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## The Image of the Right to Privacy in Selected Polish Constitutional Court Cases

- **ABSTRACT:** *This research article aims to present an image of the right to privacy in selected Polish constitutional court cases. The paper starts with a concise introduction indicating the scope of the study, the justification for undertaking the analysis, and the methodology used. As part of the introduction, the current structure of the judiciary in Poland will also be presented. The court cases related to the right to privacy heard by the Polish Constitutional Tribunal will then be presented with a focus on considerations related to the understanding of the concept of the right to privacy, its content, scope, and elements, and the legally justified premises limiting this human right. Such judgments are based on the Constitution of the Republic of Poland. This will be done on the basis of three judgments of the Polish Constitutional Tribunal of significant importance to the title issue. As part of these considerations, reference will also be made to numerous other judgments of the Polish Constitutional Tribunal, so that the presented discourse has the broadest possible context. The paper ends with a concise summary containing original observations related to the matter being discussed.*
- **KEYWORDS:** the right to privacy, Poland, jurisprudence, the Polish Constitutional Tribunal, the Constitution of the Republic of Poland

### 1. Introduction

As part of this study, an image of the right to privacy in selected Polish court cases is presented. This will not cover all court cases concerning the right to privacy but rather, carefully selected decisions of the Polish judiciary holding

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the most importance. The scope of the study is therefore the level of application of law, where it is possible to decode the meaning, scope, content, and elements of the right to privacy in Poland in terms of the law in action. However, this scope should be narrowed down to the most important body of the judiciary in Poland, which has the greatest impact on the understanding of law in practice. Poland has a continental law system that shows many differences from Anglo-Saxon law, including the effects of issuing court decisions.<sup>1</sup> This is an extremely interesting issue; however, it is beyond the scope of the present study. This is sufficient to indicate that there is no case law in Poland. This does not mean, however, that some judgments issued by Polish judicial authorities do not have an impact wider than that between the parties to court proceedings. This applies particularly to one body of the Polish judiciary. Pursuant to Article 190 of the Constitution of the Republic of Poland of April 2, 1997 (CRP),<sup>2</sup> judgments of the Constitutional Tribunal shall be of universally binding application and shall be final. For this reason, the scope of this study includes the jurisprudence of the Polish Constitutional Tribunal. There is one more Tribunal in Poland, the Polish Tribunal of State. Nevertheless, it does not issue any decisions that would be relevant from the perspective of the title issue. The Tribunal of State is a judicial authority whose task, in light of Article 198 of the Constitution of the Republic of Poland, is to issue judgments in cases of violation of the Constitution of the Republic of Poland or laws by strictly defined persons in connection with the position held or within the scope of their office. Constitutional liability before the Tribunal of State is borne by the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Audit Office, members of the National Broadcasting Council, persons entrusted by the Prime Minister to run a ministry, the Supreme Commander of the Armed Forces, and, in the scope specified in Article 107 of the Polish Constitution, deputies and senators.<sup>3</sup>

There are many reasons for undertaking research on the image of the right to privacy in selected Polish constitutional court cases. The most significant, however, is the fact that the content of statutory law often does not reflect the specificity of its functioning in practice. Legal researchers must be careful not to rely solely on theoretical sources, disregarding the real effects of interpreting

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1 Stein, 1991, pp. 1594–1598; Tetley, 1999, pp. 701–712; Pejovic, 2001, pp. 818–841; Algero, 2005, pp. 782–807.

2 The Constitution of the Republic of Poland of April 2, 1997, adopted by the National Assembly on April 2, 1997, adopted by the Nation in a constitutional referendum on May 25, 1997, signed by the President of the Republic of Poland on July 16, 1997 (Journal U. 1997 No. 78, item 483).

3 See Barański, 2015, pp. 39–40.

and applying the law.<sup>4</sup> This order is not accidental, for first the interpretation is made and only then is the law applied. This means that the application of the law is an activity secondary to interpretation, as it determines the manner of application of the law, which in turn determines the practical image of the law. We are talking here about how the law is understood, what results from it, and what implications it has in the outside world; we are thus talking about law in action. Legal theorists can conduct research on law in isolation from this practical aspect of law. In science, no one can forbid this. Developing theories, making original divisions, creating new concepts, or trying to explain the law based on literature is very valuable. Nevertheless, it should be held that the study of law in action and the effects of its operation in practice are no less valuable. This is what the analysis of jurisprudence serves regarding the act of applying it, to determine the interpretations of the law that it implies. This makes the examination of court cases an extremely valuable resource for understanding the practical image of the law. This justifies the analysis of the title issue undertaken herein.

This article will use the research method typical of the legal sciences, which is the linguistic and logical method constituting the exegesis of the content of legal documents. The subject analysis will be supplemented with the use of linguistic hermeneutics and the views of the representatives of the doctrine (theoretical and legal methods). An axiological method is also used, referring to commonly accepted values as the subject of the implementation of law.<sup>5</sup> Nevertheless, the most important method that will be applied in this study is the case study method through the analysis of selected Polish constitutional court cases concerning the right to privacy. The subject of the case-study analysis will be the rulings of one of the highest judicial authorities in Poland, containing interpretations of the concept of the right to privacy, its content, scope, and elements, and the legally justified premises limiting this human right. Importantly, although it is important to define an appropriate methodological approach by selecting appropriate methods when conducting scientific research, it is no less important for the quality of legal analysis to be open to what is unfamiliar and unexplored, and to maintain objectivity and reliability. The logical reasoning in this article is mainly based on the deductive method. However, the inductive method was not excluded, depending on the needs of the research problem. The cognitive and interpretative functions and, as a subsidiary, the didactic function, were considered the purpose of the application of the research instruments described above.

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4 Examples of studies that pay attention to both theoretical and practical aspects of the problems raised in the field of legal sciences, for example, are: Wielec, 2017a, pp. 111–124; Wielec, 2010 r., pp. 39–44; Wielec and Oręziak, 2018b, pp. 50–65; Wielec and Oręziak, 2018a, pp. 76–90; Wielec, 2020a, p. 76–87; Wielec, 2012, pp. 243–255; Wielec and Szymczykiewicz, 2011, pp. 155–163; Wielec and Szymczykiewicz, 2010, pp. 123–133; Wielec, 2020b, pp. 193–207; Wielec, 2021a, pp. 241–255; Wielec, 2021b, pp. 179–192.

5 In the field of axiology, see Wielec, 2017b, pp. 1–407.

In Poland, the judicial system results directly from the provisions of the Polish Constitution. According to Article 173, the courts and tribunals shall constitute a separate power and shall be independent of other branches of power. This is the case with the judiciary in Poland. Pursuant to Article 174 of the Polish Constitution, courts and tribunals issue judgments on behalf of the Republic of Poland. This means that only the courts and tribunals have the power to issue a judgment on behalf of the Polish state. Pursuant to Article 175(1) of the Constitution of the Republic of Poland, the administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts, and military courts. Additionally, in light of Article 175(2) of the Polish Constitution, extraordinary courts or summary procedures may be established only during times of war. Contrarily, reference is made to ordinary legislation in Article 176(2) of the Constitution of the Republic of Poland, pursuant to which the organizational structure, jurisdiction, and procedure of the courts shall be specified by statute. To sum up this part of the argument, there are tribunals and courts in Poland. There are two tribunals, the Constitutional Tribunal, whose jurisprudence will be analyzed in this study, and the Tribunal of State, whose scope of activity has been outlined above and is considered irrelevant for this analysis. Courts in Poland are divided into the Supreme Court, common courts, administrative courts, and military courts. Relevant laws in Poland define this system.<sup>6</sup> Common courts are categorized into three types: district, regional, and appellate courts. Military courts are divided into military garrisons and district courts. Pursuant to Article 183 of the Polish Constitution, the Supreme Court shall exercise supervision over common and military courts regarding judgments that also perform other activities specified in the Constitution and statutes specified in the Constitution of the Republic of Poland and relevant laws. An example of another activity is, in light of Article 1 clause 3 of the Act of December 8, 2017, on the Supreme Court, recognition of election protests and validation of elections to the Sejm and the Senate, election of the President of the Republic of Poland, elections to the European Parliament, examination of protests against the validity of a nationwide referendum or a constitutional referendum, and confirmation of the validity of the referendum. In turn, administrative courts are divided into Supreme Administrative Courts and voivodeship administrative courts. Pursuant to Article 3(2) of the Act of July 25, 2002, Law on the System of Administrative Courts, the Supreme Administrative Court supervises the activity of voivodeship administrative courts in the scope of adjudication in the manner specified by statutes, and in particular, hears appeals against the judgments of these courts, adopts

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<sup>6</sup> See Act of December 8, 2017, on the Supreme Court (i.e., Journal of Laws of 2022, item 480, as amended); Act of August 21, 1997, Law on the System of Military Courts (i.e., Journal of Laws of 2022, item 655, as amended); the Act of July 25, 2002, Law on the System of Administrative Courts (i.e., Journal of Laws of 2022, item 1259); Act of 27 July 2001, Law on the System of Common Courts (i.e., Journal of Laws of 2022, item 655, as amended).

resolutions clarifying legal issues, and recognizes other cases falling within the jurisdiction of the Supreme Administrative Court under other laws. Another act is, for example, the Act of August 30, 2002, Law on Proceedings before Administrative Courts.<sup>7</sup> According to Article 15 § 1(4), the Supreme Administrative Court shall settle disputes over jurisdiction between the bodies of local government units and between local government appeal boards, unless a separate act provides otherwise, and disputes over powers between the bodies of these units and government administration bodies. Complementing this brief outline of the judiciary in Poland is the clarification of the Constitutional Tribunal's role. The Constitutional Tribunal is a separate body from the Supreme Court, common, administrative, and military courts, and under Article 188 of the Constitution of the Republic of Poland, it adjudicates on: compliance of laws and international agreements with the Constitution of the Republic of Poland; compliance of statutes with ratified international treaties, the ratification of which required prior consent expressed in the statute; compliance of legal provisions issued by central state organs with the Constitution of the Republic of Poland, ratified international agreements, and statutes; compliance with the Constitution of the Republic of Poland of the goals or activities of political parties; and constitutional complaints.<sup>8</sup> Additionally, pursuant to Article 189 of the Constitution of the Republic of Poland, the Constitutional Tribunal resolves disputes over powers between the central constitutional organs of the state. Importantly, as has already been emphasized, under Article 190(1) of the Polish Constitution, the judgments of the Constitutional Tribunal are binding and final. This is a normatively provided exception, as in Poland, court judgments are binding only between the parties to court proceedings. In summary, this short outline of the structure of the Polish judiciary, it would appear, constitutes another justification for the choice of the selected jurisprudence of the Polish Constitutional Tribunal as the subject of the analysis of this study.

## 2. Selected Polish constitutional jurisprudence

### ■ 2.1. *Regulatory environment*

The Polish Constitution recognizes a normatively defined right to privacy. Pursuant to Article 47 of the Polish Constitution, everyone shall have the right to legal protection of his private and family life and of his honor and good reputation,

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<sup>7</sup> Act of August 30, 2002, Law on Proceedings before Administrative Courts (i.e., Journal of Laws of 2022, item 329, as amended).

<sup>8</sup> Pursuant to Art. 79(1) of the Polish Constitution: 'In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.'

and to make decisions about his personal life. Pursuant to Article 48 of the Polish Constitution, parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child, as well as his freedom of conscience and belief and his convictions. The limitation or deprivation of parental rights may be effected only in the instances specified by the statute and only on the basis of a final court judgment. Pursuant to Article 49 of the Polish Constitution, the freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by the statute. Pursuant to Article 50 of the Polish Constitution, the inviolability of the home shall be ensured. Any search of a home, premises, or vehicles may be made only in cases and in a manner specified by statute. Pursuant to Article 51 of the Polish Constitution, no one may be obliged, except on the basis of a statute, to disclose information concerning his person. Public authorities shall not acquire, collect, or make accessible information on citizens other than that which is necessary in a democratic state ruled by law. Everyone shall have the right of access to official documents and data collections concerning himself. Limitations on such rights may be established by statutes. Everyone shall have the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to a statute. Principles and procedures for the collection of and access to information shall be specified by the statute. Additionally, pursuant to Article 31(3) of the Polish Constitution, any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations should not violate the essence of freedom and rights.

■ **2.2. Judgment of the Constitutional Tribunal dated December 12, 2005, file ref. act K 32/04<sup>9</sup>**

On December 12, 2005, the Polish Constitutional Tribunal issued a judgment in the case of a conflict that may occur between the operational activities of the police and the fundamental rights of an individual. The case concerned the questioning of several provisions of the Police Act<sup>10</sup> and the entire order of the Police Commander in Chief on April 6, 1990,<sup>11</sup> with regard to the acquisition and storage of this information through operational activities carried out by the police. It should

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9 Judgment of the Constitutional Tribunal of December 12, 2005, K 32/04, OTK-A 2005, No. 132.

10 Act of April 6, 1990, on the Police (Journal of Laws of 2002, No. 7, item 58, as amended).

11 Regulation No. 6 of the Police Commander in Chief of May 16, 2002, on obtaining, processing and using information by the Police and methods of establishing and maintaining collections of such information (Journal of Laws of the Police Headquarters of 2002 No. 8, item 44, as amended).

be emphasized that these provisions concerned various aspects and methods of the authority's interference with the privacy of an individual through the exercise of powers related to operational and intelligence activities by the police. Here, we talk primarily about the constitutionally regulated freedom of communication and protection related to the private sphere. The Constitutional Tribunal noted that the operational activity of the police, which is based on ordinary legislation and carried out naturally under secret conditions, is in clear conflict with certain fundamental rights of an individual. The Constitutional Tribunal emphasized that this applies in particular to the individual's right to privacy, the constitutional freedom of communication and the related protection of the secret of communication, the protection of information autonomy (Articles 49 and 51 of the Polish Constitution), and the constitutional guarantee of the judicial protection of individual's rights. In this case, the Constitutional Tribunal pointed to one very important aspect of Poland's right to privacy. It should be stated that some of the rights and freedoms provided for in the Constitution of the Republic of Poland contain reference to ordinary legislation, which may define the limitations of these rights and freedoms. This is the case with Articles 49, 50, 51(3) of the Polish Constitution. Other legal regulations, such as Article 47 (generalized right to privacy) or Article 51(3) of the Polish Constitution, do not provide for the possibility of introducing a statutory limitation on these constitutional powers. It can be concluded that if a specific provision of the Constitution of the Republic of Poland does not in itself provide for the possibility of limitations, ordinary legislation cannot directly limit the rights and freedoms guaranteed by that provision of the Constitution of the Republic of Poland. Nevertheless, in Poland, there is a regulation of Article 31(3) of the Constitution of the Republic of Poland, constituting the general principle of maintaining proportionality of a possible restriction of constitutional liberty or rights in the event that they were to be subject to limitations in ordinary legislation, irrespective of their subject matter. The Constitutional Tribunal noted in this case that this principle applies both to the situation where the Constitution of the Republic of Poland provides for the creation of exceptions by statutes and the situation where the ordinary legislator, regulating another matter, and not exercising constitutional authorization to co-define a certain sphere, somehow accidentally falls into collision with constitutional freedoms and rights of the individual. This observation also applies to the rights and freedoms provided for in the Constitution of the Republic of Poland, which have been rigorously formulated, that is, similar to the generalized right to privacy specified in Article 47 of the Polish Constitution. We are discussing a situation in which the Constitution of the Republic of Poland itself does not provide that the law may limit a specific right or freedom. In this context, if the law interferes with such rights or freedoms, it is necessary to maintain proportion, and going beyond this proportionality of the restriction will be decisive for the conclusion that interference by the ordinary legislator took place in an excessive and therefore unconstitutional manner. In

this case, we deal with the weighing of goods that are important to the state and citizens, namely, on the one hand, public security, and on the other hand, the right to privacy with all its elements. Therefore, a compromise between these goods is necessary, in accordance with the content of Article 31(3) of the Polish Constitution. The Constitutional Tribunal believes that the legal instruments that enable the balancing of an appropriate compromise include two premises. First, it is a substantive legal premise that sets the limits set by the legal system on the interference of the authorities with individual spheres of privacy of an individual. Second, it is a premise of procedural guarantees related to the intrusion in question. Such procedural guarantees may include, for example, the necessity to report an inspection to a non-police authority and the legalization by this authority of interference with a given right or constitutional freedom. Additionally, it should be related to the premises and procedures of legalization performed by an external body, the procedure of making the interested party aware of the control and its results, and control measures in the event of an excess of the body conducting control. Having examined case No. K 32/04, the Constitutional Tribunal ruled that selected provisions of the Police Act were inconsistent with Article 51(4) in connection with Article 31(3) of the Polish Constitution, Article 49 in connection with Article 31(3) of the Polish Constitution, and Article 51(2) in connection with Article 31(3) of the Polish Constitution. Additionally, the Constitutional Tribunal ruled that the order of the Police Commander in Chief on April 6, 1990, was inconsistent with Article 51(5) and Article 93(2) of the Polish Constitution.

### ***2.3. Judgment of the Constitutional Tribunal of 5 March 2013, file ref. act U 2/11<sup>12</sup>***

On March 5, 2013, the Constitutional Tribunal issued a judgment in the case of § 5 par. 1 and 2 and § 10 sec. 1 of the Regulation of the Minister of Justice of February 23, 2005, on the subject of examination or performance of activities involving the accused and the suspect (hereinafter: the Regulation of the Minister of Justice of February 23, 2005).<sup>13</sup> The case was initiated by Ombudsman's submission of a request underlining that, in light of the provisions of the Regulation, in certain situations the examination of the accused person (suspect) may be carried out in the presence of third parties, and in order to conduct the examination, direct coercive measures may be used. In terms of relevance to the title issue, the Ombudsman stated that § 5 par. 1 of the Regulation of the Minister of Justice of February 23, 2005, is inconsistent with the generalized right to privacy provided for in Article 47 in connection with Article 31(3) of the Polish Constitution. This objection was supported by the Public Prosecutor General, stating that the right to

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12 Judgment of the Constitutional Tribunal of March 5, 2013, U 2/11, OTK-A 2013, No. 3, item 24.

13 Ordinance of the Minister of Justice of February 23, 2005, on the subject of examination or performance of activities involving the accused and the suspect (Journal of Laws No. 33, item 299).

privacy guarantees individual protection against actions of public authority, which limits his freedom to decide about himself, and orders the introduction of positive mechanisms of effective protection of privacy. In this context, the standard of protection of the intimacy of the person undergoing medical intervention<sup>14</sup> serves to implement the constitutional right to privacy of the individual. Importantly, according to the Public Prosecutor General, the Act of June 6, 1997, the Code of Criminal Procedure (CCP)<sup>15</sup> does not define other standards in the context of treatments and examinations. The aforementioned standard of protection of the intimacy of a person undergoing medical intervention, as defined in the Act of November 6, 2008, on Patient Rights and Patient's Rights Ombudsman, is general and applies both to a patient voluntarily reporting to a healthcare facility and to any other case of providing health services in a different form, including against the will of the examined person. This fact was pointed out by the Public Prosecutor General and, taking it into account, he noted that, in his opinion, the questioned § 5 par. 1 of the ordinance of the Minister of Justice of February 23, 2005, restricts the privacy of an individual by ordering assistance when there is a need to use direct coercion or at the request of the examiner or performing the activity, because the said "assistance" threatens the intimacy of the examined person. Because this provision enters the sphere reserved only by statute, the Public Prosecutor General suggested that it is inconsistent with Article 47 in connection with Article 31(3) of the Polish Constitution. In the opinion of the Constitutional Tribunal, Article 47 of the Polish Constitution defines two separate human rights. First, the right of an individual to legal protection of the spheres of life is indicated in the first part of this provision, that is, private life, family life, honor, and good name. Second, we are talking about the freedom to decide on one's personal life. The Constitutional Tribunal took the position that the first right of an individual must be accompanied by a statutory regulation allowing the protection of privacy, family life, honor, and good name. The second, on the other hand, means that it is forbidden to interfere with the freedom of an individual to shape his or her personal life. It should be noted that, on the one hand, the freedom to decide about one's personal life is one of the aspects of the general freedom of a human being defined in Article 31(1) of the Polish Constitution,<sup>16</sup> and, on the other hand, personal freedom in the

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14 This standard in Poland is defined in Art. 20(1) in connection with Art. 22(2) of the Act of November 6, 2008, on the Rights of the Patient and the Patient's Rights Ombudsman (i.e., Journal of Laws of 2020, item 849, as amended). Pursuant to Art. 20(1) of the aforementioned Act, the patient has the right to respect for intimacy and dignity, in particular when providing health services. On the other hand, according to Art. 22(2) of the aforementioned act, in order to implement the right referred to in Art. 20(1) of the aforementioned act, a medical practitioner is obliged to act in a manner ensuring respect for the intimacy and dignity of the patient.

15 Act of June 6, 1997, Code of Criminal Procedure (i.e., Journal of Laws of 2022, item 1375).

16 Pursuant to Art. 31(1) of the Polish Constitution, human freedom is subject to legal protection.

strict sense provided for in Article 41(1) of the Polish Constitution.<sup>17</sup> Importantly, in these circumstances, the Constitutional Tribunal stated that the two powers provided for in Article 47 of the Polish Constitution should be defined jointly as the right to privacy. The Constitutional Tribunal also drew attention to the fact that the Constitution of the Republic of Poland emphasizes the importance of the right to privacy in the system of constitutional protection of rights and freedoms. This is because pursuant to Article 233(1) of the Polish Constitution,<sup>18</sup> the right to privacy in Poland is inviolable even in the event of a state of emergency or martial law. Therefore, it should be emphasized that even such exceptional circumstances cannot constitute a justification for the ordinary legislator to mitigate the premises legitimizing entering the sphere of private life without risking the accusation of unconstitutional arbitrariness.<sup>19</sup> Based on this, the Constitutional Tribunal rightly concluded that the norms limiting the right to privacy with all its elements should be regulated at the statutory level, particularly when it comes to the realities of criminal proceedings, which is closely related to the deepest interference of the legislator with constitutional rights and civil liberties. Referring to the elements of the right to privacy, the Constitutional Tribunal noted that Poland's right to privacy was protected in many ways. The multifaceted nature of this right is manifested in the fact that it is protected by several constitutional rights and freedoms, and is closely related to the constitutional order to protect the human dignity provided for in Article 30 of the Polish Constitution.<sup>20</sup> These constitutional rights and freedoms are contained in the section from Article 47 to Article 51 of the Polish Constitution. The Constitutional Tribunal also emphasized that the preservation of human dignity requires respect for the purely personal sphere, so that no one is exposed to the necessity of communing with other people or sharing their experiences or intimate experiences with others. It should be emphasized that the private sphere of a person is constructed from the ceilings legally open, to a greater or lesser extent, to external influences. At the same

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17 Pursuant to Art. 41(1) of the Polish Constitution, everyone is guaranteed personal inviolability and freedom. Deprivation or restriction of liberty may take place only on the principles and in the manner specified in the Act.

18 Pursuant to Art. 233(1) of the Constitution of the Republic of Poland, the act specifying the scope of limitations of human and civil freedoms and rights during martial law and emergency may not limit the freedoms and rights specified in Art. 30 (human dignity), Art. 34 and Art. 36 (citizenship), Art. 38 (protection of life), Art. 39, Art. 40 and Art. 41 (4) (humane treatment), Art. 42 (incurring criminal liability), Art. 45 (access to court), Art. 47 (personal rights), Art. 53 (conscience and religion), Art. 63 (petitions) and Art. 48 and Art. 72 of the Polish Constitution (family and child).

19 See also: Judgment of the Constitutional Tribunal of June 20, 2005, K 4/04, OTK-A 2005, no. 6, item 64; Judgment of the Constitutional Tribunal dated November 20, 2002, file ref. K 41/02, OTK ZU No. 6 / A / 2002, item 83.

20 Pursuant to Art. 30 of the Constitution of the Republic of Poland, the inherent and inalienable dignity of a human being is a source of freedom and human and civil rights. It is inviolable, and its respect and protection is the responsibility of public authorities.

time, as can be seen from the considerations already presented, the approval of the imperious encroachment of public authority into constitutional rights and freedoms is not the same.<sup>21</sup> In these circumstances and taking into account the arguments presented, the Constitutional Tribunal decided, *inter alia*, that § 5 par. 1 of the Regulation of the Minister of Justice of February 23, 2005, is inconsistent with Article 74 § 4 of the Code of Criminal Procedure<sup>22</sup> and Article 92(1), Article 41(1), and Article 47 in connection with Article 31(3) of the Polish Constitution.

#### **2.4. Judgment of the Constitutional Tribunal of November 25, 2021, file ref. act Kp 2/19<sup>23</sup>**

On November 25, 2021, the Constitutional Tribunal issued a judgment on the declaration of the property status of public officials and relatives. The subject of the considerations in this judgment was the application of the President of the Republic of Poland (hereinafter, the President of RP) submitted pursuant to Article 122(3) of the Polish Constitution.<sup>24</sup> In his application of October 18, 2019, the President of the Republic of Poland requested that the provisions of the Act of September 11, 2019, Amending the Act on the Exercise of the Mandate of a Deputy and Senator and Some Other Acts be examined for compliance with the Constitution of the Republic of Poland (hereinafter, the Act of September 11, 2019).<sup>25</sup> The President of RP questioned the provision of Article 1 point 1 of the Act of September 11, 2019, which amends Article 35 of the Act of May 9, 1996, on the Exercise of the Mandate of Deputy and Senator (hereinafter: the Act on the Exercise of the Mandate of Deputy and Senator),<sup>26</sup> and Article 1 point 2 of the Act of September 11, 2019, amending the Annex to the Act on the Exercise of the Mandate of a Deputy and Senator, to the extent that they concern their own children, children of the spouse, and adopted

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21 Judgment of the Constitutional Tribunal of December 12, 2005, file ref. K 32/04, OTK ZU No. 11/A/2005, item 132.

22 Pursuant to Art. 74(4) of the Code of Criminal Procedure, the Minister of Justice, in consultation with the minister competent for health matters, shall define, by way of a regulation, the detailed conditions and manner of subjecting the accused and the suspect to examination, as well as performing the activities referred to in § 2 point 1 and 3 and § 3, bearing in mind that the collection, recording, and analysis of the evidence should be carried out in accordance with the current knowledge in the field of forensics and forensics.

23 Judgment of the Constitutional Tribunal of November 25, 2021, file ref. no. Kp 2/19, OTK Series A 2022, item 6.

24 Pursuant to Art. 122(3) of the Constitution of the Republic of Poland, 3. prior to the signing of the act, the President of the Republic may submit a motion to the Constitutional Tribunal regarding the compliance of the act with the Constitution. The President of the Republic may not refuse to sign a bill that has been recognized by the Constitutional Tribunal as conforming to the Constitution.

25 Act of September 11, 2019, amending the Act on the Performance of the Mandate of a Deputy and Senator and Some Other Acts, Available at: [https://orka.sejm.gov.pl/proc8.nsf/ustawy/3795\\_u.htm#\\_ftn1](https://orka.sejm.gov.pl/proc8.nsf/ustawy/3795_u.htm#_ftn1) (Accessed date: 24 August 2022).

26 Act of May 9, 1996, on the Performance of the Mandate of a Deputy and Senator (i.e., Journal of Laws of 2022, item 1339).

children of a deputy or senator. The President of the Republic of Poland made Article 47 and Article 51(2) in connection with Article 2, Article 31(3), and Article 18 of the Polish Constitution and Article 32(1) in connection with Article 47, Article 51(2), and Article 18 of the Polish Constitution. In the justification of his application, the President of the Republic of Poland explained that the act of September 11, 2019, submitted to him for signature by the Marshal of the Sejm, extended the scope of asset declarations submitted by persons holding public functions to include information on the financial situation of their relatives (spouse, own children, children of a spouse, adopted children, and a person living together). In this context, it is important that the statements in question have been defined as non-confidential, except, for example, for information such as address details, the location of the property, and information enabling the identification of movable property, as well as personal data of the persons closest to the person making the declaration. In his application, the President of the Republic of Poland emphasized that he fully supported the goals that the Act of September 11, 2019, was generally intended to achieve. In particular, we refer to support for undertakings related to the fight against corruption<sup>27</sup> and ensuring the transparency of public life.<sup>28</sup> It is worth quoting the position of the President of the Republic of Poland expressed in the justification to the application of October 18, 2019, according to which,

Despite the fact that the project promoters had commendable intentions, the analysis of constitutional aspects shows that in this case there was a conflict of constitutionally protected values—the right of citizens to obtain information about the activities of public authorities and persons discharging public functions, as expressed in Article 61(1) of the Constitution, with the right to legal protection of private life, regulated in Article 47 of the Constitution, guaranteed in terms of personal data protection by Article 51(2) of the Constitution.<sup>29</sup>

The President of the Republic of Poland emphasized that regardless of whether the norm that the ordinary legislator wanted to implement was Article 61(1) of the Polish Constitution,<sup>30</sup> the constitutionally protected value is the right to privacy,

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27 In this context, see Matejuk, 2004, pp. 28–30; Szyk, 2015, pp. 37–53; Kaczmarek, 2021, pp. 65–76; Dzieczyk, 2016, pp. 111–121.

28 In this context, see Opaliński, 2019, pp. 35–43; Jabłoński, 2018, pp. 107–120; Chałubińska-Jentkiewicz, 2020, pp. 299–314.

29 Application of the President of the Republic of Poland of October 18, 2019, pp. 5–6.

30 Pursuant to Art. 61(1) of the Constitution of the Republic of Poland, a citizen has the right to obtain information about the activities of public authorities and persons discharging public functions. This right also covers obtaining information on the activities of economic and professional self-government bodies as well as other persons and organizational units to the extent that they perform tasks of public authority and manage municipal property or the property of the State Treasury.

the general guarantees of which are derived from Article 47 of the Polish Constitution and Article 51 of the Polish Constitution.<sup>31</sup> It is also worth paying attention to the discourse of the President of the Republic of Poland, largely based on the previous jurisprudence of the Constitutional Tribunal. First, the President of the Republic of Poland indicated that Article 47 of the Constitution of the Republic of Poland implies the prohibition of presuming the competence of public authority in the field of interference with privacy, the order to refrain from interference by both public authorities and entities of private law, and the obligation for the state to create conditions in which an individual may freely and safely use their constitutional rights.<sup>32</sup> Second, the President of the Republic of Poland noted that the special importance of the right to privacy in the system of constitutional protection of rights and freedoms is demonstrated by the fact that, pursuant to Article 233(1) of the Polish Constitution, even conditions such as martial law and a state of emergency do not allow ordinary legislators to relax the conditions under which it is possible to enter the sphere of private life without risking the accusation of unconstitutional arbitrariness.<sup>33</sup> Third, the President of the Republic of Poland emphasized that in the sphere of information autonomy, constitutional norms guarantee individual protection against obtaining, processing, storing, and disclosing, in a way that violates the rules of usefulness, necessity, and proportionality in the strict sense, of information such as a) health,<sup>34</sup> b) financial situation,<sup>35</sup> c) family situation,<sup>36</sup> d) name or image, or e) other information necessary for the activities of public authorities.<sup>37</sup> Fourth, the President of the Republic of Poland pointed out that in the sphere of decision-making autonomy, constitutional norms guarantee individual protection against interference with: a) one's own life or health,<sup>38</sup> b) shaping one's family life,<sup>39</sup> c) bringing up children

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31 See Judgment of the Constitutional Tribunal dated November 20, 2002, file ref. act K 41/02; Judgment of the Constitutional Tribunal dated December 13, 2011, file ref. act K 33/08.

32 Judgment of the Constitutional Tribunal dated July 30, 2014, file ref. K 23/11, OTK-A 2014, No. 7, item 80.

33 Judgment of the Constitutional Tribunal of November 20, 2002, K 41/02, OTK-A 2002, No. 83.

34 Judgment of the Constitutional Tribunal of May 19, 1998, U 5/97, OTK 1998, No. 4, item 46; Judgment of the Constitutional Tribunal of February 19, 2002, U 3/01, OTK-A 2002, No. 1, item 3.

35 Judgment of the Constitutional Tribunal of June 24, 1997, K 21/96, OTK 1997, No. 2, item 23; Judgment of the Constitutional Tribunal of November 20, 2002, K 41/02, OTK-A 2002, No. 83.

36 Judgment of the Constitutional Tribunal of November 12, 2002, SK 40/01, OTK-A 2002, No. 6, item 81; Judgment of the Constitutional Tribunal of July 13, 2004, K 20/03, OTK-A 2004, No. 63.

37 Judgment of the Constitutional Tribunal of June 23, 2009, K 54/07, OTK-A 2009, No. 86; Judgment of the Constitutional Tribunal of December 13, 2011, K 33/08, OTK-A 2011, No. 10, item 116.

38 Judgment of the Constitutional Tribunal of July 9, 2009, SK 48/05, OTK-A 2009, No. 7, item 108; Judgment of the Constitutional Tribunal of October 11, 2011, K 16/10, OTK-A 2011, No. 80.

39 Judgment of the Constitutional Tribunal of January 27, 1999, K 1/98, OTK 1999, No. 1, item 3; Judgment of the Constitutional Tribunal of April 28, 2003, K 18/02, OTK-A 2003, No. 4, item 32.

in accordance with one's own convictions,<sup>40</sup> and d) giving birth to a child.<sup>41</sup> In light of the above remarks and after analyzing all the arguments, the factual and legal status of the Constitutional Tribunal noted that in its latest jurisprudence, it had already pointed out that the constitution-maker established the privacy of an individual, not as a constitutionally granted subjective right, but as a constitutionally protected freedom with all the resulting consequences.<sup>42</sup> Such a construction of the right to privacy means

the freedom of individuals to act within the framework of freedom up to the limits established by law. Only an unambiguous statutory regulation may impose restrictions on undertaking specific behaviors within the framework of specific freedom. It is unacceptable to presume that the competence of public authorities interferes with individual freedom. An inherent element of all constitutional human freedoms is the state's obligation to respect and protect them by law, as well as to refrain from interfering with freedom by both the state and private entities.<sup>43</sup>

This is important because, in the case of a subjective right, an individual should have an appropriate entitlement resulting from a legal norm that defines the content and scope of this right. It is important that in the event of a conflict between the constitutional freedom of one individual and the subjective right of another, the subjective right should give way to freedom, at least until the legislator resolves the conflict in favor of the subjective right, while respecting the principle of proportionality. The Constitutional Court also noted that privacy relates primarily to personal, family, and social life and is sometimes defined as the right to be left alone.<sup>44</sup> However, it should be emphasized that privacy also refers to the protection of information about a person and guarantees a certain state of independence within which an individual can decide on the scope and range of sharing and communicating information about his life to other people.<sup>45</sup> Privacy also has a special relationship with human dignity, since the inviolability of human dignity requires, above all, respect for the purely personal sphere in which one is not exposed to the necessity of being with others or sharing one's

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40 Judgment of the Constitutional Tribunal of December 2, 2009, U 10/07, OTK-A 2009, No. 163

41 Judgment of the Constitutional Tribunal of May 28, 1997, K 26/96, OTK 1997, No. 2, item 19.

42 Judgment of the Constitutional Tribunal dated July 30, 2014, file ref. K 23/11, OTK ZU No. 7 / A / 2014, item 80.

43 Ibid.

44 Braxton, 1976, pp. 699–720; Cope, 1978, pp. 671–773.

45 Judgment of the Constitutional Tribunal of June 24, 1997, K 21/96, OTK 1997, No. 2, item 23; Judgment of the Constitutional Tribunal of November 20, 2002, K 41/02, OTK-A 2002, no. 83.

experiences or sensations of an intimate nature.<sup>46</sup> The Constitutional Tribunal also recalled that the importance of the right to privacy in the system of constitutional protection of rights and freedoms is demonstrated, *inter alia*, by the fact that this right is, pursuant to Article 233(1) of the Polish Constitution, inviolable even in acts limiting other rights, issued under martial law and under the state of emergency. In this regard, it is also important that, despite the fact that Article 47 of the Polish Constitution does not directly indicate permissible limitations, there is a possibility of limiting the sphere of the right to privacy, due to, *inter alia*, the rights and freedoms of other individuals or the need to live in a community. However, these restrictions must be justified in Article 31(3) of the Polish Constitution. Additionally, the Constitutional Tribunal indicated that a special breach in the sphere of the right to privacy is created by Article 61 of the Polish Constitution and the right of access to public information guaranteed therein. However, this provision, also in the opinion of the Constitutional Tribunal, only concerns the privacy of persons discharging public functions. The interference of public authorities with the private lives of individuals not performing public functions is subject to much more restrictive restrictions. In this regard, the Constitutional Tribunal expressed the view that ‘obtaining information about the private life of individuals by public authorities, especially covertly, must be limited to necessary situations, permissible in a democratic state only for the protection of constitutionally recognized values and in accordance with the principle of proportionality.’<sup>47</sup> In light of all the above remarks and legal and factual arguments, the Constitutional Tribunal in the present case, with regard to all challenged legal regulations, ruled that they were inconsistent with Article 18, Article 47, and Article 51(2) in connection with Article 31(3) of the Polish Constitution.

### 3. Summary

Briefly summarizing the analysis carried out as part of this paper on the selected Polish constitutional jurisprudence in terms of the right to privacy, the most important and final conclusions resulting from the above scientific discourse outlining the image of the right to privacy within the scope of the study should be presented.

First, Article 47 of the Polish Constitution defines two separate human rights. First, the right of an individual to legal protection of the spheres of life is indicated in the first part of this provision, that is, private life, family life, honor, and good name. Second, there is the freedom to decide one’s own personal life.

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46 Judgment of the Constitutional Tribunal dated December 12, 2005, file ref. K 32/04, OTK ZU No. 11 / A / 2005, item 132.

47 Judgment of the Constitutional Tribunal dated July 30, 2014, file ref. K 23/11, OTK ZU No. 7 / A / 2014, item 80.

The first right of the individual must be accompanied by statutory regulations to defend privacy, family life, honor, and good name. The second, means that it is forbidden to interfere with the freedom of an individual to shape his or her personal life. These two powers provided for in Article 47 of the Polish Constitution should be defined jointly as the right to privacy.

Second, in the sphere of informational autonomy, constitutional norms guarantee individual protection against obtaining, processing, storing, and disclosing, in a way that violates the rules of usefulness, necessity, and proportionality in the strict sense, information, for example about a person's: a) health condition, b) financial situation, c) family situation, d) name or image, or e) other information necessary for the activities of public authorities.

Third, in the sphere of decision-making autonomy, constitutional norms guarantee individual protection against interference with the individual's decisions, including those about: a) one's own life or health, b) shaping family life, c) raising children in accordance with one's own convictions, and d) giving birth to a child.

Fourth, the Polish constitution-maker defined the privacy of an individual not as a constitutionally granted subjective right but as constitutionally protected freedom with all the ensuing consequences. In the case of a subjective right, an individual should have an appropriate entitlement resulting from a legal norm that defines the content and scope of this right. It is important that in the event of a conflict between the constitutional freedom of one individual and the subjective right of another, the subjective right should give way to freedom, at least until the legislator resolves the conflict in favor of the subjective right while respecting the principle of proportionality.

Fifth, Article 47 of the Polish Constitution, constituting a generalized right to privacy, or Article 51(3) of the Polish Constitution, does not provide for the possibility of introducing a statutory limitation of their scope. Article 47 of the Constitution of the Republic of Poland implies a prohibition on presuming the competence of public authority to interfere with privacy, an order to refrain from constitutionally unacceptable interference by both public authorities and private law entities, and an order for the state to create conditions under which individuals can freely and safely exercise their constitutional rights. However, there is a regulation of Article 31(3) of the Constitution of the Republic of Poland constituting the general principle of maintaining the proportionality of a possible restriction of constitutional liberty or rights in the event that they were subject to limitations in ordinary legislation, irrespective of their subject matter. This also applies to the rights and freedoms provided for in the Constitution of the Republic of Poland, which have been rigorously formulated, such as the generalized right to privacy specified in Article 47 of the Polish Constitution. In this context, if the Act interferes with the rights or freedoms defined in this way, it is necessary to maintain proportion, and going beyond this proportionality of the restriction will be

decisive for the conclusion that interference by the ordinary legislator took place in an excessive and therefore unconstitutional manner. This means that a certain compromise is necessary in line with the content of Article 31(3) of the Polish Constitution. Legal instruments that make it possible to balance an appropriate compromise include two premises. First is a substantive legal premise that sets the limits set by the legal system on the interference of the authorities with individual spheres of privacy of an individual; second is a premise of procedural guarantees related to the intrusion in question.

Sixth, a special breach in the sphere of the right to privacy is created by Article 61 of the Polish Constitution and the right of access to public information guaranteed therein. However, this provision applies only to the privacy of people discharging public functions. The interference of public authorities with the private lives of individuals not performing public functions is subject to much more restrictive restrictions.

Seventh, the Constitution of the Republic of Poland emphasizes the importance of the right to privacy in the constitutional protection of rights and freedoms. This is because pursuant to Article 233(1) of the Polish Constitution, the right to privacy is inviolable even in the event of a state of emergency or martial law. Therefore, it should be emphasized that even such exceptional circumstances cannot constitute a justification for the ordinary legislator to mitigate the premises legitimizing entering the sphere of private life without risking the accusation of unconstitutional arbitrariness. Norms limiting the right to privacy with all their elements should be regulated at the statutory level.

Eighth, Poland's right to privacy is protected in many respects. The multifaceted nature of this right is manifested in the fact that it is protected by several constitutional rights and freedoms (Articles 47 to 51 of the Polish Constitution) and is closely related to the constitutional order to protect human dignity provided for in Article 30 of the Polish Constitution. Maintaining a person's dignity requires respecting his purely personal sphere, so that no one is exposed to the need to associate with other people or share his or her experiences of an intimate nature with others. A person's private sphere is constructed from the ceilings that are, to a greater or lesser extent, legally open to external influence.

Concluding the analysis, it should be noted that the image of the right to privacy in the jurisprudence of the Polish Constitutional Tribunal is a significant and indeed key element of the protection of rights and freedoms in Poland. The scope, meaning, and elements of the right to privacy affect the life of every human being and should be effectively protected in proportion to emerging threats. Human privacy is one of the aspects of human life currently under attack and whose defense is in the interests of the autonomy or even sovereignty of every human being.

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