *perpetuitas obligationis* is explicitly stated in, *inter alia*, Article 6 (2) of the Advocacy Act and Article 37 (1a) of the Tax Advisory Act.

Secondly, the scope of professional secrecy is extremely broad: it includes both data provided directly by the client and information obtained independently by the professional during the course of their activities, regardless of the form in which it is recorded or the medium on which it is stored. Noteworthy in this context are the provisions contained in Article 15 of the Code of Ethics for Legal Advisors and in the Ethical Principles for Tax Advisers.

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12 Ibidem, pp. 45–50.

Thirdly, the duty of confidentiality extends to collaborators and other employees of the professional – this is an important preventive measure to avoid the circumvention of secrecy through indirect actions or the outsourcing of auxiliary services.

Finally, most statutes provide a common list of exceptions under which the duty of secrecy is waived – these are situations arising from anti-money laundering and counter-terrorist-financing legislation, as well as from the Tax Ordinance concerning so-called "tax schemes" (Chapter 11a of Part III). Notaries and bailiffs, as public officials performing some state tasks, may, in exceptional cases, be released from the duty of confidentiality by competent authorities, if the state's interests require it. Statutory auditors, due to the audit oversight system, have an obligation to provide certain information to supervisory state authorities, which also constitutes an exception to professional secrecy.

Legal scholarship consistently acknowledges that professional codes of ethics constitute an independent and legitimate source of confidentiality obligations. In modern civil society, characterised by rapid social and organisational transformation, new categories of protected information continuously emerge in response to evolving professional practices and client expectations. Professional self-regulatory bodies, through their ethical codes and standards, play a crucial role in identifying and codifying these emerging confidentiality requirements, frequently anticipating formal legislative intervention. This dynamic interaction between statutory law and professional ethics ensures that confidentiality protections remain responsive to changing social needs while maintaining their fundamental protective function.[13]

The functional differentiation of professional secrecy depends on the nature of the activity. In some legal professions, secrecy is almost absolute. The privileged status of defence secrecy has deep historical foundations in Polish criminal procedure. As early as the Code of Criminal Procedure of 1928, Article 101 (b) established the absolute character of defence secrecy, categorically prohibiting the examination of defence counsel regarding facts learned in that capacity. This absolute protection distinguished defence secrecy from general advocate professional secrecy: whereas an attorney could refuse to testify based on professional secrecy, courts retained discretionary authority to release them from this obligation. In 1997, the current Code of Criminal Procedure was adopted, reaffirming the absolute character of defence secrecy while simultaneously imposing limitations on attorney professional secrecy other than defence secrecy, where justified by the interests of the administration of

[13] Ibidem, p. 51.

justice (Articles 178 (1), 180 § 2 of the Code of Criminal Procedure).[14] The absolute nature of defence secrecy (Article 178 of the Code of Criminal Procedure) guarantees that defence counsel cannot be compelled to disclose confidential information obtained during legal defence, underscoring the constitutional right to defence protected in criminal proceedings.[15] In the case of notaries and bailiffs, exceptions are allowed owing to the public-law character of their functions. In economic professions, such as tax advisers and statutory auditors, specific methods of disclosing data apply, including some information given to courts, tax authorities, and public oversight bodies. This should be understood as an emphasis on public interest and financial market transparency. Therefore, the professional secrecy of representatives of economic professions must be balanced against their informational obligations towards the state.

A significant innovation in self-regulatory frameworks is also the increasing importance of technology. Many self-regulatory acts contain provisions requiring professionals to use cryptographic measures and electronic data protection procedures, such as in § 19 (5) of Resolution no. 403/2023 of the National Bar Council (Naczelna Rada Adwokacka) and in Article 6 (4) of the Ethical Principles for Tax Advisers. In this way, professional secrecy no longer possess merely a formal-legal dimension and acquires a real operational character, encompassing obligations concerning the security of personal and electronic data.

Unlike the medical professions, where the legislator permits the breach of confidentiality in order to protect human life or health, in legal and economic professions, there is no analogous humanitarian clause. The doctrine holds that such situations could potentially justify recourse to the concept of necessity (Article 26 § 1 of the Polish Penal Code),[16] however, there is no statutory basis allowing for the disclosure of professional secrecy for the benefit of a third party. This distinguishes the professions under analysis from those of doctors or psychologists, where the legislature has provided a more flexible model for the relationship between confidentiality and the value of life.

In summary, professional secrecy in legal and economic professions remains a normatively coherent, but functionally diverse legal institution. The shared minimum

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14 M. Matusiak-Frącczak, *Ochrona poufności komunikacji klienta z adwokatem. Standardy międzynarodowe, standard Unii Europejskiej oraz standardy krajowe wybranych państw a prawo polskie*, Warszawa 2023, p. 217.

15 M. Kurowski, in: *Kodeks postępowania karnego*, vol. 1. *Komentarz aktualizowany*, red. D. Świecki, 2025 [LEX database], Article 178.

16 A. Bereza, *Ograniczenia tajemnicy zawodowej adwokata i radcy prawnego w świetle konstytucyjnego prawa do obrony i prawa do sądu*, Studia Iuridica Lublinensia 2022, vol. 31, no. 3, s. 31–50.

of protection includes the permanence of the obligation over time, a broad personal and material scope, and an identical core of statutory exceptions. At the same time, sectoral differences – related to the goals of the respective profession – determine the possibility of waiving secrecy and the degree of its instrumentalisation in the public interest. In the legal professions, the protection of clients and their right to defence, justify the nearly-absolute nature of professional secrecy. In the financial sector, the growing role of supervision and compliance justifies greater flexibility in informational obligations. Thus, the system governing professional secrecy in Poland represents a consciously structured framework balancing constitutionally protected values: individual privacy and public safety, professional loyalty, and market integrity. Professional secrecy is therefore not a homogeneous category; it remains a dynamic legal instrument, the content and limits of which depend on the values of a given profession and the scope and manner of its social function.

Tab. 1. Legal Foundations of Professional Secrecy for Legal and Economic Professions

Profession	Law	Corporate resolution
Advocate (*Adwokat*)	Act of 26 May 1982 – Law on the Bar (consolidated text: Journal of Laws 2024 no. 1564)	Resolution no. 403/2023 of the Presidium of the National Bar Council of 7 December 2023, on the publication of the consolidated text of the Code of Ethics for Lawyers
Legal Advisor (*Radca prawny*)	Act of 6 July 1982 on Legal Advisors (consolidated text: Journal of Laws 2024 no. 499)	Resolution no. 3/2014 of the Extraordinary National Assembly of Legal Advisors of 22 November 2014 – Code of Ethics for Legal Advisors
Notary (*Notariusz*)	Act of 14 February 1991 – Law on Notaries (consolidated text: Journal of Laws 2024 no. 1001 as amended)	Resolution of the National Notarial Council of 12 December 1997 – Code of Professional Ethics for Notaries
Court Bailiff (*Komornik sądowy*)	Act of 22 March 2018 on Court Bailiffs (consolidated text: Journal of Laws 2024 no. 1458)	Resolution no. 1/2015 of the National Council of Bailiffs of 28 January, 2015 – Code of Professional Ethics for Court Bailiffs
Patent Attorney (*Rzecznik patentowy*)	Act of 11 April 2001 on Patent Attorneys (consolidated text: Journal of Laws 2024 no. 749)	Resolution no. 7/2018 of the National Council of Patent Attorneys of 13 December 2018, on the Principles of Ethics for Patent Attorneys
Tax Adviser (*Doradca podatkowy*)	Act of 5 July 1996 on Tax Consultancy (consolidated text: Journal of Laws 2021 no. 2117)	Resolution no. 16/VIII/2023 of the National Council of Tax Advisors of 21 November 2023 – Principles of Ethics for Tax Advisers
Statutory Auditor (*Biegły rewident*)	Act of 11 May 2017 on Statutory Auditors, Auditing Firms, and Public Oversight (consolidated text: Journal of Laws 2024 no. 1035 as amended)	Resolution no. 1161/16a/2011 of the National Council of Statutory Auditors of 13 December 2011 – Principles of Professional Ethics for Statutory Auditors

Source: Author's own work.

3. Professional secrecy in the jurisprudence of the Constitutional Tribunal

The Constitutional Tribunal has addressed the issue of professional secrecy multiple times in its jurisprudence. In the judgment of 22 November 2004, SK 64/03, the Tribunal, when evaluating the issue of professional secrecy for legal professionals, concluded that the only constitutional provision upon which the absolute obligation to maintain confidentiality can be based is Article 42 (2) of the Constitution of the Republic of Poland, which guarantees the right to defence. Furthermore, the Tribunal confirmed that the obligation of legal advisers (*radca prawny*) to maintain professional secrecy "is inextricably linked […] with the role of the legal counsel as a public trust profession" and that the existence of this obligation, "backed by criminal sanctions, serves as a guarantee of confidentiality for those seeking legal assistance." In this judgment, the Tribunal clearly noted that **"the duty to maintain secrecy was established for the benefit of clients, not legal counsels. It is not a privilege granted to the professional group, but rather an obligation associated with the performance of the profession."** In this context, it was pointed out that Article 17 (1) of the Constitution, which is a provision of systemic nature, does not imply any right for representatives of public trust professions to professional secrecy.[17]

Before the Tribunal, various attempts were made to derive the constitutional foundations of professional secrecy from various provisions—namely Articles 2, 17 (1), 31 (3), 45 (1), 49, 51 (1)–(2), and 77 (2) of the Constitution. Although the Tribunal acknowledged that its previous case law allows constitutional right to be inferred from the combined content of multiple provisions when they contain coherent elements addressed to a specific addressee, it nonetheless held that these patterns do not suffice to reconstruct a autonomous constitutional right guaranteeing professional secrecy for persons performing public trust professions.[18]

The Constitutional Tribunal has recognised that a potential conflict arises when a legal professional who is also the accused must choose between maintaining client confidentiality and exercising the constitutional right to defence. Under Article 180 § 2 of the Code of Criminal Procedure – which operates as a *lex specialis* overriding the professional secrecy rules in the *Legal Advisers Act* – a court may, in the interests of justice and only when a fact cannot be established by other means, authorise the examination of a legal adviser on matters covered by professional secrecy. However, where the accused is the legal adviser, the right to defence prevails. The

17 Judgment of the Constitutional Tribunal of 22 November 2004, SK 64/03, OTK 2004, no. 10A, item 107, thesis 34, 42, 48.

18 Judgment of the Constitutional Tribunal of 4 October 2010, SK 12/08, OTK 2010, no. 8A, item 87.

Constitutional Tribunal has emphasised that it is solely the accused's prerogative to decide whether to waive confidentiality; any attempt by the court or prosecutor to compel or to release the adviser from secrecy would impermissibly restrict the accused's right to full defence.[19]

It is also worth noting that the Constitutional Tribunal has expressed its views on provisions governing professional and defence secrecy in cases initiated by the Commissioner for Human Rights and the Prosecutor General; see the judgments of the Tribunal of 10 December 2012, K 25/11; 11 December 2012, K 37/11 and 30 July 2014, K 23/11.[20]

In the previously discussed judgment (case no.) K 41/05, the Tribunal analysed the institution of professional secrecy in the case of the profession of a legal counsel. It was stated that professional secrecy "constitutes both an essential guarantee and a *conditio sine qua non* for the performance of the legal adviser's profession." It was emphasised that maintaining professional secrecy is an obligation for individuals practising public trust professions. In the context of the aforementioned **bond of trust** between an advocate and his or her client, the Tribunal also noted that "maintaining this relationship has a dual significance: it is necessary for the client, who, by disclosing secrets, can rely on the trusted person of her or his advocate, and it is also beneficial for society as a whole, as it facilitates knowledge of the law and the realisation of the right to defence, thereby contributing to the proper administration of justice and the discovery of truth."[21]

The Tribunal expanded its considerations on this matter in the judgment of 23 July 2024, K 13/20,[22] in which it examined the obligations of tax advisers relating to

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19 Order of the Constitutional Tribunal of 29 September 2014, Ts 174/14, OTK 2014, no. 5B, item 517.

20 Judgment of the Constitutional Tribunal of 10 December 2012, K 25/11, OTK 2012, no. 11A, item 132; judgment of the Constitutional Tribunal of 11 December 2012, K 37/11, OTK 2012, no. 11A, item 133; judgment of the Constitutional Tribunal of 30 July 2014, K 23/11, OTK 2014, no. 7A, item 80.

21 Judgment of the Constitutional Tribunal of 2 July 2007, SK 41/05, OTK 2007, no. 7A, item 72, thesis 59, 129.

22 The judgment in question was not published in the Journal of Laws of the Republic of Poland [Dziennik Ustaw], similarly to all decisions of the Constitutional Tribunal issued after the Resolution of the Sejm of the Republic of Poland of 6 March 2024 concerning the removal of the effects of the constitutional crisis of 2015–2023 in relation to the functioning of the Constitutional Tribunal. In that resolution, the Sejm, referring to the judgments of the European Court of Human Rights of 7 May 2021 in *Xero Flor v Poland* (application no. 4907/18) and of 14 December 2023 in *M.L. v Poland* (application no. 40119/21), stated that individuals unauthorised to adjudicate sit on the bench of the Constitutional Tribunal and that its rulings are therefore tainted by a legal defect.
It is, however, worth noting the controversies surrounding the cited case law of the European Court of Human Rights. The Constitutional Tribunal has consistently maintained that no domestic body or mechanism exists in the Polish legal system that could verify the legality of the election of judges to the Tribunal. The Tribunal itself, in its full-bench decision of 7 January 2016, U 8/15 (OTK 2016,

the reporting of tax schemes, which conflicted with the requirements of maintaining professional secrecy. In this ruling, the Tribunal reaffirmed its previously established position that Article 17 (1) of the *Constitution* does not imply a "constitutionally mandated obligation to maintain professional secrecy." However, the statutory provisions regulating this matter should be formulated in a sufficiently clear manner, "so as to enable tax advisors, as representatives of public trust professions, to act in the interest of the individual." In this context, the Tribunal referred to the standards of legal certainty derived from Article 2 of the Constitution. Furthermore, it was indicated that the provisions regulating professional secrecy may be subject to review in the context of the proportionality of interference with constitutional rights and freedoms – the right to privacy (Article 47), the protection of the secrecy of communication (Article 49), and the protection of informational autonomy (Article 51 (2)). As the Tribunal stated: "The determination that Article 17 (1) of the Constitution does not result in constitutionally protected rights and freedoms does not mean that regulations changing the scope of professional secrecy cannot be examined by the Tribunal for violations of other values protected by the Fundamental Law." [23]

4. The Importance of Professional Secrecy for Constitutional Values

As previously indicated, professional secrecy for representatives of public trust professions has its source in statutory acts and corporate acts adopted by professional self-governing bodies. These regulations do not have their foundation directly in

no. 1A, item 1), declared itself incompetent to review the constitutionality of the Sejm's resolutions of the 8th term concerning the appointment of Constitutional Tribunal judges and consequently discontinued the proceedings.

Moreover, with regard to the *Xero Flor* judgment, serious doubts as to its merits were raised even within the adjudicating chamber of the Strasbourg Court. In his dissenting opinion, Judge Krzysztof Wojtyczek stated that the reasoning of the *Xero Flor* judgment was "flawed due to a somewhat unclear and superficial presentation of domestic law, coupled with a distorted portrayal of the Tribunal's jurisprudence, carefully avoiding all unfavourable precedents. The approach chosen by the Court to maintain the rule of law in the respondent State is far from optimal." Furthermore, irrespective of whether the Constitutional Tribunal can be regarded as a "court" within the meaning of the Convention, Judge Wojtyczek also questioned, in his dissent, the inclusion of constitutional complaint proceedings within the scope of Article 6 of the Convention. In his view, the case law of the European Court of Human Rights indicates that "the Convention does not require guaranteeing a right of access to a court (or to any other non-judicial body) competent to annul or invalidate a normative act, even if such access is provided for in a specific form under domestic law."

[23] Judgment of the Constitutional Tribunal of 23 July 2024, K 13/20, OTK-A 2024, item 66, thesis 119, 123.

the Constitution, which in Article 17 (1) only provides for the possibility of creating professional self-governing bodies by law. The constitutional legislator does not expressly require the obligation to regulate professional secrecy in these acts, nor does it even refer to this institution. The obligation to maintain professional secrecy has been interpreted in the jurisprudence of the Constitutional Tribunal as one of the characteristic features of public trust professions, whose existence is foreseen by the *Constitution*. The only exception is the defence privilege, which has its source directly in the constitutional right to defence. Although Article 42 (2) of the Constitution also does not directly regulate the defence privilege, it has been interpreted in the case law of the Tribunal as stemming from the necessity to interpret the constitutional right to defence broadly.[24]

As a rule, it should therefore be stated that it is the legislator's responsibility to appropriately regulate this institution whenever it creates a professional self-governing body representing individuals performing a specific public trust profession. There is no direct constitutional obligation placed on the legislator, unlike Article 15 (2) of the Constitution, which requires the definition of the basic territorial division of the state by statute. In the case of professional secrecy, the legislator also does not have clear "guidelines" in this regard, as in the aforementioned Article 15 (2) of the Constitution, which obliges the legislator to take into account social, economic, or cultural ties and to ensure the ability of territorial units to perform public tasks.

It is appropriate to examine the compliance of regulations governing professional secrecy with Article 17 (1) of the Constitution in terms of protecting the public interest and ensuring the proper performance of the profession. It is necessary to agree with the opinion presented by the Tribunal in its judgment with case no. K 13/20, that representatives of professions of public trust play an essential role in a democratic state of law realizing the principles of social justice. Due to the connection between professions of public trust and state institutions (e.g., an advocate defending an accused before a court), guaranteeing the individual the possibility to reveal their problems without restraint strengthens the principle of trust in the state and the law it enacts, as derived from Article 2 of the Constitution. Clients are assured that their representatives will not be forced to disclose acquired information to public institutions, which could use it in ongoing proceedings. Professional secrecy is not a constitutional freedom or right but an obligation linked to the nature of the public trust profession. Therefore, restrictions imposed on it do not have to comply with the strict criteria laid down in Article 31 (3) of the *Constitution*. This

[24] P. Sarnecki, *Art. 42*, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 2, eds. L. Garlicki, M. Zubik, 2nd ed., Warszawa 2016.

provision pertains only to freedoms and rights, and does not apply to other norms that do not express individual subjective rights.[25]

As emphasised in the jurisprudence of the Constitutional Tribunal, professional secrecy can protect separate constitutional rights and freedoms. In this context, one must undoubtedly refer to Articles 47, 49, and 51 (2) of the Constitution. The first of these stipulates that everyone has the right to legal protection of their private and family life, honour, and reputation, as well as the right to decide about their personal life. This provision guarantees the right to privacy. It is worth noting that Article 7 of the Charter of Fundamental Rights of the European Union contains a similar provision, according to which: "Everyone has the right to respect for his or her private and family life, home and communications."[26] The Court of Justice of the European Union, when examining provisions that obligate advisers bound by professional secrecy to report the use of tax schemes by their clients, held that such provisions infringed Article 7 of the Charter.[27]

In the Polish legal doctrine, a distinction is made between the "private" sphere of life, which is protected under Article 47 of the Constitution, and the "non-private" – public and social – sphere, which is not subject to this protection.[28] However, its judgment in case no. K 13/20, the Constitutional Court acknowledged that regulations concerning professional secrecy may also be examined in relation to this standard of review. This applies not only when a representative of a profession of public trust receives information regarding the strictly private sphere of life, but also in professional matters, such as the application of tax schemes in the course of business activity. Therefore, the Court opted for a uniform treatment of the regulations regarding professional secrecy in this context. This approach should be considered correct, as it is not always possible to clearly distinguish situations where an individual turns to a representative of public trust profession regarding an issue related entirely to their private life, from those concerning only her or his professional life. Both spheres of life can overlap, for example, in the context of conducting business activity.

The obligation to protect information transmitted by clients to representatives of public trust professions also has its source in Article 49 of the Constitution, which

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25 L. Garlicki, K. Wojtyczek, *Art. 31*, in: *Konstytucja*…, vol. 2.

26 Charter of Fundamental Rights of the European Union, OJ C 364/1, 18.12.2000, https://www.europarl.europa.eu/charter/pdf/text_en.pdf [access: 21.07.2025].

27 Judgment of the Court (Grand Chamber) of 8 December 2022, C-694/20 (request for a preliminary ruling from the Grondwettelijk Hof – Belgium) – Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v. Vlaamse Regering.

28 P. Sarnecki, *Art. 47*, in: *Konstytucja*…, vol. 2.

ensures the freedom and protection of the secrecy of communications. Such secrecy may only be restricted in cases specified by statute and in the manner prescribed therein. However, it should be noted that this freedom has a broader scope than would be implied by the right to privacy – it also pertains to the "non-private" sphere of life and includes entities other than individuals, with the exception of public law institutions.[29] It is beyond doubt that in a democratic state governed by the rule of law, it is essential for the legislator to be mindful of the need to protect the secrecy of communication and the information transmitted by an individual to a representative of a public trust profession, so that they can effectively carry out their work while fulfilling the constitutional "mission" of public trust professions.

An essential aspect in this context is also Article 51 (2) of the Constitution, which provides that public authorities cannot collect, gather, or disclose information about citizens that is not necessary in a democratic state governed by the rule of law – it guarantees the informational autonomy of the individual. Regulations requiring the transmission of confidential information to representatives of public trust professions align with the provisions of this article. By imposing such statutory duties, the state may, in fact, "collect and gather" information about citizens. Based on a literal interpretation of Article 51 (2) of the Constitution, read in isolation, one might conclude that private bodies could gather personal data without such restrictions, as these only apply to public entities. However, such a statement cannot be accepted. Firstly, the freedom to gather information is limited by the right to privacy. Secondly, one cannot lose sight of the systemic role of professional secrecy, which is inseparably linked to the proper performance of a public trust profession.

Both the content of Article 49 and Article 51 (2) of the Constitution refer to the right to privacy and are logical extensions of it.[30] On the other hand, they have a broader scope in that they do not apply only to the strictly private sphere of the individual but can also be applied to the economic and professional spheres. Given the specific relationship between these provisions, it is appropriate that in its judgment in case no. K 13/20, the Constitutional Tribunal identified Articles 49 and 51 (2) of the Constitution as the primary standards of review, while Article 47 of the Constitution served as the connecting standard.

The regulations under review, which may potentially restrict the freedoms and rights mentioned above, must be subjected to control through the so-called "proportionality test" arising from Article 31 (3) of the Constitution. Therefore, any

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29 M. Bartoszewicz, *Art. 49*, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. M. Haczkowska, Warszawa 2014.

30 P. Sarnecki, *Art. 51*, in: *Konstytucja*…, vol. 2.

norm that, through the regulation of the institution of professional secrecy, may affect the restriction of the right to privacy, the confidentiality of correspondence, or informational autonomy, must pass the proportionality test, which requires answers to the following questions:

1. Is it capable of achieving the intended effects desired by the legislator (usefulness of the norm)?
2. Is it necessary for the protection of the public interest with which it is associated (necessity of action by the legislator)?
3. Are the effects proportionate to the burdens or restrictions it imposes on the individual (proportionality in the strict sense)? [31]

One of the clearest examples of how the proportionality test is applied in practice can be found in the judgment of the Polish Constitutional Tribunal in case no. K 13/20. The Tribunal started with the criterion of *usefulness*. It noted that the regulation was meant to fight aggressive tax planning and to secure fiscal interests of the state. However, it stressed that the obligation was drafted too broadly. It applied not only to schemes designed to avoid taxation unlawfully, but also to arrangements that amounted to legal tax optimisation. Because of this, the Tribunal questioned whether the measure could really achieve its declared purpose. At the stage of necessity, the Tribunal recalled that the legislator had justified the provisions by invoking the need to implement European Union law and to protect budgetary balance. The Tribunal underlined, however, that the Polish Constitution requires restrictions of rights to be indispensable, and here the provisions were not. First, the obligation was not the only possible instrument to secure compliance with reporting duties. Second, there were already less restrictive measures that placed responsibility directly on taxpayers themselves.

In its assessment of *proportionality sensu stricto*, the Tribunal weighed the expected benefits of the regulation against the restriction of fundamental rights. The contested provisions interfered with professional secrecy and the confidentiality of communication, both of which belong to the sphere of privacy and informational autonomy. At the same time, the impact of the rules on public finances was at most indirect and uncertain. The Tribunal concluded that the interference with rights was disproportionate when compared with the potential fiscal benefits. In conclusion, the Tribunal demonstrated that the contested provisions failed each stage of the proportionality test. They were not clearly useful, not indispensable, and the

[31] See Judgment of the Constitutional Tribunal of 23 April 2008, K 16/07, OTK 2008, no. 3A, item 45 and there recalled jurisprudence.

balance of interests weighed in favour of protecting constitutional rights rather than maintaining the broad reporting duty.

In the legal doctrine, alternative proposals have also been formulated for examining the regulation of professional secrecy through the prism of constitutional values. Dariusz Dudek, in his polemic with the judgment of the Constitutional Tribunal in case no. SK 64/03, advanced the thesis that Article 180 § 2 of the Code of Criminal Procedure, insofar as it allows for the "legal compulsion" of an advocate to testify against his or her client, infringes several constitutional standards of review. Specifically, he identified the following constitutional provisions as violated:

- Article 30 (Human Dignity) – as it undermines the dignity of both the client and the lawyer, since breaching the confidentiality inherent in their relationship constitutes a form of moral incapacitation of both parties;
- Article 31 (1) (Individual Freedom) – as it restricts the freedom to perform a profession of public trust in accordance with its essential nature;
- Article 42 (2) (Right to Defence) – as it renders the right to silence illusory and weakens the material dimension of the right to defence;
- Article 45 (1) (Fair Trial) – as it violates the principle of fairness and the integrity of the trial by allowing the state to exploit the confidential channel of communication between lawyer and client;
- Article 53 (1) (Freedom of Conscience) – as it compels the lawyer to act contrary to professional ethos and deontological norms, given that the duty of confidentiality constitutes an imperative of professional conscience.

Dudek emphasised that professional secrecy should be regarded as a fundamental condition of public trust and as a prerequisite for maintaining the integrity and quality of the administration of justice. Importantly, as he observed, the Constitutional Tribunal has not yet examined the issue of professional secrecy in the context of Articles 30, 31 (1), and 53 (1) of the Constitution. His reflections therefore provide valuable guidance for potential future constitutional litigation concerning the relationship between professional secrecy, the autonomy of legal professions, and the protection of fundamental rights in a democratic state governed by the rule of law.[32]

[32] D. Dudek, *The Constitution and the Attorney – Client Privilege*, Palestra 2019, no. 7–8, pp. 35–49.

Final Conclusions

The study conducted in this article shows that professional secrecy, although an inherent feature of public trust professions, has not been explicitly recognised as one of the constitutional values in the Constitution. The constitutional legislator did not expressly designate professional secrecy as an independent constitutional good. However, analysis of the Constitutional Tribunal's case law, regulations contained in statutes and normative acts of professional self-governing bodies indicates that this institution holds a special axiological status within the Polish legal system.

The scope and nature of professional secrecy, as well as the list of professions recognised as public trust professions, remain the exclusive prerogative of the legislator. It is the legislator who decides on the shape, depth of protection and potential exceptions to the duty of confidentiality, taking into account the specifics of each profession and the current social and public needs. In this regard the legislator enjoys considerable regulatory discretion which, however, should not lead to the violation of fundamental constitutional standards.

The special value of professional secrecy is primarily revealed in its instrumental significance for the protection of other constitutional goods. It is not only a *sine qua non* condition for the exercise of public trust professions; it is also crucial for the fulfilment of the role assigned to representatives of public trust professions under Article 17 (1) of the Constitution, which in turn serves as one of the means for realising the principle of citizens' trust in the state and in the law it enacts, as outlined in Article 2 of the Constitution. Professional secrecy also serves as a key tool for protecting individual constitutional rights. In particular, it plays a fundamental role in the realisation of the right to privacy (Article 47 of the Constitution), the secrecy of communication (Article 49 of the Constitution), and the informational autonomy of the individual (Article 51 (2) of the Constitution).

In this context, the position of the Constitutional Tribunal is particularly clear, as it consistently regards professional secrecy as an obligation inseparably connected with the performance of a public trust function, rather than a right of the person performing that profession. This distinction not only emphasises its fundamental importance for building social trust, but also excludes an instrumental approach to professional secrecy by the representatives of the discussed professions.

Finally, any restrictions on professional secrecy must meet rigorous constitutional standards of clarity and proportionality, as outlined in Article 31 (3) of the Constitution. In this regard, professional secrecy is not protected as an autonomous value, but rather as a tool for safeguarding the fundamental rights and freedoms of individuals. Therefore, any legislative interference with the obligation to maintain

secrecy should undergo a detailed constitutional analysis within the framework of the proportionality test, including the criteria of suitability, necessity, and strict proportionality.

It is also worth noting that the legal doctrine has put forward an alternative approach to assessing the constitutionality of regulations concerning professional secrecy by examining such provisions through the broader framework of constitutional values enshrined in Articles 30, 31 (1), 42 (2), 45 (1), and 53 (1) of the Constitution. By linking professional secrecy to the protection of human dignity, personal freedom, the right to defence, the fairness of judicial proceedings, and the freedom of conscience, this perspective underscores its status as a constitutional value indispensable for preserving public trust in the legal professions and ensuring the integrity of the justice system.

The analysis of selected judgments of the Constitutional Tribunal has led the author to formulate the thesis that professional secrecy does not constitute an autonomous constitutional value. Its observance, however, contributes to the protection of constitutional values such as the right to privacy, the secrecy of communications, and informational autonomy. Its content and scope are shaped by the legislator, who enjoys broad regulatory discretion, albeit limited by the necessity to respect overarching constitutional norms.

Professional secrecy remains a complex normative construct of instrumental character, which, although not a constitutional value *per se*, is nevertheless a crucial element in the protection of essential constitutional values and in the effective functioning of public trust professions within a democratic state governed by the rule of law. In this way, this institution not only contributes to the realisation of constitutional objectives related to the protection of the public interest but, above all, enables the effective protection of fundamental rights and freedoms of individuals, serving as a necessary condition for citizens' trust in state institutions and law.

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