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THE TERM "MINISTER" UNDER THE POLISH CODE OF CRIMINAL PROCEDURE AS APPLICABLE TO THE ROMAN CATHOLIC CHURCH

1. Introduction

In the literature concerning this subject, there are no doubts that the clergy – penitent privilege (i.e. the prohibition on Polish courts from demanding ministers of religion[1] to disclose information they have acquired during a penitent's confession), as defined in Article 178 point 2 of the Polish Code of Criminal Procedure (CCP),[2] relates to Confession within the legal sphere of the Catholic Church in its Latin rite as well as in its Eastern rites.[3] Unfortunately, in this regulation the

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[1] In this paper the term "minister" means ministers of religion and clerics of all Churches and religious associations. In canon law, to put it simply, the equivalent of "minister" is the term "cleric" and means a person authorised to administer a sacrament, e.g. a minister of the sacrament of Penance.

[2] CCP – abbreviation for the Code of Criminal Procedure of 6 June 1997 of the Republic of Poland. [Ustawa z 6 czerwca 1997 r., Kodeks postępowania karnego (Dz.U. z 1997 r., Nr 89, poz. 555 ze zm.)].

[3] M. Rusinek, *Z problematyki zakazów dowodowych w postępowaniu karnym*, Warszawa 2019, p. 129; Idem, *Kodeks Postępowania Karnego*, II: *Komentarz do art. 167-296*, ed. R.A. Stefański, S. Zabłocki, Warszawa 2019, p. 235.

term "minister" is not precise.[4] This is because it refers to all Churches and religious associations, not just the Catholic Church, regardless of the fact that most Polish people are members of the Catholic Church.[5]

As the term "minister" is common to both the law of the Republic of Poland and the ecclesiastical law of the Churches or religious associations, I shall use two kinds of criteria to describe it: firstly, the external criteria in the domestic regulations, and secondly, the internal criteria in the regulations of the particular Church or religious association.[6]

My aim is to relate the general provision in Article 178 point 2 CCP, to the religious practices of the Roman Catholic Church, in order to specify who is designated as a "minister" by Article 178 point 2 CCP when it is applied to the Roman Catholic Church. Due to the limited length of this study, I will narrow down my interpretation of the regulation to a single research method – I will analyse Article 178 point 2 CCP by referring it to the internal and external criteria of the term "minister."

2. The external criterion

The Polish legislator refrained from defining the term "minister" in Article 178 pt. 2 CCP for a concept as refined and elusive from a procedural point of view as a confession. This article of the CCP does not specify who is designated by the term, unlike, for example, Article 8 par. 13 of *Ustawa o systemie ubezpieczeniach społecznych* (the Social Insurance System Act), which says, "Clerics and members of men's and women's religious orders of the Catholic Church, other churches and religious associations, except for students of theological seminaries, novices, postulants and persons in the juniorate phase of their monastic formation who are under

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[4] M. Wielec, *Zakaz dowodowy tajemnicy spowiedzi w postępowaniu karnym*, Warszawa 2012, p. 324.

[5] In 2018 there were about 33 million Catholics in Poland – *Mały Rocznik Statystyczny Polski*, Warszawa 2019, p. 114.

[6] M. Jurzyk, *Ochrona spowiedzi w postępowaniu dowodowym a prawa penitenta i duchownego*, «Radca Prawny» 2/2004, p. 72.

the age of 25 years, are considered to be ministers of religion."[7] However, the fact that the CCP does not define an external criterion for the term "minister" does not necessarily mean that the legislator narrowed down the interpretation of Article 178 point. 2 CCP exclusively to an analysis of ecclesiastical law, without the possibility of referring to the legal doctrine and provisions of the Polish legislation for criminal proceedings. Many commentators on the regulation say there is such a possibility. To determine who is designated by the term "minister," they consider a Supreme Court resolution which has a definition of the term "minister." Interestingly enough, this is a resolution on regulations relating to Polish citizens' general obligation to defend the Republic of Poland (Supreme Court Resolution (7) of 6 May 1992 (I KZP 1/91), «Orzecznictwo Sądu Najwyższego. Izba karna i Izba Wojskowa» 7-8/1992, item 46, p. 9-14 – hereinafter: SC Resolution of 1992).[8] It says that a minister of religion is a "person belonging to a Church or a religious association who is distinct from other co-religionists by being called to organise religious worship on a regular basis."

A literal analysis of this text enables us to ascertain that, for the Supreme Court judges, the essential determinants of what makes a person a minister of religion are their "calling" and – even more importantly – "organising religious worship on a regular basis." The resolution does not state in what manner such a "calling" is to be made or what is involved in "organising religious worship." However, the grounds it gives emphasise that a person appointed to minister is distinct from other co-religionists by virtue of organising religious worship "on a regular basis." A "regular basis" is a constitutive element of the term "minister" and this is why a religious ministry is irreconcilable with the duties arising from the

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[7] Ustawa z 13 października 1998 r. o systemie ubezpieczeń społecznych (Dz.U. z 1998 r., Nr 137, poz. 887). [the Social Insurance System Act of 13 October 1998]. According to the grounds of the SC Resolution of 6 May 1992 («OSNKW» 7-8/1992, item 46), this act of legislation does not contain a definition of the term "minister".

[8] M. Rusinek, *Z problematyki zakazów…*, p. 128; Idem, *Kodeks postępowania karnego*, II: *Komentarz do art. 167-296…*, p. 236; M. Jurzyk, *op. cit.*, p. 72; M. Tomkiewicz, "*Tajemnica spowiedzi*" i "*tajemnica duszpasterska*" *w procesie karnym*, «Prokuratura i Prawo» 2/2012, p. 51.

Act on the General Obligation to Defend the Republic of Poland, as the resolution's grounds put it. This may mean that religious ministry in the Roman Catholic Church is irreconcilable with the performance of the obligations of lay persons. According to the resolution, in the event of a failure to distinguish ministers from lay persons in the law of a Church or religious association, the key to resolving the problem could lie in the nature of the involvement of a Church's members in its activities.

There are good reasons for the high level of generality in the definition of the term "minister" in the legal doctrine elaborated on the grounds of the Supreme Court's 1992 Resolution. Hence, this definition may constitute the external criterion of the term "minister" common and acceptable to all the Churches and religious associations officially recognised by the Polish State.

3. The internal criterion

However, some authors express a different view. They specify which persons are exempted from testifying as a witness under Article 178 point 2 CCP by interpreting the term "minister" in the same way as the law of a given Church or religious association on persons authorised to hear Confession. Sometimes they refer to Rakoczy or authors citing him. They recognise a need to define the term "minister" by considering regulations which do not belong to the legal system of the Republic of Poland or to Polish law. Apart from an internal criterion, which would be defined in various ways pursuant to the law of particular Churches and religious associations, they do not see a need to specify an external criterion of the term "minister" which would be common and acceptable to all Churches and religious associations officially recognised by the Polish State. Authors who appear to hold this opinion include Boratyńska, Grzegorczyk, Paprzycki, Kwiatkowski, and several others.[9]

[9] K.T. Boratyńska, *Świadkowie*, [in:] *Kodeks postępowania karnego. Komentarz*, ed. A. Sakowicz, Warszawa 2018, p. 522; T. Grzegorczyk, *Kodeks postępowania karnego*, I, Warszawa 2014, p. 614; L. Paprzycki, *Świadkowie*, [in:] *Kodeks postępowania karnego*, I, ed. L. Paprzycki, Warszawa 2013, p. 609; Z. Kwiatkowski, *Zakazy*

The latter opinion appears to have received strong support from the Supreme Court Ruling of 14 June 1937. (SC Ruling of 14 June 1937, I K 454/37, «Zbiór Orzeczeń Sądu Najwyższego. Orzeczenia Izby Karnej» 1/1938, item 11, p. 18-20 – hereinafter: SC Ruling of 1937). In its grounds we read, "it is obvious that the application [of the clergy – penitent privilege – *T.J.*] should depend only on the internal regulations of a given religious denomination which is recognised by the State, and which has an established institution of Confession and ministers authorised to hear Confession." Pursuant to this ruling, the starting point for the interpretation of Article 178 point 2 CCP currently in force, with regard to Confession in the Roman Catholic Church, should be the Catholic Church's own law.

It must be stressed that the SC Ruling of 1937 applies expressly to Article 101a of the 1928 CCP, which contains a regulation with the same wording as in Article 178 point 2 of the CCP now in force – in contrast to the SC Resolution of 1992. Even though the 1937 Ruling was issued over eighty years ago, it still seems to hold good as regards its grounds, and therefore is still in harmony with the provisions currently in force, including Article 2 of *Ustawa* z 17 maja 1989 r. o *stosunku Państwa do Kościoła Katolickiego w Polskiej Rzeczypospolitej Ludowej* (the Act of 17 May 1989 on the Relations of the Polish People's Republic with the Catholic Church), which says, "The matters of the [Catholic – T.J.] Church are governed by its own law; it freely exercises spiritual and jurisdictional authority, and manages its own affairs."[10]

In its ruling of 19 September 2000, the Supreme Administrative Court (SAC) concurred with the SC Ruling of 1937.[11] Referring to the SC Resolution of 1992, it held that "the lack of a definition of the term 'minister' in legislation concerning Churches and other religious associations calls for a thorough knowledge of the rules by which

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dowodowe w procesie karnym, Zakamycze 2005, p. 171; B. Rakoczy, *Tajemnica spowiedzi w polskim postępowaniu cywilnym, karnym i administracyjnym*, «Przegląd Sądowy» 11-12/2003, p. 128. [See also footnote 21 and the text concerning it].

[10] Ustawa z 17 maja 1989 r. o stosunku Państwa do Kościoła Katolickiego w Rzeczypospolitej Polskiej (Dz.U. z 1989 r. Nr 29, poz. 154 ze zm.

[11] SAC Ruling of 19 September 2000, III SA 1411/00.

a given Church or religious association operates, in order to be able to determine whether a particular person is a minister." Thus – in line with the regulation in the 1967 General Obligation to Defend the Republic of Poland Act [*Ustawa z 21 listopada 1967 r. o powszechnym obowiązku obrony Rzeczypospolitej Polskiej*] – the SAC's jurisdiction confirmed that, in order to interpret the term "minister" in Article 178 point 2 CCP, we have to consider the given Church's or religious association's own law. In the context of Church law, this seems to apply to persons "who are distinct from other co-religionists by being called to organise religious worship on a regular basis."

Speaking of a Church's autonomy, we cannot fail to notice that the right to define the principles by which it conducts religious worship (including Confession) is undoubtedly one of its powers connected with its religious activity in the strict sense.[12] Hence State law cannot interfere in a Church's or religious association's own affairs by deciding which persons have the authority to perform its religious duties (including the authority to hear Confession).[13]

To conclude this part of my study, I should point out that in his work on the personal scope of the provision in Article 178 point 2 CCP, Rakoczy, who is cited by many commentators, referred to Article 2 of the Act of 17 May 1989 on the Relations of the Polish People's Republic with to the Catholic Church. Writing on the guarantees granted to the Catholic Church by the Polish State, he noted that "canon law regulations make it possible to determine who engages in Confession." However, he did not stop at an internal criterion of the term "minister," as some suggest.[14] For Rakoczy, a Church's law constituted one of the elements (but not the only element) which must be taken into account

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[12] M. PIETRZAK, *Prawo wyznaniowe*, Warszawa 2013, p. 252-253.

[13] Ustawa z 17 maja 1989 r. o gwarancjach wolności sumienia i wyznania, art. 1 ust. 3, art. 2 ust. 2 (Dz.U. z 2017 r., poz. 1153 ze zm.), [Act of 17 May 1989 on Guarantees of Freedom of Conscience and Religion]; Konkordat między Stolicą Apostolską i Rzeczpospolitą Polską podpisany 28 lipca 1993 r., art. 5, art. 8 ust. 1 (Dz.U. z 1998 r., Nr 51, poz. 318), [Concordat between the Apostolic See and the Republic of Poland, signed on 28 July 1993].

[14] B. RAKOCZY, *op. cit.*, p. 128.

in the interpretation of the term "minister." For him it was the point of departure for further considerations regarding Article 178 point 2 CCP.

4. Only an internal criterion?

In the light of the above observations, I must draw attention to the consequences of adopting the interpretation of the term "minister" in Article 178 point 2 CCP, which refers to an internal criterion diverse for particular Churches or religious associations, while at the same time avoiding the need to define an external criterion for the term. An interpretation of this article limited to consideration of a Church's or religious association's own law could entail the risk of members of particular Churches or religious associations being treated unequally by Polish criminal proceedings law. The extent of the clergy's exemption from giving evidence would depend exclusively on the individual definition of the term "minister" by a Church's or religious association's own law, and on how it regulates the administration of Confession. A uniform external criterion, which according to most commentators is the definition of the term "minister" given in the SC Resolution of 1992, would appear to provide a safeguard preventing the subjectification of the law. This Resolution would seem to be an appropriate transmission belt for the general provision of Article 178 point 2 CCP, in particular cases in which Confession is administered in accordance with the (written or customary) law of a specific Church or religious association. If this definition were taken into account as an external criterion, it would protect the rights of members of different Churches and religious associations against unequal treatment in Polish criminal courts. The SC Resolution of 1992 drew attention to the need to comply with the constitutional principle of equality of civil rights and obligations for all Polish citizens, while at the same time acknowledging the law of the diverse Churches and religious associations in the determination of what is designated by the term "minister."

Out of respect for the autonomy of Churches and religious associations, as well as their members' right to freedom of conscience and religion, the

definition of the manner in which co-religionists are called to organise regular religious services (as referred to both in the SC Resolution of 1992 and indirectly in the SC Ruling of 1937) should be done by the law of a Church or religious association. This would describe the internal criterion for the term "minister" and exert a real influence on the application of the provision in Article 178 point 2 CCP to cases in the scope it regulates. Such a procedure would protect the laws of the Churches and religious associations against the interference of State legislation in the conduct of religious worship.

It is self-evident that the Polish State guarantees the Catholic Church the right conditions to fulfil its mission freely and in public, and to exercise ecclesiastical jurisdiction as well as the management and administration of its affairs on the grounds of canon law (Article 5 of the Concordat concluded between the Republic of Poland and the Holy See, hereinafter "the Concordat"), and guarantees it freedom to conduct worship in accordance with Article 5 (Article 8 par. 1 of the Concordat). The Polish State also guarantees the ecclesiastical authorities the right to organise public worship in accordance with canon law and the appropriate Polish legal regulations (Article 8 par. 1 of the Concordat). However, these guarantees do not necessarily mean that, if a religious act (e.g. the Sacrament of Penance within the meaning of the CIC)[15] is conducted invalidly within the legal scope of the Catholic Church, it cannot produce effects on the grounds of Polish law, if the law of the Polish State considers such effects the outcome of the invalidly conducted religious act, regardless of its ivalidity within the legal scope of canon law. A noteworthy example is the situation where, if a couple contracts marriage on the grounds of the Concordat (i.e. marries in church), there is no correlation between an ecclesiastical tribunal's ruling to pronounce the marriage null and void, and the effects connected with contracting marriage within the scope of Polish law (Article 10 par. 3-5 of the Concordat).

[15] CIC – abbreviation for: Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus, 25 I 1983, AAS 75/1983, No. 2, pp. 1-317.

Whenever the Polish State ascribes legal effects to religious acts within the scope of its law, it should take due care to respect the autonomy of the Churches and religious associations, and it should not restrict the rights of their members by narrowing down the referents of terms appropriate for a given religion which aregenerally acknowledged in (and also outside) the given Church or religious association, and which are also used in the law of the Polish State. This means that if, in Catholic Church law, the designation of the term "minister" includes deacons, presbyters, and bishops, then the law of the Polish State should not change the referents of the term "minister" by ascribing specific effects to the ministry of such persons, unless its aim and wording of a given provision were to formulate a different arrangement, as in the Social Insurance System Act, where the legislator has applied an interpretation that extends the term "minister" in accordance with CIC. The Supreme Court seems to share a similar opinion in its grounds for the SC Resolution of 1992, where it asserts that "it is admissible to give a specific [colloquial – *T.J.*] term a different meaning than the colloquial one only if this follows explicitly from the given provision."

We cannot overlook the fact that Polish law contains regulations stating precisely which minister, within the meaning of canon law, may engage in acts which are an inherent component of his ministry and which also produce effects on the grounds of Polish law. In such cases the personal scope of the term "minister" is determined by means of an agreement reached between the Church or religious association and the Polish State.[16]

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[16] Konkordat…, art. 27, [Concordat…]; Ustawa z 17 maja 1989 r. o stosunku Państwa do Kościoła Katolickiego…, art. 15a ust. 2; Obwieszczenie Ministra Spraw Wewnętrznych z 5 lutego 2015 r. w sprawie ogłoszenia wykazu stanowisk, których zajmowanie upoważnia do przyjmowania oświadczeń o wstąpieniu w związek małżeński oraz sporządzania zaświadczeń stanowiących podstawę sporządzania aktu małżeństwa zawartego w sposób określony w art. 1 § 2 i 3 Kodeksu rodzinnego i opiekuńczego, wraz z Załącznikiem (Monitor Polski z 2015 r., poz. 230), [Notice issued by the Minister of Internal Affairs on 5 February 2015, announcing a list of offices entitled to accept declarations of contract of marriage and to issue certificates providing a basis for the drawing up of a certificate for a marriage contracted in the manner specified in Article 1 par. 2 and 3 of the Family and Guardianship Code, together with Appendix]; Ustawa

So would it be possible to interpret Article 178 point 2 CCP and reconcile the grounds given in the SC Ruling of 1937 with the opinion shared by some commentators who say that the SC Resolution of 1992 contains a definition of the term "minister"? It would seem so – if we were to accept that the admission of a particular person's exemption from the duty to give evidence depended on whether he satisfied both the internal and external criterion of the term "minister." But this would only be so providing the external criterion did not restrict the scope of the internal criterion of the term "minister," which follows indirectly from acknowledging the role played by ecclesiastical law (in the SC Ruling of 1937) as regards confessional privilege (the clergy – penitent privilege), i.e. a minister's exemption from the duty to testify as a witness concerning facts he had learned during Confession. A restriction of the scope of the internal criterion of the term "minister" would be admissible only if the law of a Church or religious association were to define the term "minister" in a way that would be contradictory to the *ratio legis* of the confessional privilege or were in breach the constitutional rights of individual groups to equal treatment in the eyes of the law (Article 23 par. 1 of the Polish Constitution of 1997; SC Resolution of 1992).[17]

5. Roman Catholic ministers (clerics)

Considering what I have said so far on the criteria to determine which persons cannot be questioned as witnesses on their knowledge acquired during Confession within the scope of canon law, we may define three groups of persons (constituting three sets of referents of the term "minister") entitled to the exemption, depending on which of the Supreme Court documents, or on which opinion of legal doctrine

z 28 listopada 2014 r. Prawo o aktach stanu cywilnego, art. 91 (Dz.U. z 2014 r., poz. 1741 ze zm.), [Act of 28 November 2014 – Law on Registry Office Records]; Ustawa z 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy, art. 8 (Dz.U. z 1964 r., Nr 9, poz. 59 ze zm.), [Act of 25 February 1964 – Family and Guardianship Code].

[17] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. z 1997 r., Nr 78, poz. 483), [Constitution of the Republic of Poland of 2 April 1997].

we use in the interpretation of the term "minister" under Article 178 point 2 CCP.

5.1. A restrictive interpretation

The first and "narrowest" group consists exclusively of presbyters and bishops, usually specified by the joint, collective term "priests." Under the CIC they are regarded as ministers of the Sacrament of Penance (Can. 965 CIC). They are also qualified to receive authorisation (*facultas*) to hear Confession (Can. 966 CIC). Such authorisation is granted on the grounds of canon law or by a competent ecclesiastical authority, and is a necessary condition for the validity of the absolution a priest grants to penitents during Sacrament of Penance.[18]

These persons satisfy the conditions for exemption from the duty to testify as witnesses under Article 178 point 2 CCP, as laid down by canon law, and by the (literally interpreted) requirements of the SC Ruling of 1937 and the SC Resolution of 1992. In the meaning of canon law, they are regarded as authorised to hear the confessions of penitents coming to the Sacrament of Penance, and also lawfully appointed to conduct regular religious worship. A priest is appointed to administer the Sacrament of Penance on the grounds of two acts: his ordination to the priesthood, and the jurisdiction to which he belongs and which has the faculty to hear Confession (Can. 129 § 1, 966 § 2, 1008 CIC).

However, this interpretation comes up against difficulties. Eighty years ago and also later, under the Communist regime in the Polish People's Republic, the point considered the main purpose of exempting a minister from having to testify in criminal proceedings and disclosing information he had obtained during Confession was the acknowledgement of the social value of the institution of the Seal of Confession, which ministers of the Sacrament of Penance were and still are obliged to observe on the grounds of canon law.[19] Currently, although the Seal of Confession is still regarded as the purpose of the

[18] See T. Jakubiak, Upoważnienie do słuchania spowiedzi wg Kodeksu prawa kanonicznego z 1983 roku, «Warszawskie Studia Teologiczne» 25/2/2012, pp. 35-56.

[19] M. Jurzyk, *op. cit.*, p. 67; SC Ruling of 1937, p. 11; M. Cieślak, *Zagadnienia dowodowe w procesie karnym*, I, Warszawa 1955, p. 272.

clergy – penitent privilege, the main accent in legal literature is placed on the rights of the Churches and religious associations, and also on the rights of individual persons to freedom of conscience and religion.[20] Nowadays many legal experts hold that the *ratio legis* for the clergy – penitent privilege should be seen in the need to protect the penitent's trust in the confessor and his right to religious practices.[21] In connection with this change in legal doctrine with regard to the *ratio legis* of the provision in Article 178 point 2 CCP, a restriction of the referents of the term "minister" exclusively to presbyters and bishops would seem to be incompatible with the article's purposive and axiological interpretation.[22]

To conclude my remarks on the first group of referents, I shall observe that the interpretation I have outlined above has received a fair amount of support in the legal literature. Some authors maintain that only persons who have been authorised pursuant to their Church's own law to hear individual confessions may be considered "ministers" under Article 178 point 2 CCP.[23] To justify their argument, the majority of these authors

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[20] M. Abramek, *Duchowny w procesie karnym – rozważania na kanwie zakazu dowodowego z art. 178 pkt 2 KPK*, «Monitor Prawniczy» 5/2019, p. 271; T. Grzegorczyk, op. cit., 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, ed. J. Żylińska, M. Filipowska-Tuthill, Wrocław 2016, p. 90; M. Jurzyk, *op. cit*., p. 71; B. Rakoczy, *op. cit*., p. 126.

[21] M. Rusinek, *Tajemnica zawodowa i jej ochrona w polskim procesie karnym*, Warszawa 2007, p. 77. In speaking of the *ratio legis* of the provision of Article 178 point 2 CCP, we must bear in mind that the right of Catholics to freedom of conscience and faith enables them to fulfil obligations connected with religious practice. In accordance with Can. 989 CIC: "All the faithful who have reached the age of discretion are bound faithfully to confess their grave sins at least once a year". According to Can. 916 CIC: "Anyone who is conscious of grave sin may not celebrate Mass or receive the Body of the Lord without previously having been to sacramental confession …"].

[22] *Kodeks postępowania karnego*, II: *Komentarz do art. 167-296…*, p. 239; Z. Kwiatkowski, *op. cit*., p. 175; T. Grzegorczyk, *op. cit*., p. 614; M. Wielec, *op. cit*., p. 183-186, 334.

[23] M. Kurowski, *Świadkowie*, [in:] *Kodeks postępowania karnego*, vol. 1, *Komentarz*, ed. D. Świecki, Warszawa 2020, p. 756-757; M. Śladkowski, *Fakty powierzone*

refer to Rakoczy or to Paprzycki. However, Paprzycki bases his argument on Article 53 of the Polish Constitution of 1997 and the SC Resolution of 1992, yet as I have shown above, these grounds have been used to arrive at different conclusions. Paprzycki presents his opinion taking into account the opinions of other authors, such as Rakoczy, Jurzyk and Tomkiewicz, who put the main emphasis on the CIC in their interpretation of Article 178 point 2 CCP.[24] Other authors hold a different opinion on the grounds of the SC Resolution of 1992. In their opinion, the term "minister" may be understood pursuant to Article 178 point 2 CCP much more widely than is done by, for example, Rakoczy and Paprzycki.[25] I will now present the arguments which I understand reflect this latter opinion.

5.2. A literal – "moderate" – interpretation

The second group of referents of the term "minister" are deacons, presbyters and bishops.[26] In canon law, they are "clerics" (Can. 266 § 1 CIC).[27] In a literal interpretation of Article 178 point 2 CCP, it could be argued that deacons too, while not being ministers of the Sacrament of Penance, could still enjoy the right to the clergy – penitent privilege, due to their membership of the "clergy," if they were to hear sacramental

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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*, ed. A. BIŁGORAJSKI, Warszawa 2015, p. 277; D. GRUSZECKA, *Świadkowie*, [in:] *Kodeks postępowania karnego. Komentarz*, ed. J. SKORUPKA, Warszawa 2020, p. 416; K.T. BORATYŃSKA, *op. cit.*, p. 522. [See also footnote 7 and the text concerning it].

[24] L.K. PAPRZYCKI, *Świadkowie*, [in:] J. GRAJEWSKI, L.K. PAPRZYCKI, *Kodeks postępowania karnego. Komentarz*, I, Zakamycze 2003, p. 440-441.

[25] *Kodeks postępowania karnego*, II: *Komentarz do art. 167-296…*, p. 239; D. SZUMIŁO-KULCZYCKA, *Świadkowie*, [in:] *Kodeks postępowania karnego. Komentarz orzeczniczy*, ed. K. DUDKA, H. PALUSZKIEWICZ, D. SZUMIŁO-KULCZYCKA, Warszawa 2015, p. 258; R.A. STEFAŃSKI, *Świadkowie*, [in:] J. BARTOSZEWSKI et al., *Kodeks postępowania karnego. Komentarz*, I, Warszawa 2003, p. 786-787.

[26] T. GRZEGORCZYK, *op. cit.*, p. 614 [This author's opinion is expressed indirectly].

[27] D. LE TOURNEAU, *The Enrollment or Incardination*, [in:] *Exegetical Commentary on the Code of Canon Law*, ed. A. MARZOA, J. MIRAS, R. RODRIGUEZ-OCAŃA, English language ed. E. CAPARROS, P. LAGGES, II.1, Montreal-Chicago 2004, pp. 305-307.

Confession in breach of the provisions of canon law.[28] It should be noted that on the grounds of their power of holy orders, deacons are regularly appointed to conduct religious worship[29] and thereby meet the condition held in the Polish legal doctrine with reference to the SC Resolution of 1992 that, as "ministers", they are exempted from the duty to disclose any information they have learned during Confession. With regard to Confession (*confessio*) to a deacon, we should note that, although deacons are not ministers of the Sacrament of Penance (*sacramentum paenitentiae*), since a "minister" is a person authorised to administer a sacrament – in canon law confessions made in good faith to a deacon are acknowledged as as sacramental confession (*confessio sacramentalis*). In other words, this is just the same as confessing to a priest authorised to hear confession as part of a valid Sacrament of Penance (Can. 1378 § 2 n. 2 CIC).[30]

Unquestionably, deacons are ministers (clerics) within the meaning of the CIC and SC rulings. Considering the respective autonomy of the Polish State and of the Church, and the fact that the assessment of the validity of sacraments administered by the Church (including confessions heard by deacons) does not lie within the scope of powers exercised by Polish courts – we may assume that deacons, like presbyters

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[28] There are circumstances in which a deacon may hear sacramental Confession. in accordance with Can. 990 CIC, This is when he acts as an interpreter.

[29] See Paulus VI, *Motu proprio Generales normae de diaconatu permanenti in Ecclesia Latina restituendo feruntur "Sacrum diaconatus ordinem"*, n. V-VI, 18 VI 1967, AAS 59/1967, pp. 701-703; Sacrosanctum Concilium Oecumenicum Vaticanum II, *Constitutio dogmatica de Ecclesia "Lumen Gentium"*, n. 29, 21 XI 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, drugie wydanie wzorcowe*, Katowice 1999, n. 227, p. 153.

[30] Confession of sins to a person who is not a legitimate minister authorised to impart absolution in accordance with canon law may not result in a valid sacramental absolution. In such a case, God may nevertheless grant the penitent the necessary sanctifying grace outside of the sacrament of penance and reconciliation. – Sacrosanctum Concilium Oecumenicum Vaticanum II, *Constitutio pastoralis de Ecclesia in mundo huius temporis "Gaudium et Spes"*, n. 22, 7 XII 1965, AAS 58/1966, p. 1043; *Catechism of the Catholic Church*, n. 1452.

and bishops, are referents of the term "minister" under Article 178 point 2 CCP. This thesis is confirmed in the axiological and purposive interpretation of the provision in Article 178 point 2 CCP.[31] In canon law, the "seal of Confession" (the term used until 1983) and the "secret of Confession" (as of 1983) is binding on deacons (Can. 899 CIC 1917,[32] Can. 983 § 2 CIC[33]), and a breach of secrecy carries a threat of sanctions under canon law (Can. 2369 § 2 CIC 1917, Can. 1388 § 2 CIC).

The recognition of Roman Catholic deacons as members of the group entitled to the clergy – penitent privilege also seems to be compatible with the opinions of those authors whose interpretations of Article 178 point 2 CCP emphasise a Church's or religious association's own law. Although the CIC does not consider deacons ministers of the Sacrament of Penance – "minister" meaning a person authorised to administer the sacrament – it nevertheless regards them as clerics. Furthermore, canon law admits one exception when a deacon is authorised to be privy to confession as part of the Sacrament of Penance. This is when he acts as an interpreter (Can. 990 CIC).[34] It should be stressed, however, that canon law says that in such circumstances the deacon is not the minister of the Sacrament of Penance, but only an interpreter. He is an "assistant" to the minister. He is privy, that is he listens in to the confession as an interpreter, but absolution is imparted by the priest.

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[31] *Kodeks postępowania karnego*, II: *Komentarz do art. 167-296…*, p. 236; T. Grzegorczyk, *op. cit.*, p. 614; M. Tomkiewicz, *op. cit.,* pp. 53-54; B. Rakoczy, *op. cit.,* p. 129.

[32] CIC 1917 – abbreviation for: Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus. Benedicti Papae XV auctoritate promulgatus, Romae 1917, AAS 9/1917/II.

[33] With the promulgation of the *Code of Canon Law* in 1983, to denote the secrecy binding persons acquiring knowledge from sacramental Confession, two terms started to be employed: "seal of Confession" – binding ministers of the sacrament of Penance, and "secret of Confession" – binding those other than ministers of the sacrament of Penance. The objective scope of the terms "secret" and "seal" is the same. The difference in terminology is the consequence of the ecclesiastical legislators differentiating the *ratio legis* of the terms.

[34] W. Stetson, *The Penitent*, [in:] *Exegetical Commentary on the Code of Canon Law*, ed. A. Marzoa, J. Miras, R. Rodriguez-Ocańa, English language ed. E. Caparros, P. Lagges, II.1, Montreal-Chicago 2004, p. 842.

5.3. An extending interpretation

The third and largest group which can also constitute a set of referents of the term “minister” consists of all persons who, under ecclesiastical law, are appointed to perform any regular religious services whatsoever. This group, like the catalogue of referents of the term “minister” in the the Social Insurance System Act, encompasses not only deacons, presbyters and bishops – who are regarded as clerics within the meaning of the CIC regulations – but also some lay persons.[35]

In the Roman Catholic Church, a person’s calling to regularly organise religious worship can ensue not only through his ordination, which enables him to exercise the power of governance (Can. 129 § 1 and 1008 CIC), but also by the conferral of authorisation on that person, or by his appointment to an office or duty (service) (Can. 129 § 2 CIC; Can. 145 CIC; Can. 150 CIC; Can. 230 § 1, 3; Can. 517 § 2; Can. 785 § 1 CIC; Can. 861 § 2 CIC; Can. 910 § 1 CIC; Can. 1112 § 1 CIC; Can. 1168 CIC; *Introduction* to OP, n. 19).[36] Hence, according to the definition accepted in legal doctrine from the SC Resolution of 1992, all persons appointed in this way to regularly organise religious worship may be considered ministers and therefore should be exempted from the duty to testify as witnesses on the grounds of Article 178 point 2 CCP if they were to hear sacramental Confession in breach of canon law. [37]It must be noted that, although just like deacons, lay persons who are regularly appointed to perform other religious services cannot be ministers of the Sacrament of Penance, in canon law Confession conducted in good faith in their presence as part of an invalid Sacrament of Penance is considered “sacramental Confession” (Can. 1378 § 2 n. 2 CIC).[38] Thus,

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

[36] OP – abbreviation for: *Obrzędy pogrzebu dostosowane do zwyczajów diecezji polskich* [Funeral Rites Adapted to the Customs of Polish Dioceses], 2nd edition, updated, Katowice 2009.

[37] There are situations where, in accordance with the CIC, lay persons are authorised to be privy to sacramental Confession (Can. 990 CIC).

[38] J. Syryjczyk, *Kanoniczne prawo karne. Część szczególna*, Warszawa 2003, p. 105-106.

in accordance with the SC Ruling of 1937, this too should be covered by the clergy – penitent privilege under Article 178 point 2 CCP, and persons hearing such a confession should be exempted from appearing as witnesses with regard to the information they have obtained from it. Since lay persons (like deacons) who acquire information by being privy to a penitent's confession are obliged to keep the "secret" (or previously the "seal") of Confession, on the grounds of the provision in Article 178 point 2 CCP and its *ratio legis*, they too should be exempted from the duty to give evidence. As I have already pointed out, the definition of a "minister" in the SC Resolution of 1992 as used in the legal doctrine says that a minister is appointed to "regularly" organise religious worship, so perhaps we should consider what exactly "regularity" means. Is it not just "performing duties which are irreconcilable with other lay duties,"[39] or "an appointment for an indefinite period of time until recall or resignation," but also "being asked to perform a task (even on just one specific occasion) which is provided for on a regular basis in a Church's or religious community's own legislation"? Were we to acknowledge that "regularity" also covers the latter case, an interpreter mediating during sacramental Confession could also be a referent of the term "minister." The interpreter's services are provided for in Can. 990 CIC.

In the determination of the persons entitled to the exemption under Article 178 point 2 CCP, both the SC Ruling of 1937 and the legal doctrine stress the need to take into account a recognised Church's internal regulations establishing the institution of Confession and the ministers authorised to hear confessions. Hence an interpreter whose services are provided for on a regular basis in compliance with the CIC, should be regarded as a referent of the term "minister." Because of the particular nature of the services an interpreter performs during sacramental Confession, the Roman Catholic Church does not appoint such a person in the same way as it appoints other persons to other offices, or for the performance of other duties. The interpreter must be a person whom the penitent will accept, so in view of the particular nature and rare

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[39] SC Resolution of 1992

need to use such services, he or she must be appointed *ad casum*, that is for a specific occasion.

To conclude this part of my article, I will observe that the inclusion of lay persons who are appointed to regularly perform a religious service on the grounds of the Church's jurisdictional powers in the group considered ministers within the meaning of the SC Resolution of 1992, regardless of the fact that they are not clerics under the CIC, would be a partial implementation of the proposals to amend Article 178 point 2 CCP by extending it to include all persons who acquire information during Confession, regardless of the manner in which they acquire such information.[40] As I have pointed out, such a specification of referents of the term "minister" would not be a violation of the Church's autonomy in matters regarding the performance of religious worship.

The third group of referents of the term "minister" complies with the definition of the term "minister" used in the legal doctrine, but it may be incompatible with the grounds given in the SC Resolution of 1992. The Resolution does not consider every appointment to an office or for the performance of a duty carried out on a regular basis in the Church a sufficient qualification to make the appointee a minister. Furthermore, the Resolution observes that the semantic interpretation of a legal provision assumes that a "meaning other than the colloquial meaning can only be ascribed" to a word used in a colloquial sense "if this follows explicitly from the legislative act in question." Hence an extending interpretation of the term "minister" would probably be supplemented with restrictive conditions and reservations.

On the other hand, we may say that someone who is entrusted with a duty which is to be done "regularly" and consequently cannot be reconciled with the obligations of lay persons is a minister in the sense of the SC Resolution of 1992. So we could still call people involved in the management of a parish "ministers" (Can. 517 § 2). Likewise, people who become missionaries (Can. 784 CIC) or missionary catechists (Can. 785 § 1 CIC), as well monks, students of theological seminaries, novices, postulants and persons in the juniorate stage of their monastic

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[40] M. Tomkiewicz, *op. cit.*, p. 57.

formation would all qualify as "ministers." Although the Supreme Court's 1992 Resolution draws attention to the differentiation between ministers and lay persons in the law of a Church or religious association, it nevertheless declares that "the recognition of a specific person as a minister . . . calls for a thorough acquaintance with the principles a Church or religious association follows, because these principles – together with all the circumstances of a particular case – make it possible to ascertain whether the given person was appointed to organise and conduct religious worship." Therefore, in the analysis of Article 178 point 2 CCP we cannot stop at a merely literal interpretation of the provisions of canon law regulating the administration of the Sacrament of Penance. Such an interpretation, carried out exclusively with reference to the internal criterion, could lead to a restriction of the constitutional right of Catholics to equal treatment in the eyes of the law as compared with members of other religions which do not have a Sacrament of Holy Orders within the meaning of the CIC.

An interpretation extending the group of referents of the term "minister" to include lay persons appointed to regularly organise religious worship could apply, for example, when a lay person performing a task in the Catholic Church is asked to act as an interpreter during the Sacrament of Confession (Can. 990 CIC). In such a situation, even though that person were not a minister in the sense of having the authority to administer the sacrament, in accordance with the CIC, he would still be authorised to be privy to the confession.[41] In the situation where a lay person is appointed to assist in or attend the performance of religious worship on a regular basis in compliance with the CIC provisions for the Sacrament of Penance, on the grounds of the SC Resolution of 1992, we may assume that the privilege defined in Article 178 point 2 CCP may also apply to lay persons.

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[41] It should be emphasised, however, that in accordance with canon law, such a person is not a minister of the Sacrament of Penance, but only an interpreter. He is an "assistant" to the minister. He listens in and is privy to the confession as an interpreter, but the absolution is imparted by the priest.

6. Conclusion

My analysis of the internal and external criteria of the term "minister" under Article 178 point 2 CCP leads to three possible sets of referents of the term "minister" for Confession as practised in the Roman Catholic Church. Polish law recognises the clergy – penitent privilege, i.e. it exempts Roman Catholic ministers who hear confessions from the obligation to testify as witnesses in matters which would involve the disclosure of the information they have acquired during a confession. The literature on the subject takes several different approaches to these groups of referents, depending on the significance the authors ascribe to particular criteria for the interpretation of Article 178 point 2 CCP.

The interpretation I have presented is not the only one which commentators have examined. Alongside the potentially admissible referents of the term "minister" under Article 178 point 2 CCP I have discussed in this paper, some commentators say that under this provision, the participants necessary to assist in the administration of a confession are also exempted from the obligation to give evidence. Some go as far as to formulate doctrine on the amendments which should be introduced to the current provisions, making the exemption applicable to all "third" parties acquiring information during a confession.

I am continuing my study on the full extent of the personal scope of the clergy – penitent privilege under Article 178 point 2 CCP, and have not been able to present the full results of my work hitherto owing to the limited space available in this paper.

The Term "Minister" under the Polish Code of Criminal Procedure as Applicable to the Roman Catholic Church

Summary

In Article 178 point 2 of the Polish Code of Criminal Procedure, the legislator recognises the clergy – penitent privilege and has provided that "a minister of religion may not be examined in the capacity of witness on information communicated to him during the a penitent's

confession." Since this provision employs general terms (i.e. such as are common to many Churches and religious associations) which have not been defined in the Code of Criminal Procedure, including, for instance, the term "minister," interpretative difficulties often occur with the implementation of the clergy – penitent privilege.

Hence my main aim in this paper was to identify the referents of the term "minister" in Article 178 Section 2 of the Code as applicable to the Roman Catholic Church. To do this, I offer a discussion both of the internal and external criteria for the term "minister," which turns out to be an indispensable step allowing me to go on to the description of the personal scope of these provisions.

Termin „duchowny" z polskiego Kodeksu postępowania karnego dla Kościoła rzymskokatolickiego

Streszczenie

W art. 178 pkt 2 k.p.k ustawodawca zapisał: „Nie wolno przesłuchiwać jako świadków: (…) duchownego co do faktów, o których dowiedział się przy spowiedzi". Ponieważ norma w nim zawarta odwołuje się do ogólnych terminów (bo wspólnych dla wielu Kościołów i wspólnot religijnych), ale i za razem niezdefiniowanych w k.p.k., jak chociażby termin „duchowny", stosowanie przedmiotowego zakazu dowodowego okazuje się napotykać na trudności interpretacyjne.

Biorąc pod uwagę powyższe problemy, głównym celem, jaki przyświecał autorowi przy powstaniu tego artykułu, było określenie desygnatów terminu „duchowny" z art. 178 pkt 2 k.p.k dla Kościoła rzymskokatolickiego. Dla jego realizacji autor określił kryteria wewnętrzne i zewnętrzne omawianego pojęcia, co z kolei okazuje się nieodzowne w opisaniu zakresu podmiotowego przywołanej normy.

Słowa kluczowe: artykuł 178 pkt 2 k.p.k; zakaz dowodowy; duchowny; spowiedź; Kościół rzymskokatolicki.

Keywords: article 178 point 2 CCP; the clergy – penitent privilege; minister of religion; the Sacrament of Confession; the Roman Catholic Church.

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