

Legal Protection of the Seal of Confession in Spanish law

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SOMMARIO. Questa ricerca analizza il segreto ministeriale come una categoria giuridica che protegge il sigillo confessionale nel diritto spagnolo. In precedenza, vengono studiati due aspetti della stessa questione, ovvero il aspetto confessionale (riservatezza della confessione) e il legale secolare (il segreto ministeriale). Per affrontare il primo, si sintetizzano storia e regolamenti nel diritto canonico. E per indagare sul secondo, il segreto ministeriale, verranno spiegati i valori legali alla base di questo fenomeno. Infine, verrà analizzata criticamente la regolamentazione legale del segreto ministeriale nel diritto spagnolo.

PAROLE CHIAVE: segreto ministeriale, sigillo confessionale, diritto processuale, diritto penale, diritto canónico, Spagna.

ABSTRACT: This research analyzes the religious communications privilege as a legal rule that protects the seal of confession in Spanish law. Two facets of the same issue are studied in preparation for this, namely the religious side (seal of confession) and the secular legal side (the religious communications privilege). To address the first, history and regulations in canon law are synthesized. To investigate the second, the religious communications privilege, the legal values underlying this phenomenon will be explained. Finally, the legal regulation of religious communications privilege in Spanish law will be critically analyzed.

KEYWORDS: religious communications privilege, seal of confession, procedural law, criminal law, canon law, Spain.

1. Introduction

Secularization as a social phenomenon means at least three things: (i) religion is no longer relevant in the public sphere, so the foundation of political living-together is secular; (ii) institutional religious beliefs and

practice within a given population have decreased; (iii) religious beliefs are «another option» among different commodities in the free market of beliefs and ideas.¹

In this regard, state law is embodied in time and space, and cannot be dissociated from either that secularization or from its historical baggage.

For this reason, when dealing with sensitive issues such as the seal of confession or the religious communications privilege, ethical and legal arguments come to light—for and against their protection—revealing a secularized mentality that may even influence specific aspects of individual and collective fundamental rights.

Indeed, the seal of confession and the religious communications privilege enjoy constant and consolidated legal protection in Spanish law. However, this protected relationship has recently been involved in problems such as the abuse of minors by the Catholic clergy, and so the solidity of the long-standing legal protection may falter.

The weakening of the religious communications privilege is understandable in a secularized context since the seal of confession (and the religious communications privilege in general) is scrutinized under utilitarian or consequentialist criteria according to which before an exception to the general rule (namely securing secrecy of religious communication) the legal protection of minors is always more important. If (theoretically) the disappearance of the abuse of minors could be attained breaking the protective rule of the religious communications privilege, then nothing, without exception, may legally support the maintenance of an institution from which (theoretically again) evil over good follows.

The reasoning is simplistic but tremendously effective in Spanish media,² where subtly but constantly the value of the legal protection of

¹ R. SERRANO, “Así erró Zaratustra”, *Acepresa*, 2007 [accessed 02.01.2021], <http://www.acepresa.com/articulos/asi-erro-zaratustra/>.

² J. BASTANTE, “Secreto de confesión: ¿Bula para pederastas?”, *Eldiario.es*, 2018 [accessed 02.07.2019], https://www.eldiario.es/sociedad/Secreto-confesion-Bula-pederastas_0_811219226.html; J. G. BEDOYA, “Los escándalos de pederastia desafían al secreto de confesión”, *El País*, 2018 [accessed 02.07.2019], https://elpais.com/sociedad/2018/09/09/actualidad/1536508658_743805.html; G. GASTAMINZA, “Un cura rechaza testificar en un caso que conoció en su función sacerdotal”, *El País*, 2002 [accessed 08.08.2019], https://elpais.com/diario/2002/07/19/sociedad/1027029605_850215.html; Y. MONTERO, “El fiscal solicita el archivo de la causa contra un cura que se negó a

religious secrecy has been undermined. Despite this, does this simplistic and effective reasoning yield a fair result, considering all the elements at stake?

This research aims precisely to delve into those elements that condition both the debate and the fair result of the hypothetical conflict between the protection of ministerial secrecy and other paramount interests of individuals or of the state. To this aim, two facets of the same question are studied, namely, the religious side (the seal of confession) and the secular legal side (the religious communications privilege). By addressing the former, history and regulations in canon law are synthesized. To investigate the latter —ministerial secrecy— the legal values underlying this phenomenon and the legal regulation (current and future) of ministerial secrecy in Spanish law will be critically analyzed.

I must anticipate that the study of the legal regulation of the religious communications privilege in Spanish law is practically reduced to several regulations (largely procedural and criminal), since Spanish courts have rarely ruled on this issue and so there is no significant case law to speak of.

2. The religious communications privilege

The religious communications privilege consists of the secrecy that the religious minister rightly keeps before governmental authorities concerning facts known by him due to his office or the peculiar service of a religious or spiritual nature.

The religious communications privilege is an aspect of the legal regime of religious ministers. In Spanish law, a religious minister is «the individual who, in each religious denomination or group, performs functions of religious leadership or leads worship or religious service, regardless of his/her rank in the respective religious community. In

testificar”, *El País*, 2003 [accessed 06.01.2021], https://elpais.com/diario/2003/03/18/sociedad/1047942004_850215.html; M. PLANELLES, “Un sacerdote recurre al secreto de confesión para evitar declarar en un juicio”, *El País*, 2014 [accessed 06.01.2021], https://elpais.com/ccaa/2014/02/26/andalucia/1393445771_925186.html; E. ROS, “Secreto de confesión o secreto inconfesable”, *El País*, 1995 [accessed 06.01.2021], https://elpais.com/diario/1995/03/06/ultima/794444401_850215.html; J. M. VIDAL, “Víctima de abusos: «Cuando hablamos, el sacerdote encubridor nos calumnió y hasta reveló secretos de confesión para hacernos daño»”, *Religión Digital*, 2020 [accessed 06.01.2021], https://www.religiondigital.org/espana/Victima-hablamos-sacerdote-encubridor-confesion-abusos-sexuales-sacristan-cieza-murcia_0_2272872739.html.

Spain, this terminology has also been accepted, to simplify the wording of the laws, by those religions that do not have worship in the proper sense of the word, such as Judaism or Islam. Within each religious group, each minister is designated according to its own regulations».³

The salient features of ministerial secrecy could be described as follows. The individual who reveals does so to the extent that he/she is a member, believer, or follower of religious group and proceeds to communicate facts or actions to another as a means of worshipping, receiving advice, or spiritual relief. The depositary of the revelation keeps the confidential communication due to a particular qualification endowed by the religious group to which he/she belongs. The objective element (facts, actions, etc.) is impregnated with confidentiality and this appears to be an essential element of the relationship established, one that is characterized by secrecy.

The religious communications privilege is understood here as an oral secret. However, it could well encompass documentary secrecy as well. Be that as it may, documentary secrecy offers specific features that deserve a different and more specific treatment.

Often, startling cases appear in the media in which the ministerial secret is involved. We shall remember several of these cases.

Christmas Eve, 1993. A 23-year-old young man knelt at the confessional of Father Paolo Turturro, in the Santa Lucia parish (Palermo, Italy) to repent and confess that he had participated on May 23, 1993, in the spectacular murder of the anti-mafia judge Giovanni Falcone, his wife, Judge Francesca Morvillo, and three bodyguards. The young penitent was only looking for forgiveness and peace of mind. Paolo Turturro — one of the famous anti-mafia priests in Italy, later convicted of child abuse⁴— seems to have been unable to maintain the absolute secrecy of the confession: in the Christmas homily, he explained to his parishioners his recent experience in the confessional, leaving the penitent

³ Cfr. A. MONTOYA MELGAR (ED.), *Diccionario Jurídico de la Real Academia de Jurisprudencia y Legislación*, Thomson Reuters Aranzadi, Cizur Menor (Navarra), 2016, p. 726. M. GONZÁLEZ SÁNCHEZ, *Los ministros de culto en el ordenamiento jurídico español*, Centro de Estudios Políticos y Constitucionales, Madrid, 2003.

⁴ S. PALAZZOLO, “La storia a due facce di don Turturro ‘Prego dopo la condanna’”, *La Repubblica*, 8 giugno 2014 [accessed 01.08.2019], <https://ricerca.repubblica.it/repubblica/archivio/repubblica/2014/06/08/la-storia-a-due-facce-di-don-turturro-prego-dopo-la-condannaPalermo07.html>.

anonymous, which would constitute indirect revelation. The news about that Christmas preaching spread quickly, causing bewilderment.⁵

1996, Lane County (Oregon). The recording of the conversation held by Reverend Timothy Mockaitis with Conan Wayne Hale, a correctional inmate, was intended to be used as evidence in the criminal murder trial against said inmate. The Federal Court of Appeal, Ninth Circuit, heard the lawsuit brought by the priest and the bishop of the diocese against the use of the recording. The three magistrates of the court, among whom were Judge John Thomas Noonan, understood that the recording and seizure of the tape violated the free exercise of religion of Reverend Mockaitis. However, the Court did not order the destruction of the tape, as requested by the priest.⁶

In 2001 a judgment of the High Court of Caen, in France, condemned the Bishop of Bayeux, Bishop Pican, for covering up a crime. Faced with the controversial issue, some observers have since stated that with this judicial ruling there was an undue restriction of the ministerial secrecy of Bishops and a break in the nexus of trust between them and their priests.⁷

In the debate on the Rules of Procedure and Evidence of the International Criminal Court, held in 1998 and 1999, a proposal led by Canada and France was rejected which sought not to recognize the right of ministers of religion to refrain from testifying in court on issues known through the seal of confession or confidences of their faithful.⁸

⁵ A. ZINITI, “Preti contro Turturro 'dannoso esibizionismo’”, *La Repubblica*, 29 dicembre 1993 [accessed 01.08.2019], <https://ricerca.repubblica.it/repubblica/archivio/repubblica/1993/12/29/preti-contro-turturro-dannoso-esibizionismo.html>.

⁶ “Prosecutor Might Use Confession to a Priest”, *The New York Times*, May 13, 1996 [accessed 26.01.2021], <http://www.nytimes.com/1996/05/13/us/prosecutor-might-use-confession-to-a-priest.html>; *The Reverend Timothy Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997); T. J. MOCKAITIS, *The seal: a priest's story*, Xlibris, Philadelphia, PA, 2008.

⁷ “Justice: Mgr. Pierre Pican a justifié sa décision de ne pas faire appel de sa condamnation”, *Le Monde*, 9 septembre 2001 [accessed 26.01.2021], https://www.lemonde.fr/archives/article/2001/09/09/justice-mgr-pierre-pican-a-justifie-sa-decision-de-ne-pas-faire-appel-de-sa-condamnation_4195441_1819218.html; “Pierre Pican”, *Wikipédia* [accessed 26.01.2021], https://fr.wikipedia.org/wiki/Pierre_Pican.

⁸ R. J. ARAUJO, “International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the «Priest-Penitent» Privilege Under International Law”, *American University International Law Review*, vol. 15, 3, 2000.

These episodes, in which it is intended to protect religious secrecy against secular interference, contrast with other examples in which a minister of religion intends to break their duty of confidentiality in reporting illicit deeds to state authorities. This was indeed the case in Argentina in 2017 when a Mormon bishop denounced a rapist to prevent further abuse occurring.⁹ This situates us before a legal evolution, without which it is difficult to understand the religious communications privilege.

This legal evolution may be described as follows. The religious communications privilege arose in Western legal systems either as a transposition of a canon law duty or as a specific manifestation of the religious freedom of certain Christian groups. Afterwards, the religious communications privilege was «secularized» by being assimilated within the professional secrets of doctors or lawyers, extending it to all ministers of religion, and becoming an entitlement or even a general obligation.¹⁰ Finally, what was seemingly a protective element in favor of religious denominations and groups was contested by those religious ministers in whose groups there was no specific obligation of secrecy whatsoever but, on the contrary, the obligation to reveal to governmental authorities was the religiously enforceable conduct.¹¹

As indicated, the «secularization» of the religious communications privilege meant its assimilation within professional communication privileges. Consequently, it might be assumed that the legal features of these professional privileges and the religious communications privilege are the same. However, there are important distinctions concerning their rationale and limits.

⁹ “Un obispo mormón rompió el secreto de confesión para denunciar a un violador”, *La Nación*, 26 abril 2017 [accessed 26.01.2021], <https://www.lanacion.com.ar/sociedad/un-obispo-mormon-rompio-el-secreto-de-confesion-para-denunciar-a-un-violador-nid2017686/>.

¹⁰ J.-L. BAUDOUIN, *Secret professionnel et droit au secret dans le droit de la preuve: étude de droit québécois comparé au droit français et à la common-law*, Librairie générale de droit et de jurisprudence, Paris, 1965.

¹¹ M. BROYDE; Y. REISS; N. DIAMENT, “Confidentiality and Rabbinic Counseling - An Overview of Halakhic and Legal Issues”, *Jewish Law Articles* [accessed 26.01.2021], <http://jlaw.com/Articles/RabbinicCounseling1.html>; A. AL-HIBRI, “The Muslim Perspective on the Clergy-Penitent Privilege Symposium: Executing the Wrong Person: The Professionals’ Ethical Dilemmas”, *Loyola of Los Angeles Law Review*, 4, 1995; A. M. SOKOBIN, “Rabbinic Confidentiality: American Law and Jewish Law”, *University of Toledo Law Review*, 4, 2006.

As to the rationale, the series of protected rights or interests is not the same in all the so-called professional secrets. In the case of communications to doctors and lawyers, the right of privacy of the patient or client, the deontological requirements, and the proper development of the professional relationship come together. Communications to journalists «should not be confused with the generic professional secrecy of doctors, lawyers, etc., since they do not share the same legal nature, nor content, nor do they protect the same legal right, nor can their ownership be predicated from the same individuals. Thus, while generic professional secrecy is configured as a legal duty to keep secret data that has become known through the exercise of a specific profession, the journalists' privilege is configured as a fundamental right not to reveal information sources. The legal interest protected in the former is privacy, while in the latter is the right to information and, therefore, the creation of a free public opinion».¹² Finally, in the case of the religious communications privilege, the scheme of interests and rights at stake is thrice radically modulated by religious freedom. First, the religious freedom of the faithful or believer to be able to practice acts of worship according to the rules of his own religious community. Second, the religious freedom of the minister of religion to comply with the disciplinary duty that obliges him to remain silent. And third, the religious freedom of the church, religious community, or group to establish and observe norms regulating its rites and worship (usually called autonomy of religious groups).

Regarding the limits, it is vital to note that clergy-penitent secrecy is absolute in many cases. This is to say that, once the conditions established by the legal system have been met to identify the religious communications privilege (to ensure its external recognition), there are no intrinsic limits that may prevail over it. Nevertheless, in some legal systems extrinsic limits might exist as the waiver of the penitent,¹³ the minister of religion's duty to report or to testify in cases involving the abuse of minors,¹⁴ and the report of future crimes.¹⁵ By contrast, in other

¹² S. SÁNCHEZ GONZÁLEZ Y OTROS, *Dogmática y práctica de los derechos fundamentales*, Tirant lo Blanch, Valencia, 2006, pp. 293-294.

¹³ W. COLE DURHAM, R. SMITH, “§ 20:9. The clergy-penitent privilege”, *Religious Organizations and the Law*, Westlaw, 2020.

¹⁴ R. PALOMINO LOZANO, “Sigilo de confesión y abuso de menores”, *Ius Canonicum*, vol. 59, 118, 2019.

¹⁵ Australia, *Evidence Act 1995*, Section 127 Religious confessions. (1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious

professions or «status» there are recognized intrinsic and extrinsic exceptions to the duty of secrecy; for officials or public servants, the notorious and public knowledge, and facts in process of notoriety.¹⁶ For liberal professions, this is the conscious or unconscious concealment of pieces of evidence or illegal objects, the facts in which client and professional have a common interest (as partners, accomplices, etc.),¹⁷ future illicit facts, and fee disputes.¹⁸ For doctors, this is in particular the state of health as a contested issue in civil or criminal proceedings.¹⁹

In the next section, the features, nature, and value of the seal of confession are exposed, which in my view are at the origin of the religious communications privilege.

3. The *sigillum confessionis*

The seal of confession is «a particular kind of secret that obliges the confessor to never reveal, for any reason and without exception, the penitent or the sins the penitent has revealed in the sacrament of penance».²⁰

Can. 959 CIC establishes: «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».

3.1. *Historical features*

Throughout history, the sacrament of penance has been characterized by the seal of secrecy that obliges the confessor. The first salient reference to the obligation of secrecy is found in a letter from Pope Leo the Great in 459 to the bishops of Campania, Somnio, and Piceno, in which he

confession made, to the person when a member of the clergy. (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.

¹⁶ R. GARCÍA MACHO, *Secreto profesional y libertad de expresión del funcionario*, Tirant lo Blanch, Valencia (1994), pp. 26 ff.

¹⁷ M.N. HOWARD, P. CRANE, D.A. HOCHBERG, *Phipson on Evidence* (14th ed.), Sweet & Maxweel, Londres, 1990, pp. 513 ff.

¹⁸ A. BEST, *Evidence: examples and explanations*, Little, Brown, Boston, 1994, p. 175.

¹⁹ A. BEST, *Evidence: examples and explanations*, p. 183.

²⁰ D. CITO, “Sigilo sacramental”, in *Diccionario General de Derecho Canónico*, vol. VII, Aranzadi, Cizur Menor (Navarra), 2012, p. 307.

condemns the practice of divulging confessed sins.²¹ The violation of the secrecy was set up as illicit conduct in the *Capitularia* of Charlemagne.²²

Even in the 9th century, at the local level, a clear reference to the secret of confession is made in the Council of Douzy (874).²³ The Capitula Rodolphi established that when the confession is spontaneous and the crime is hidden, the penance imposed must not be public, so that the other faithful do not harbor suspicions when they see that a serious penance is imposed for something they are not aware of. A similar measure is provided in the Constitutions of Bishop Richard Poore (Salisbury Synod, 1217-1219), prescribing not to impose on a woman such a penance that makes her suspect in the eyes of her husband.²⁴

The *Poenitentiale Summorum Pontificum*, around the 10th century, repeated the condemnatory statement of banishment already established in the *Poenitentiale Cassinense*.²⁵ This serious penalty also appeared in the *Concordia Discordantium Canonum* by Master Gratian.²⁶ The basic

²¹ *De poenitentia scilicet quae ita a fidelibus postulatur, ne de singulorum peccatorum genere libellis scripta confessio publice recitetur, conscientiarum sufficiat solis sacerdotibus indicari confessionum secreta. Quamvis enim plenitudo fidei videatur esse laudabilis, quae propter Dei timorem apud omnes erubescere non veretur, tamen quia non omnium huiusmodi sunt peccata, ut ea, qui poenitentiam poscunt, non timeant publicare, removeatur tamen improbabilis consuetudo, ne multi a poenitentiae remediis arceantur, dum aut erubescunt aut metuunt inimicis suis sua facta reserare, quibus possint legum constitutione percelli. Sufficit enim illa confessio, quae primum Deo offertur, tunc etiam sacerdoti, qui pro delictis poenitentium precator accedit. Tunc enim plures ad poenitentiam poterint provocari, si populi auribus non publicetur conscientia confitentis.* Leo I Pp, Epistula 168. *Ad Episcopos per Campaniam, Samnium et Picenum constitutos*, Mansi 6, 410-411.

²² *Ut t hoc inquiratur, si de partibus Austriae verum est quod dicunt an non, quod presbyteri de confessionibus accepto pretio manifestent latrones.* MGH - 2 Leges. 2 Capitulum 01. *Capitularia Regum Francorum* [1925-1933] 175.

²³ R. P. STAKE, «Grounding the "Priest-Penitent Privilege" in American Law», in *Confidentiality in the United States. - A Legal and Canonical Study*, Canon Law Society of America ed., Washington D.C., 1988, p. 149.

²⁴ J. M. GONZÁLEZ DEL VALLE, *El sacramento de la penitencia. Fundamentos históricos de su regulación actual*, Eunsa, Pamplona, 1972, p. 210.

²⁵ P. Cassinense XII,17. *Si quis sacerdos palam fecerit et secretum penitentiae usurpauerit et quavis homo intellexerit, et declaratum fuerit quem celare debuerit, ab omni honore suo in cunctum populum deponatur et diebus vitae suae peregrinando finiat.* A. H. GAASTRA, *Between Liturgy and Canon Law. A Study of Books of Confession and Penance* (doctoral dissertation), Universiteit Utrecht, Utrecht, 2007, pp. 15-16 [accessed 29.07.2019], <https://dspace.library.uu.nl/bitstream/handle/1874/23216/full.pdf?sequence=11&isAllowed=y>.

²⁶ *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*

elements of the text eventually passed from Gratian to the Synod of Paris (1203), and from there to the IV Lateran Council (1215) in whose canon 21, in a universal and undoubted manner, was established the content, scope, and gravity of the seal of confession:²⁷ «Let the priest be discreet and cautious (...) 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».²⁸ The Decretals of Gregory IX or *Liber extra* contain a similar text, establishing the removal of the priest and perpetual penance in seclusion.²⁹

Subsequently, the maintenance of the obligation of secrecy as an inherent element to the confession is steadfast, which is thrice reflected in the 1917 Code: (1) regulation of the seal of confession, chance knowledge,

scandalo. Nam si hoc fecerit, deponatur, et omnibus diebus uitae suae ignominiosus peregrinando pergat. Corpus Iuris Canonici, ed. Friedberg, Lipsia, 1879, vol. 1, Decretum Magistri Gratiani, Pars II, C. 33, q. 3, c. 2.

²⁷ D. TARANTINO, “Confesión y sigilo sacramental en el Concilio Lateranense IV: de la normativa a la reflexión doctrinal”, *Vergentis*, vol. 1, 3, 2016.

²⁸ H. J. D. DENZINGER, *Enchiridion symbolorum et definitionum: quae de rebus fidei et morum a conciliis oecumenicis et summis pontificibus emanarunt*, Sumptibus Stahelianis, 1854, n. 363.

²⁹ (...) *qui peccatum in poenitentiali indicio sibi detectum praesumpserit revelare, non solum a sacerdotali officio deponendum decernimus, verum etiam ad agendam perpetuam poenitentiam in arctum monasterium detrudendum.* Decretales Gregorii IX 5.38.12.

and acquired knowledge;³⁰ (2) protection of secrecy from procedural discovery rules;³¹ and (3) crime of violation of the seal of confession.³²

3.2. Current regulations

The Code of Canon Law of 1983 renews the legal protection of the seal of confession³³ extending it to the so-called acquired knowledge.³⁴ The new norm of can. 983 distinguishes between the duty of secrecy (which affects people other than the priest who may be aware of the content of the confession) and the seal of confession (which only affects the priest to whom the confession was made to obtain absolution even if it could be denied). There is no duty of secrecy, however, regarding simulated or feigned confessions. Experts also distinguish between the essential elements of the seal (manifested venial and mortal sins, circumstances

³⁰ 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.*

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.*

³¹ C. 1755 §1. *Testes iudici legitime interroganti respondere et veritatem fateri debent.* §2. *Salvo praescripto can. 1757, §3, n. 2, ab hac obligatione eximuntur: 1° Parochi aliique sacerdotes quod attinet ad ea quae ipsis manifestata sunt ratione sacri ministerii extra sacramentalem confessionem; civitatum magistratus, medici, obstetrices, advocati, notarii aliique qui ad secretum officii etiam ratione praestiti consilii tenentur, quod attinet ad negotia huic secreto obnoxia (...)*

C. 1757 §1. *Ut non idonei repelluntur a testimonio ferendo impuberes et mente debiles. (...)* §3. *Ut incapaces: (...) 2° Sacerdotes, quod attinet ad ea omnia quae ipsis ex confessione sacramentali innotuerunt, etsi a vinculo sigilli soluti sint; imo audita a quovis et quoquo modo occasione confessionis ne ut indicium quidem veritatis recipi possunt.*

³² 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 c. 2368, §1. §2. Quicumque praescriptum can. 889, §2 temere violaverit, pro reatus gravitate plectatur salutari poena, quae potest esse etiam excommunicatio.*

³³ Can. 983 § 1. *Sacramentale sigillum inviolabile est; quare nefas est confessario verbis vel alio quovis et quavis modo de causa aliquatenus prodere poenitentem.* § 2. *Obligatione secretum servandi tenentur quoque interpretes, si detur, necnon omnes alii ad quos ex confessione notitia peccatorum quoquo modo pervenerit.*

³⁴ Can. 984 § 1. *Omnino confessario prohibetur scientiae ex confessione acquisitae usus cum poenitentis gravamine, etiam quovis revelationis periculo excluso.* § 2. *Qui in auctoritate est constitutus, notitia quam de peccatis in confessione quovis tempore excepta habuerit, ad exteriorem gubernationem nullo modo uti potest.*

that could contribute to the identification of the penitent, identity and sins of the accomplices, denial of absolution, imposed penance...) from the accidental object (attitude of the penitent, form of confession...). The strict obligation of secrecy falls on the former.³⁵

Criminal protection of secrecy is established in can. 1388.³⁶ This canon distinguishes between the direct violation of the seal (penalized by the excommunication *latae sententiae* reserved for the Holy See³⁷); indirect violation of the seal (sanctioned with mandatory indeterminate excommunication *ferendae sententiae*); and violation of the obligation of secrecy (sanctioned with a mandatory indeterminate *ferendae sententiae* penalty that may reach the maximum censure).³⁸ Similarly, current canon law punishes the recording by any technical means or malicious disclosure in the media of the things said by the priest or by the penitent in the true or feigned sacramental confession.³⁹

Consistently with this criminal protection, canon law excludes the confessor from testimony, even when the penitent asks for his statement.⁴⁰

³⁵ D. CITO, “Sigilo sacramental”, p. 308.

³⁶ Can.1388 § 1. *Confessarius, qui sacramentale sigillum directe violat, in excommunicationem latae sententiae Sedi Apostolicae reservatam incurrit; qui vero indirecte tantum, pro delicti gravitate puniatur.* § 2. *Interpres aliique, de quibus in can. 983, § 2, qui secretum violant, iusta poena puniantur, non exclusa excommunicatione.*

³⁷ CONGREGATIO PRO DOCTRINA FIDEI, “Rescriptum ex Audientia”, XXI Maii 2010, AAS 102 (2010) 419-43. Art. 4.

³⁸ «Existe violación directa cuando el confesor revela formalmente o, en un modo equivalente junto con la indicación de la persona aquello que constituye el objeto del sigilo sacramental. En cambio, es indirecta cuando a través de palabras o acciones que tienen otra finalidad, se pone en peligro de revelar lo que es la materia del sigilo. Esto puede ocurrir tanto cuando se habla de la materia sin nombrar a la persona como al hablar de la persona sin mención de la materia pero con el peligro de revelación o de inducción a la sospecha, dado que para que se produzca violación no es necesario que los destinatarios de la manifestación conozcan personalmente al penitente, e incluso podrían ignorar que lo revelado por el sacerdote haya sido conocido por él, en confesión.» D. CITO, “Sigilo sacramental”, p. 309.

³⁹ CONGREGATIO PRO DOCTRINA FIDEI, “Rescriptum ex Audientia”, XXI Maii 2010, AAS 102 (2010) 419-43. Art. 4.4°.

⁴⁰ Can. 1548 § 1. *Testes iudici legitime interroganti veritatem fateri debent.* § 2. *Salvo praescripto can. 1550, § 2, n. 2, ab obligatione respondendi eximuntur: 1 clerici, quod attinet ad ea quae ipsis manifestata sunt ratione sacri ministerii (...)*

Can. 1550 § 1. *Ne admittantur ad testimonium ferendum minores infra decimum quantum aetatis et mente debiles; audiri tamen poterunt ex decreto iudicis, quo id expedire delectetur.* § 2. *Incapaces habentur: 1 qui partes sunt in causa, aut partium nomine in iudicio consistunt, iudex eiusve assistentes, advocatus aliique qui partibus in eadem causa assistunt vel astiterunt; 2 sacerdotes, quod attinet ad ea omnia quae*

Crimes related to the sexual abuse of minors have led to an unprecedented canonical legal development to tackle this abhorrent problem.⁴¹ However, this move has not implied a weakening of the confidentiality feature of the sacrament of penance.

The *Motu proprio* «Vos estis lux mundi» was intended to facilitate the complaint and avoid the obstruction of investigation reports relating to crimes of sexual abuse and child pornography. Article 3 of this *Motu Proprio* exempts priests from the duty to report concerning what has been manifested to them in the exercise of their sacred ministry.⁴² Shortly after this pontifical norm was published, more specifically on June 29, 2019, the Apostolic Penitentiary issued a Note about the importance of the internal forum and the inviolability of the seal of confession.⁴³ For our purposes here, three basic ideas in the Note may be highlighted. First, the inviolability of the seal of confession comes from divine law and is rooted in the very nature of the sacrament to the point of admitting no exceptions either in the ecclesial or in the civil spheres. Second, the absolute prohibition imposed by the sacramental seal is intended to prevent the priest from making the content of the confession known outside the sacrament; secrecy goes beyond the penitent's will; the

ipsis ex confessione sacramentali innotuerunt, etsi poenitens eorum manifestationem petierit; immo audita a quovis et quoquo modo occasione confessionis, ne ut indicium quidem veritatis recipi possunt.

⁴¹ Among others, F. R. AZNAR GIL, “El delito contra el sexto mandamiento del decálogo cometido por un clérigo con un menor de edad”, *Revista Española de Derecho Canónico*, vol. 70, 175, 2013; J. BERNAL, “Cuestiones canónicas sobre los delitos más graves contra el sexto mandamiento del Decálogo”, *Ius Canonicum*, vol. 54, 107, 2014; Á. LÓPEZ-SIDRO LÓPEZ, “La responsabilidad penal del clero en casos de abusos: una aproximación a la cuestión en Australia, Chile y Estados Unidos”, *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, vol. 50, 2019; D. MILANI, “Los abusos del clero. El proceso de reforma de una Iglesia en crisis”, *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, vol. 50, 2019; G. NÚÑEZ, “Abusos sexuales de menores. Consideraciones sobre el derecho de defensa y la colaboración con la autoridad civil”, *Scripta Theologica*, vol. 46, 2014; G. NÚÑEZ GONZÁLEZ, “Nueva regulación para la protección de menores y personas vulnerables en el Estado de la Ciudad del Vaticano”, *Ius Canonicum*, vol. 59, 117, 2019.

⁴² PAPA FRANCISCO, *Motu proprio* «Vos estis lux mundi», 7 May 2019, Art. 3.

⁴³ APOSTOLIC PENITENTIARY, «Note of the Apostolic Penitentiary on the Importance of the Internal Forum and the Inviolability of the Sacramental Seal», 21 June 2019 [accessed 29.01.2021], https://www.vatican.va/roman_curia/tribunals/apost_penit/documents/rc_trib_appen_pro_20190629_forointerno_sp.html. The Note is the subject of the interview to Card. Mauro Piacenza “Penitenciaría Apostólica: fuero interno e inviolabilidad del sigilo sacramental”, *Vatican News*, 1 July 2019 [accessed 02.02.2021] <https://www.vaticannews.va/es/vaticano/news/2019-07/penitenciaría-apostólica-foro-interno-sigilo-sacramental.html>.

penitent, once the sacrament is celebrated, does not have the power to release the confessor from the duty of secrecy, because this duty comes directly from God. And third, secret communications, as well as so-called «professional secrets», differ from those of the internal, sacramental, and extra-sacramental forums.

3.3. Nature and limits of the seal of confession

The Note from the Apostolic Penitentiary invites us to reflect on the foundations of the seal of confession. For this purpose, natural law grounds may be taken into consideration: the good reputation of the faithful, the freedom of the Church in the development of its spiritual mission before the possible invasion of political power, consistent protection for a relationship analogous to that of certain professions (medical, legal), and so forth.⁴⁴

However, the Note itself places us on the ground of the revealed divine law, which connects with the argument of Thomas Aquinas.⁴⁵ Aquinas affirms that the confession by which an individual submits to the priest is a sign of the interior confession by which that individual submits to God. But God, explains Aquinas, conceals the sin of the man who humbles himself through penance: it is fitting for this to be signified in this sacrament. For this reason, the sacrament—he continues—imposes the obligation of secrecy and whoever misses this secret misses the sacrament. Secrecy is also justified by the fact that the faithful move more easily to confess their sins and manifest them with simplicity if there is secrecy. It is not true—writes the Angelic Doctor—that the seal of confession is against charity, since charity does not require any to remedy an unknown sin and what is known under the seal of confession is as if it were ignored, even though it is known as representative of God, yet is unknown as a private person. However—he adds—in such cases the possible remedy to sin must be sought without revealing the confession; for example, by admonishing the penitents, ensuring that others do not follow the bad example or advising the prelate that he must monitor their faithful more diligently, but in a manner that neither by his words nor by his conduct the confessor gives occasion to discover the penitent. Just as the precept of confession cannot be altered by man, secrecy cannot be dispensed by any human authority. No one, he goes so

⁴⁴ R. T. KENNEDY, *State protection of confessional secrecy in the United States of America*, Pontificia Universitas Lateranensis, Romae, 1975, pp. 3-15.

⁴⁵ TOMÁS DE AQUINO, *Summa Theologiae*, Suppl. Q. 11 aa. 1-5.

far as to affirm, is cited as a witness except as a man; for the same reason he can swear without damage to his conscience that he is ignorant of what he knows only as a minister of God. Aquinas also indicates that when justice is in danger, what was heard in confession should not be revealed if it is also known otherwise, avoiding scandal as much as possible. In short, Thomas Aquinas links the seal to the very divine nature of the sacrament. From there derives both the mandatory nature of secrecy and its unavailability and non-derogability, even in extreme cases.

In reconsidering the argumentation of the Note of the Apostolic Penitentiary, it should be noted that the seal is not only a guarantee of the normal development of an act of worship, but is also part of the «very nature of the sacrament»; that is why the Church «declares» it (positive divine law), not «establishes» it (ecclesiastical or canonical-positive law).⁴⁶ Objectively, the seal is an intrinsic characteristic of one of the sacraments of the Catholic Church. Consequently and subjectively, it is the confessor's duty to keep a full reservation of what has been heard.⁴⁷ Comparing it with the instrumental nature of secrecy in other canonical relationships and institutions (making the *ius connubii* effective through secret marriage, can. 1131; protecting professional or family relationships in the canonical procedure, can. 1548 §2; guaranteeing independence in the appointment of bishops, can. 377 §2; preserving charity concerning the privacy of individuals, can. 645 §4), the seal of confession not only protects concomitant and concurrent legal rights but also identifies the sacred character of the penance itself.

Canon lawyers have indeed tried to decide whether the secrecy of confession could be suspended under certain conditions. It has been sustained that if the penitent releases the confessor from the duty of secrecy, the confessor is exempted⁴⁸; or that the extra-sacramental

⁴⁶ «Catechismus Catholicae Ecclesiae», n. 1467. *Perspectis sanctimonia et magnitudine huius ministerii et observantia personis debita, Ecclesia declarat omnes sacerdotes qui confessiones audiunt, obligatos esse ad secretum absolutum relate ad peccata quae eorum poenitentes illis sint confessi, sub poenis severissimis. Neque possunt usum facere cognitionum quas illis confessio praeberit circa poenitentium vitam. Hoc secretum, quod exceptiones non admittit, «sigillum sacramentale» appellatur, quia id quod poenitens sacerdoti manifestavit, manet a sacramento «sigillatum».*

⁴⁷ R. PALOMINO LOZANO, "Secreto", in *Diccionario General de Derecho Canónico*, vol. VII, Aranzadi, Cizur Menor (Navarra), 2012, pp. 173-174.

⁴⁸ G. J. ZUBACZ, *The sacramental seal of confession from the Canadian civil law perspective* (doctoral dissertation), Saint Paul University, Ottawa, Canada, 2008, pp.

private conversation with the priest in which the penitent repeats everything said within the confession situates the content in a different context in which the obligation disappears.⁴⁹ However, taking into account the intrinsic link of the seal with the sacrament (not of the sigil with the penitent's privacy, as might be deduced from can. 983 «quare nefas est [...] prodere paenitentem» or from can. 984 «cum paenitentis gravamine») it must be concluded that the penitent cannot dispense the confessor from their stringent duty.⁵⁰

Be that as it may, even if it is considered lawful for the priest to testify in a civil trial at the request of the penitent, this leaves intact—in my opinion—the moral entitlement of the confessor to refrain from testifying if he conscientiously considers that he cannot do it due to the damage to the sacrament it may cause, or to any harm to third parties that his action may provoke.

4. Fundamental rights and legal interests at stake

Once we have had the opportunity to summarize the concept, history, and nature of the seal of confession, it is time to explore the legal interests and fundamental rights that come into play in the regulation or legal modeling of the religious communications privilege, a right that encompasses a spectrum of communications of a religious nature—the seal of confession among them.

The religious communications privilege is an exception to a general principle. This principle associates justice with the truth. Governments and their authorities seek, for the common good, to identify the truth of the facts to do justice and to allocate rights and obligations, sanctions, or benefits. Consequently, the disclosure and knowledge of the truth are crucial, both in civil and criminal proceedings, as well as in police or administrative investigations. To this aim, the law establishes the duty to denounce or report to the authorities in their investigations, or to testify

68-69 [accessed 04.07.2019]
<https://ruor.uottawa.ca/bitstream/10393/29803/1/NR52340.PDF>.

⁴⁹ G. J. ZUBACZ, *The sacramental seal of confession from the Canadian civil law perspective*, pp. 81-82.

⁵⁰ D. CITO, “Sigilo sacramental”, p. 308. It is important to underline this because secular law experts may hold that if the penitent asks the confessor to testify, there is no harm to the penitent and there would be no violation of secrecy. C. DONZE, “Breaking the Seal of Confession: Examining the Constitutionality of the Clergy-Penitent Privilege in Mandatory Reporting Law”, *Louisiana Law Review*, vol. 78, 1, 2018, p. 306.

the truth before the courts of justice.⁵¹ This duty appears in different specific norms and rules, such as those that oblige the witness to tell the truth,⁵² to answer all relevant cross-examination questions,⁵³ or to report possible crimes, past or future, of which someone is aware.⁵⁴

However, justice may demand exceptions to honor other interests, principles, or rights that differ from the search for the truth. Some of these interests lie in the judicial system itself (concerning the professional secrecy that links lawyer and client). Others are based on social values of special esteem (the deontology of certain professions or their normal development, as is the case of the health professions). And, finally, others are requirements of fundamental rights and freedoms, such as the fundamental right to personal and family privacy (the exemption from the duty to testify or report family members) or the fundamental right to religious freedom (the religious communications privilege).

As it is easy to conclude, the right to privacy and the right to religious freedom simultaneously converge in ministerial secrecy. Confidentiality protects privacy and at the same time facilitates the normal development of the relationship. Without confidentiality, the relationship could hardly develop in the expected atmosphere and could scarcely fulfil its purpose. Legal protection of ministerial secrecy based on the right to privacy protects mainly the faithful or penitent, not the minister of religion. Consequently, the former may lift the duty of secrecy, and the latter may find himself in the position from which the general principle starts, which

⁵¹ «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.

⁵² Ley de Enjuiciamiento civil española, Artículo 365. 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; Codice de Procedura Penale Artículo 198. 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”.

⁵³ M.N. HOWARD, P. CRANE, D. HOCHBERG, *Phipson on evidence*, 14th ed., Sweet & Maxwell, London, 1990, p. 242.

⁵⁴ Ley de Enjuiciamiento criminal española, Artículo 262. Los que por razón de sus cargos, profesiones u oficios tuvieren noticia de algún delito público, estarán obligados a denunciarlo inmediatamente al 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 tratare de un delito flagrante. Los que no cumplieren esta obligación incurrirán en la multa señalada en el artículo 259, que se impondrá disciplinariamente.

is not to keep silent but to reveal the truth. This final result is not unthinkable taking into account the legal configuration of the matter in countries of the Anglo-American legal tradition.⁵⁵

As pointed out earlier, religious freedom also converges in the religious communications privilege, shaping its foundation in full. We have considered religious freedom as a specific foundation of the religious communications privilege before, but a more nuanced exposition is subsequently detailed.

Let us remember, first of all, that freedom of thought, conscience, and religion includes the right to manifest, either alone or in a community with others, and in public or private, religion or beliefs through teaching, worship, and observance (this is recognized by article 18 of the Universal Declaration of Human Rights of 1948). Justifying the protection of ministerial secrecy on this fundamental right is not only possible but remains consistent. Indeed, to observe religious freedom fully and satisfactorily, respecting the specific patterns of religious practice and observance is needed. In the case of the sacrament of penance, secrecy is an essential characteristic. If the confidential religious communication would be compulsorily broken before the authorities of the state or before the courts of justice, then it is apparent that laws that command such violation would become a serious obstacle (if not an open infringement) of the free practice of religion. Furthermore, if ministerial secrecy were not recognized in the secular sphere, then it would be a deterrent of the adherence of believers to their religion and, ultimately, a negative effect on certain religious groups.

It is also interesting to note, secondly, that in the hypothetical conflict between the duty of the minister of religion to appear in court and testify, on the one hand, and the duty to remain silent (as prescribed by religious law) on the other, we find the typical dilemma of religious conscientious objection,⁵⁶ which is considered a phenomenon worthy of careful consideration.

⁵⁵ DONNA KRIER IOPPOLO, "Civil Law and Confidentiality", *Confidentiality in the United States.- A Legal and Canonical Study*, Canon Law Society of America, Washington D.C., 1988, p. 31-32.

⁵⁶ This is how the North American law describes and analyzes it in *The People v. Phillips*, 1 *Western Law Journal* 109 (1843), reproduced in *The Catholic Lawyer*, vol. I (1955), pp. 199-209: «After carefully examining this subject, we are of opinion that such a witness ought not to be compelled to answer. The benevolent and just principles of the common law, guard with the most scrupulous circumspection, against

Third, this conflict between a secular duty and a religious one highlights religious autonomy. Religious autonomy is part of the fundamental right to religious freedom. It means the right of the church, confession, or religious community to manifest beliefs institutionally, through self-government (*ad intra*) and the expression of its own identity (*ad extra*), even against state regulatory requirements. Religious autonomy is, for example, the right to select one's leaders, define one's doctrines without external intervention, resolve one's disputes or conflicts, and direct one's institutions.⁵⁷ A peculiar form of expression of religious autonomy in Spanish law is the so-called religious groups' «safeguard clauses of religious identity and their character» recognized in article 6.1 of the Organic Law of Religious Freedom. When secular law exempts one from the duty to testify or report the content of communications that fall under the religious communications privilege, it generates a special rule that gives priority to the characteristics of a phenomenon of a confessional legal order (duty not to reveal) concerning the demands that this same phenomenon has in the secular law itself (duty to reveal).

In practice, this special rule may follow two basic patterns. One is the «reinforcement» of the secrecy duty, excluding before governmental authorities or judges any type of report or testimony made by ministers of religion, who become unqualified/incompetent to report or to testify. The other comprises a generic rule that guarantees the minister of religion the right to abstain from the duty to testify or report; however, if

temptations to perjury, and against a violation of moral feeling; and what greater inducement can there be for the perpetration of this offence, than placing a man between Scylla and Charybdis, and in such an awful dilemma that he must either violate his oath, or proclaim his infamy in the face of the day, and in presence of a scoffing multitude? And is there not something due to the feelings of human nature, which revolt with horror at an avowal that must exclude the witness from the pale of decent society, and subject him to that degradation which is a frequently the cause as the consequences of crime? (...) It cannot therefore, for a moment be believed, that the mild and just principles of the common Law would place the witness in such a dreadful predicament; in such a horrible dilemma, between perjury and false swearing: If he tells the truth he violates his ecclesiastical oath — If he prevaricates he violates his judicial oath — Whether he lies, or whether he testifies the truth he is wicked, and it is impossible for him to act without acting against the laws of rectitude and the light of conscience» (p. 201-203). This same argument, albeit in a different legal tradition, is followed by J. CARBONNIER, *Derecho Flexible* (transl. L. DIEZ-PICAZO), Tecnos, Madrid (1974), p. 27.

⁵⁷ W. COLE DURHAM, R. SMITH, “§ 5:1. Defining church autonomy”, *Religious Organizations and the Law*, Westlaw, 2020.

the minister of religion reports or testifies, the statement made is valid. This model is, in my view, more congruent with state neutrality.

The two previous models appear both in unilateral state legal rules and in concordats or agreements between the state and religious groups. The inclusion of clauses of religious communications privilege in concordats or agreements plays a double role: prevent possible collisions between secular and religious law as a *secundum legem* solution to eventual problems of conscientious objection to apparently neutral laws, and satisfying the real legal needs posed by certain religious groups—not necessarily all—in terms of religious freedom and autonomy.

Next, Spanish regulations on the religious communications privilege are expounded.

5. Religious communications privilege in Spanish law

In Spanish law, the regulation of the religious communications privilege results from both bilateral-agreed and unilateral rules. Part of this set of rules arose in legal and political circumstances that differ from those set out in the Spanish Constitution of 1978. This Constitution imprints on previous rules a well-determined orientation. The constitutional articles that guide regulations on the religious communications privilege are, mainly, article 16 (freedom of religion),⁵⁸ 18 (right to privacy),⁵⁹ 24.2 (professional and familiar communications privilege),⁶⁰ 53 (special legal

⁵⁸ Spanish Constitution of 1978, Official Gazette (hereinafter BOE) no. 311, 29 December 1978. Article 16. 1. Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law. 2. No one may be compelled to make statements regarding his religion, beliefs or ideologies. 3. There shall be no State religion. The public authorities shall take the religious beliefs of Spanish society into account and shall consequently maintain appropriate cooperation with the Catholic Church and the other confessions.

⁵⁹ Article 18.1. The right to honor, to personal and family privacy and to the own image is guaranteed. 2. The home is inviolable. No entry or search may be made without the consent of the occupant or a legal warrant, except in cases of flagrante delicto. 3. Secrecy of communications is guaranteed, particularly of postal, telegraphic and telephonic communications, except in the event of a court order to the contrary. 4. The law shall limit the use of data processing in order to guarantee the honor and personal and family privacy of citizens and the full exercise of their rights.

⁶⁰ Article 24. 2. (...) The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences.

protection of fundamental rights),⁶¹ and 10.2 (fundamental rights interpretive rules).⁶²

5.1. Bilateral agreed rules on the religious communications privilege

In 1976, the Spanish government and the Holy See signed an agreement whose primary purpose was the settlement of historic disputes about the election of bishops and the so-called «privilegio del fuero» (the remnants of a clergy jurisdictional privilege). This agreement contains the following provision:

«Article II.3. In no case may clerics and members of religious orders be required by judges or other Authorities to give information on persons or matters of which they have had knowledge by reason of their ministry».⁶³

This is a provision for the protection of Catholic religious communications, almost identical to that contained in Article XVI of the Spanish concordat of 1953.⁶⁴ The literal wording of the text («In no case may clerics and members of religious orders be required») makes it clear that it grants an exemption, not a prohibition to testify; this is a pattern

⁶¹ Article 53. 1. The rights and liberties recognized in Chapter Two of the present Title are binding for all public authorities. The exercise of such rights and liberties, which shall be protected in accordance with the provisions of Article 161, 1a), may be regulated only by law which shall, in any case, respect their essential content. 2. Any citizen may assert his or her claim to the protect the liberties and rights recognized in Article 14 and in Section 1 of Chapter Two, by means of a preferential and summary procedure in the ordinary courts and, when appropriate, by submitting an individual appeal for protection («recurso de amparo») to the Constitutional Court. This latter procedure shall be applicable to conscientious objection as recognized in Article 30. 3. The substantive legislation, judicial practice and actions of the public authorities shall be based on the recognition, respect and protection of the principles recognized in Chapter Three. The latter may only be invoked in the ordinary courts in the context of the legal provisions by which they are developed.

⁶² Article 10. 2. The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain.

⁶³ Instrumento de Ratificación de España al Acuerdo entre la Santa Sede y el Estado Español, hecho en la Ciudad del Vaticano el 28 de julio de 1976, BOE núm. 230, de 24 de septiembre de 1976.

⁶⁴ Concordato entre España y la Santa Sede, BOE núm. 292, de 19 de octubre de 1953. Artículo XVI.7. Los clérigos y los religiosos podrán ser citados como testigos ante los Tribunales del Estado; pero si se tratase de juicios criminales por delitos a los que la ley señale penas graves deberá pedirse la licencia del Ordinario del lugar en que se instruye el proceso. Sin embargo, en ningún caso podrán ser requeridos, por los Magistrados ni por otras Autoridades, a dar informaciones sobre personas o materias de las que hayan tenido conocimiento por razón del Sagrado Ministerio.

that brings religious communications privilege closer to the legal treatment of conscientious objections.⁶⁵ The protective scope of the agreed precept surpasses the seal of confession, which is of course protected, to extend to spiritual communications other than the sacrament of penance.⁶⁶ The subjective scope includes both clergy and members of religious orders. The definition of these categories of individuals must be construed by reference to canonical rules.⁶⁷ Regarding the objective scope, the norm intends it to apply not only to the legal procedure but also to other fields such as administrative law, citizen security protocols, etc. Afterwards, the Agreement on legal affairs between the Spanish government and the Holy See, of January 3, 1979, did not introduce any new provision regarding the religious communications privilege, so it can be considered that Article II.3 of the 1976 Agreement is the main legal rule in this matter.

Sixteen years before the enactment of the 1976 Agreement, the religious communications privilege returned to the agreed Spanish regulations. We will subsequently discuss how.

According to Article 81.1 of the Spanish Constitution of 1978,⁶⁸ an Organic Law⁶⁹ developed the fundamental right to religious freedom in 1980.⁷⁰ This Organic Law «kept the spirit of consensus that prevailed in the political forces during the elaboration of the Constitution and was approved by an overwhelming majority of the Congress, indeed almost unanimously. This fact was indicative of the acceptance of the new constitutional system of church-state relations».⁷¹ Article 7 of the Organic Law of Religious Freedom provided that the state could enact

⁶⁵ R. NAVARRO-VALLS; J. MARTÍNEZ-TORRÓN, *Conflictos entre conciencia y ley: las objeciones de conciencia*, 2. ed., rev. y ampliada, Iustel, Madrid, 2012, pp. 518-519.

⁶⁶ J.M. TORNE Y GARCÍA, “La declaración testifical de clérigos y religiosos en el proceso penal español”, *Revista de Derecho Procesal*, I enero-marzo (1967), p. 140.

⁶⁷ V. MORENO CATENA, *El secreto en la prueba de testigos del proceso penal*, Montecorvo, Madrid, 1980, p. 256.

⁶⁸ Article 81. 1. Organic laws are those relating to the development of fundamental rights and public liberties, those which establish Statutes of Autonomy and the general electoral system, and other laws provided in the Constitution.

⁶⁹ A.-C. ÁLVAREZ-CORTINA; M. RODRÍGUEZ BLANCO (EDS.), *La libertad religiosa en España: XXV años de vigencia de la ley orgánica 7/1980, de 5 de julio (comentarios a su articulado)*, Editorial Comares, Granada, 2006; M. RODRÍGUEZ BLANCO; M. GONZÁLEZ SÁNCHEZ (EDS.), “40º aniversario de la Ley Orgánica de Libertad Religiosa”, *Derecho y Religión*, vol. 25, 2020.

⁷⁰ Ley Orgánica 7/1980, de 5 de julio, de Libertad Religiosa, BOE núm. 177, de 24 de julio de 1980.

⁷¹ J. MARTÍNEZ-TORRÓN, *State and Religion in Spain*, Nomos, 2020, pp. 374-375.

Cooperation Agreements with Churches, Confessions and religious Communities registered in the Registry of Religious Entities, if those religious groups have had gained, due to their scope and number of believers, well-known roots («notorio arraigo») in Spain. Thus, on November 10, 1992, the Parliament approved the Cooperation Agreements of the Spanish state with the Federation of Evangelical Religious Entities of Spain, with the Federation of Jewish Communities of Spain, and with the Islamic Commission of Spain.⁷² These are three «mirror agreements» due to their similarities (namely the subjects dealt with and the terminology used) and because they follow the path of the topics agreed upon long before with the Catholic Church, which at this point behaves as a pattern of cooperative legal treatment.⁷³ The three agreements included clauses related to the religious communications privilege, in articles 3.2 of each of the three laws, as a specific aspect of the legal regime of ministers of religion: these individuals will not be obliged to testify about facts that have been revealed to them in the exercise of functions of worship or religious assistance.

Strikingly, when dealing with this topic the Agreement with the Islamic Commission of Spain follows a different wording from the other two, specifying «in the legally established terms for professional secrecy». This equation to professional secrecy may distort the specific nature of the religious communications privilege or at least distance the regulation of one of the agreements from the other two for no well-founded reason. Perhaps what is emphasized with this singular addition —«in the legally established terms for professional secrecy»— is that the Islamic religious secret (and likely the Jewish religious secret as well) is not founded on a requirement of a religious-ritual nature, but rather on the right to privacy.

As to the individual entitled, the Agreements establish a legal concept of the minister of religion that adds, to the religious requirement established by each group, a formal requirement of accreditation. For this reason, the religious communications privilege recognized in the Agreements protects ministers of religion who comply with state legal rules (Article 3.2 refers to 3.1)⁷⁴, the confessional notion not being sufficient. By

⁷² Leyes 24, 25 y 26 de 10 de noviembre de 1992, BOE núm. 272, de 12 de noviembre de 1992.

⁷³ P. J. VILADRICH, “Los principios informadores del Derecho eclesiástico español”, in *Derecho eclesiástico del Estado español*, 1ª ed., Eunsa, Pamplona, 1980, pp. 292-294.

⁷⁴ Ley 26/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Comisión Islámica de España, BOE núm. 272, de 12/11/1992, artículo 3.1. A los efectos legales, son dirigentes religiosos islámicos e Imanes de las

contrast, the 1976 Agreement with the Holy See, as described previously, offers a different shape without these additional requirements.

From the point of view of matters protected by secrecy, the three agreements protect confidentiality concerning «facts that have been revealed to them in the exercise of functions of worship or religious assistance». There is no limitation to a specific context or to a specific act of worship, but instead to the type of relationship; it must have a religious content accompanied by the expectation of confidentiality.

The formal scope of protection is loosely defined by the term «declare». I do not think that it is an exclusive reference to the witness statement, but it could well embrace any manifestation or explanation required by the state authorities.

The bilaterally agreed regulations with the three minority religious groups, therefore, protect ministerial secrecy but add dissonant elements, such as the requirement of accreditation to protect ministers of religion and the assimilation of religious communications to Islamic ministers of religion to professional secrecy.

Comunidades Islámicas las personas físicas dedicadas, con carácter estable, a la dirección de las Comunidades a que se refiere el artículo 1 del presente Acuerdo, a la dirección de la oración, formación y asistencia religiosa islámica y acrediten el cumplimiento de estos requisitos mediante certificación expedida por la Comunidad a que pertenezcan, con la conformidad de la «Comisión Islámica de España». Ley 24/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Entidades Religiosas Evangélicas de España, artículo 3.1. A todos los efectos legales, son ministros de culto de las Iglesias pertenecientes a la FEREDE las personas físicas que estén dedicadas, con carácter estable, a las funciones de culto o asistencia religiosa y acrediten el cumplimiento de estos requisitos, mediante certificación expedida por la Iglesia respectiva, con la conformidad de la Comisión Permanente de la FEREDE. Ley 25/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Comunidades Judías de España, artículo 3.1. A todos los efectos legales son ministros de culto de las Comunidades pertenecientes a la Federación de Comunidades Judías de España las personas físicas que, hallándose en posesión de la titulación de Rabino, desempeñen sus funciones religiosas con carácter estable y permanente y acrediten el cumplimiento de estos requisitos mediante certificación expedida por la Comunidad a que pertenezcan, con el visado de la Secretaría General de la FCJE. Esta certificación de la FCJE podrá ser incorporada al Registro de Entidades Religiosas.

5.2. *Internal non-agreed legal rules*

5.2.1. Procedural law

In expounding procedural regulations, we shall start with the civil procedure. According to Article 361 of the Spanish Law of Civil Procedure, ministers of religion are not excluded from being suitable witnesses.⁷⁵ Article 371.1 provides that the witness when due to their status or profession must keep secrecy regarding the facts on which they are questioned will explain this reasonably and the court, considering the basis for that refusal to testify, will resolve what is appropriate in law by a judicial order. If the witness is released from testifying, this exemption will be noted in the record.

As we can see, Article 371.1 does not mention ministers of religion, lawyers, doctors, or journalists;⁷⁶ any reason of religious or professional duty, if assessed and accepted by the court, could release an individual from testimony. According to this scheme, religious communications privilege is recognized on a case-by-case basis. Such a scheme seems to be beneficial in theory for three reasons. First, because it grants the exemption only to those who are required to keep secrecy due to disciplinary requirements, regulations, etc., of their own community, church, or religious group. Second, because it does not add additional requirements, such as the registration of the religious group in the Registry of Religious Entities,⁷⁷ the declaration of well-known roots («notorio arraigo») in Spain,⁷⁸ or the pre-existence of a cooperation agreement. And third, unlike the regulation of religious communications privilege included in the cooperation agreements of 1992, the Civil Procedure Law system does not condition the exemption to other

⁷⁵ Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, BOE núm. 7, de 08/01/2000, Artículo 361. Idoneidad para ser testigos. Podrán ser testigos todas las personas, salvo las que se hallen permanentemente privadas de razón o del uso de sentidos respecto de hechos sobre los que únicamente quepa tener conocimiento por dichos sentidos. Los menores de catorce años podrán declarar como testigos si, a juicio del tribunal, poseen el discernimiento necesario para conocer y para declarar verazmente.

⁷⁶ Artículo 371. Testigos con deber de guardar secreto. 1. Cuando, por su estado o profesión, el testigo tenga el deber de guardar secreto respecto de hechos por los que se le interroga, lo manifestará razonadamente y el tribunal, considerando el fundamento de la negativa a declarar, resolverá, mediante providencia, lo que proceda en Derecho. Si el testigo quedare liberado de responder, se hará constar así en el acta.

⁷⁷ Real Decreto 594/2015, de 3 de julio, por el que se regula el Registro de Entidades Religiosas, BOE núm. 183, de 1 de agosto de 2015.

⁷⁸ Real Decreto 593/2015, de 3 de julio, por el que se regula la declaración de notorio arraigo de las confesiones religiosas en España, BOE núm. 183, de 1 de agosto de 2015.

requisites than those alleged to the judge or the court. However, it is no less true that this generic procedural law exemption system could lend itself to restrictive interpretations, either due to ignorance of the religious requirements or because public interest (namely compulsory testimony to acquire truth) could always be considered more important than the value of the privilege. This interpretation might not be improbable in secularized countries such as Spain since, as noted at the beginning, utilitarian reasoning immediately finds more weight to reveal the truth in court than to respect confessional rules that might seem regressive and obscurantist.

Article 262 of Spanish Law of Criminal Procedure regulates the reporting duty of any individual when aware of any criminal conduct.⁷⁹ Article 263 provides an exemption from that duty «to dissident ecclesiastics and ministers of religion regarding the news that has been revealed to them in the exercise of the functions of their ministry».⁸⁰ Besides, Article 417 of the same law regulates the protection of ministers of religion in testimony, establishing an exemption without imposing a duty of silence.⁸¹ The wording «dissident ministers of religion» deserves attention, «dissidents» should be interpreted —integrating it with article 11 of the Spanish Constitution of 1876— as belonging to religions other than Catholic, but not just Christian religions.⁸² In the current regime, the extension of protection can be considered absolute, and even more

⁷⁹ Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal, BOE núm. 260, de 17/09/1882, Artículo 262. Los que por razón de sus cargos, profesiones u oficios tuvieren noticia de algún delito público, estarán obligados a denunciarlo inmediatamente al 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 tratare de un delito flagrante. Los que no cumplieren esta obligación incurrirán en la multa señalada en el artículo 259, que se impondrá disciplinariamente.

⁸⁰ Artículo 263. La obligación impuesta en el párrafo primero del art. anterior no comprenderá a los Abogados ni a los Procuradores respecto de las instrucciones o explicaciones que recibieren de sus clientes. Tampoco comprenderá a los eclesiásticos y ministros de cultos disidentes respecto de las noticias que se les hubieren revelado en el ejercicio de las funciones de su ministerio.

⁸¹ Artículo 417. No podrán ser obligados a declarar como testigos: 1.º Los eclesiásticos y ministros de los cultos disidentes, sobre los hechos que les fueren revelados en el ejercicio de las funciones de su ministerio. 2.º Los funcionarios públicos, tanto civiles como militares, de cualquiera clase que sean, cuando no pudieren declarar sin violar el secreto que por razón de sus cargos estuviesen obligados a guardar, o cuando, procediendo en virtud de obediencia debida, no fueren autorizados por su superior jerárquico para prestar declaración que se les pida. 3.º Los incapacitados física o moralmente.

⁸² V. MORENO CATENA, *El secreto en la prueba de testigos del proceso penal*, p. 258.

advantageous than that of the 1992 agreements previously explained. Paradoxically, the conjunction of bilateral and unilateral norms does not offer a unified concept of the minister of religion regarding the sources of definition: the concept of the minister of worship for Catholic clergy is determined by canon law; the concept for religious groups that enjoy the Agreements of Cooperation of 1992 is determined by the state based on that of each confession and group, and the concept of the minister of religion for religious groups without agreement does not have a specific legal definition, it leads to the appreciation of the criminal court or judges according to what each minister of religion is able to explain. This lack of a unified concept of a minister of religion is not the consequence of an explicit or implicit intention of the state to discriminate against minority religious groups, nor does it reveal the Catholic Church's subtle intention to achieve a privileged status, but instead is simply due to the lack of coordination and coherence between the different rules.

This lack of coordination and coherence could perhaps be solved in the next Spanish Law of Criminal Procedure, now a draft of the Ministry of Justice. However, the draft bill exhibits several problems.

Article 661 of the Draft Bill establishes that «[t]he ministers of religions recognized by the state may not be compelled to testify relating facts that have been entrusted to them in the exercise of the functions of their ministry for which they must keep secret». Religious communications privilege is envisaged in the draft bill as a subtype of professional secrecy because it is regulated in the same article as the privilege of lawyers, attorneys, doctors or health personnel, and translators or interpreters, and because the article is labeled with the introductory clause «Exemptions from the duty to testify due to professional secrecy».⁸³

Regarding the exemption to the duty to testify, the aforementioned article adds an interesting final clause: «Except for lawyers and solicitors, all

⁸³ Artículo 661. Exenciones a la obligación de declarar por razón de secreto profesional. 1. No podrán ser obligados a prestar testimonio: (...) 4.º. Los ministros de confesiones religiosas reconocidas por el Estado, sobre los hechos que les hayan sido confiados en el ejercicio de las funciones de su ministerio por las que deban guardar secreto. (...) Salvo los abogados y procuradores, todas las personas mencionadas estarán obligadas a prestar declaración cuando el titular del secreto les releve del deber de guardarlo. GOBIERNO DE ESPAÑA, MINISTERIO DE JUSTICIA, “Normas en tramitación”, [accessed 17.02.2021], <https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/210126%20ANTEPROYECTO%20LECRIM%202020%20INFORMACION%20PUBLICA%20%281%29.pdf>.

individuals mentioned will be obliged to give a statement when the holder of the secret relieves them of the duty to keep it». This clause places the Catholic priest in a difficult situation since canon law—as the Apostolic Penitentiary pointed out and has been recalled previously—does not exempt the priest from the duty of secrecy at the penitent's request. Hence, the text of the draft bill is in open contradiction with the fundamental right of religious freedom by subordinating the exemption to the will of the faithful or penitent, the holder of the secret. This serious injury is further increased since the exemption from the duty to report⁸⁴ regulated in the draft bill we are examining here is devised following the wording of this exemption from the duty to testify.⁸⁵

The military procedural law in article 135 exempts from the duty to report «ministers of religion concerning facts or liable individuals from which they know because of the exercise of their ministry».⁸⁶ For the exemption from the duty to testify, this law refers to the Law of Criminal Procedure.⁸⁷

⁸⁴ Anteproyecto de Ley de Enjuiciamiento Criminal (versión para información pública). Artículo 526. Obligación de denunciar. 1. Cualquier persona que haya presenciado la comisión de un delito perseguible de oficio deberá denunciarlo de inmediato ante la policía o ante el Ministerio Fiscal. 2. También están obligados a denunciar quienes por razón de su cargo, profesión u oficio tengan noticia de la perpetración de algún delito, aunque no lo hayan presenciado.

⁸⁵ Artículo 527. Exenciones a la obligación de denunciar. El deber de denunciar no comprenderá: (...) b) A quienes, de acuerdo con lo dispuesto en esta ley, estén exentos del deber de declarar por razón de secreto profesional respecto de los hechos de que se trate.

⁸⁶ Ley Orgánica 2/1989, de 13 de abril, Procesal Militar, BOE núm. 92, de 18 de abril de 1989. Artículo 135. La obligación establecida en el artículo anterior no alcanzará: 1.º Al cónyuge del presunto culpable o persona ligada a éste por relación estable de convivencia afectiva. 2.º A los ascendientes, descendientes y colaterales hasta el segundo grado, inclusive, de consaguinidad o afinidad, salvo cuando haya obligación de dar parte militar. 3.º A los abogados y procuradores, respecto de las explicaciones o instrucciones que recibieran de sus clientes, aun en el caso de que no llegaran a encargarse de su representación o defensa. 4.º Al defensor militar, una vez nombrado respecto a su defendido. 5.º A los ministros de cultos religiosos, respecto de los hechos o a las personas responsables de que tuvieren conocimiento en razón del ejercicio de su ministerio.

⁸⁷ Artículo 170. Están exentos de la obligación de declarar el Rey, la Reina, sus respectivos consortes, el Príncipe de Asturias y los Regentes del Reino. También están exentos del deber de declarar los Agentes diplomáticos acreditados en España, en todo caso, y el personal administrativo, técnico o de servicio de las misiones diplomáticas, así como sus familiares, si concurren en ellos los requisitos exigidos en los tratados, y todas las demás personas a las que la Ley de Enjuiciamiento Criminal declara dispensadas o exentas de prestar declaración.

5.2.2. Criminal law and prison law

In the opinion of experts, the conduct of revealing secrets by the minister of religion is not included in paragraph 1 of Article 199 of the Spanish Penal Code:⁸⁸ «Whoever reveals the secrets of others, of which he knows because of his trade or labor relations, will be punished with a prison sentence of one to three years and a fine of six to twelve months». The reason for this opinion is that «an interpretation that extends the concept of professional to these categories of individuals is not possible».⁸⁹ Article 197 of the same code penalizes the disclosure of confidential communications made by a third party who intercepts the conversation between the minister of religion and the faithful, introducing aggravations of the penalty when specific circumstances concur, such as the profit aim or the content of the conversation disclosed (personal data that reveals ideology, religion, beliefs, health, racial origin or sexual life).⁹⁰

Spanish legislation regulates the communications of persons deprived of liberty in prisons, including the communications of ministers of religion

⁸⁸ Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, BOE núm. 281, de 24 de noviembre de 1995.

⁸⁹ R. GARCÍA ALBERO, “Comentario al artículo 199 del Código Penal”, in *Comentarios al Código Penal (Tomo II)*, Aranzadi, 2008, BIB 2008\4062, 3.4. Problemática particular de los eclesiásticos y ministros de cultos.

⁹⁰ Artículo 197. 1. El que, para descubrir los secretos o vulnerar la intimidad de otro, sin su consentimiento, se apodere de sus papeles, cartas, mensajes de correo electrónico o cualesquiera otros documentos o efectos personales, intercepte sus telecomunicaciones o utilice artificios técnicos de escucha, transmisión, grabación o reproducción del sonido o de la imagen, o de cualquier otra señal de comunicación, será castigado con las penas de prisión de uno a cuatro años y multa de doce a veinticuatro meses. (...) 5. Igualmente, cuando los hechos descritos en los apartados anteriores afecten a datos de carácter personal que revelen la ideología, religión, creencias, salud, origen racial o vida sexual, o la víctima fuere un menor de edad o una persona con discapacidad necesitada de especial protección, se impondrán las penas previstas en su mitad superior. 6. Si los hechos se realizan con fines lucrativos, se impondrán las penas respectivamente previstas en los apartados 1 al 4 de este artículo en su mitad superior. Si además afectan a datos de los mencionados en el apartado anterior, la pena a imponer será la de prisión de cuatro a siete años.

with inmates.⁹¹ The law provides that these communications are subject to rules of intervention.⁹²

In a rare decision on the religious communications privilege, the Spanish Supreme Court ruled in a case concerning stolen jewels that, after the sacramental penance of the thief, were delivered to the confessor.⁹³ The appellant, in that case the thief, requested the testimony of the parish priest, but the priest did not appear, weakening—in the appellant's opinion—the chance of the spontaneous regret legal assessment. The Supreme Court held: «The rejection [of the appeal] is imposed by virtue of the following reasons: a) because article 707 in relation to 417.1º, both of the Criminal Procedure Law, establishes that they cannot be compelled to testify the priests 'on the facts that are revealed to them in the exercise of the functions of their ministry', and although the accused admitted his intervention 'on the occasion of other judicial proceedings', this would not exempt the Catholic priest from the duty of secrecy without the express authorization of the penitent, which cannot be presumed; b) that the confession of the facts in the sacrament of penance is not relevant for the purposes and effects of the lessening of punishment due to spontaneous repentance that must have expression in the confession before the Authorities in charge of the investigation and punishment of the crimes [...]» Therefore, the court maintained the non-existence of an implicit waiver and, at the same time, pointed out that the legal protection of religious communications does not depend on the private or public knowledge of the confessed crime.

⁹¹ Ley Orgánica 1/1979, de 26 de septiembre, General Penitenciaria, BOE núm. 239, de 5 de octubre de 1979. Artículo 51.3. En los mismos departamentos podrán ser autorizados los internos a comunicar con profesionales acreditados en lo relacionado con su actividad, con los asistentes sociales y con sacerdotes o ministros de su religión, cuya presencia haya sido reclamada previamente. Estas comunicaciones podrán ser intervenidas en la forma que se establezca reglamentariamente.

⁹² Real Decreto 190/1996, de 9 de febrero, por el que se aprueba el Reglamento Penitenciario, BOE núm. 40, de 15 de febrero de 1996, Artículo 49.5. Los Notarios, Médicos, Ministros de Culto y otros profesionales acreditados, cuya presencia haya sido solicitada por algún interno por conducto de la Dirección del Establecimiento para la realización de las funciones propias de su respectiva profesión, podrán ser autorizados para comunicar con aquél en local apropiado.

⁹³ Sentencia del Tribunal Supremo 11 octubre 1990, STS 12988/1990 - ECLI: ES:TS:1990:12988.

6. Concluding remarks

To date, religious communications privilege in Spanish law has been a sound and protected rule. Its historical roots lie in the seal of the Catholic sacrament of penance, from which it has undergone a process of secularization until its merger with so-called professional secrets. However, such a merger does not do justice either to the foundation of the different secrets or to the legal interests and fundamental rights at stake. Under current Spanish regulations, religious communications privilege has two sources of legal protection: agreed bilateral rules and unilateral or non-agreed rules. Regarding the bilaterally agreed rules, the Agreement of Cooperation with the Islamic Commission of Spain is particularly striking; it seems to equate the religious communications privilege to professional secrecy in general. In projecting this issue to the future, the regulation of the religious communications privilege in the would-be Law of Criminal Procedure (now a draft bill) is more disconcerting —not to say harmful to the fundamental right of religious freedom. In light of this draft bill, it seems to me that it is consistent to conclude with the same idea with which this study began: in a secularized context, the seal of confession in particular and the religious communications privilege in general are subjected to a utilitarian or consequentialist debate in which the justification of a hypothetical socially valued good will always have more weight than the unconditional protection of an institution that, because of its unknown character, could be easily harmed.