

THE TRUE FACE OF THE RIGHT TO PRIVACY ON THE EXAMPLE OF THE SECRET OF CONFESSION IN CRIMINAL PROCEEDINGS

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ABSTRACT

The scientific paper concerns the image of the right to privacy on the example of the secret of confession in criminal proceedings. First of all, the introductory comments, including the scope of the study, will be provided. After that, considerations regarding the concept of privacy as a term of fundamental importance will be presented. This will also include an indication of privacy features. Then, the right to privacy will be presented with the definition of elements forming its concepts. After the above, criminal proceedings will be outlined as an area of applying the right to privacy in criminal law practice. This will give the opportunity to present a legal institution in procedural criminal law, which is an example of the functioning of privacy. For this reason, the study will analyze the secret of confession and will deal with the relationship between the penitent and the confessor. The current reasoning in study will lead to the analysis of the standards of Polish criminal proceedings with the legal institution of the secret of confession. In this context, it will be also important for paper to deal with the sources of the secret of confession and analysis of the secret of confession in other legal acts of the Polish legal system, apart from the Code of Criminal Procedure. The paper ends with a concise summary where it will be noticed that the secret of confession is the highest-ranking example of respecting the right to privacy in criminal proceedings. The analysis contained in paper also applies to natural law.

KEYWORDS

*privacy
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1. Introduction

The right to privacy, using the example of confessional secrecy in criminal proceedings, is an issue that combines three areas. The first is privacy as, generally speaking, a natural sphere of every human being based on individual needs, intimate requirements, dreams, peculiar intercourse, and, finally, leaving some circumstances and facts from life simply hidden. It is a thoroughly ontological, philosophical, psychological, sociological, and existential sphere, very strongly connected with the essence of humanity. Privacy is a very delicate, subjective, elitist, and personal element of the structure of human existence.¹ The second area, on the other hand, is the right to privacy, as integrated with the former, a thoroughly legal issue framed by a number of elements comprising a certain standard, scope, guarantee, or boundary that must be respected and required to be respected by other members of the human society, so that relations in this community are healthy and predictable.² The third is the area of criminal procedure, as one of the very complex mechanisms of the broadly understood legal system, in which the criminal procedure (also known as procedural law, criminal trial, formal criminal law) has a specific role, tasks, principles of operation, and outcomes of these actions.³ All these elements are present in the title issue of the institution of the secret of confession.

The first two concepts, that is, privacy and the right to privacy, evoke positive associations, often with the beauty of human nature because privacy is the basic condition for being a free person. You can even allegorically indicate that privacy is like a home, not everyone is invited to the house, and not everyone can be a witness of our personal thoughts, information, actions, or conclusions. Privacy is also something of the soul; not everyone wants to be looked at because the soul is the innermost part of our existence.

On the other hand, there is no doubt that criminal proceedings are not romantic, but rather highly mechanical, characterized by repression, firmness, arbitrariness, and the categorization of public entities with monopolies on justice, determining the truth, assessment of human behavior, and for setting the boundaries of privacy.

These three areas—privacy, the right to privacy, and criminal proceedings—are very broad and controversial. This is especially true when we consider the impact of new technologies in this regard.⁴ Nevertheless, these areas are united by one of

1 | See: Parent, 1983, pp. 305–338; Gehrke, 2011, pp. 432–449; Powers, 1996, pp. 369–386.

2 | See: Thomson, 1975, pp. 295–314; Rubinfeld, 1989, pp. 737–807; Marmor, 2015, pp. 3–261; McCloskey, 1980, pp. 17–38; O'Brien, 1902, pp. 437–448; Diggelmann, 2014, pp. 441–458.

3 | See: Oręziak, 2019d, pp. 61–63; Stuntz, 1994, pp. 1016–1078; Hart, 1958, pp. 401–441.

4 | In terms of the impact of new technologies on many levels of practical application, see: Oręziak, 2019c, pp. 102–109; Oręziak, 2018a, pp. 199–219; Oręziak, 2020, pp. 187–196; Oręziak, 2019a, pp. 181–192; Oręziak, 2018b, pp. 117–141; Wielec and Oręziak, 2018, pp. 50–65; Karski and Oręziak, 2021, pp. 242–261; Oręziak, 2021, pp. 47–78; Oręziak, 2019b, pp. 432–448; Wielec, 2021, pp. 311–322; Oręziak, 2022, pp. 125–140; Oręziak and Łuniewska, 2021, pp. 223–232; Oręziak and Świerczyński, 2019, pp. 257–275.

the many institutions involved in Polish criminal proceedings. This is the secret of confession, which focuses on the reasons and necessity, dangers, and benefits of exercising the right to privacy.

2. Privacy

To begin with, it is worth considering what privacy is, how to understand it, its place, and its limitations and guarantees, in the context of the right to privacy and the specific profile of criminal proceedings.

Privacy in Latin *privatus* – it is an element of human life not exposed to the outside, arranged according to one's own will, with all external interference kept at a minimum.⁵ Privacy is not a legal term; it is rather a concept bordering ontology, psychology, pedagogy, or sociology. Nevertheless, privacy as a concept for further consideration has its basic and distinctive features, including legal references.

The first characteristic of privacy is autonomy. It is known that, autonomy is a concept associated with independence.⁶ In this context, autonomy can be considered in two dimensions: the first as autonomy in relation to the state and public authorities, and the second as autonomy in shaping one's own personal life.⁷ It is a sphere free from external interference—that is, autonomous—in which everyone has the right to minimum intimacy with the outside world.⁸

The second characteristic of privacy is self-existence. The concept of self-existence is related to individual existence, existence 'by itself,' not being related to something, or a part of something.⁹ In this context, privacy is something individual, a certain legal good, something that exists independently of something else, creating a separate, unrelated whole, which is a constant and unchanging feature of human society.¹⁰

The third characteristic of privacy is intimacy. Intimacy is something that is intended for the loved ones, something that is strictly personal, confidential, secret, close, and intimate.¹¹ In this context, privacy is something exceptionally personal. It is a sphere of seclusion enjoyed by every individual, within which the individual, using their privacy, creates their own personality and reality, decides about personal matters when they wish, as well as protects and defends privacy when it is tampered with.¹²

The fourth characteristic of privacy is naturalness. Conceptually, naturalness is a property of nature, that is, compliance with its laws, in accordance with the

5 | Kopff, 1972, p. 30.

6 | Skorupka, Auderska and Łempicka, 1968, p. 24.

7 | Mana-Walasek, 2016, p. 462.

8 | Jędruszczak, 2005, pp. 197–215.

9 | Skorupka, Auderska and Łempicka, 1968, p. 733.

10 | Sakiewicz, 2006.

11 | Skorupka, Auderska and Łempicka, 1968, p. 239.

12 | Michałowska, 2013.

ordinary order of things.¹³ In this context, privacy is understood as reasonable freedom – for a person doing something in an ordinary and unforced manner, inherent in nature, in accordance with its laws, and the ordinary order of things, in which man is the central figure.

Based on these four privacy features, it can be determined that it is an extremely personal sphere of every human being, protected against outside interference.¹⁴ It is a personal sacrum derived directly from human nature as a rational and sensitive being. Privacy is an indispensable element of the life of every individual, which should be strictly protected at all times, regardless of whether it concerns the property, personal, emotional, or spiritual sphere.

3. Right to privacy

Earlier, privacy was analyzed more from a sociological or axiological point of view; now, it is worth considering the legal side of this issue. The law is necessary for the essence of privacy. It also provides the basis for its respect, observance, and compliance. As already indicated, 'privacy' – in the first place – is not a legal concept, but the concept of 'right to privacy' is a term that clearly refers to the area of law. Privacy is an inherent human trait, and hence it must be a straightforward and respectful reference. This is done by granting of 'rights,' wherein the legal system shaped one of its elements as the right to privacy.

Finding the sources of the law for this concept, it can be noted that currently neither the Polish Constitution nor the Conventions and International Covenants contain a precise definition of the right to privacy, but, on the basis of guarantees, provide the possibility of preliminary determination of the content of this right.¹⁵ It can only be indicated by way of illustration that the elements of the right to privacy are outlined in the Constitution of the Republic of Poland and, inter alia, some acts of international law.

First, it is necessary to point to the provision of Article 8 of the Convention on Human Rights and Fundamental Freedoms of 1950, which regulates the right to respect private and family life, stating that everyone has the right to respect their private and family life, home, and correspondence. Interference by public authorities in the exercise of this right is unacceptable, except in cases provided for by law and necessary in a democratic society for the sake of state security, public security or economic well-being of the country, protection of order and prevention of crime, protection of health and morals, or protection of rights and freedom of others.

A similar statement is provided by the International Covenant on Civil and Political Rights, which expressly forbids any interference in the private life of an individual, stipulating in Article 17 that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to

13 | Skorupka, Auderska and Łempicka, 1968, p. 432.

14 | Mielnik, 1996, pp. 29–41; Banaszewska, 2013, pp. 127–136; Szablowska, 2006, pp. 181–197.

15 | Krzysztofek, 2014; Gonschior, 2017.

unlawful attacks on his honor and reputation. In addition, under this provision, everyone has the right to legally protect themselves against such interference and attacks.¹⁶

These documents only state the general prohibition of violating an individual's privacy. Generally, on this legal level, it can be assumed that the right to privacy is the right to respect privacy in every area, which is also a fundamental right of the human person.¹⁷ This law protects the individual against public authority, society, and professional actors, because it is the right of a person to be left alone. Thus, a person can live according to the natural order of things, with the least possible interference from the outside.¹⁸

On the other hand, the first element of respect for the right to privacy under the Polish law in the Polish Constitution is personal inviolability. Pursuant to Article 41 of the Polish Constitution, personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by the statute.

The second element is the explicit prerequisite for ensuring privacy in the Polish Constitution, although not in its legal definition. Pursuant to Article 47 of the Polish Constitution, everyone shall have the right to legal protection of his private and family life, of his honor and good reputation, and to make decisions about his personal life. The provision of Article 47 of the Polish Constitution grants everyone the right to legal protection of private and family life, honor and a good name, and to decide about their personal life. The Polish constitutional regulation of the right to privacy is based on the following components: first -the right to privacy must be enjoyed by every person; second – privacy is protected against arbitrary and unlawful violations; third – the state should provide legal remedies in the event of a breach of someone's privacy; fourth – restrictions on the right to privacy must be exceptional and dictated by a clearly more important interest than this right.¹⁹ At the same time, it emphasizes that the essence of the right to the protection of private life is to guarantee an individual a certain sphere of 'isolation.' The individual must have the right to decide which facts in this sphere may be disclosed to other people, as well as receive guarantees that their private lives will not be violated, etc.²⁰

The third element is to ensure the confidentiality of communication, because according to Article 49 of the Polish Constitution, freedom and protection of the secret of communication are ensured. Its limitation may only exist in the cases specified in the Act and in the manner specified therein.²¹

The fourth element is the inviolability of the apartment, because pursuant to Article 50 of the Constitution, the inviolability of the apartment is ensured. A search of the flat, room, or vehicle may only take place in the cases specified in the Act and in the manner specified therein.

16 | Hofmański, 1995, p. 253 i n.

17 | Winczorek, 2000, p. 66.

18 | Kustra A., 2003, p. 17 i n.

19 | Kański, 1991, p. 70; Eichstaedt, 2003, pp. 28 et seq.

20 | Braciak, 2004, p. 112.

21 | Jarosz-Żukowska, 2008, p. 11.

Complementary to respect for the right to privacy are also issues related to faith and religion, treated as one of the most important elements of every human being. Hence, the fifth element is to ensure religious freedom because, pursuant to Article 53 of the Polish Constitution, everyone is guaranteed freedom of conscience and religion. Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing rites, or teaching.²²

Thus, it can be seen that although there is no unambiguous definition of the right to privacy, its absolute importance for individuals and legal systems is evident. This introduction of the 'right to' causes the legal system to consider the requirements of the matter to which a certain right belongs. The introduction of the 'right to' as can be seen, the right to privacy – introduces privacy to a completely different, top level in the structure of the legal system, as a result of which privacy becomes a legally materialized area. There is a, perhaps general, specification of this privacy, its boundaries, effects, limitations, etc. It is even assumed that

the importance of the right to privacy (Article 47 of the Constitution) in the system of constitutional protection of rights and freedoms is shown, *inter alia*, by the fact that this right is [...] inviolable. This means that even exceptional and extreme conditions do not allow the legislator to relax the conditions under which one can enter the sphere of private life without exposing himself to the accusation of unconstitutional arbitrariness.²³

The importance of the right to privacy is so great that it is justified to guarantee its protection in the system of state law and in the highest-ranking statute. Often, there is an expectation of the state power to enter the most secretive nuances of an individual's life. The guarantee of the right to privacy is, therefore, particularly desirable at the present time, in which there are virtually unlimited technical surveillance possibilities.²⁴

The right to privacy is the right to respect private life and is at the same time a fundamental right of the human person.²⁵ In defining this law, the science of law indicates that

this law protects the individual from public authority, against society and other individuals, that is, it is the right of a person to be left alone in order to live their own life (in a way that they prefer) with the smallest possible interference from the outside.²⁶ This means that the individual must be protected against any interference with private, family and home life, against any attack on their physical or mental integrity or against

22 | Sobczyk, 2013; Sobczyk, 2017.

23 | Justification to the judgment of the Constitutional Tribunal of 20 November 2002; K. 41/2002; OTK ZU 2002/ 6A, item 83; 'Monitor Podatkowy' 2002, No. 12, p. 2; Glosa 2002/12, p. 5; Glosa 2003/1, p. 39; Glosa 2003/4, p. 48; Glosa 2003/5, p. 49.

24 | Kustra A., 2003, pp. 9 et seq.

25 | Winczorek, 2000, p. 66.

26 | Kustra E., 2003, pp. 17 i n.

their moral or intellectual freedom [...] against any activity aimed at spying, controlling and persecuting them, against fraudulent use of written and oral statements and the disclosure of information provided or obtained by them under professional secrecy.²⁷

4. Criminal proceedings

Criminal proceedings constitute a completely different area. The terms, privacy and the right to privacy, are concepts that can be identified as positive and pleasant. On the other hand, in criminal proceedings, the indicated positive feelings related to privacy and the right to privacy are not in the lead, but rather, those that are opposed to the natural freedom of man, such as coercion, sanctions, arbitrariness, and the power of public authorities.²⁸ After all, in criminal proceedings, one of the highest human values, which is truth, can often become a victim because it can be incorrectly determined and then result in an unfair sentence.

Privacy and the right to privacy take on completely different dimensions in criminal proceedings. These are concepts and areas that constitute limits to the interference of power that is possible in criminal proceedings. Often, criminal proceedings may lead to the direct elimination of most manifestations of the right to privacy. This is because criminal proceedings are a complicated mechanism in the implementation of *ius puniendi* – i.e. the state law of punishing for committed crimes.²⁹ Criminal proceedings are saturated with institutions that are, or may be, considered contrary to the right to privacy. In criminal proceedings, we have, after all, temporary arrest, control and recording of conversations, searches, examination of a person, extradition, exhumation, and so on.

There is no doubt that the criminal liability established in the course of criminal proceedings is the most controversial legal liability. It is in this area, as in no other area, that the status of a free individual can be penetrated most deeply in the majesty of the law. Therefore, in the area of criminal proceedings or criminal law, there must be a specific balance between the necessity to define the limits of interference with the rights of an individual by a public authority and securing these rights against possible abuses of this authority. It must be admitted that the entire criminal procedure involves a number of conflicts. Among other things, in the Polish doctrine of criminal proceedings, it is noted that, on the one hand, in criminal proceedings, it is about respecting one of the fundamental values of the form of truth regulated in Article 2 § 2 of the Code of Criminal Procedure, according to which, 'the basis of any decisions should constitute true factual findings.'³⁰ On the other hand, it turns out that the truth in criminal proceedings cannot be learned in certain specific circumstances. It will be the same as with privacy; on

27 | Braciak, 2004, p. 39.

28 | Wielec, 2017, p. 97.

29 | Śliwiński, no date, p. 3; Waltoś, p. 7; Waltoś, 1997a, pp. 26 et seq.

30 | Waltoś, 2014, p. 213.

the one hand, it must be protected, but it is also understandable that in the name of knowing the truth, this privacy can be severely damaged. Hence, it is so important to clearly—as far as possible—define the limits of possible interference with the right to privacy in criminal proceedings.

5. The secret of confession

In light of the comments presented, the question becomes legitimate whether there is any institution in criminal proceedings that will be an example of the functioning of privacy. It is here that the institution of the secrecy of confession comes into play.³¹ Privacy and the right to privacy, also include emotions, feelings, faith, and spirituality. Confession is a thoroughly theological, religious, and spiritual issue, undoubtedly falling within the scope of individual privacy. It must be admitted that thoroughly ecclesiastical and religious institutions rarely have their respective connotations in state law. Confession itself is such an institution, which is the backbone of the secret of confession. Confession mostly has a religious purpose. Therefore, the regulation of confession and the secrecy of confession in the first place are made in canon law. Hence, the starting point is confession, which has a clear ecclesial foundation and theological character. However, the Code of Canon Law does not contain a definition of confession. This term is more appropriate to theology than to canon law, which connects confessions directly with the sacrament of penance.³² All messages transmitted even during an unfinished confession fall within the scope of the protection of the secret of confession under canon law. However, it is worth noting that the subject of the confession is abstract and unpredictable, which eliminates the possibility of cataloguing potential information that may be passed on by the penitent to the clerical confessor. Hence, it is clear that the protection of the denomination guaranteed by the secrecy of confession must be broad and cover not only all messages presented by the penitent but also the entire course of the confession.³³ This also applies to the external reactions of the penitent, such as nervousness, self-confidence, crying, screaming, etc., which are also a sign of the privacy of the individual.

The Code of Canon Law, currently in force³⁴ regards the issue of confession and the secret of confession, as the basic legal act of the Catholic Church of the Latin rite. It was promulgated on January 25, 1983, by John Paul II in the apostolic constitution of *Sacre disciplinae leges* and entered into force on November 27, 1983, replacing the Code of Canon Law and numerous church laws issued after 1917.

31 | Szpor and Gryszczyńska, 2016, p. 244.

32 | Katechizm Kościoła Katolickiego, 1994, pp. 340–341: By specifying this sacrament, the Catechism of the Catholic Church assumes that it is the sacrament of penance and reconciliation, the sacrament of conversion, the sacrament of forgiveness, and the sacrament of confession.

33 | Syryjczyk, 2001, p. 113.

34 | Codex Iuris canonici auctoritate Joannis Pauli PP. II.

This ecclesiastical legislative act in Canon 959 shows that in the sacrament of penance, the faithful who confess their sins to the authorized minister, expressing sorrow for them and having a resolution to correct them, receive from God the forgiveness of sins after baptism committed by the minister and at the same time are reconciled with the Church, which by sinning they inflicted a wound.

In another provision of Canon 983, the Code of Canon Law states that sacramental secrecy is inalienable, and therefore, the confessor is not allowed to betray the penitent in words or in any other way and for any reason whatsoever. The translator, if any, is also bound by the obligation of secrecy, as well as all others who in any way learned about sins from confession.

In Canon 984, the Code of Canon Law indicates that it is absolutely forbidden for a confessor to use information obtained in a confession that causes a nuisance to the penitent, even with the exclusion of any danger of disclosure. Anyone in authority may in no way use the knowledge obtained about the sins confessed at any time in a confession in external governance.

In the regulation of Canon 1388, the Code of Canon Law specifies that a confessor who directly violates the sacramental mystery is subject to excommunication binding by the law itself reserved to the Holy See. In turn, when it violates it, it should be punished only indirectly according to the severity of the crime. The translator and others mentioned in Canon 983 § 2 of the Code of Canon Law, who breach a secrecy, should be punished with a just penalty, including excommunication.

Finally, in the last provision, which directly relates to the secrecy of confession under canon law, that is, in the provision of Canon 1550 of the Code of Canon Law, it is assumed that priests are incapable of being witnesses in relation to everything they know from the sacrament of confession, even if the penitent asks for it to be disclosed. Moreover, what anyone and in anyway was heard during a confession cannot be accepted in court as a trace of truth.

6. The relationship between the penitent and the confessor

After analyzing the provisions of canon law in the context of confession and the secrecy of confession, it can be noticed that apart from the typically theological purpose of confession, which is the forgiveness of sins, confession is, per se, the transmission of certain information that must remain undisclosed.

The sacramental nature of the penitent's confession means that what the penitent has conveyed to the confessor cannot be made public. The secrecy of the confession must be maintained.³⁵ The penitent's spiritual well-being takes precedence over everything else, and using the information obtained during the confession cannot be justified by any reason. This is the right to privacy of the highest order.

The non-theological goal of the secret of confession is to protect privacy, and in it, the freedom of communication during confession between the penitent and

the confessor. It is a ban on the use of knowledge obtained during a confession by anyone.

Therefore, there is a vital question of what is so important in confession that it is included in the provisions of criminal procedures.

The key to answering this question is the 'relationship.' During a confession, an exceptionally personal and sensitive relationship is established between the penitent and the confessor. This relationship is an unconditional opening of one person to another. There is no more sincere and private confession than one made during the sacrament of confession. Owing to the sincerity of the confession and the enormous degree of the penitent's trust in the confessor, the protection of the secret of confession must be the greatest possible. The penitent revealing his sins, that is, information, a fragment of his private life or even a part of his worldview, does so in full trust in the confessor in order to grant him absolution by the clergyman. Church legislation strongly emphasizes that the role of the confessor is not only to mediate the administration of the sacrament of penance but also to provide advice, as well as spiritual and psychological support.³⁶ The confession of sins, understood as the presentation of the penitent's inner feelings, must be protected against public manifestation.³⁷

Moreover, it is assumed that the priest's legal and canonical obligation to keep the secret of confession is so imperative that he must keep this secret not only towards outsiders, but also with the penitent himself outside of confession.³⁸ The view that the

absolute secrecy concerning sins and the far-reaching caution concerning the other mentioned factors apply not only to the priest in the sense that they forbid him to disclose the content of his confession to third parties, but also to refer to them in non-sacramental contact with the penitent himself, unless he expressly agrees to it, preferably on his own initiative

does not raise any objections.³⁹ The imperativeness of the secret of confession means that the priest, even in danger of death, cannot be released from keeping this secret. Likewise, if the priest were to be called as a witness before a judicial authority, the imperativeness of the secrecy of confession releases him from the court oath taken to testify to the truth, to which every witness is obliged. The knowledge possessed by a confessor is impenetrable. In canon law, the secrecy of confession protects the priest, who is a witness, from committing a crime or perjury or giving false testimony.

The act of confession is characterized by verbal, direct, and confidential communication, in which knowledge is revealed, the public dissemination of which

36 | Can. 978 § 1: The priest should remember that when listening to confession he acts as both judge and doctor, and that he was appointed by God as a steward of divine justice and mercy in order to contribute to God's honor and the salvation of souls.

37 | Salij, 1998, p. 10.

38 | Witek, 1979, p. 187.

39 | Jan Paweł II, 1994, p. 22.

could cause irreversible retaliation for the penitent. Therefore, the basic assumption of the secret of confession is the protection of human dignity. No one shall be allowed to unlawfully harm the good name that someone has or infringe on the rights of each person to protect their own privacy.⁴⁰

Hence, the Church and state legislators try to protect this most private confession of the penitent from being made public and then from being used. The protection covers all messages transmitted by the penitent to the confessor, surrounding them with absolute secrecy, from which nothing and no one can release a clergyman.

7. Polish criminal proceedings and the secret of confession

The Polish criminal procedure is based mainly on the provisions of the Code of Criminal Procedure and places the secrecy of confession in the issues of broadly understood issues of evidence. More precisely, it places the secrets of confession within the so-called evidence prohibitions in criminal proceedings.

In the doctrine of criminal procedure, prohibitions on collecting evidence are defined as rules that prohibit the collection of evidence under certain conditions or limit the search for or extraction of evidence.⁴¹ The secret of confession is not the only one admitted and respected in criminal proceedings. Polish criminal proceedings also respect defense secrets, medical secrets, mental health secrets, banking secrets, and many others.⁴² However, the secrecy of confession is second to none when privacy and the right to privacy is considered. Perhaps it is matched to some extent by its protective secrecy. The secret of confession is absolute and irrevocable. As discussed above, the secret of the confession is not of state origin. Its roots are clearly canonical because the prohibition of evidence of the secret of confession is the result of already existing facts on the ecclesial level, and not facts on the level of state law. The evidential prohibition of the secret of confession is one of the consequences of using the sacrament of penance.

The doctrine of the criminal trial clearly emphasizes the canonical origin of the secrecy of confession and stipulates that its evidential prohibition enables the confessor to fully implement the strict obligation of silence imposed on him in the canon law as to the facts learned during confession and to avoid possible conflict situations, where in the absence of such a prohibition, evidence would include clergy and other persons called to participate in the criminal trial as witnesses.⁴³ The legislator creates a ban on evidence in situations where 'the benefit of finding the truth may sometimes turn out to be less than the disadvantage that the taking of evidence may entail.'⁴⁴ In addition, respecting the secrecy of confession during

40 | Can. 220.

41 | Cieślak, 1955, p. 264.

42 | Wielec, 2014, p. 488.

43 | Kunicka-Michalska, 1972, p. 160.

44 | Śliwiński, 1959a, p. 308.

the collection of evidence is common in criminal proceedings. The counterpart of the ban on the evidence of the secrecy of confession in other regulations is, inter alia, in common law, the so-called privilege: *priest – penitent privilege*.⁴⁵

From the previously presented definitive forms of evidence prohibitions, it can generally be stated that they block the possibility of obtaining and using evidence in a criminal trial. The role of evidence, on the other hand, is 'to obtain the judgments needed to issue a decision'.⁴⁶

Historically, each codification of criminal proceedings in Poland strictly recognized the secret of confession. It is worth briefly presenting that, inter alia, in the provisions of the Polish Code of Criminal Procedure of 1928, the evidence ban on the secrecy of confession was included in the provision of Article 101 of the Code of Criminal Procedure, according to which it is not allowed to hear as a witness: a). Of the clergyman – as to the facts he found out in confession.⁴⁷ In the next Polish Code of Criminal Procedure of 1969, this issue was discussed in Article 161 point 2, according to which 'It is not allowed to interrogate the clergyman as witnesses as to the facts about which he learned during confession'.⁴⁸ On the other hand, in the current Code of Criminal Procedure of 1997, the prohibition of evidence of the secrecy of confession is regulated in Article 178 point 2, according to which 'it is not allowed to interrogate the clergyman as witnesses as to the facts which he learned during confession.'

The content of the current provision of Article 178 point 2 of the CCP triggers several important conclusions.⁴⁹

First, the evidentiary prohibition of the secrecy of confession in criminal proceedings is an absolute prohibition of evidence in the sense that it applies in every possible situation, and even when the clergyman himself acting as a confessor has the will or consent to disclose information derived from confession.

Second, the prohibition applies only to those facts about which the confessor learned during the confession, which means that it is possible to question the confessor in relation to other facts. The subjective scope of the prohibition of the evidential secrecy of confession is determined by the content of the provision of Article 178 point 2 of the Code of Criminal Procedure, clearly indicating that this prohibition binds the clergyman. The difficulty arises in defining the term 'cleric' ('confessor'). The term clergyman has been made more specific by Polish jurisprudence, which supplements—by necessity—the deficiencies in legislative regulations. It is assumed that a clergyman is a person belonging to the Catholic Church or another Church or religious association, who is distinguished from all followers of a given religion by the fact that he or she has been called upon to organize and perform religious worship on a permanent basis.⁵⁰ Of course, it also applies to denominations that operate legally in the country. The objective scope

45 | Whittaker and Lennard, 2000, pp. 45–168; Mazza, 1998, pp. 171–204; Sippel, 1993, pp. 1127–1164; Walsh, 2005, pp. 1037–1089; Brooks, 2009, pp. 117–147.

46 | Śliwiński, 1959, p. 291.

47 | Nisenson and Siewierski, 1947, p. 77.

48 | Bafia et al., 1971, p. 211.

49 | Wielec, 2016, pp. 315–327.

50 | Resolution of the Supreme Court of May 6, 1992, I KZP 1/92, OSNKW 1992/7 – 8/46.

of the prohibition of evidentiary secrecy of confession in criminal proceedings covers all information disclosed by the penitent to the confessor, regardless of whether they are relevant to the conducted criminal proceedings. It is not possible to take any evidence from the information disclosed during a confession, using the confessor as the source of this information.

It is also forbidden to prove the course of the confession and final result. All messages transmitted even during an unfinished confession fall within the scope of the protection of the secret of confession under canon law.⁵¹ However, it is worth noting that the subject of the confession is abstract and unpredictable, which eliminates the possibility of cataloguing potential information that may be passed on by the penitent to the clerical confessor. Hence, it is clear that the protection of the denomination guaranteed by the secrecy of confession must be broad and cover not only all messages presented by the penitent but also the entire course of the confession.⁵² This also applies to the penitents' external reactions (nervousness, confidence, crying, screaming, etc.). The fact of hearing a confession, however, is beyond the protection of the secret of confession. This is because, although it is forbidden to hear as a clerical witness to the facts discovered during confession, this prohibition does not prohibit the clergyman from revealing the very fact that someone benefited from the confession.⁵³

8. Sources of the secret of confession

In light of the comments presented, the question remains, what are the roots of respecting the secret of confession in the context of privacy?

The answer seems to be simple given the previously presented privacy features. Since privacy is natural and very closely related to human society, there is no other way but to indicate that the root of the secret of confession in criminal proceedings is natural law. In general, natural law is inherently just, something due to human dignity.⁵⁴ The secret of confession is, therefore, an inseparable element of respecting privacy, the preservation of which is a natural duty, what is just in nature. Respecting the sincerity of the act of confession during the sacrament is due to human dignity. Everyone has the right to keep absolutely secret what was confessed during the confession. This secret is justified precisely by natural law. It follows from natural law that the confessor should keep a secret as an entrusted secret that is bound by the essence of justice. In this context, it is assumed that it is precisely during a confession that a special kind of contract ('quasi-contractus') arises between the penitent and the confessor, since the latter 'implicitly' undertakes to keep the penitent's secret. The resulting obligation is based on natural law,

51 | Płatek, 2001, p. 379.

52 | Syryjczyk, 2001, p. 113.

53 | Judgment of the Supreme Court of October 24, 1932, II 1 K 1048/32, ZO 1932/231; Prusak, 1999, p. 548.

54 | Hervada, 2011, p. 4.

which requires the fulfilment of contracts and forbids violating natural secrets that take away the good name of others. Therefore, the obligation to keep the sacramental secret has its basis and justification in natural law.⁵⁵

Specifically, in the system of natural law, the secret of confession is based on two important and closely related values: human dignity and freedom of conscience and religion. It adds up to the broadly understood right to privacy and its respect in the legal system. As mentioned earlier in the constitutional provisions, the principle of religious freedom is defined in Article 53 of the Polish Constitution, which grants everyone the freedom of conscience and religion and thus defines the subjective and objective scope of this freedom.⁵⁶ The above constitutional provisions coexist (as in the first case) with concordat norms. Thus, the right to religious freedom in the Polish concordat of 1925 was not indicated separately but resulted from the previously presented provision of Article 1. On the other hand, the current concordat regulation regulates the matter in question in Article 5, which states that, by observing the principle of religious freedom, the state ensures that the Catholic Church, regardless of the rite, carries out her mission freely and in public, including the exercise of jurisdiction and the administration of her affairs on the basis of canon law. These assumptions are specified in the Act of May 17, 1989, on Guarantees of Freedom of Conscience and Religion (Journal of Laws of 1989, No. 29, item 155, as amended), which states that religious freedom manifests itself in the performance of religious functions, including organizing and publicly celebrating worship; determining religious doctrine, dogmas, and principles of faith and liturgy; and providing religious services.⁵⁷ This is based on the view that 'faith is not limited only to the religious beliefs held by an individual and the attitudes resulting from them, but also implements external acts of worship.'⁵⁸

Religious literature clearly indicates that the right to freedom of thought, conscience, and religion includes two powers: the right to change religion and beliefs and the freedom to demonstrate religious affiliation and beliefs individually or collectively, publicly, in the circle of believers or privately by worshipping, teaching, practicing, and ritual activities.⁵⁹ On the other hand, the form of the right to manifest religion is, first, cultivation, which includes, inter alia, prayer, services, liturgy, and second, practicing, which includes activities directly and closely related to this practice that are elements of religious practice in a generally recognized form and not of a commercial nature.⁶⁰ Therefore, it is recognized that 'the practice of religious faith takes place in a social environment and is expressed in private and public external acts.'⁶¹ This is an evident manifestation of the professed religion, and this is the most intimate element of privacy itself. According to the assumptions of the relevant denomination, the practice of religion undoubtedly requires the practice of religious acts, such as the use of the sacraments (e.g.,

55 | Syryjczyk, 2001, p. 115.

56 | Warchałowski, 2000, p. 12; Warchałowski, 2005, pp. 17 et seq.; Sitarz, 2004, pp. 9 et seq.

57 | Radecki, 2000; IV CKN 88/00; OSP 2004/5/58.

58 | Ryguła, 2005, p. 89.

59 | Warchałowski, p. 140.

60 | Warchałowski, p. 141; Misztal, 2000, p. 46.

61 | Andrzejczuk, 2002, p. 99.

penance), which 'not only presupposes faith, but also uses words and things to increase, strengthen and express it.'⁶² In the legal sense, sacraments are signs and means through which faith is expressed and strengthened, God is worshiped, and man is sanctified.⁶³ The above definitions indicate that the practice of confession is a direct form of manifesting religion. The state cannot arbitrarily prohibit the free exercise of religious activities by its citizens, as this would be contrary to the natural character of an individual (subject to two systems). Therefore, it is right in the view that 'although the state is not obliged to perform religious acts, it is obliged to recognize and respect the religious freedom vested in its citizens.'⁶⁴ No state authority can forbid or impede the practice of confession because it is the practice of religion. An element of confession is its inseparable secrecy. Thus, it is not only appropriate to ensure the free practice of confession, but also to provide her with special protection, on par with that which she enjoys in canon law. Through this, the state authority actively implements the principle of religious freedom. The state authority should create favorable conditions for the practice of religion because, in this way, it fulfils its social duty towards its citizens. The social nature of humans determines the public manifestation of their religious freedom.⁶⁵ Any impediments or prohibitions in religious practice that would cause a person to fear the actual fulfilment of his or her religious duties are strictly prohibited.

The second element of the natural law system is human dignity. Semantically, the word 'dignity' comes from the Latin word *dignus*, which directly means worthy of respect and worship, or obligated to respect and of great importance.⁶⁶ Among the synonymous terms of dignity are words such as pride, honor, ambition, and fame,⁶⁷ as well as venerable, respected, dignified, majestic, honest, honorable, respectable, etc. Undoubtedly, dignity is one of the oldest values recognized in society. The essence of human dignity is aptly reflected in the Stoic maxim, according to which 'man is a holy thing for man' (*homo homini res sacra*).⁶⁸ It is often emphasized that dignity is also the intangible intimate sphere of an individual falling within the broadly understood right to privacy. This is fulfilled in the context of information and circumstances derived directly from private life, but in some respects known in the realities of criminal proceedings. After all, there is no doubt that privacy, as is broadly understood, falls within the scope of the guarantee of the rights and freedoms of an individual.⁶⁹ These rights are based on the inherent and inviolable dignity of humans.⁷⁰ An example of respecting privacy derived from the value of dignity is a number of procedural institutions, such as secrets (secret of confession,

62 | Konstytucja o liturgii świętej Sacrosanctum concilium No. 59.

63 | Szafrowski, 1985, p. 102.

64 | Krukowski, 2000, pp. 99 et seq.

65 | See Deklaracja o wolności religijnej Dignitatis humanae [Declaration on Religious Freedom Dignitatis humanae], No 3.

66 | Jedlecka, no date, p. 168.

67 | Dubisz, 2006, p. 1039.

68 | Sadowski, no date.

69 | Banaszak, 2004, p. 166 n.; Witkowski, 2001, p. 102 n.

70 | See: justification for the Judgment of the Constitutional Tribunal of April 11, 2000, file ref. Act. K. 15/98, OTK ZU No. 3 (2000), item 86.

correspondence, health, etc.).⁷¹ Dignity is a value in the Polish legal order and is of great importance. The Constitution of the Republic of Poland emphasizes its high rank, first in the preamble, stating that the inherent and inalienable dignity of human beings is the source of human freedom and rights, and then in the provision of Article 30, maintaining that the inherent and inalienable dignity of man is the source of human and civil freedom and rights. It is therefore recognized that

freedom and rights are justified in the very humanity and dignity of the human person. Nobody can deprive a person of this dignity because it is inalienable. Freedom and rights are not established, but are declared, guaranteed, and protected. The legislator only has to formulate them in the form of normative formulations.⁷²

Dignity as a source of rights requires taking into account the individual with all his potentialities and directing this right to the development of the state and the individual.⁷³ The provision of Article 30 of the Constitution treats dignity not only as a foundation of rights, but also as a legal value and norm. Hence, it is also clear in the jurisprudence that

pursuant to Article 30 of the Constitution of the Republic of Poland, the inherent and inalienable dignity of human beings is inviolable, and its respect and protection is the duty of public authorities. This obligation should be carried out by public authorities, first of all, wherever the State acts within the empire, carrying out its repressive tasks, the performance of which may not lead to a greater restriction of human rights and dignity than it results from the protective tasks and the purpose of the repressive measure applied.⁷⁴ It is therefore evident that the right to the legal protection of private life understood in this way has its source in the inherent dignity of the human person.⁷⁵

9. The secret of confession in other legal acts of the Polish legal system, apart from the Code of Criminal Procedure

The regulation of the secret of confession is not only a norm of the criminal process or canon law. The same regulations that protect the penitent's religion are included in several other acts as well. Illustratively, for a complete picture of the analysis, it is worth getting acquainted with them.

For example, with regard to the secrecy of confession, the same regulation from the Code of Criminal Procedure⁷⁶ can be found in Article 261 § 2 of the Code

71 | Wielec, 2014, p. 487.

72 | Winczorek, 2000, p. 47.

73 | Wiśniewski and Piechowiak, 1997, p. 19.

74 | Judgment of the Supreme Court of February 28, 2007, file ref. no. V CSK 431/06.

75 | Justification to the Judgment of the Constitutional Tribunal of 11 April 2000, file ref. no. K. 15/98, OTK ZU 3 (2000), item 86.

76 | Law of June 6, 1997. Code of Criminal Procedure (Journal of Laws 1997 No. 89 item 555).

of Civil Procedure,⁷⁷ according to which a witness may refuse to answer a question asked to him, if the testimony could expose him or his relatives mentioned in the preceding paragraph to criminal liability, shame, or severe and direct pecuniary damage, or if the testimony would be combined with violation of essential professional secrecy. The clergyman may refuse to testify to the facts entrusted to him during the confession.

The difference is visible because the provisions of the civil procedure treat the secrecy of confession as a relative law resulting only in the possibility of renewing the testimony, which is a significant dissonance compared to the original regulation for this institution, that is, the code of canon law.

Diametrically different regulations for the protection of a penitent's confession made during confession appear, inter alia, in the Code of Administrative Procedure. Pursuant to the provision of Article 82 of the Code of Administrative Procedure,⁷⁸ witnesses cannot be: 1) persons incapable of perceiving or communicating their observations; 2) persons obliged to keep secret classified information for the circumstances covered by the secrecy, if they have not been exempted from the obligation to maintain this secrecy in accordance with the applicable provisions; and 3) clergy as to the facts covered by the secret of confession.

In accordance with the provision of Article 43 of the Supreme Audit Office,⁷⁹ on the other hand, it is not allowed to interrogate as witnesses: 1) a defense counsel as to the facts about which he learned while giving legal advice or conducting a case; and 2) a clergyman as to the facts he learned about in confession.

Another legal act in the form of the Tax Ordinance⁸⁰ states that witnesses cannot be: 1) persons incapable of perceiving or communicating their observations; 2) persons obliged to keep secret classified information on the circumstances covered by the secrecy, if they have not been, in accordance with applicable regulations, exempt from the obligation to keep this secret; 3) clergy of legally recognized denominations – as to the facts covered by the secret of confession.

The comparison reveals that there is a certain dissonance in the provisions of civil procedure. The regulation contained therein regarding the secret of confession completely misses the prototype of this institution in canon law. It is a volitional right of a clergyman, because in accordance with the provisions of Article 261 § 1 of the Code of Civil Procedure, a clergyman may refuse to testify as to the facts he learned about during confession, and in the Code of Canon Law and the Code of Criminal Procedure, it is an absolute block to disclose this type of information, even if the penitent agrees. Further, the Code of Criminal Procedure, the Code of Administrative Procedure, the Act on the Supreme Audit Office, and

77 | Law of November 17, 1964. Code of Civil Procedure (Journal of Laws 1964 no. 43 item 296).

78 | Law of June 14, 1960 Administrative Procedure Code (Journal of Laws 1960 No. 30 item 168).

79 | Act of December 23, 1994 on the Supreme Audit Office (Journal of Laws 1995 No. 13 item 59).

80 | Law of August 29, 1997. Tax Ordinance (Journal of Laws 1997 No. 137 item 926).

the Tax Ordinance, recognize the strictness of the confidentiality of confession, by which they respect its canonical form.⁸¹

10. Summary

In summary, the secret of confession is the highest-ranking example of respect for the right to privacy in criminal proceedings.⁸² The highest level of privacy is trust in another person, honesty, and truth, which is respected through the secret of confession in criminal proceedings. The essence of the confession made during the sacrament of confession is based on the highest degree of privacy. In criminal proceedings, to protect the secret of confession, the legislator resigns from the possibility of questioning certain persons, even if their testimony could be of fundamental importance for the resolution. These ties imposed on the legislator, forcing him to respect the secret of confession, have exceptionally strong roots, derived directly from natural law, which, like nothing else, shapes order, predictability, achieving justice, and mutual respect in the functioning of human society.

81 | Rakoczy, 2003, p.126.

82 | Wielec, 2012, pp. 111-125.

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