

# LEGAL PROTECTION OF CONFESSIONAL SECRECY AND OF RELIGIOUS COMMUNICATIONS THROUGH CONCORDATS

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## 1. INTRODUCTION

Every once in a while in newspapers and press news incidents appear, specifically related to Criminal law, in which confidential communications between pastors or religious ministers and penitents are involved. For example, let's think about the Toledo (Ohio) murder trial<sup>2</sup> in 2006, the Spanish "Zumarraga Priest" case in 2002<sup>3</sup>, the American "Towle" case 2001<sup>4</sup>, the *affaire* of the Catholic Bishop of Bayeux (France), Monsignor Pican<sup>5</sup>, also in 2001, and the "Mockaitis" case<sup>6</sup> in 1997, in the United States as well.

Many countries in our legal environment protect with the cloak of privileges before the courts and public authorities several categories of special communications (client-attorney, marital, doctor-patient, parent-child or journalist-communicant among them). The religious communications between member of the clergy and church members are frequently also protected in a varied range of models, scopes and content.

This paper deals with the protection of religious communications with special reference to Concordats provisions as a tool for securing the confidentiality and the sacramental discipline rules of the Canon Law in secular legal systems. To this aim, we analyse here the Canon law discipline on the sacrament of penance, the different models and interests

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<sup>2</sup> H. M. FRIEDMAN, "Toledo Murder Trial Of Priest Continues With Suggestion Of Ritualistic Killing", *religion Clause*, May 01, 2006, ref. 18.06.2008, available in web <<http://religionclause.blogspot.com/2006/05/toledo-murder-trial-of-priest.html>>.

<sup>3</sup> Y. MONTERO, "Un cura se arriesga a cumplir un año de cárcel por negarse a testificar en un juicio", *El País*, 10.10.2002, ref. 18.06.2008, available in web <[http://www.elpais.com/articulo/sociedad/cura/arriesga/cumplir/ano/carcel/negarse/testificar/juicio/elpepi soc/20021010elpepisoc\\_5/Tes](http://www.elpais.com/articulo/sociedad/cura/arriesga/cumplir/ano/carcel/negarse/testificar/juicio/elpepi soc/20021010elpepisoc_5/Tes)>.

<sup>4</sup> "Court hears priest's testimony in murder case appeal", CNN.com/Law Center, ref. 10.06.2008, available in web <<http://archives.cnn.com/2001/LAW/07/18/priest.confession/>>.

<sup>5</sup> "Church's Professional Secrecy Under Threat in France (Harsh Denunciation by Outgoing Head of Bishops' Conference)", *Zenit: The World Seen From Rome*, ref. 10.06.2008, ZE01110601-2001-11-06, available in web <<http://www.zenit.org/article-2841?l=english>>; "Bishop kept quiet over paedophile", *BBC News: World: Europe*, ref. 10.06.2008, available in web <<http://news.bbc.co.uk/1/hi/world/europe/1390018.stm>>.

<sup>6</sup> "Prosecutor Might Use Confession To a Priest", *The New York Times*, May 13, 1996, ref. 10.06.2008, available in web <<http://query.nytimes.com/gst/fullpage.html?res=9C0DE6DB1239F930A25756C0A960958260>>; *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997).

which come up in the protection of religious communications and finally the different concordats and accords between the Holy See and States under which the religious communication is regulated and protected. A special reference deserves here the special provision in this topic developed in the Agreement between the Slovakian Republic and the Holy See of 2000.

## 2. CANON LAW DISCIPLINE ON THE *SIGILLUM CONFESSIONIS*

Early in history, the Roman Catholic Church protected the communication which the sacrament of penance<sup>7</sup> involves with a compulsory and absolute obligation on the priests not to reveal the content of the communication made to them by the penitents. The first data concerning obligation not to reveal appeared in the 5th century<sup>8</sup>. In the 9th century the discipline of confessional secrecy arose in regional or provincial synods, like the Douzy Council (874). The Gratian's *Concordia Discordantium Canonum* establishes severe penalties to those priests who reveal penance content<sup>9</sup>. The uniform regulation of the secret of penance arose in the 13th century on the occasion of the Fourth Lateran Council (1215) inside the Constitution 21: "Let the priest be discreet and cautious that he may pour wine and oil into the wounds of the one injured after the manner of a skilful physician, carefully inquiring into the circumstances of the sinner and the sin, from the nature of which he may understand what kind of advice to give and what remedy to apply, making use of different experiments to heal the sick one. But let him exercise the greatest precaution that he does not in any degree by word, sign, or any other manner make known the sinner, but should he need more prudent counsel, let him seek it cautiously without any mention of the person. He who dares to reveal a sin confided to him in the tribunal of penance, we decree that he be not only deposed from the sacerdotal office but also relegated to a monastery of strict observance to do penance for the remainder of his life"<sup>10</sup>. The basic principle of the secrecy and the punishment of violation of the secrecy were ratified constantly by different synods and councils<sup>11</sup>. Remarkably, in the 14th century the Czesch priest John Nepomuk, confessor of the queen, refused to divulge the secrets of the confessional and was tortured and thrown into the river Vltava from Charles Bridge in Prague at the behest of Wenceslaus, King of the Romans and King of Bohemia.

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<sup>7</sup> 1983 CODE c. 959. In the sacrament of penance the faithful who confess their sins to a legitimate minister, are sorry for them, and intend to reform themselves obtain from God through the absolution imparted by the same minister forgiveness for the sins they have committed after baptism and, at the same, time are reconciled with the Church which they have wounded by sinning.

<sup>8</sup> S. LEO THE GREAT (440-461), Letter *Magna indignatione*, 54 PL 1209c.

<sup>9</sup> "Sacerdos ante omnia caueat, ne de his, qui ei confitentur peccata sua, recitet alicui quod ea confessus est non propinquis, non extraneis, neque, quod absit, pro aliquo scandalo. Nam si hoc fecerit, deponatur, et omnibus diebus uitae suae ignominiosus peregrinando pergat" (De Penitentia, D. 6 c. II).

<sup>10</sup> "Sacerdos autem sit discretus et cautus ut more periti medici superinfundat vinum et oleum vulneribus sauciati diligenter inquirens et peccatoris circumstantias et peccati per quas prudenter intelligat quale illi consilium debeat exhibere et cuiusmodi remedium adhibere diversis experimentis utendo ad sanandum ægrotum. Caveat autem omnino ne verbo vel signo vel alio quouis modo prodat aliquatenus peccatorem sed si prudentiori consilio indigerit illud absque ulla expressione personæ caute requirat quoniam qui peccatum in poenitentiali iudicio sibi detectum præsumperit revelare non solum a sacerdotali officio deponendum decernimus verum etiam ad agendam perpetuam poenitentiam in arctum monasterium detrudendum". E. DENZINGER, *Enchiridion symbolorum et definitionum*, Wiceburgi, 1854, p. 116.

<sup>11</sup> J.L. LINDSAY, "Privileged Communications (Part I.- Communications with spiritual advisers)", *Northern Ireland Legal Quarterly*, vol. 13 (1958-1960), p. 160.

The protective cloak of the secrecy reaches not only to the identity of the penitent and the essential content of the confession, but also to the accomplice of the crimes or sins<sup>12</sup>. The 1917 Code of Canon Law made clear the objective<sup>13</sup> and subjective<sup>14</sup> extension of the confessional secret. From the objective viewpoint, the secrecy embraced the knowledge derived from the sacrament of confession; from the subjective viewpoint it embraced not only the priest but also the translator and those who accidentally or in whatever form notice the communication. Penalties for breach of secrecy varied from excommunication *latae sententiae* (for direct revelation)<sup>15</sup> to minor forms of punishment.

The 1983 Code of Canon Law reiterates the protection of the seal of confession, but it differentiates inside the secrecy forum two different requirements: (i) the obligation of the priest concerning the penance sacrament (seal of confession) and (ii) the obligation of those who notice or have knowledge of the content of the communication (obligation of secret)<sup>16</sup>. The 1983 Code enforces specific penalties for the revelation as well<sup>17</sup>. The

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<sup>12</sup> “(1) Pervenit (enim) haud ita pridem ad aures Nostras, nonnullos istarum partium confessarios falsa zeli imagine seduci se passos, sed a zelo secundum scientiam (cf: Rom 10, 2) longe aberrantes, perversam quandam et perniciosam praxim in audiendis Christi fidelium confessionibus et in saluberrimo paenitentiae sacramento administrando invehere atque introducere coepisse: ut videlicet, si forte in paenitentes incidissent socium criminis habentes, ab iisdem paenitentibus socii huiusmodi seu complicitis nomen passim exquirent, atque ad illud sibi revelandum non inducere modo suadendo conarentur, sed quod detestabilius est, denunciata quoque, nisi revelarent, absolutionis sacramentalis negatione prorsus adigerent atque compellerent; immo etiam complicitis eiusdem nedum nomen, sed habitationis insuper locum sibi exigerent designari: quam illi quidem intolerandam imprudentiam tum procurandae complicitis correctionis aliorumque bonorum colligendorum specioso praetextu colorare, tum emendicatis quibusdam doctorum opinionibus defendere non dubitarent; cum revera opiniones huiusmodi vel falsas et erroneas sequendo, vel veras et sanas male applicando, perniciem tam suis quam paenitentium animabus consciscerent, ac sese praeterea plurium gravium damnorum, quae inde facile consecutura fore praevidere debuerant, reos coram Deo aeterno iudice constituerent”. Benedict XIV, *Suprema Omnium Ecclesiarum Sollicitudo* (1745).

<sup>13</sup> 1917 CODE c. 890. §1. Omnino prohibitus est confessario usus scientiae ex confessione acquisitae cum gravamine poenitentis, excluso etiam quovis revelationis periculo.

§2. Tam Superiores pro tempore existentes, quam confessarii qui postea Superiores fuerint renuntiati, notitia quam de peccatis in confessione habuerint, ad exteriorem gubernationem nullo modo uti possunt..

<sup>14</sup> 1917 CODE c. 889. §1. Sacramentale sigillum inviolabile est; quare caveat diligenter confessarius ne verbo aut signo aut alio quovis modo et quavis de causa prodat aliquatenus peccatorem.

§2. Obligatione servandi sacramentale sigillum tenentur quoque interpretes aliique omnes ad quos notitia confessionis quoquo modo pervenerit..

<sup>15</sup> 1917 CODE c. 2369. §1. Confessarium, qui sigillum sacramentale directe violare praesumpserit, manet excommunicatio specialissimo modo Sedi Apostolicae reservata; qui vero indirecte tantum, obnoxius est poenis, de quibus in can. 2368, §1.

§2. Quicumque praescriptum can. 889, §2 temere violaverit, pro reatus gravitate plectatur salutari poena, quae potest esse etiam excommunicatio.

<sup>16</sup> 1983 CODE c. 983. §1. The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason.

§2. The interpreter, if there is one, and all others who in any way have knowledge of sins from confession are also obliged to observe secrecy;

c. 984 §1. A confessor is prohibited completely from using knowledge acquired from confession to the detriment of the penitent even when any danger of revelation is excluded.

§2. A person who has been placed in authority cannot use in any manner for external governance the knowledge about sins which he has received in confession at any time.

<sup>17</sup> 1983 CODE c. 1388. §1. A confessor who directly violates the sacramental seal incurs a *latae sententiae* excommunication reserved to the Apostolic See; one who does so only indirectly is to be punished according to the gravity of the delict.

1990 Code of Canon Law for the Oriental Churches follows the patterns and characteristics of the Latin Church Code<sup>18</sup>.

The preceding account makes clear that Canon Law confers the confessional secrecy a special protection, upon two basic principles: the protection of the penitent before social pressure concerning reputation and inextricably the protection of the dignity or sanctity of the sacrament itself, avoiding any kind of evil misuse of the confessional.

### 3. MODELS AND INTERESTS IN THE PROTECTION OF RELIGIOUS COMMUNICATIONS

“Religious communications” is a more general concept in comparison with the confessional secrecy. Religious communications embrace communications made to somebody with special religious duties, or qualification for spiritual counselling or spiritual relief purposes.

In the legal secular regulation of the protection of religious communications, it is possible to find different categories of legal interests to be protected. Several of them are common to other categories of privileged communications, while others are distinctive of the religious character of the communication. At the same time the specific combination of interests casts different results in the legislation and in the judicial decisions concerning legal protection of privileged communications.

The starting point for an account of religious protected communications is simple. The State and its authorities are interested in knowing the truth to adjudicate rights and penalties. Revealing and knowing the truth about past, present or future events is crucial for civil and criminal procedures and for police investigation as well.

To this aim, the law establishes a general principle to render the truth both in police investigation and in criminal and civil procedures<sup>19</sup>. This principle appears in different mandatory norms or rules under which, for instance, the witness is called to provide the true story<sup>20</sup> or is compelled to answer every question put to him or her in cross-examination that is relevant to the issue<sup>21</sup>, or the duty of every individual to inform the police concerning wrongdoings he or she knows about<sup>22</sup>.

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§2. An interpreter and the others mentioned in can. 983, §2 who violate the secret are to be punished with a just penalty, not excluding excommunication.

<sup>18</sup> See 1990 COC c. 733, 734 and 1456.

<sup>19</sup> As in Canadian Law, “One of the primary aims of the adversarial trial process is to find the truth and all relevant information is, therefore, presumptively admissible”. *R. v. Gruenke*, [1991] 3 S.C.R. 263, J. ST. - MICHEL, “La Cour suprême du Canada a-t-elle aboli le secret de la confession?”, *Ius Ecclesiae*, vol. V no. 1 (1993), p. 424.

<sup>20</sup> Article 365 of the Spanish Code of Civil Procedure: “1. Antes de declarar, cada testigo prestará juramento o promesa de decir verdad, con la conminación de las penas establecidas para el delito de falso testimonio en causa civil, de las que le instruirá el tribunal si manifestare ignorarlas”; Article 198 of the Italian Code of Criminal Procedure: “1. Il testimone ha l'obbligo di presentarsi al giudice e di attenersi alle prescrizioni date dal medesimo per le esigenze processuali e di rispondere secondo verità alle domande che gli sono rivolte”.

<sup>21</sup> M.N. HOWARD, P. CRANE, D. HOCHBERG, *Phipson on evidence*, 14<sup>th</sup> ed., Sweet & Maxwell, London, 1990, p. 242.

<sup>22</sup> Article 262 of the Spanish Code of Criminal Procedure: “Los que por razón de sus cargos, profesiones u oficios tuvieren noticia de algún delito público, estarán obligados a denunciarlo inmediatamente al

To this general rule, there are different kinds of exceptions and exclusions, narrowly limited to avoid fraudulent or frivolous justifications. Part of the exceptions relies in the normal and fair development of the court procedures. This is the case of the client-attorney privilege (though there are more justifications to this rule). Other exceptions are rooted in highly protected values, such as privacy, religious freedom, deontology of several professions, or social highly esteemed values.

From the perspective of privacy, it is clear that the protection works in support of the client/patient/penitent's private life. In these cases, the relationship with a professional or religious minister has an implicit or explicit attribute: confidentiality. Confidentiality protects privacy, and at the same time makes possible the normal development of that professional relationship. Without confidentiality, that relationship hardly could be adequate and accomplish with the goals pursued and barely would be developed in a normal atmosphere. Protection of private confidentiality appears both in civil law and in criminal law, depending in the legal system we look at. But it is clear that, since confidentiality protects mainly client/patient/penitent's privacy, these persons could waive the secrecy duty that obliges attorney, doctor or pastor. That is: if the penitent asks the pastor or religious minister

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Ministerio fiscal, al Tribunal competente, al Juez de instrucción y, en su defecto, al municipal o al funcionario de policía más próximo al sitio, si se tratase de un delito flagrante.

Los que no cumplieren esta obligación incurrirán en la multa señalada en el artículo 259, que se impondrá disciplinariamente”.