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The Subjective Scope of the Norm Laid Down in Article 178 Section 2 of the Code of Criminal Procedure for Confession as Governed by the Law of the Roman Catholic Church

Introduction

The Polish legal system includes provisions concerned with the exercise of the right to freedom of conscience and religion. One of them is Article 178 Section 2 CCP[1]. It touches upon a matter that is very important for members of the Roman Catholic Church, but also very delicate, namely confession. The provision stipulates: "A minister[2] may not be examined in the capacity of a witness on facts communicated to him in confession".

Since the legislator refers in it to general terms common to many Churches and religious communities (such as "confession" and "minister"), the application of the absolute prohibition referred to in the said Article as to evidence produced during the performance of religious practices poses some interpretive difficulties[3]. In view of this problem, the author of this article has endeavoured to determine the subjective scope of the said provision as regards confession as governed by the law of the Roman Catholic Church.

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[1] CCP – *Code of Criminal Procedure Act of 6 June 1997* (Journal of Laws of 1997, No. 89, item 555, as amended). The article was translated by Małgorzata Wójcik.

[2] In this article, the term "minister" refers to church ministers and clerics of all Churches and religious associations. In very simplified terms, the equivalent of the term "minister" in the Code of Canon Law is the term "cleric". The term "minister" in the law of the Catholic Church, on the other hand, means a person entitled to celebrate a sacrament – e.g. the minister of the sacrament of penance. Each use of the word "minister" in this latter meaning will be noted.

[3] *Kodeks postępowania karnego*, Vol. 2. *Komentarz do art. 167–296*, R.A. Stefański, S. Zabłocki (ed.), Warszawa 2019, pp. 230–231; M. Tomkiewicz, *„Tajemnica spowiedzi" i „tajemnica duszpasterska" w procesie karnym*, „Prokuratura i Prawo" 2012, No. 2, pp. 50–51; M. Wielec, *Zakaz dowodowy tajemnicy spowiedzi w postępowaniu karnym*, Warszawa 2012, p. 324.

The concept of "minister" in the case-law and doctrine

In literature of the subject there is no doubt that the prohibition of examining ministers on knowledge obtained from confession refers to confession held in the Catholic Church[4]. Unfortunately, unlike other Polish legal acts or the CIC[5], neither the Criminal Code[6] nor the Code of Criminal Procedure specifies the referent of the term "minister"[7]. Considering that in the Polish legal system the criteria for defining this concept are not uniform and depend on the matter regulated by the legal acts which contain it, determination of the subjective scope of Article 178 Section 2 of the CCP belongs to the case-law and the doctrine[8].

In identifying the referents of the term "minister", it is helpful to apply the criteria of the concept of "minister" set out in the Resolution of the Supreme Court[9] of 6 May 1992 which concerns provisions on the general obligation to defend the Republic of Poland (*SC Resolution (7) of 6 May 1992* (*I KZP 1/91)*, "Orzecznictwo Sądu Najwyższego. Izba Karna i Izba Wojskowa" 7–8/1992, item 46, pp. 9–14 – hereinafter referred to as SC Resolution of 1992)[10]. It specifies that a minister is "a person belonging to the Church or a religious association who stands out from the general followers of a particular religion in that he has been designated to organize religious worship on a regular basis".

Even though these criteria are very general and do not contain a direct reference to the internal regulations of Churches or religious associations, they do not prevent an interpretation of Article 178 Section 2 CCP made by juxtaposing the content of the said Resolution with the internal laws of Churches or religious associations. This interpretation of the term "minister" was upheld by the SAC[11] in its judgment of 19 September 2000[12]. Referring to the SC

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[4] M. Rusinek, *Z problematyki zakazów dowodowych w postępowaniu karnym*, Warszawa 2019, p. 129; *Kodeks postępowania karnego*, Vol. 2..., p. 235.

[5] CIC – *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, pp. 1–317.

[6] CC – *Criminal Code Act of 6 June 1997* (Journal of Laws of 1997, No. 88, item 553, as amended).

[7] *Social Insurance System Act of 13 October 1998*, Art. 8 Sec. 13 (Journal of Laws of 1998, No. 137, item 887); can. 266 § 1 CIC.

[8] The criteria of the term "minister" in the case-law and the doctrine have been discussed at length in: T. Jakubiak, *Referents of the Term "Minister" under Article 178 Section 2 of the Code of Criminal Procedure in the Roman Catholic Church* – submitted for publication in „Zeszyty Prawnicze".

[9] Hereinafter referred to as SC.

[10] M. Rusinek, op. cit., p. 128; *Kodeks postępowania karnego*, Vol. 2..., p. 236; M. Jurzyk, *Ochrona spowiedzi w postępowaniu dowodowym a prawa penitenta i duchownego*, „Radca Prawny" 2004, No. 2, p. 72; M. Tomkiewicz, op. cit., p. 51.

[11] SAC – Supreme Administrative Court.

[12] SAC Judgement of 19 September 2000, III SA 1411/00.

Resolution of 1992, it stated that "the absence of a definition of the term 'minister' in the legislation concerning Churches and other religious associations requires a thorough examination of the principles of the functioning of the Church or religious association concerned in order to consider a particular person to be a minister".

The advisability of employing this procedure in the interpretation of Article 178 Section 2 CCP was explicitly pointed out by the SC in its judgment of 14 June 1937 (SC Judgment of 14.06.1937, I K 454/37, "Zbiór Orzeczeń Sądu Najwyższego. Orzeczenia Izby Karnej" 1/1938, item 11, pp. 18–20 – hereinafter: SC Judgment of 1937). It concerned Article 101a of the 1928 Code of Criminal Procedure which contained the same norm as Article 178 Section 2 CCP currently in force[13]. In its substantiation, the Court stated that "it is clear that its application [of the prohibition] should depend only on the internal regulations of the state-recognized religious denomination concerned which establish the institution of confession and the ministers authorized to hear it".

The interpretation of Article 178 Section 2 CCP made by referring the criteria of the term "minister" developed in the case-law to regulations of the Catholic Church does not violate the autonomy of the state and the Church[14]. It protects the Church from the state legislator's interference with the Church's authority to lay down the principles of divine worship[15].

Ministers pursuant to the CIC

In the Catholic Church, designation for permanent ministry is usually carried out on the basis of two acts of power: the power of orders and the power of jurisdiction. While in the case of some religious ministries, designation for their performance on the basis of only one act of power is insufficient for their validity (e.g. the sacrament of penance, confirmation), both acts nevertheless independently meet the criteria of the term "minister" laid down by the SC in the 1992 Resolution.

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[13] K.T. Boratyńska, *Świadkowie*, [in:] *Kodeks postępowania karnego. Komentarz*, A. Sakowicz (ed.), Warszawa 2018, p. 522; T. Grzegorczyk, *Kodeks postępowania karnego*, Vol. 1, Warszawa 2014, p. 614; L. Paprzycki, *Świadkowie*, [in:] *Kodeks postępowania karnego*, Vol. 1, L. Paprzycki (ed.), Warszawa 2013, p. 609; Z. Kwiatkowski, *Zakazy dowodowe w procesie karnym*, Kraków 2005, p. 171; B. Rakoczy, *Tajemnica spowiedzi w polskim postępowaniu cywilnym, karnym i administracyjnym*, „Przegląd Sądowy" 2003, No. 11–12, p. 128.

[14] *Act of 17 May 1989 on the guarantees of the freedom of conscience and confession*, Article 1 Section 3, Article 2 Section 2 (Journal of Laws of 2017, item 1153, as amended); M. Pietrzak, *Prawo wyznaniowe*, Warszawa 2013, pp. 252–253.

[15] *Concordat between the Holy See and the Republic of Poland, signed in Warsaw on 28 July 1993,* Articles 5, 8 Section 1 (Journal of Laws of 1998, No. 51, item 318).

In view of the above, it may certainly be assumed that the group of persons covered by the prohibition of evidence includes presbyters and bishops. Pursuant to cann. 965 and 966 CIC, they are ministers of the sacrament of penance and satisfy all the criteria (interpreted literally) of the SC Judgment of 1937 and the SC Resolution of 1992 for being considered "ministers" within the meaning of Article 178 Section 2 CCP[16].

Another group in the Roman Catholic Church who should also be considered as referents of the term "minister" within the meaning of Art. 178 Section 2 CCP are deacons. In can. 266 § 1 CIC they are included in clerics (ministers) together with presbyters and bishops[17]. Moreover, by virtue of the power of orders, they are permanently designated for the exercise of divine worship[18]. Since they also satisfy the condition laid down in the SC Resolution of 1992, it seems legitimate to include them as well in the subjective scope of the prohibition of admitting evidence from information obtained by a minister during confession. Invalidity of the sacrament of penance performed by deacons, in accordance with the laws of the Catholic Church, should not affect their eligibility for inclusion in the referents of the term "minster" in Article 178 Section 2 CCP, given that the state and the Church are autonomous, and that state courts are not competent to assess the validity of sacraments celebrated in Churches and religious associations[19].

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[16] *Kodeks postępowania karnego*, Vol. 2. *Komentarz do art. 167–296*, R.A. Stefański, S. Zabłocki (ed.), Warszawa 2019, pp. 230–231; D. Szumiło-Kulczycka, *Komentarz do art. 178*, [in:] *Kodeks postępowania karnego. Komentarz orzeczniczy*, K. Dudka, H. Paluszkiewicz, D. Szumiło-Kulczycka (ed.), Warszawa 2015, p. 258; M. Kurowski, *Świadkowie*, [in:] *Kodeks postępowania karnego*, Vol. 1, *Komentarz aktualizowany*, D. Świecki (ed.), Warszawa 2020, pp. 749–807; M. Śladkowski, *Fakty powierzone duchownemu podczas spowiedzi jako przedmiot zeznań w postępowaniu cywilnym, karnym i administracyjnym*, [in:] *Wolność wypowiedzi versus wolność religijna. Studium z zakresu prawa konstytucyjnego, karnego i cywilnego*, A. Biłgorajski (ed.), Warszawa 2015, p. 277; D. Gruszecka, *Świadkowie*, [in:] *Kodeks postępowania karnego. Komentarz*, J. Skorupka (ed.), Warszawa 2020, p. 416; K.T. Boratyńska, *Świadkowie*..., p. 522.

[17] T. Grzegorczyk, *Kodeks postępowania karnego*, Vol. 1, p. 614 (this opinion is expressed by the author indirectly); D. Le Tourneau, *The Enrollment or Incardination*, [in:] *Exegetical Commentary on the Code of Canon Law*, A. Marzoa, J. Miras, R. Rodriguez-Ocaña (ed.), English language ed. E. Caparros, P. Lagges, Vol. 3/1, Montreal–Chicago 2004, pp. 305–307.

[18] Cf. Paulus VI, Motu proprio Generales normae de diaconatu permanenti in Ecclesia Latina restituendo feruntur *Sacrum diaconatus ordinem*, n. V–VI, 18.06.1967, AAS 59 (1967), pp. 701–703; Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio dogmatica de Ecclesia *Lumen Gentium*, n. 29, 21.11.1964, AAS 57 (1965), p. 36; *Pontyfikał Rzymski odnowiony zgodnie z postanowieniem Świętego Soboru Powszechnego Watykańskiego II wydany z upoważnienia papieża Pawła VI poprawiony staraniem papieża Jana Pawła II. Obrzędy święceń biskupa, prezbiterów i diakonów*, 2nd standard edition, Katowice 1999, n. 227, p. 153 (AAS –*Acta Apostolicae Sedis. Commentarium Officiale*, Typis Polyglottis Vaticanis 1909-).

[19] *Kodeks postępowania Karnego*, Vol. 2..., p. 236; T. Grzegorczyk, *Kodeks postępowania karnego*, vol. 1, p. 614; M. Tomkiewicz, op. cit., pp. 53–54; B. Rakoczy, op. cit., p. 129.

Invalidly ordained

The law of the Catholic Church provides for the possibility of declaring the invalidity of sacred ordination for the diaconate, the presbyterate and the episcopate. This is done by way of a final and binding decree of competent church authorities (cann. 1708–1712 CIC)[20]. In view of the possibility that confession may be heard by an invalidly ordained cleric, the question arises whether the subjective scope of the prohibition of admitting evidence in Polish criminal proceedings from information obtained during confession as governed by the law of the Roman Catholic Church also covers such confessors.

As has already been mentioned, in order to determine whether the person hearing a confession is a minister within the meaning of Article 178 Section 2 CCP, it must be established whether he has been designated for permanent religious ministry within the meaning of the law of the Roman Catholic Church and whether it is possible to make a sacramental confession to him pursuant to the CIC (even if not resulting in sacramental absolution).

When considering this problem, it should be noted that the law of the Catholic Church knows the institution of presumed validity of acts of the power of orders and acts of the power of jurisdiction placed correctly with respect to their external elements. It applies as long as the competent ecclesiastical authority does not declare the ordination to be invalid (can. 124 § 2 CIC). In view of the guarantees granted to the Catholic Church by the Polish state in Article 8 Section 2 of the Concordat, this presumption should also be recognised by Polish courts. Thus, until the competent ecclesiastical authority decrees otherwise, a person formally designated by the above-mentioned acts for permanent religious ministry should also be regarded as a "minister" in a criminal trial.

This poses some problems, however. In applying the norm stipulated in Article 178 Section 2 CCP, state courts would have to actively cooperate with ecclesiastical courts, which, in view of the autonomy of the state and the Church, is difficult to accomplish. In order to avoid problems with examining the validity of orders or ecclesiastical acts of the power of jurisdiction during a criminal trial, it seems reasonable to uphold the current practice employed by state authorities which verify membership in the clerical state of the Catholic Church based on the relevant acts in their external dimension[21]. In such a situation, invalidation of sacred ordination under state law seems to resemble, as far as the effects are concerned, the "invalidation" of a validly performed act of the power of orders. Thus, a person who has been invalidly ordained or

[20] Cf.: T. Jakubiak, *Problem nieważności przyjęcia sakramentu święceń*, Płock 2018.

[21] It is worth noting that the legal effectiveness of a concordat marriage is not assessed based on the validity of "religious" marriage under the CIC, but on compliance with state law. Therefore, a concordat marriage may be validly concluded in the light of state law while being invalid under the CIC.

designated by an ineffective act of jurisdiction for the exercise of an office which involves the ministry of confession[22] may not be examined in the capacity of a witness on knowledge obtained when hearing a confession made before his ordination was declared invalid.

This thesis is supported by the *ratio legis* of the prohibition of evidence stipulated in Article 178 Section 2 CCP, which is to guarantee the penitent's right to exercise the freedom of conscience and religion, and not only to protect the seal of confession. Consequently, also confession made to an invalidly ordained cleric should be included in the objective scope of the prohibition of evidence, and an invalidly ordained cleric should be included in its subjective scope[23]. It is worth noting that this argumentation is confirmed by judicial practice, according to which, when assessing the applicability of the prohibition to ministers of all denominations and Churches, the courts focus on the fact that confession has been made to a person who is considered a minister, and not on the validity of confession or validity of the act by which the Church or religious association has designated a particular person to organize religious worship on a permanent basis.

This view seems to be negated by Grzegorczyk and Stefański. They believe that the prohibition does not apply to persons who do not have any authority to hear confessions (including ordination), but only usurp the right to act as a minister and confessor, since not being ministers, they are not referred to in the said Article at all[24]. In his comments to Article 178 Section 2 CCP, Grzegorczyk substantiates his thesis by arguing that, in the case of the Roman Catholic denomination, one can hardly speak of this being an act of worship, seeing that it is performed by a person who is not a cleric of this denomination. Consequently, he believes that in such a case no confession takes place at all.

In contrast to this view, it should be noted that persons who have not been validly ordained may not be said to be usurpers, because they actually hear confessions in good faith. Having been formally granted the faculty of hearing confessions by competent authorities, they are indeed persons who have been permanently designated to offer worship (cann. 834, 839 CIC). Thus, pursuant to the SC Resolution of 1992, they may be regarded as ministers. Furthermo-

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[22] Although an act of jurisdiction may be validly performed, it will be ineffective due to the absence of the priestly ordination of the person who is being designated for the ministry of confessor.

[23] T. Grzegorczyk, *Kodeks postępowania karnego*, Vol. 1..., p. 613; J. Szydlik-Brudny, *Zakazy dowodowe niezupełne o bezwzględnym charakterze – jako przyczyny uniemożliwiające stosowanie źródeł i środków dowodowych w procesie karnym po nowelizacji Kodeksu postępowania karnego*, [in:] *Postępowanie dowodowe w procesie karnym – zagadnienia wybrane*, J. Żylińska, M. Filipowska-Tuthill (ed.), Wrocław 2016, p. 90; M. Jurzyk, op. cit., p. 71; M. Cieślak, *Zagadnienia dowodowe w procesie karnym*, Vol. 1, Warszawa 1955, p. 272.

[24] *Kodeks postępowania karnego*, Vol. 2..., p. 236; T. Grzegorczyk, *Kodeks postępowania karnego*, Vol. 1..., p. 614.

re, according to the CIC – to which Grzegorczyk refers when defining the term "minister" – even when the minister of the sacrament of penance (I deliberately distinguish between the terms "confession" – *confessio*, "sacrament of penance" – *sacramentum paenitentiae*, "sacramental confession" – *confessio sacramentalis*, that is, the confession of sins performed during the "sacrament of penance," even invalidly celebrated or not resulting in absolution)[25] is a deacon or a lay person usurping the power of orders, this may be a case of true worship which does not involve sacramental grace. Even then, in fact, sacramental confession actually takes place (because the penitent makes it in good faith), even if it is not followed by a validly granted absolution due to the failures on the part of the confessor. It should be noted that in can. 1378 CIC – which stipulates a penalty for usurping the authority of a confessor (even by lay persons) – when referring to the confession of sins made in such circumstances, the legislator uses the term "sacramental confession".

As regards sacraments celebrated invalidly, the Roman Catholic Church distinguishes between an invalid sacrament and a putative sacrament, depending on the state of knowledge of the person receiving the sacrament as regards its invalidity (can. 1061 § 3 CIC). The theology of the Catholic Church does not deny the possibility of obtaining the grace of pardoning sins when a person confesses in good faith to a usurper. As long as the required conditions are met, this may be a case of non-sacramental reconciliation with God. After the faithful who thus reconciles with God becomes aware that the sacrament of penance was celebrated invalidly, he or she should confess the sins which have already been forgiven (not directly "through the power of the keys") once again during the sacrament of penance and reconciliation in order to obtain sacramental absolution (so that sins may be forgiven directly through "the power of the keys")[26].

The possibility of accepting under Polish law that an invalidly ordained priest who has been formally granted the faculty of hearing confessions is subject to the prohibition of evidence is also substantiated by the equality of Churches and religious associations in Poland. The doctrine considers as ministers those members of religious communities who, without being ordained (within the meaning of the CIC), hear a non-sacramental confession (within the meaning of the CIC) on the basis of their non-sacramental faculty (within

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[25] It should be noted that both in Article 178 Section 2 CCP and in Article 261 § 2 of the Code of Civil Procedure the legislator uses the term "confession". A different term – "seal of confession" which, if interpreted in the spirit of the CIC, would suggest "sacramental confession" – is used in Article 82 Section 3 of the Code of Administrative Procedure. On the multiple meanings of the term "confession". See: M. Jurzyk, op. cit., pp. 73–76.

[26] T. Jakubiak, *Referents...*; *Catechism of the Catholic Church*, Libreria Editrice Vaticana, Vatican City 1994, n. 1452; Thomas Aquinatus, *Summa Theologica*, Supplementum Tertiae Partis, q. 35, art. 3, [in:] Thomas Aquinatus, *Opera omnia*, Vol. 20, Romae 1906, p. 65.

the meaning of the CIC)[27]. The same applies also to those cases where by way of an act of jurisdiction in the Catholic Church a man is formally granted the faculty of hearing confessions (albeit ineffective from the point of view of the CIC), or where he is tasked with pastoral work (indirectly involving the need to celebrate the sacrament of penance), even though he has not been ordained or validly ordained within the meaning of the CIC.

In concluding the above reflections, it is worth pointing out that the invalidity of ordination in the Catholic Church is declared in extremely rare cases (several instances a year globally). Consequently, the question of admitting evidence from knowledge obtained during sacramental confession heard by an invalidly ordained priest is mostly an academic question. The above reflections may nevertheless be helpful in examining the possibility of hearing as witnesses those persons who knowingly usurp the right to celebrate the sacrament of penance or who have inadvertently acquired knowledge from confession.

Transferred to the lay state

In addition to declaring the invalidity of ordination, the Catholic Church also has the institution of dismissal from the clerical state or transfer to the lay state. In simple terms, despite having been validly ordained, a deacon, priest, or bishop who has been dismissed loses the right to exercise the power of orders (though if he did exercise it, the religious acts whose validity requires solely the power of orders would be valid, though illicit, because a validly granted power of orders can never be lost), and also loses the power of governance as well as all his functions and offices (cann. 292 and 845 § 1 CIC). The loss of the right to exercise the power of orders and prerogatives in the case of "secularized" priests (i.e. presbyters and bishops) is not absolute. Despite their being transferred to the lay state, the legislator does not deprive them of the right to confess, to validly and licitly impart absolution even of sins for which an ecclesiastical penalty has been imposed or declared where the penitent is in danger of death (can. 976 CIC). In addition, "former" priests can also in certain situations: baptize (can. 861 CIC), confirm (can. 883 n. 3 CIC), anoint the sick (can. 1003 § 2 CIC), grant indulgence for the hour of death[28]. The fact that "secularized" ministers permanently hold the power of orders and are permanently authorized by law to celebrate sacraments and sacramentals in certain circumstances proves that they satisfy the conditions required for being included in the subjective scope of Article 178 Section 2 CCP. A priest

[27] Evangelical Church of the Augsburg Confession, Anglican Church – *Code of Criminal Procedure*, Vol. 2..., p. 236.

[28] *Enchiridion indulgentiarum. Normae et concessiones*, ed. quarta, reimpressio, Libreria Editrice Vaticana 2004, n. 12 § 1, p. 58.

hearing a sacramental confession before and after being transferred to the lay state cannot testify as a witness during criminal proceedings[29].

It is worth noting at this point that this view is upheld by Hofmański, but only to an extent. He is of the opinion that the prohibition of interrogation applies to ministers transferred to the lay state only as regards knowledge obtained from confession before "secularization"30. As already mentioned, being transferred to the lay state does not destroy the sacramental character of ordination, and therefore the "secularized" person fulfils the conditions commonly accepted in literature (as referred to in the SC Resolution of 1992) to continue to be considered a minister. Furthermore, being transferred to the lay state does not preclude the possibility of imparting valid absolution under cann. 144 and 976 CIC. Thus, Hofmański's view is not justified. Failure to protect a confession made to a minister who has been transferred to the lay state or who has abandoned priesthood would be contrary to the purpose for which the prohibition of evidence has been established[31].

Priests who do not have the faculty of hearing confessions

Under the law of the Roman Catholic Church, it is assumed that only a priest (*sacerdos*), that is, a presbyter or a bishop, may be the minister of the sacrament of penance (*sacramentum paenitentiae*) (can. 965 CIC). In order for a priest to be able to validly impart absolution, in addition to the power of orders he must also have the faculty (*facultas*) of exercising this power in respect of certain believers, otherwise known as the faculty of hearing confessions. It is given by the law itself or by a grant made by the competent authority (can. 966 CIC)[32].

One of the ways of granting a faculty by law is by supplying the missing *facultas*. In factual or legal common error and in positive and probable doubt

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[29] *Kodeks postępowania karnego*, Vol. 2..., p. 236; K.T. Boratyńska, *Świadkowie*..., p. 522. Some authors have failed to consider a situation where confession is made to a priest who has been transferred to the lay state. They have claimed, however, that confession made before the laicization of the priest is covered by the prohibition of evidence under Article 178 Section 2 CCP – K. T. Boratyńska, *Świadkowie*..., p. 522; T. Grzegorczyk, *Kodeks postępowania karnego*, Vol. 1..., p. 613–614; L. Paprzycki, *Świadkowie*, [in:] *Kodeks postępowania karnego*, Vol. 1..., p. 608; *Dowody i postępowanie dowodowe w procesie karnym. Komentarz praktyczny z orzecznictwem, Wzory pism procesowych*, P. Kruszyński (ed.), Warszawa 2018, p. 263; Z. Kwiatkowski, op. cit., p. 173.

[30] *Kodeks postępowania karnego*, Vol. 1, *Komentarz do artykułów 1–296*, P. Hofmański (ed.), Warszawa 2011, pp. 981–982.

[31] M. Jurzyk, op. cit., p. 73.

[32] For more on the issue of the minister of the sacrament of penance in the Latin Church, see: T. Jakubiak, *Upoważnienie do słuchania spowiedzi wg Kodeksu prawa kanonicznego z 1983 roku*, „Warszawskie Studia Teologiczne" 2012, Vol. 25, No. 2, pp. 35–56.

of law or of fact on the part of a priest or the person making confession as to the presence of the *facultas* necessary to validly impart absolution, the Church legislator supplies this power to the confessor by the power of the law itself (can. 144 CIC). It should be emphasized that this is not a case of convalidation (sanation) of an invalid act, but with an actual and valid sacrament of penance. The institution of supplying the missing faculty makes it practically impossible for a priest to impart an invalid absolution due to the lack of the necessary faculty.

Even if there was a lack of faculty on the part of a priest hearing a sacramental confession required to impart a valid absolution (which is rare due to the disposition of can. 144 CIC), then, in view of his permanent designation for the offering of worship on account of his ordination, such a priest would be subject to the prohibition of evidence under Article 178 Section 2 CCP. Pursuant to can. 965 CIC, he is considered a minister of the sacrament of penance and thus satisfies the criteria stipulated in the SC Resolution of 1992 and the SC Judgment of 1937.

The view that ministers who hear confessions while not having the required *facultas* must not be examined is shared by Stefański and Grzegorczyk as well as Tomkiewicz and Rakoczy. They argue that narrowing down this protection solely to valid confessions would be difficult to reconcile with the essence and purpose of confession, as well as the constitutional principles. Grzegorczyk and Rakoczy note that although in such a situation the sacrament of penance is invalid, the knowledge of particular circumstances has nevertheless been obtained by the minister from the penitent during confession[33]. This thesis is also confirmed by the construction of Article 178 Section 1 CCP which says that the defence counsel's privilege also applies to counsels who ultimately refuse a case[34]. A similar situation occurs when the minister of the sacrament hears a confession, but because of his lacking the faculty to validly impart absolution, the confession does not result in the penitent's receiving sacramental grace. This opinion is also supported by the view generally expressed in the doctrine that the prohibition of examining ministers does not depend on whether or not absolution was imparted. As rightly pointed out by Grzegorczyk, "the information has been obtained by the minister during confession, so it is also covered by the seal"[35].

[33] *Kodeks postępowania karnego*, Vol. 2..., p. 236; T. Grzegorczyk, *Kodeks postępowania karnego*, Vol. 1..., p. 614; M. Tomkiewicz, op. cit., p. 53–54; B. Rakoczy, op. cit., p. 129.

[34] W. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, Warszawa 2014, p. 222.

[35] T. Grzegorczyk, *Kodeks postępowania karnego*, Vol. 1..., p. 613.

Usurpers of the title of "minister" within the meaning of CIC

The definitions and criteria of the term "minister" formulated by the SC and the Polish legislator go far beyond the catalogue of persons whom the Latin Church now considers to be clerics. This discrepancy leads to the conclusion that also in the case of Article 178 Section 2 CCP there is no reason why the term should not be interpreted more broadly than it is currently done by the Roman Catholic Church, which has historically used different definitions, after all. Before 1973 (until the Second Vatican Council reform), it considered as clerics those who had already received tonsure (can. 108 § 1 CIC/1917[36])[37]. Before 1917 (promulgation of the first Code of Canon Law) it had attributed three different meanings to the term "cleric". In the broader sense, clerics had also included the religious (that is, also women)[38].

In view of the reflections concerning men who have been invalidly ordained priests in the Catholic Church, it is impossible not to reflect on whether the prohibition of examining priests on knowledge obtained during confession also applies to men who, without being ordained priests (whether validly or not) usurp the right to hear a sacramental confession.

Some of the authors studying this matter have made the answer to this question dependent on whether the penitent was confessing to such a usurper in good or bad faith[39]. Hofmański disagreed with this approach. He argued that in view of the problems involved in demonstrating good faith in a criminal trial, Rakoczy's view is difficult to accept[40]. It seems, however, that this opinion does not take into account such obvious cases as when a usurper unknown to a penitent, disguised as a Catholic cleric, sits in a confessional or a shriving pew, making the general impression of fulfilling the legally required conditions for being a confessor, and thus, in general reception, is regarded as a person permanently designated for the exercise of religious worship.

Without going into the details, Paprzycki opines that there can be no prohibition under Art. 178 Section 2 CCP of examining a person who hears a confession when the person is not a cleric[41].

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[36] CIC/1917 – *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus. Benedicti Papae XV auctoritate promulgatus*, Romae 1917, AAS 9 (1917) II.

[37] Paulus VI, Litterae apostolicae motu proprio datae. Disciplina circa Primam Tonsuram, Ordines Minores et Subdiaconatum in Ecclesia Latina innovatur *Ministeria quaedam*, n. I, 15.08.1972, AAS 64 (1972), p. 531.

[38] F. Bączkowicz, J. Baron, W. Stawinoga, *Prawo kanoniczne. Podręcznik dla duchowieństwa*, Vol. 1, Opole 1958, p. 302.

[39] B. Rakoczy, op. cit., p. 133.

[40] *Kodeks postępowania karnego*, Vol. 1, *Komentarz do artykułów 1–296*…, p. 981.

[41] L. Paprzycki, *Świadkowie*, [in:] *Kodeks postępowania karnego*, Vol. 1…, p. 608; *Dowody i postępowanie dowodowe*…, p. 264.

Polemicizing with the above-cited opinions, it is worth noting that the Catholic Church itself treats a confession of sins made (apparently in good faith) before a lay person (and therefore a usurper of priestly authority) as a sacramental confession. This results from the provisions of can. 1378 CIC, already discussed, according to which it is possible to make a sacramental confession (*confessio sacramentalis*) as part of an invalid sacrament of penance (*sacramentum paenitentiae*) before a lay person or a deacon. In the above-mentioned provision of can. 1378 § 2 n. 2 CIC, the legislator has provided for a penalty of suspension[42] or interdict[43] for those who, while not being priests authorized to impart absolution, hear sacramental confession or impart absolution (that is, usurpers). A literal interpretation of that provision leads to the conclusion that the Church legislator uses the term "sacramental confession" when referring to confession of sins made in such circumstances. The penalty of "interdict" (imposed in the lay Church) for violating the prohibition proves that lay persons may also commit this offense, and therefore also they – according to can. 1378 § 2 n. 2 CIC – hear "sacramental confession", even though they are not ministers of the sacrament of penance[44]. Thus, considering usurpers of the "priestly faculty of hearing confessions" as a referent of the term "minister" seems to be in line with the SC judgment of 1937, since the internal rules of the Catholic Church apply the term "sacramental confession" to a confession of sins made before a person not authorized to impart valid absolution or hear confessions.

Considering the *ratio legis* of the norm laid down in Article 178 Section 2 CCP, it seems legitimate to postulate that usurpers should be covered by the prohibition of being examined in the capacity of witnesses on knowledge obtained from confession they have unlawfully (within the meaning of the CIC) heard. Their inclusion in the subjective scope of that prohibition will protect the rights of persons confessing in good faith to a usurper to exercise their freedom of conscience and religion. Failure to include them in the prohibition of examination could become an "incentive" for various subjects to impersonate confessors in order to "extort" information from penitents. Thus, it would infringe the guarantees of freedoms granted to Churches and religious communities, as well as to individuals. Moreover, it would be contrary to the *ratio legis* of the norm under consideration.

[42] Suspension – a penalty imposed on clerics.
[43] Interdict – a penalty imposed on lay persons.
[44] J. Syryjczyk, *Kanoniczne prawo karne. Część szczególna*, Warszawa 2003, pp. 105–106.

"Third" parties

As has already been mentioned, in accordance with the definition of the term "minister" generally accepted in the interpretation of the norm laid down in Article 178 Section 2 CCP, inferred from the SC Resolution of 1992, ministers are considered to be persons belonging to the Church or religious association who are distinct from the general faithful of the religion in question in that they have been designated to organise religious worship on a permanent basis. Since in the Catholic Church such designation is performed both by an act of the power of orders and by an act of the power of jurisdiction – namely, by conferring a faculty, office or ministry – it should be postulated that also those who have been designated for permanent divine worship other than by ordination should be included in the subjective scope of the prohibition of evidence provided for in Article 178 Section 2 CCP[45].

In reply to the possible argument that the sacrament of penance performed before a lay person is invalid, it is worth noting that although lay persons, like deacons, cannot be ministers of the sacrament of penance, a confession made (in good faith) before them, despite the invalidity of the sacrament of penance, is referred to in the law of the Roman Catholic Church as "sacramental confession" (can. 1378 § 2 n. 2 CIC)[46]. Accordingly, pursuant to the SC Judgment of 1937, persons designated in accordance with the CIC for permanent divine worship by appointment rather than ordination should also fall within the scope of the subjective prohibition of evidence under Article 178 Section 2 CCP[47]. Particularly that in Polish law lay people have already been recognized as ministers of the Catholic Church, as is the case in the Social Security Act[48]. The fact that according to the SC Resolution of 1992 ministers include lay people permanently designated for religious ministry by the Church's power of jurisdiction, even though they are not clerics within the meaning of the CIC, would represent a partial response to *de lege ferenda* postulates that the provisions of Article 178 Section 2 CCP be extended to include all persons who have obtained information from confession in any way whatsoever[49].

By way of legal analogy with the prohibition stipulated in Article 178 Section 1 CCP, it also appears legitimate to extend the subjective scope of the prohibition stipulated in Article 178 Section 2 CCP, as is done in the case-law as regards the norm laid down in Article 178 Section 1 CCP (Kraków Administrative Court's judgment of 25 November 1993, II Akr 144, LEX No. 28059), the extension also being supported by Stefański, to all persons who, without

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[45] T. Jakubiak, *Referents*…

[46] J. Syryjczyk, op. cit., pp. 105–106.

[47] T. Jakubiak, *Referents*…

[48] M. Klimas, *Postępowanie sądowe w sprawach z zakresu ubezpieczeń społecznych*, Warszawa 2013, p. 44.

[49] M. Tomkiewicz, op. cit., p. 57; T. Jakubiak, *Referents*…

being ministers, have acquired knowledge of facts revealed during confession against the will of the confessing person[50]. This may occur, for example, when: 1) confession takes place in a hospital room, when the person cannot confess in such a way as not to be heard by others, 2) the confessing person is in a state of shock (e.g. after an accident), 3) the confessing person is deaf and is unable to submit to the minister's request that he or she lower their voice while confessing. In addition, all other necessary participants in confession[51] should be included in this prohibition, i.e. interpreters who enable the exercise of the substantive rights of the confessing person (in this case, the right to freedom of conscience and religion)[52].

The possibility of examining persons other than ministers in the capacity of witnesses could prevent the exercise of the right to freedom of conscience and religion by sick or physically challenged or handicapped persons who wish to confess without being heard by others but are unable to do so, or who are not aware, due to their various deficiencies, that the addressees of their confession also include persons other than the confessor. In such a situation, the person who requires an interpreter or the presence of third parties in order to be able to confess, for example a physically or mentally handicapped person, would not enjoy equal protection of the right to defence in a criminal trial as a person who is healthy or who knows the language of the confessor and who can confess in conditions which guarantee complete discretion. Therefore, it does not seem entirely justified to challenge, as is done by Klejnowska, the thesis formulated in literature that failure to include persons other than ministers in the subjective scope of the prohibition stipulated in Article 178 Section 2 CCP limits the freedom of conscience and religion, and may result in the defendant's feeling constrained in the performance of divine worship out of the fear that information revealed during confession may be insidiously used against him or her by third parties[53].

Admitting such evidence would circumvent the prohibition of examining ministers on facts communicated to them during confession[54]. It would also be contrary to the constitutional right of persons affected by various deficiencies to equal treatment before the law, the right not to be discriminated against on legal grounds, the right of defence, the right to freedom of conscience and religion (Article 32 of the Constitution)[55].

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[50] *Kodeks postępowania karnego*, Vol. 2…, p. 232.

[51] Necessary participants in confession should also be considered as including all those who have become participants in confession without the will of the confessing person.

[52] *Dowody i postępowanie dowodowe*…, p. 262.

[53] M. Klejnowska, *Dowodzenie*, [in:] *Proces karny*, G. Artymiak, M. Rogalski (ed.), Warszawa 2012, p. 326.

[54] R.A. Stefański, Świadkowie, [in:] Z. Gostyński i in., *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa 2003, pp. 786–787.

[55] *Constitution of the Republic of Poland of 2 April 1997 r.* (Journal of Laws No. 78, item 483).

The inclusion in the subjective scope of persons, other than the confessor, who legitimately (interpreter) or illegitimately (eavesdropper) obtain information from confession is supported by the teleological interpretation and the axiology of the Article concerned. As observed by Stefański, "narrowing the disposition of this provision down only to ministers (...) results in that the provision does not fully and properly safeguard the values for whose protection it has been established". The interrogation of other persons would violate the right to privacy, the religious feelings of the confessing person, and their freedom of conscience and religion[56]. Kwiatkowski argues for the prohibition of examining persons other than ministers by contending that the legislator's goal was to exclude reliance on information which does not come from the penitent in a criminal trial. Examination of other persons would therefore be a circumvention of this prohibition[57].

As pointed out by Grzegorczyk, the inclusion of other persons in the prohibition of evidence results, *inter alia*, from the *ratio legis* of Article 178 Section 2 CCP, i.e. protection of the constitutional right to religious freedom (Article 53 of the Polish Constitution), which entails respecting the seal of confession in those religious denominations which provide for secret confession. And just such secret confession is provided for in the Catholic Church. Pursuant to the CIC, not only ministers but all persons who have gained knowledge of the penitent's sins from confession are prohibited from disclosing such information (can. 983 CIC). The law of the Roman Catholic Church provides for severe penalties for violating this prohibition (can. 1388 CIC).

Grzegorczyk rightly notes that in CIC the sacramental seal (*sacramentale sigillum*) applies to confessors, and the secrecy of confession (*secretum*) to all others who have gained information of the penitent's sins from confession. However, noting the differences in terminology, he states: "this distinction between two legal terms of canon law must influence the interpretation of Article 178 Section 2 CCP"[58]. This thesis may be polemicized with, however, as the objective scope of both the sacramental seal and the secrecy is the same[59]. In the law of the Roman Catholic Church in force before the promulgation of the CIC, this prohibition had been referred to with a single term: *sacramentale sigillum* (can. 889 CIC/1917). The distinction made by the legislator in the CIC does not alter the absolute nature of the secrecy of confession. It results from the need to reflect the different nature of those prohibitions, and thus the *ratio legis* of the norms laid down in can. 983 § 1 CIC and can. 983 § 2 CIC[60]. The legislator's use of the term *secretum* in can. 983 § 2 CIC

[56] *Kodeks postępowania karnego*, Vol. 2..., p. 239.
[57] Z. Kwiatkowski, op. cit., p. 175.
[58] T. Grzegorczyk, *Kodeks postępowania karnego*, Vol. 1..., p. 614.
[59] J. Syryjczyk, op. cit., p. 131.
[60] The seal of confession is based on revealed Divine Law, while secrecy – on natural law.

does not equate that prohibition with non-sacramental secret, which may be disclosed in special circumstances[61]. Grzegorczyk's opinion that the terminological distinction made by the legislator in can. 983 CIC affects the interpretation of Article 178 Section 2 CCP seems to be unfounded, especially that in the CCP the legislator does not use the term "seal of confession," but the expression "examining a minister in the capacity of a witness on facts communicated to him in confession." When analysing the provisions of CIC from the point of view of the prohibition of disclosing information obtained from confession, one must bear in mind the provisions of can. 1550 § 2 n. 2 CIC in which the legislator stipulates that information obtained from sacramental confession, irrespective of whom it is disclosed by, may not be admitted in ecclesiastical court even as an indication of the truth, and that no one may be examined on facts they have come to know from sacramental confession.

It should be emphasized at this point that Grzegorczyk was of the opinion that although a literal analysis of the provision in question does not indicate that an interpreter is also subject to the prohibition, in view of the *ratio legis* of the solution in question it is possible to consider the inclusion of an interpreter, even if only by way of exception. The reason for such an interpretation is that in certain situations the participation of an interpreter is necessary for the exercise of the constitutional right to freedom of conscience and religion, as guaranteed by Article 9(1) of the European Convention on Human Rights[62]. It is worth noting that although Grzegorczyk himself contended that persons other than the minister and interpreter could not be included in the prohibition of examination, he failed to consider circumstances (mentioned above) in which the participation of persons other than the interpreter must also be taken into account, out of necessity and without the will of the penitent, in the exercise of the right to freedom of conscience and religion, and must therefore be included in the scope of the prohibition of evidence.

Also Paprzycki has commented on whether the group of persons subject to the prohibition is wider than persons expressly specified in Article 178 CCP. Based on a teleological interpretation, he held that "it is unacceptable to examine in the capacity of witnesses those persons whose participation in the practices concerned is natural or indispensable, even if they are not the referents of the terms used in the provision"[63].

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[61] Ibid, pp. 131–132; Apostolic Penitentiary, *Note on the importance of the internal forum and the inviolability of the sacramental seal*, 21.06.2019,

http://www.vatican.va/roman_curia/tribunals/apost_penit/documents/rc_trib_appen_pro_20190629_forointerno_en.html (as on 18.06.2019).

[62] T. Grzegorczyk, *Kodeks postępowania karnego*, Vol. 1…, p. 614–615.

[63] L. Paprzycki, *Świadkowie*, [in:] *Kodeks postępowania karnego*, Vol. 1…, p. 608; *Dowody i postępowanie dowodowe*…, p. 263.

Conclusions

When interpreting Article 178 Section 2 CCP, the case-law and the doctrine place much emphasis on the exercise of the right to freedom of conscience and religion of the confessor and the penitent. In defining the objective scope of this norm, they refer to the laws of the Churches and religious associations which regulate the institution of confession and the ministers authorized to hear it. When doing so, however, one may not refer only to selected legal norms of the Church or religious association concerned, but must bear in mind its entire legal system. This was not done, however, when establishing the catalogue of persons who may not be examined in criminal proceedings on knowledge obtained during confession as regulated by the law of the Roman Catholic Church.

As results from the above reflections, the doctrine's limitation in interpreting the prohibition of evidence only to the norm of cann. 965 and 966 CIC, without referring to the entire system of the law of the Catholic Church, has resulted in the set of referents of the term "minister" used in Article 178 Section 2 CCP having been significantly restricted, to the detriment of the constitutional rights of members of the Catholic Church. Therefore, in order to redirect the discussion on the prohibition of admitting evidence from the examination of ministers on facts communicated to them during confession, the author of this study went beyond the provisions of CIC usually cited in the literature of the subject. By taking into account the legal system of the Roman Catholic Church as a whole, the author has been able to propose an interpretation of Article 178 Section 2 CCP which better corresponds to the *ratio legis* of the norm it contains. In addition, it supplies further arguments confirming the validity of *de lege lata* and *de lege ferenda* postulates made in the literature that the subjective scope of the said norm should cover persons other than those usually listed in the doctrine, including the so-called necessary participants in confession.

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Summary

The Subjective Scope of the Norm Laid Down in Article 178 Section 2 of the Code of Criminal Procedure for Confession as Governed by the Law of the Roman Catholic Church

Key words: prohibition on taking evidence; minister; confession; Roman Catholic Church.

Article 178 Section 2 CCP which says that a minister may not be examined in the capacity of a witness on facts communicated to him in confession refers to the general term "minister". Consequently, application of the absolute prohibition of evidence it stipulates with regard to evidence produced in the exercise of religious practices in the Roman Catholic Church poses some difficulties. The problem is further compounded by the fact that in the Polish legal system the criteria for defining the concept of "minister" are not uniform.

Studies carried out for the purposes of this paper show that when interpreting Article 178 Section 2 CCP, the doctrine has focused on the few norms of the internal law of the Latin Church (i.e. cann. 965 and 966 CIC), while ignoring all that is provided for in the entire legal system the Catholic Church as regards confession and its ministers. As a result of such an interpretation, the set of the referents of the term "minister" in Article 178 Section 2 CCP has been significantly reduced to the detriment of the constitutional rights of members of the Catholic Church.

Therefore, in order to redirect the discussion on the prohibition of admitting evidence from the examination of ministers on facts communicated to them during confession, the author of this study went beyond the provisions of CIC usually cited in the literature of the subject. By taking into account the legal system of the Roman Catholic Church as a whole, the author has been able to propose an interpretation of Article 178 Section 2 CCP as regards its objective scope which better corresponds to the *ratio legis* of the norm it contains. In addition, it supplies further arguments confirming the validity of *de lege lata* and *de lege ferenda* postulates made in the literature that the subjective scope of the said norm should cover persons other than those usually listed in the doctrine, including the so-called necessary participants in confession.

Streszczenie

Zakres podmiotowy normy zapisanej w art. 178 pkt 2 k.p.k. dla spowiedzi odbywanej w przestrzeni uregulowanej prawem Kościoła rzymskokatolickiego

Słowa kluczowe: zakaz dowodowy, duchowny, spowiedź, Kościół rzymskokatolicki.

Art. 178 pkt 2 k.p.k., w którym zapisano: „Nie wolno przesłuchiwać jako świadków duchownego co do faktów, o których dowiedział się przy spowiedzi", odwołuje się do ogólnego terminu „duchowny". W związku z tym stosowanie bezwzględnego zakazu dowodowego, o którym mowa w przedmiotowym przepisie, wobec dowodów powstałych przy okazji realizacji praktyk religijnych w Kościele rzymskokatolickim napotyka trudności. Problem ten potęguje również fakt, że w polskim systemie prawa kryteria pozwalające zdefiniować pojęcie „duchowny" nie są jednolite.

Badania przeprowadzone na potrzeby niniejszego artykułu pokazują, że doktryna, dokonując wykładni art. 178 pkt 2 k.p.k., skoncentrowała się na nielicznych normach wewnętrznego prawa Kościoła łacińskiego (tzn. na kan. 965 i 966 CIC), pomijając to, co na temat spowiedzi i osób ją sprawujących zawarte jest w całym systemie prawa Kościoła katolickiego. Wskutek takiej interpretacji okazało się, że zbiór desygnatów pojęcia „duchowny" zapisanego w art. 178 pkt 2 k.p.k. został znacznie ograniczony ze szkodą dla konstytucyjnych praw członków Kościoła katolickiego.

W związku z tym autor niniejszego opracowania, chcąc sprowadzić na nowe tory dyskusję nad zakazem przeprowadzenia dowodu z przesłuchania duchownego z wiedzy o faktach uzyskanych przy spowiedzi, wyszedł poza powszechnie cytowane w literaturze przedmiotu przepisy CIC. Spojrzenie na cały system prawa Kościoła rzymskokatolickiego pozwoliło sformułować propozycję interpretacji art. 178 pkt 2 k.p.k. pod kątem zakresu podmiotowego przedmiotowego artykułu, lepiej odpowiadającą *ratio legis* normy w nim zapisanej. Ponadto dostarczyło kolejnych argumentów potwierdzających zasadność formułowanych w literaturze wniosków *de lege lata* i *de lege ferenda* o objęcie zakresem podmiotowym art. 178 pkt 2 k.p.k. innych osób niż czyni to przeważnie doktryna, w tym m.in. tzw. uczestników koniecznych spowiedzi.