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**PROTECTION OF THE SEAL OF CONFESSION
IN THE LAW OF CIVIL PROCEDURE
AND CRIMINAL PROCEEDINGS**

Abstract

This paper focuses on the issue of the different constructions of the law of civil procedure and criminal proceedings in reference to protection of the seal of confession. The analysis includes a review of the basic constitutional condition of the guarantee of the freedom of conscience and religion, as well as the detailed problems concerning the procedural status of clergy of various churches and religious associations within which there is individual confession. Furthermore, the authors also discuss the significant issue of the procedural status of other persons who have consciously or accidentally obtained information relayed to a member of the clergy during confession and the need to regulate their rights and obligations as witnesses in civil and criminal cases.

Keywords: protection of the seal of confession, clergy, law of civil procedure, law of criminal proceedings

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Introduction

The basic procedural aspect of the constitutionally guaranteed freedom of conscience and religion is protection of the seal of confession. Confession constitutes one of the foundations of Catholic Church liturgy (Latin and Byzantine-Ukrainian rituals), as well as that of other churches and religious associations. Individual confession is present, among others, in the Polish Autocephalous Orthodox Church, the Old Catholic Mariavite Church, and in the Polish Catholic Church. Individual confession is also available in the Evangelical Church of the Augsburg Confession (Lutheran), as well as the Anglican Church (in Poland, this is the Warsaw chaplaincy, attached to the Gibraltar Diocese in Europe).¹ Based on, among others, the doctrine of the law of criminal proceedings, Poland is an ideologically neutral state and, furthermore, in compliance with the constitution, because all churches and religious associations are equal, solutions concerning protection of the seal of confession do not solely refer to the sacraments administered in the Roman Catholic Church but also to other registered religious groups applying the same forms of releasing the worshiper from sins.² A necessary condition constitutes the existence of such a practice in a specific church or religious association.

In Art. 53 par. 2 of the Constitution of the Republic of Poland,³ the legislator enumerated the activities and behaviours within the concept of freedom of religion, indicating that it includes “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. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of worshippers, as well as the right of individuals, wherever they may be, to benefit from religious services.” Admittedly, this provision does not enumerate behaviours related to the sacrament of individual confession, yet, as indicated by M. Floreczak-Wątor, the contents thereof should be addressed in a rational manner, and it should be interpreted that it does not include a closed catalogue of behaviours comprising the freedom of religion and it can be supplemented with behaviours not directly enu-

¹ Tomkiewicz, M., *Tajemnica spowiedzi i tajemnica duszpasterska w procesie karnym*, “Prokuratura i Prawo” 2012, No. 2, pp. 50–51.

² Skorupka, J., *Kodeks Postępowania Karnego. Komentarz*, Warszawa 2015, p. 413.

³ Act of 2 April 1997 – the Constitution of the Republic of Poland, Dz.U. (Journal of Laws) of 1997, No. 78, item 483, as amended.

merated therein.⁴ This allows one to state that protection of the seal of confession, also reflected in procedural law, constitutes one of the instruments guaranteeing the freedom of conscience and religion. A worshiper should, within the perceived legal safety, be certain that the way they behave within a binding liturgical setting shall not be used by the state authorities, including ordinary courts, against them, even if they directly or indirectly reflect the existence of events or acts not socially or legally accepted.

However, the question arises as to whether the statutory constructions implemented in the law of civil procedure and the law of criminal proceedings sufficiently secure the information obtained by a member of the clergy during an individual confession against obtaining and using it for the purposes of court proceedings. To this end, the subjective and objective scope of protection of the seal of confession, as well as detailed procedural constructions, which are decisive for verification of the effectiveness of this protection in civil and criminal proceedings, has been subjected to in-depth analysis.

The essence of the seal of confession

To clarify the essence of the seal of confession, it shall be discussed with the example of the Roman Catholic Church. The Sacrament of Penance and Reconciliation (in other words: the sacrament of confession) is, according to the teachings of the Catholic Church, one of the most important elements of Christian life.⁵ The construction of the seal of confession is based on the conviction that every person has the right to intimacy, that is, not disclosing hidden weaknesses and sins to bystanders, and the right to protect their good reputation. This aim is to be achieved with the canon institution of the seal and secret of confession, introduced for the protection of the person administering the sacrament of penance.⁶

⁴ Florczak-Wątor, M., in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, LEX, commentary to Art. 53.

⁵ Szymański, M., *Tajemnica spowiedzi w prawie polskim – stan aktualny i propozycje zmian*, "Internetowy Przegląd Prawniczy TBSP UJ" 2017, No. 4, p. 73, http://www.tbbsp.wpia.uj.edu.pl/documents/4137545/137185925/IPP_2017_4/acde991d-c387-4e04-a9ee-fe173bdd46b-f#page=73. Accessed on: 16.11.2019.

⁶ Janczewski, Z., *Tajemnica i sekret w prawie kanonicznym Kościoła katolickiego*. Speech during the symposium *Prawo do Prywatności w Kościołach i Innych Związkach Wyznaniowych: od Tajemnicy Duszpasterskiej do Ochrony Danych Osobowych*, <https://ekai.pl/tajemnica-spowiedzi-w-prawie-kanonicznym/>. Accessed on: 17.11.2019.

Therefore, this seal is also protected by canon law since, in compliance with can. 983 par. 1,⁷ the sacramental secret is inviolable and therefore it is absolutely forbidden for a confessor to betray, in any way, a penitent in words or in any manner or for any reason (*sacramentale sigillum* – the sacramental seal). This covers not only disclosed sins but also all information given to the confessor during confession (defects, inclinations, pangs of conscience, flaws, etc.). The confessor cannot break the seal even to protect one's own life, and the seal even continues after the penitent's death (e.g., St. John Nepomucene, who was murdered in 1393 for not disclosing the contents of a confession⁸). It is binding irrespective of whether the confession ended with absolution, and even the fact of giving or withholding absolution is covered by the seal of confession. W. Wenz underlines that a priest's obligation to keep sacramental secrecy is of an absolute character since he must keep the secret from bystanders, as well as from the penitent, from the moment after the confession, even if the confessor would like to disclose the information at another time for the benefit of the penitent. The seal of confession is binding not only outside the confession but also during other confessions. This means that due to the circumstances, information cannot be exchanged among confessors even if they believe that the substance of the information is irrelevant.⁹ However, the doctrine of canon law underlines that the priest is not bound by the seal of confession in the case of a simulated confession, e.g., in order to ridicule the clergy.¹⁰

Because of the lack of a definition of 'clergy' in procedural acts, as well as in legal acts concerning churches and other religious associations, in order to consider a particular person a member of the clergy, an in-depth analysis of the rules of conduct of a specific church or religious association is required.¹¹ In principle, the clergy should be considered persons belonging to the church or religious asso-

⁷ Code of Canon Law of 1983, https://www.katolicki.net/ftp/kodeks_prawa_kanonicz-nego.pdf. Accessed on: 18.11.2019.

⁸ Adamowicz, L., *Tajemnica spowiedzi*, <https://www.niedziela.pl/arttykul/84830/nd/Tajemnica-spowiedzi>. Accessed on: 12.12.2019.

⁹ Wenz, W., *Co się komu należy, czyli prawo kościelne o sakramentach świętych (4)*, https://www.archidiecezja.wroc.pl/index.php?option=com_content&view=article&id=138:sakrament-pokuty-pierwszy-dar-zmartwychwstaego-pana-&catid=57:sakramenty&Itemid=194. Accessed on: 12.12.2019.

¹⁰ Pieron, B., *Ochrona tajemnicy spowiedzi w prawie polskim*, "Kieleckie Studia Teologiczne" 2012, No. 11, p. 325.

¹¹ Judgement of the Supreme Administrative Court in Warsaw of 19 September 2000, III SA 1411/00, LEX No. 47198.

ciation who have a different status than the community of worshippers of a given religion, expressed as having been appointed to the permanent organisation and administration of the religious sect.¹² Nevertheless, this status must be analysed in-depth not only with regard to the performance of the clergy's function, but also to specific rights vested in a particular person performing such activities (e.g., with regard to authorisation in the scope of an individual confession).

To sum up, the status of clergy in Polish law is granted to a person who has such a status in compliance with the internal legal norms of a church or other religious association that has a regulated legal situation, and who can act as a confessor in accordance with those norms.

However, the seal of confession is binding not only on the confessor but also other persons directly participating in the communication between the confessor and the applicant or witness thereof (purposely or accidentally). Pursuant to can. 983 par. 2, an interpreter, if there is one, and all others who in any way have knowledge of sins admitted during a confession are also obliged to observe this secrecy. In this aspect, one cannot omit the circumstances that, along with the development of the technique and technical means of saving the contents of a remote statement or communication, new practical problems concerning the seal of confession have occurred. Currently, it may be violated not only by the confessor and persons physically present during the confession but also by a third party acting remotely, e.g., in the case of eavesdropping devices affixed at the place where the penitent has a conversation with the confessor. In 1988, the Congregation for the Doctrine of the Faith issued a decree regarding the excommunication of those who divulge confessions, in order to protect the sanctity of the sacrament of Penance and to defend the rights of ministers and Christian worshippers associated with the sacrament of Penance, the sacramental seal and secrecy of Confession. In this decree, it has been determined that, without prejudice to the prescription of can. 1388, anyone who by means of any technical device makes a recording of what a priest or penitent says in a Sacramental Confession (either real or simulated) by oneself or by another person, or who divulges it through the means of social communication, incurs excommunication *latae sententiae*.¹³ The

¹² Resolution of the Supreme Court of 6 May 1992, I KZP 1/92, Decision of the Supreme Court – Criminal and Military Chamber 1992, No. 7–8, item 46.

¹³ Decree of 23 September 1988 Regarding the Excommunication of Those Who Divulge Confessions, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19880923_scomunica-confessionni_pl.html. Accessed on: 28.10.2019.

limitation applies, among other things, to the simulated confession. The reason is that a third party has no right to judge whether a confession was valid or invalid. Thus, it should be assumed that any form of an individual confession is subject to legal protection and should not be recorded and, specifically, it should not be distributed.

The form of an individual confession expressed by the place and procedure thereof also plays an important role in the proper specification of this framework of the seal of confession. Canon law stipulates that the proper place to hear sacramental confessions is a church or oratory (can. 964 par. 1). Simultaneously, the ecclesiastical legislator stipulated that the conference of bishops is to establish norms regarding the confessional (can. 964 par 2). The Polish Episcopal Conference implemented a relevant act and stipulated that an individual confession takes place in confessionals situated in churches, chapels, and premises in which the bishop permits the celebration of Holy Mass. Furthermore, the bishops agreed that, in necessary cases, clergy have the right to, at any place, in a valid and dignified manner, listen to a confession and give absolution, e.g., during a pilgrimage, field mass, or a special ministry. In consequence, it should be assumed that confessions are not to be heard outside a confessional without just cause (can. 964 par. 3).¹⁴ However, thus flexibly stipulated rules concerning the place and, at the same time, the lack of rigour with regard to the procedure determine the wide scope of procedural guarantees concerning protection of the seal of confession.

Violation of the seal of confession constitutes one of the gravest infringements of canon law; therefore, in compliance with can. 1388 par. 1, a confessor who directly violates the sacramental seal incurs *latae sententiae* excommunication binding *ex lege*; whereas, the right to lift this excommunication is reserved to the Apostolic see. On the other hand, one who does so only indirectly is to be punished according to the gravity of the delict. Whereas, an interpreter and any others mentioned in can. 983 par. 2 who violate the secret are to be punished with a just penalty, not excluding excommunication. The direct violation of the seal of confession occurs when a priest discloses a sin confessed in the sacrament of penance and indicates the person who committed this sin or gives circumstances that allow for identifying the specific person. In such a case, the confessor absolutely incurs excommunication. He can be protected from excommunication only if he did not act consciously or voluntarily. Indirect violation of

¹⁴ Wenz, W., op. cit.

the seal of confession occurs when a priest describes a sin in a manner that poses a real threat of identifying the person concerned.¹⁵ Cases of indirect violation of the seal of confession by words include the following situations: “when the confessor 1) says that somebody’s confession was arduous, difficult, etc.; 2) discusses the penitent’s sins with persons who knew of such sins from somewhere else; 3) warns parents or superiors to be more vigilant over subordinates with regard to the behaviour described during confession; 4) praises a penitent for his or her purity of conscience and compares him or her to other persons; 5) discusses with the penitent his or her confession without prior consent of such a person to have such a conversation; 6) discusses the event during public speeches by giving circumstances in a manner allowing easy identification of the penitent; 7) when, after listening to a small number of confessions, the confessor declares that during these confessions, he encountered a grave sin and individualises this sin; 8) publicly divulges that in a certain environment in which he acts as a confessor, certain events took place.”¹⁶ It should be noted that this protection refers not only to the ban on disseminating information among third parties but also – as has already been signalled – on referring to the contents of the confession in a conversation with a penitent who has not previously expressed such a will. This solution seems to be just considering that confessed sins are usually a reason for shame and remorse for the penitent, which is better dealt with in the shadow of the confessional than in repeated conversations face to face with the confessor.

Thus, one should agree with M. Szymański that for violating the seal of confession, priests are punished in the most severe manner. As has already been underlined, in this case, the penalty of excommunication (i.e., exclusion from the church) is of a *latae sententiae* character, as the confessor loses the status of a religious community member at the moment of disclosing the secret. What is more important is that this excommunication is ‘reserved to the Apostolic see’; thus, in order for the violator to return to the church, it is required to obtain the consent of the Supreme Tribunal of the Apostolic Penitentiary, being one of the three tribunals of the Roman Curia.¹⁷ The degree of effect of this penalty is pertinent to the significance of the seal of confession, which constitutes one of

¹⁵ Nowicka, J., *Kiedy można złamać tajemnicę spowiedzi? Pytamy eksperta*, 29.05.2018, misyjne.pl, <https://misyjne.pl/kiedy-mozna-zlamac-tajemnice-spowiedzi-pytamy-eksperta/>. Accessed on: 23.11.2019.

¹⁶ Płatek, J.S., *Sprawowanie sakramentu pokuty i pojednania*, Częstochowa 2001, p. 381.

¹⁷ Szymański, M., op. cit., p. 73.

the premises on which the openness of penitents, aware of the absolute character of the obligation to remain silent in a conversation with a confessor, is based.

While referring to the court proceedings, it is worth noting that in canon law, it is underlined that all matters heard by anyone and in any way on the occasion of confession cannot be accepted even as an indication of the truth in any court proceedings (can. 1550 par. 2 point 2). Furthermore, pursuant to can. 984 par. 1, a confessor is completely prohibited from using knowledge acquired from a confession to the detriment of the penitent, even when any danger of revelation is excluded. Furthermore, a person who has been placed in authority cannot use, in any manner for external governance, knowledge about sins which he has received in confession at any time (can. 984 par. 2). However, from the point of view of procedural law, the ascertainment that the seal of confession in court proceedings does not cover the fact of having an individual confession, as it ensures the possibility of benefiting from the mechanisms of protection of the seal of confession included in procedural acts, which shall be discussed later on, is of key significance.

To complete the analysis of the provisions of canon law, it should be pointed out that similar solutions are only included in the Code of Canons of the Eastern Churches (*Codex canonum Ecclesiarum Orientalium auctoritate Joannis Pauli PP. II promulgatus*). This is a uniform set of canon law for the Eastern Catholic Churches, promulgated on 18 October 1990 by Pope John Paul II by the Constitution *Sacri canones* and entered into force on 1 October 1991. The term *Eastern Catholic Churches* refers to 23 of the 24 existing, autonomous Churches, the basic feature of which is dependency on the Pope¹⁸ and which are grounded in Eastern-Christian liturgical traditions: Alexandrian, Antiochene, Byzantine, Chaldean, and Armenian. Each of the indicated churches is *sui iuris* or autonomous, yet, all of them respect the clerical and legal authority of the Pope, which allows for unification of understanding of certain religious foundations. Furthermore, this Code introduces the rule that no one can waive the obligation to keep the seal of confession (can. 733 par. 1 of the Code of Canons of the Eastern Churches). A confessor who has directly violated the seal of confession (with identification of the person and the substance covered by secrecy) is to be punished with the most severe ecclesiastical penalty (excommunication), with

¹⁸ *Nie samym chlebem żyje człowiek*, http://cerkiew.net.pl/Wiadomosci/Wiadomoscjedna.php?polaczenie=wiad_1490019803&cerkiew=cerkiew. Accessed on: 12.12.2019.

the obligation to refer to the Apostolic see in order to repeal the penalty (can. 1456 par. 1 of this Code), and at the same time, indirect violation of the seal of confession is also punishable (can. 1456 par. 1 of the Code). The Code of Canons of the Eastern Churches stipulates that the obligation of observing secrecy also binds an interpreter if one is present, as well as all others to whom knowledge of the sins from the confession comes in any way (can. 733 par. 2 of the Code of Canons of the Eastern Churches).

Due to the differentiation of the liability of the indicated individuals, it should be underlined that only a confessor is obliged to keep the sacramental secret, whereas an interpreter and other persons are strictly obliged to keep the secret. As aptly indicated by W. Wenz and M. Janusiewicz, this differentiation does not change the fundamental stance of the church on the integral protection of the sacramental forum. Whereas, as far as the priest being obliged to absolute sanctity of the secrecy is concerned, the type of the authorisation he has to hear confessions or the source of such an authorisation is also irrelevant. This authorisation may only be supplemented by, or is even based on, can. 976 (concerning the priest giving absolution to a person in danger of death).¹⁹ The basis for differentiation is provided by the source of origin of a given obligation: for a priest, this is divine law, for others – the natural law and the obligation to respect a natural secret.

Polish state law, considering the determined model of canonical protection of the seal of confession, undertakes more or less successful attempts to introduce effective instruments guaranteeing this protection, which shall be discussed below. Nevertheless, some domestic legal systems, often with Catholic roots, on the contrary, not only do not protect the seal of confession, but, in fact, attempt to introduce sanctions forcing disclosure thereof. In Ireland, the focus of a public discussion was a bill obliging clergy to transfer to law enforcement authorities any information that can help identify a sexual offender, whose victim may be either a child or an adult.²⁰ In Belgium, a priest was accused of a different offence, since he kept the seal of confession of a penitent who confessed the intention to commit suicide. The case was referred to the court of misdemeanours in Bruges. It was established that the priest, A. Stroobandt, received a phone call

¹⁹ Wenz, W., Janusiewicz, M., *Zapewnienie poszanowania i ochrony prawnej tajemnicy sakramentalnej w polskim systemie prawa*, "Wrocławski Przegląd Teologiczny" 2008, No. 16/1, p. 164.

²⁰ *Irlandia: 5 lat więzienia dla kapłanów, którzy nie zdradzają tajemnicy spowiedzi*, 4.05.2012. Bibuła, <http://www.bibula.com/?p=56284>. Accessed on: 12.12.2019.

from a person he had known for at least 20 years. The penitent, suffering from depression, confessed that he intended to commit suicide. After several fruitless conversations, the man committed suicide in his garage. The wife of the deceased accused the clergy that he did not attempt to persuade her husband against this intention and, primarily, that he did not inform anyone. What is especially interesting, while commenting on this situation, H. Wattiaux, a professor of moral theology, stated that the fact that the confession was supposedly conducted on the phone raises doubts, and if there are any doubts in this matter, then, in his opinion 'the priest is not necessarily bound with absolute secrecy.' In the procedural layer, it should be added that the Belgian provisions protect professional secrecy; however, they do not directly mention the seal of confession, and qualification of the latter because professional secrecy in the Belgian legal system is not unequivocal.²¹ As a result of the conducted proceedings, the court stated that the seal of confession is a special type of professional secrecy. However, in the court's opinion, it does not release the clergy from the obligation to provide assistance.²² In response to the court decision, Belgian bishops published a letter in which they stated that during a confession both the priest and the penitent are aware that the sin can repeat itself. A priest must use all of his power of persuasion in order to persuade a person to change his/her behaviour and take responsibility for his/her actions. In extreme cases, for example, abuse against minors, a confessor can stop administering the sacrament and postpone absolution until the penitent turns himself or herself in. However, the confessor cannot disclose what he learned during the confession through any words or gestures. Canon law does not provide for any exclusions in this case.²³ Thus, in some legal systems, the apparent issue of state law deviating from the absolute adherence to protection of the seal of confession in significant situations, e.g., for the protection of the penitent's life and health or a person hurt by the penitent, occurs.

In summarising this analysis of the substantive aspects of the seal of confession, it should be underlined that individual confession pursuant to the law

²¹ *Tajemnica spowiedzi w centrum batalii sądowej ws. samobójstwa w Belgii*, 17.11.2017. Polonia Christiana, <https://www.pch24.pl/tajemnica-spowiedzi-w-centrum-batalii-sadowej-ws--samobojstwa-w-belgii,56210,i.html>. Accessed on: 13.12.2019.

²² *Kaplan skazany, bo dotrzymał tajemnicy spowiedzi*, 20.12.2018. eKai, <https://ekai.pl/kaplan-skazany-bo-dotrzymał-tajemnicy-spowiedzi/>. Accessed on: 15.12.2019.

²³ *Belgia: ksiądz skazany za dochowanie tajemnicy spowiedzi*, 19.12.2018. misyjne.pl, <https://misyjne.pl/belgia-ksiadz-skazany-za-dochowanie-tajemnicy-spowiedzi/>. Accessed on: 13.12.2019.

of churches and religious associations should be differentiated from a pastoral conversation or a conversation held within a so-called spiritual direction. Furthermore, this concept does not refer to the public confession of worshipers' guilt during a Holy Mass. It is worth noting that the statement that such a narrow interpretation 'favours one religion by granting it privileges not available for other religions' is not correct.²⁴ Even more incorrect is the position of Z. Kwiatkowski, according to whom, the ban on hearing from clergy only from churches practising individual confession is contradictory to the guarantees of the freedom of conscience and religion resulting from the provisions of the Constitution of the Republic of Poland.²⁵ Representatives of the doctrine who express such opinions propose to introduce an explicit sanction on the obligation to keep in secret the information given to the clergy by the worshiper due to the pastoral functions fulfilled by the priest and, at the same time, to cover it with legal protection as in the case of other types of professional secrecy.²⁶ However, as aptly noticed by J. Krukowski, the principle of equality of religious association is manifested in the fact that a state cannot grant special rights to one church or religious association in the scope in which all associations have the same features. Although different treatment of religious associations is not excluded if they have a feature that others do not have²⁷ (in this case, individual confession). Extending the substantive scope of the discussed protection would lead to interpretative chaos and generally unlimited possibilities to avoid answering questions asked by procedural authorities (or the application of the inadmissibility of evidence) in any case in which a clergy is a witness.

The issue of the seal of confession in civil procedure

With regard to the law of civil procedure, the provisions of Art. 261 par. 2 *in fine* of the Code of Civil Procedure,²⁸ pursuant to which a member of clergy

²⁴ Jurzyk, M., *Ochrona spowiedzi w postępowaniu dowodowym a prawa penitenta i duchownego*, "Radca Prawny" 2004, No. 2, p. 74.

²⁵ Kwiatkowski, Z., *Zakazy dowodowe w procesie karnym*, Kraków 2005, p. 173.

²⁶ Pieron, B., *Równe czy identyczne traktowanie osób duchownych w prawie polskim*, "Annales Canonici" 2007, No. 13, p. 167.

²⁷ Krukowski, J., *Kościół i państwo. Podstawy relacji prawnych*, Lublin 2000, p. 279.

²⁸ Act of 17 November 1964 – the Code of Civil Procedure, Dz.U. (Journal of Laws) of 2019, item 1460.

may refuse to answer questions regarding facts entrusted to him during a confession, the key significance for shaping the protection of the seal of confession. As indicated by T. Ereciński, the manner of formulating this norm allows stating that clergy can, in fact, refuse not only to answer the questions but also refuse to give testimony regarding facts covered with the seal of confession.²⁹ Since a confession is one, closed, and secret whole, it is impossible to disclose its specific stage or single piece of information. As an exception, the substantive scope of confession does not include presenting facts and circumstances for non-religious reasons, that is, as a joke, not for real, etc. In that case, confession as a religious act simply does not exist.³⁰ The procedural act does not introduce any detailed references regarding the assessment of the clergy's status or verification of penitent's declarations as an individual confession due to the place and form thereof.

The provisions of internal acts establishing churches and religious associations legally functioning in the Polish legal system and indicating who is clergy, as well as who is authorised to perform the duties of a confessor, are of key significance for a procedural assessment of the subjective conditions of applying Art. 261 par. 2 *in fine*. Legal recognition of a church or a religious association can have the form of an act or registration act, and the member of clergy's status and liturgical rights, existing at the moment of the individual confession, should be confirmed by the witness by presenting a relevant document. However, one should agree with the position of B. Rakoczy that even if there are some loopholes regarding the clergy's authorisation, the information obtained by the unauthorised confessor from the penitent during an invalid confession should be covered with protection. The aim of the protection of the seal of confession is, in fact, the wellbeing of the person confessing, and such a person cannot suffer negative consequences of an invalid confession if the person acted in good faith and the invalidity is not caused by the person confessing.³¹ Nevertheless, a fundamental problem occurs in the case of more advanced loopholes, e.g., a situation when somebody impersonates a member of the clergy and in reality the person is a layman. The act does not refer to this type of cases, yet, it should be assumed

²⁹ Ereciński, T., in: Ereciński, T. (ed.), *Kodeks Postępowania Cywilnego. Komentarz. Tom II. Postępowanie Rozpoznawcze*, Warszawa 2016, LEX, commentary to Art. 261.

³⁰ Wielec, M., *Naruszenie zakazu dowodowego tajemnicy spowiedzi w prawie karnym (materialnym i proceduralnym)*, "Przegląd Prawa Wyznaniowego" 2012, No. 4, pp. 111–124.

³¹ Rakoczy, B., *Tajemnica spowiedzi w polskim postępowaniu cywilnym, karnym i administracyjnym*, "Przegląd Sądowy" 2003, No. 11–12, p. 130.

that, if a penitent acted in good faith and confessed his or her sins convinced that they are protected by the seal of confession then, they should obtain such protection. However, there are no doubts that the possibility to refuse to answer questions can also be used in the case of a lack of clergy status during answering questions provided that the witness had such status and authorisation to hear confessions provided for by the church's or religious association's law at the moment of obtaining information within a confession.

Also, with regard to the material scope of this privilege, it should be noted that, similar to the provisions of canon law, in the Code of Civil Procedure, the possibility of the clergy to refuse to answer questions can only refer to the facts learned during an auricular confession and not, e.g., during Confiteor or other form of the worshipper's contact with the clergy (e.g., within the so-called pastoral conversation).

As far as the course of the testimony given by clergy or former clergy is concerned, K. Knoppek states that instructing the witness about the right to refuse to answer questions basically should take place only at the moment when the witness is asked a question that could infringe the objects covered by the protection pursuant to the provisions of Art. 261 par. 2 of the Code of Civil Procedure. However, there might be a situation when a court does not have the information that the question asked in the given case gives the witness the right to refuse answering and thus, shall not instruct the witness of this right. Nevertheless, such a situation cannot be considered a procedural irregularity.³² Similarly, as in the case of other persons authorised to refuse to answer questions, if the clergy decided to exercise the right to refuse to answer a question, the court cannot treat the decision as confirmation of the existence of a fact with regard to which the witness did not give an answer to the question asked.

There is no doubt that the solution introduced in the Code of Civil Procedure in the scope of the protection of the seal of confession should be assessed negatively. Above all, the application of the refusal to answer questions depends on the will of the clergy or former clergy. As stated by B. Pieron, clergy with procedural status as a witness, in the case of giving information crucial to the resolution of a given case and obtained during a confession, can freely exercise the

³² Knoppek, K., in: Dolecki, H. et al. (eds.), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–366*, Warszawa 2013, LEX, commentary to Art. 261 par. 2.

right vested in him and decide if he should refuse to answer the questions.³³ This solution is especially dangerous with regard to persons who have lost their status as clergy or even were excluded from the community of a church or a religious association (e.g., as a result of excommunication had left the Catholic Church) and thus, for whom the strict provisions of ecclesiastical law no longer have any meaning. The following statement by B. Rakoczy should be considered interesting ‘due to the principle of autonomy and independence of the church from the state, which requires mutual respect even in the case of giving by the clergy consent to answer questions, the court, taking into consideration respecting the seal of confession, should not accept such testimony.’³⁴ However, such a solution is not supported with the provisions of the procedural act, yet, one may attempt to defend such a solution by direct application of the Constitution of the Republic of Poland, including Article 25 par. 3, which stipulates that the relationship between the state and churches and other religious organisations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.

Another negative aspect comprises shaping protection of the seal of confession as a right exclusively reserved to clergy and not as an inadmissibility of evidence referring to a specific category of information irrespective of the person at their disposal. One should agree with the position of M. Rusinek, expressed on the grounds of the law of criminal proceedings, that ‘a solution forbidding questioning a confessor with regard to the information obtained by him during a confession and at the same time allowing questioning other persons is inadmissible, especially since, as a rule, such persons obtain knowledge on this topic in a manner which is morally reprehensible, and even illegal.’³⁵ Meanwhile, in the law of civil procedure, not only has absolute inadmissibility of evidence not been introduced but also a situation when a third party has obtained information disclosed during a confession is not foreseen. This issue only partially solves the professional status of such persons occurring in some cases (e.g., a sworn translator obliged to keep professional secrecy). And, again, it can be assumed

³³ Pieron, B., *op. cit.*, p. 331.

³⁴ Rakoczy, B., *op. cit.*, p. 136.

³⁵ Rusinek, M., *Tajemnica zawodowa i jej ochrona w polskim procesie karnym*, Warszawa 2007, p. 78.

that due to respecting the legal provisions of churches and religious associations resulting from the Constitution of the Republic of Poland and detailed regulations between the state and those entities, despite the lack of explicit provisions of the procedural act, the court should not accept such testimony. Nonetheless, it should be underlined that not all representatives of the doctrine accept this possibility, e.g., A. Cudak stated that this provision unequivocally narrows the law to refuse answering questions only with regard to clergy, which does not give the right to intensive interpretation.³⁶ It significantly weakens the possibility of the practical use of such far-reaching protective solutions.

In this aspect, one should also indicate an important issue regarding the protection of the seal of confession in the case of taking evidence in a hearing of parties. The discussed Art. 261 par. 2 *in fine* of the Code of Civil Procedure does not refer to this means of evidence, yet, due to the aforementioned reasons, also in the case of a clergy giving testimony as a party, the court should not accept as evidence information obtained by the member of clergy during a confession (e.g., in the situation when a penitent is the opposing party). In the literature, it is indicated that canon law treats the seal of confession as professional secrecy subject to protection irrespective of the procedural role of the person obliged to adhere to it.³⁷ Such a solution can be accepted as sufficient to accept the legitimacy of extending this type of procedural construction with other means of evidence.

While proceeding to the analysis of criminal procedural solutions, the necessity to ensure a coherent approach by procedural bodies in both types of proceedings to the protection of the seal of confession should also be signalled, which is noticeable in other cases of persons authorised to refuse to answer questions or covered with the inadmissibility of evidence. As stipulated in the judicial decisions, the testimony given by a particular person in criminal procedure cannot be used as evidence in the case if they exercise the right to refuse to answer questions in the civil procedure. Other opinion would constitute circumvention of the law, and to be more exact, provisions concerning the refusal to give testimony or answer questions and, at the same time, it would infringe the principle of

³⁶ Cudak, A., in: Marciniak, A. (ed.), *Kodeks Postępowania Cywilnego. Tom II. Komentarz. Art. 205¹–424¹²*, Warszawa 2019, Legalis, commentary to Art. 261.

³⁷ E.g. Zubert, B.W., “*Sigillum Sacramentale Inviolabile Est*”, in: Dębiński, A. et al. (eds.), *Divina et Humana. Księga jubileuszowa w 65. rocznicę urodzin Księdza Profesora Henryka Misztala*, Lublin 2001, pp. 723–741.

directedness.³⁸ Such a position should be considered as right due to the necessity to maintain a coherent approach of the legislator to statutory solutions that have a decisive significance for shaping proper relations of the state with churches and religious associations. Simultaneously, it should be underlined that the feature of coherence and effectiveness cannot be attributed to the provisions of the Code of Civil Procedure with regard to the right to refuse to answer questions vested in a clergy, which require as quick adjustment as possible at least to the standards of the law of criminal proceedings.

Protection of the seal of confession in criminal procedure

The protection of the seal of confession in criminal procedure is constructed in compliance with different principles than in civil procedure. In compliance with Art. 178 point 2 of the Code of Criminal Procedure,³⁹ a member of clergy may not be examined in the capacity of a witness on facts communicated to him in a confession. As indicated in the doctrine ‘as far as the provisions providing for the right to refuse to answer questions are addressed at persons whom the legislator vests this right due to specific reasons, the absolute inadmissibility of evidence is predominantly addressed at procedural bodies and means the inadmissibility of evidence irrespective of the will of the person who cannot be heard.’⁴⁰ Therefore, ‘the provision stipulating the inadmissibility of evidence from the seal of confession not only releases the witness from answering the question but also forbids asking this type of question.’⁴¹ This separation of the exclusion of taking evidence based on the intent of the source makes the procedural solution resistant to the ill-willed activities of witnesses who would like to circumvent the mechanisms of protecting specific secrets.

In the subject literature, it is commonly accepted that the ban stipulated in Art. 178 point 2 of the Code of Criminal Procedure stating that a member of the

³⁸ Judgement of the Administrative Court in Warsaw of 18 April 2018, VI ACa 2008/16, Legalis No. 1865594.

³⁹ Act of 6 June 1997 – The Code of Criminal Procedure, Dz. U. (Journal of Laws) of 2018, item 1987.

⁴⁰ Decision of the Administrative Court in Cracow of 1 January 1995, II A Kz, 237/95, KZS 1995, No. 6, p. 36.

⁴¹ Nisenson, J., Siewierski, M., *Kodeks postępowania karnego z komentarzem i orzecznictwem*, Częstochowa 1947, p. 77.

clergy may not be examined in the capacity of a witness on facts communicated to him in a confession, is an incomplete absolute (unconditional) ban. As defined by B. Kurzępa, this ban is incomplete as it bans the taking of evidence in specific conditions, using a specific source or means of evidence or obtaining means of evidence in a specific mode. In other words, it is a ban on taking evidence through the agency of certain evidence or with the use of specific methods. At the same time, this ban cannot be repealed.⁴² B. Kurzępa aptly states that the ban on examining clergy in the capacity of a witness on facts communicated to him in a confession, prevents the use of a given source of evidence in order to determine important circumstances.⁴³ The ban concerning the seal of confession is incomplete since the circumstances covered by the seal of confession can be proven through the agency of other means of evidence. Because of these circumstances, one cannot agree with the opinion that since the obligation of discretion serves to protect the individual's interests, whereas the secrecy itself is created by the individual with the activity of 'entrusting,' there are no reasons to exclude a kind of symmetrical accessibility of lifting the protection of this secrecy by the individuals themselves as well.⁴⁴ It seems that the essence of this ban also consists of the fact that the person covered by this ban cannot give testimony against the statutory regulation of their free will. Otherwise, the legislator would apply in this case the right to refuse to answer questions stipulated with regard to, e.g., persons obligated to not disclose 'proprietary,' 'confidential' or classified information, or persons bound by the secrecy clause due to their profession or function (Art. 180 par. 1 of the Code of Criminal Procedure).

The issue of the protection of the seal of confession in criminal procedure was already the object of a Supreme Court analysis in the interwar period, and, due to the stability of the construction applied by the legislator in this matter, these deliberations continue to be valid. The Supreme Court stated that the provision banning hearing clergy in the capacity of a witness on facts communicated during a confession does not stipulate to what kind of religious confessions it refers, whereas, on the other hand, this provision stipulating the exception from the rule cannot be subject to extensive interpretation. Simultaneously, as underlined by the

⁴² Kurzępa, B., *Zakazy dowodzenia w procesie karnym*, "Prokurator" 2002, No. 2, p. 28.

⁴³ Ibidem.

⁴⁴ Gruszecka, D., in: Skorupka, J. (ed.), *Kodeks Postępowania Karnego. Komentarz*, Warszawa 2020, Legalis, commentary to Art. 178.

Supreme Court, it is obvious that use of this right should depend solely on the internal provisions of the religious association recognised by the state, stipulating the institution of the seal of confession and clergy authorised to hear confessions. While referring to the specific factual circumstances discussed in this procedure, the Supreme Court noted that Mosaic faith (Judaism) does not include any religious activity that could be identified with confession, that is, confessing sins before a priest and receiving absolution given by the priest's authority and thus, extending this provision to confessions made by this religion's worshipper before a rabbi, is not justified.⁴⁵ It confirms the basic thesis that for the assessment of the subjective and objective scopes, also pursuant to the law of criminal proceedings, provisions of acts creating the status, organisational structure and rites of the churches and religious associations legally operating in Poland, are of decisive significance. The lack of individual confession in their liturgies, as well as the status of clergy with authorisation to hear auricular confessions, do not allow application of Art. 178 point 2 of the Code of Criminal Procedure against a specific person and information held by such a person.

As in the scope of the civil procedure, protecting the penitent's goodwill is also of significance in criminal procedure. It seems that this opinion is expressed, among others, in the position by T. Grzegorzczuk, who stated that the seal of confession is binding also in a case in which clergy have not yet obtained the authority to hear confessions pursuant to the law of a given religious association and thus, according to the internal provisions, the confession with his participation would be invalid.⁴⁶ In each of these cases, the party's evidentiary motion contrary to this ban should be denied pursuant to Art. 170 par. 1 point 1 of the Code of Criminal Procedure when the taking of such evidence is inadmissible.

In analysing the timeframe of the protection of the seal of confession in criminal procedure, one could state that it refers to the period of performing the function of clergy by a person who is to act as a witness, yet, due to the aforementioned provision resulting from, among others, canon law, such a narrow interpretation cannot be applied. Therefore, it should be assumed that the inadmissibility of evidence also refers to former clergymen who had a relevant status and authorisation at the time of obtaining the information and it does not cease even after the penitent's death, irrespective of his procedural status. Similarly,

⁴⁵ Judgement of the Supreme Court of 14 June 1937, I K 454/37, LEX No. 351899.

⁴⁶ Grzegorzczuk, T., *Kodeks postępowania karnego. Komentarz*, Warszawa 2014, p. 614.

it is not possible to approve the opinion according to which hearing as a witness with regard to the facts disclosed during a confession of a person who has purposefully eavesdropped on a confession (e.g., recorded it), as it would menace religious feelings and the privacy of the confessing person; whereas, gaining information from an interpreter or a person who has accidentally overheard the confession would be a clear violation of the freedom of conscience of those persons.⁴⁷ Therefore, modification of the provisions of Art. 178 of the Code of Civil Procedure should be considered in order to ensure the effective protection of the seal of confession in criminal procedure, especially in the context of the problem of applying Art. 168a of the Code of Criminal Procedure in practice, which shall be discussed later on.

At the same time, it should be underlined that also in the law of criminal proceedings, the objective scope of the inadmissibility of evidence refers to the information obtained during a confession (both, with regard to the contents of the penitent's statement and to the fact that he or she has not mentioned something to the confessor), and not during other contacts between the penitent and confessor (e.g., within periods of 'spiritual guidance'). Furthermore, it is worth noting an interesting opinion according to which the inadmissibility of evidence stipulated in Art. 178 point 2 of the Code of Criminal Procedure does not prevent from hearing from clergy who heard the confession of the accused but earlier had been an eyewitness to an event that later on constituted the object of the confession. In such a situation, the object of the clergy's testimony can comprise solely facts he saw.⁴⁸ In consequence, the information obtained during an individual confession also in this case cannot be the object of testimony (e.g., with regard to the motivation of the accused's activities).

Another interesting aspect of protection of the seal of confession noted in the doctrine of the law of criminal proceedings consists of situations in which the penitent's sins are manifested in written form (e.g., a deaf-mute person presents the confessor with a written list of their sins). In this scope, an opinion occurs according to which the ban on disclosing information obtained during a confession should also refer to materials that include information constituting the seal of

⁴⁷ Gensikowski, P., in: Drajewicz, D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz. Art. 1–424*, Warszawa 2020, Legalis.

⁴⁸ Sowiński, P.K., *Prawo świadka do odmowy zeznań w procesie karnym*, Warszawa 2004, p. 29.

confession.⁴⁹ Nonetheless, this opinion should be considered as too far-reaching, since in such a situation an accused could refer the discussed inadmissibility of evidence to each evidence in the form of a private document including notes, e.g., because they include a set of acts that could constitute a subject of the confession. It would result in numerous complications in the scope of the assessment of the inadmissibility of evidence and, in practice, would lead to abuses of the procedural authorisation.

With reference to the same course of evidence from the testimony given by a witness, it is worth noting that the inadmissibility of evidence hindering testimony does not repeal the clergy's obligation to appear, since the court has to verify formal aspects referring to the status of this person in light of the law of their church or religious association and detailed procedures concerning forgiving sins in order to apply the inadmissibility of evidence stipulated in Art. 178 of the Code of Criminal Procedure. It cannot do so effectively without the personal appearance of the member of clergy in order to remove any doubts and present relevant documents.

To sum up the deliberations referring to the protection of the seal of confession in criminal proceedings, testimony given by a member of clergy (also former clergy with secular status, or so-called secularisation) in the scope covered with the ban, does not constitute evidence and thus, cannot influence the contents of the factual grounds for resolution. However, one should agree with the opinion of D. Gruszecka, who claims that in this context, the lack of the inadmissibility of evidence due to the inconsistency with the inadmissibility of evidence with regard to so-called private evidentiary activity pursuant to the new regulation of Art. 168a of the Code of Criminal Procedure, can have alarming consequences.⁵⁰ This provision stipulates that the evidence cannot be considered inadmissible only on the grounds that it has been obtained in violation of the provisions of the procedure or by means of a prohibited act referred to in Art. 1 par. 1 of the Criminal Code, unless the evidence was obtained with regard to the public officer performing official duties as a result of manslaughter or voluntary cause of the detriment to health or deprivation of freedom. In consequence, the present procedural construction does not sufficiently protect the values constituting the foundations of the regulations of internal acts of churches and religious associations

⁴⁹ Tomkiewicz, M., *op. cit.*, p. 59.

⁵⁰ Gruszecka, D., *op. cit.*

absolutely protecting the seal of confession since it allows presenting information entrusted during an individual confession by third parties, who, e.g., obtained this knowledge as a result of eavesdropping. It is obvious that also in this case one could apply the conclusions already indicated on the grounds of the Code of Civil Procedure that respecting the internal regulations of churches and religious associations should exclude the acceptance of such evidence. However, in this case we deal with a different situation because of the clear provisions of Art. 168a of the Code of Criminal Procedure, which does not have an equivalent in the Code of Civil Procedure and which then hinders, if not prevents, the adoption of such an interpretation. It may, in practice, have negative consequences for the relation of the state with churches and religious associations that have individual confession in their liturgies if in the criminal procedure there is a case which is *de facto* a circumvention of the inadmissibility of evidence aimed at protecting this secrecy.

Conclusions

Ensuring coherence of the provisions of state law and the internal law of churches and religious associations (demonstrated herein with the example of the canon law of the Catholic Church) is of fundamental significance to an assessment of the effectiveness of the protection of the seal of confession in civil and criminal procedure. The latter constitute a point of reference for proper stipulation of the subjective and objective scopes of procedural construction, which are to protect the seal of confession and, in turn, decide on the actual protection of the freedom of conscience and religion in procedural law. In the doctrine, it is underlined that the admissibility of interference in the contents of a confession via the proceedings would inevitably lead to the limitation of worshipers' trust in the clergy and thus, has been deemed inadmissible.⁵¹ As rightly noted by M. Szymański, 'the most important reason for recognising by the state the inviolability of the seal of confession constitutes the necessity to protect the dignity of a person who confesses their sins. It would be difficult to reconcile constitutional guarantees of human dignity and the freedom of conscience and religion with the admissibility of the state's interference in such an intimate area of religious life. It must be remembered that a penitent wishing to experience spiritual purification,

⁵¹ Hofmański, P., et al., *Kodeks postępowania karnego. Komentarz*, Warszawa 2007, p. 817.

confesses his or her sins, which often influence not only their spiritual situation.⁵² As results from the aforementioned deliberations, constructions of procedural acts are far from perfection and, above all, do not reflect the intention of the ecclesiastical legislator, who wishes to provide worshipers with full comfort of speaking about the most intimate spheres of their lives.

In the first place, in both cases, procedural law does not represent subjective assumptions of protecting the seal of confession expressed in canon law in the triad of confessor–interpreter–third party. Both the law of civil procedure, as well as the law of criminal proceedings, in Art. 261 par. 2 of the Code of Civil Procedure and Art. 178 point 2 of the Code of Criminal Procedure, respectively, focus on clergy and omit the two other individuals. While sworn translators are obliged to observe the professional standards of secrecy protection, which, in a way, fills in the legal loophole, a non-professional translator or a third party (who intentionally or unintentionally overhears a confession, etc.) there are no safeguards in place. It is a problem, the solution to which, by reference to the general principle of respecting the rules applied by churches and religious associations legally operating in Poland, may be, in many cases, insufficient, especially in the context of Art. 168a of the Code of Criminal Procedure, which introduces as evidence in criminal proceedings certain categories of the ‘fruit of the poisonous tree’. To this end, decidedly weaker protection in civil proceedings should be indicated, which, by exercising the right to refuse to answer questions, leaves the possibility of exercising this privilege to the will of the authorised, which, in case of ill will on the part of a former member of clergy, can be a contradiction of the essence of the relation between a confessor and a penitent based on complete trust.

This relation of mutual trust between a clergy and worshippers is necessary for proper implementation of the mission of a religious association and entrusted tasks. It constitutes another argument in favour of diversification of the legal status of clergy of churches or religious associations where a confession or other analogous practice is exercised, with regard to clergy that belong to churches or religious associations not exercising this religious practice.⁵³ Therefore, it is appropriate that the legislator provides protection only in the case of an occurrence of an individual (auricular) confession in liturgy, not taking into consideration other situations referring to the clergy’s relations with worshippers. In this

⁵² Szymański, M., op. cit., p. 78.

⁵³ Pieron, B., *Ochrona Tajemnicy...*, p. 167.

case, there are also several signalled doubts primarily referring to the situation when a confessor does not adhere to the rule of his liturgy or even has no right to hear confessions and the penitent does not know about it and gives very personal information in confidence. Truthfully, most often an interpretation favourable for the penitent acting in good faith is proposed; however, due to the fact that exclusions referring to the evidence from testimony given by a witness are exceptional in character, they should not be interpreted in an extended manner. Thus, it should be specified in provisions of procedural acts. Similar doubts cover the issue of the place and procedures applied in the scope of confessing and the significance thereof for stating that we deal with a confession and not, e.g., with a pastoral conversation excluded from procedural protection. However, it should be assumed that the seal of confession does not cover the fact of the existence of penitence, since it opens the path to benefit from solutions protecting the secrecy.

To sum up, *de lege ferenda*, the civil-procedural construction of the protection of the seal of confession requires decisive interference by introduction of regulations concerning the clergy who obtained information during a confession to the categories of individuals who cannot act as witnesses (Art. 259 of the Code of Civil Procedure). Moreover, both the Code of Civil Procedure (Art. 261 of the Code of Civil Procedure), as well as the Code of Criminal Procedure (Art. 178 of the Code of Criminal Procedure), require refocusing provisions in order to specify the subjective and objective scope of procedural guarantees of the seal of confession's protection.

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