“The seal of the confessional: Sacerdotal privilege in Ireland.”

Abstract

Keywords: Sacerdotal, Episkeia, Privilege, Absolute Nature.

This essay probes contentious issues within sacerdotal privilege between church and state. Following a short historical conspectus, this essay considers whether such privilege should be absolute or not and emerging related issues such as third party disclosure, freedom of religion, legislation and privacy rights will also receive consideration.

McGrath acknowledges arguments in favour of sacerdotal privilege: the strong ethical obligations and the serious consequences on ministers of religion not to reveal confessions. Furthermore, he adds that there is a strong argument to be made that a priest is the ultimate holder of the privilege which cannot be waived by the penitent. Heffernan invites questioning of this area of law in the context of the possibility of interesting questions arising now in contemporary society and the possibility of extension of the privilege to other spiritual and counselling areas. Most compelling is the commentary from Healy:

‘In light of the significant expansion of the courts’ constitutional jurisprudence, the juridical recognition of constitutional imperatives, and the yielding of the private privileges to constitutional considerations, this aspect of the sacerdotal privilege remains appropriately amenable to reconsideration’.

The lack of clear empirical data relating to the efficacy of the confessional privilege, whether supporting or not, is noticeable by its absence. Research is required into the ameliorating effect of confessors upon penitents and society, and any related deterring effect on present or future criminal behaviour and acts. Also, empirical studies to determine whether penitents would be dissuaded from confessing their crimes, in the knowledge that their confessions may be divulged, should be considered separately by both Church and State. The obvious defence against such studies is the risk of breaching the seal of the confessional in its present form. This problem will need the invocation of epikeia (Behrens describes epikeia as a practice of observing an exception to a rule of human law where such a rule conflicts with the law of God or the law of reason), with balance and respect for privacy, to be overcome. The element of circular reasoning used to justify the validity of the seal of the confessional cannot continue to rotate. The medieval arguments are finding less traction in contemporary society, thereby challenging Wigmore’s third evidential element of privilege. A critical area of supervisory need occurs where the confessional itself ceases to be fit for purpose in that a confessor has misused or abused sacramental power. Radical thinking and action by the Roman Curia and the respective civil power will be crucial to effect cessation, censure and protection of citizens from offenders.

The strictness of canon law must be reflected by equal rigidity of civil law providing a balanced foundation of enquiry as to the appropriateness whether the privilege of the seal of the confession is to be held as absolute. Given the systematic collapse of society’s support of the Church in light of its abuse offences and its handling of the abuse, the long term survival of absolute privilege must surely be in doubt.
Introduction

The Irish and English legal systems have long held that a person is under a duty to disclose, subject to certain limits, information, whether oral or written, to the court\(^1\). This duty has in recent times, in Ireland, become the subject of much debate and controversy\(^2\). Central to this issue is the element of privilege. Healy describes privilege as that which operates so that any person to whom it attaches may refuse to answer certain questions or produce certain documents or even prevent others from doing so\(^3\). There is a tension between the protection of disclosure and a court’s ability to discover the truth.

Finlay C.J. provided a helpful description of this tension in *Smurfit Parabas Bank* stating:

\[
'privilege should only be granted by the courts in the public interest where the proper conduct of the administration of justice can be said to outweigh the disadvantage arising from the restriction of the disclosure of all relevant facts.'\(^4\)
\]

There are several subcategories of privilege recognised in law, examples include: legal professional, journalistic, marital, and the category under consideration in this essay: sacerdotal privilege. Sacerdotal privilege is a particularly salient area, where competing interests are required to balance the just principles of privilege law. On one side, the requirements of a Church’s canonical rules forbids divulging information under priest-penitent relations outside the confessional under any circumstances\(^5\). On the other side the civil authority has a duty to protect the citizens of the state from harm\(^6\).

Following a short historical conspectus, this essay will consider whether such privilege should be absolute or not and emerging related issues such as third party disclosure, freedom of religion, legislation and privacy rights will also receive consideration.

---

\(^1\) *Calcraft v Guest* [1898] 1 Q.B. 759

\(^2\) *The Murphy Report* 2009

\(^3\) Healy, *Irish Law of Evidence* (Round Hall 2004) at 13-01

\(^4\) *Smurfit Paribas Bank Ltd v A.A.B. Export Finance Ltd* [1990] 1 I.R. 469 at

\(^5\) Code of Canon Law 1983, Canon 983 § 1,2

\(^6\) Art 40.3.1° and 40.3.2° Bunreacht na hEireann
Historical Conspectus

Pre-Reformation: The preservation of the confessional seal dates back to 1200 and is recorded in the 21st canon of the 4th Lateran Council and slightly later in the 1217 canon in Salisbury, England. There is evidence to support the early presence of the confessional seal. Lyndwood asserts that it only applied specifically to sacramental confession. However, it is unclear how non-Church courts would have approached a refusal of information claiming sacerdotal privilege. There may have been some confusion regarding the common laws recognition of sacerdotal privilege at this time according to Coke. While recognising the sacrament of confession, he opined that this did not extend to treasonous crimes.

Reformation: Conflicting records and opinions obfuscate the status of the seal of the confessional at this time. Bursell asserts that auricular confession was specifically enjoined in the Edwardian prayer books of 1549 and 1552 and that each received the sanction of parliament. Zubacz suggests the opposite, asserting that the prayer books of both 1552 and 1662 no longer required confession and that the practice of auricular confession declined losing its compulsory element, ultimately being replaced by the Anglican book of prayer. The prayer books themselves were abolished by parliament in 1645.

It appears, therefore, that the seal of the confessional was recognised before the reformation and that it began to decline thereafter.

Post-Reformation: In Du Barré v Livette the court distinguished the King v Sparkes case where a papist prisoner had confessed before a protestant clergyman. The confession was permitted evidence at trial and the prisoner was convicted and executed. The privilege was not ruled against here but was simply ignored. In Broad v Pitt the matter attracted more attention. Best C. J. stated:

---

8 Lyndwood, ‘Provinciale Angliae’ (1697) 334
9 Coke is thought to have refered to the Church Act 1315. Number 9 Edw. II St. 1 c.14 and R. v. Garnet (1606) 2 St. Tr.217. Garnet, a priest, was executed for not speaking out having become aware of a plot to kill King James. Garnet claimed under the seal of the confessional.
10 Bursell (n 7) 87
11 Zubach, The Seal of the Confessional and Canadian Law (Wilson and Lapleur 2009) 3.3
12 Du Barré v Livette (1791) Peake 108 170 E.R. 96
The privilege is an anomaly, not to be extended; it does not exist in the case of clergymen or medical men; however important the communications to them may be, they are compellable to disclose them, though I, for one, will never compel a clergymen to do so, if he objects.¹³

Two points emerge from the historical examination above. First, that the privilege does not receive any special recognition by the court and second, there is a reluctance to compel any communications under the asserted privilege. The argument can be made that the second point is in contradiction with the first. The explicit unwillingness to enforce a communication from an unrecognised privilege results in it’s recognition, albeit negative.

The courts of equity have shown more clarity in their reasoning. Two cases are considered: in the first, a Canadian bank refused to produce a letter claiming privilege.¹⁴ Jessel J. ruled that there was no privilege and stated:

‘Our law has not extended that privilege to either the medical or sacerdotal professions...in foreign countries where the Catholic faith prevails that privilege should prevail...as a man should not be hampered in going to confession by the thought that either he or his priest may be compelled in a court of justice the substance of the confession. Whether it is rational or irrational, is not recognised by our law.’¹⁵

There is little uncertainty in the honourable judge’s remarks above and in A.G. v Guardian Papers 113 years later Donaldson L.J. described that application of confidentiality where:

‘The right can arise out of a contract whereby one party undertakes that he will maintain the confidentiality of information directly or indirectly made available to him by the other party or acquired by him in a situation, e.g. ...But it can also arise as a necessary incident of a relationship between the confidant and the confider, e.g. priest and penitent.’¹⁶

---

¹³ Broad v Pitt (1828) Moody and Malkin 233 173 E.R. 1142
¹⁴ Anderson v Bank of British Colombia [1875] L.R. Ch. D. 2 644
¹⁵ ibid at 651
¹⁶ A.G. v Guardian Newspapers Ltd. (No. 2)[1988] 3 W.L.R. 776 at 177
He avoids any explicitly recognised right to a confessional privilege giving emphasis to the contractual aspects only.

**Jurisprudence in Ireland**

*Cook v Carroll*,\(^{17}\) remains the *locus classicus* case and is cited beyond Irish shores\(^{18}\). Duffy J. formulated a judicial decision *astabula rasa* (clean slate). Facts: The plaintiff brought an action for the seduction of her daughter against a defendant. The local priest, who had earlier facilitated a conference between the parties, was called to give evidence of this conference. The priest refused to give evidence in the court claiming priest-penitent privilege as provided for in canon law\(^{19}\) and was subsequently fined £10 for contempt of Court. He did not appeal and the plaintiff’s action was dismissed. On appeal at Tralee High Court the priest was again called to testify and again he refused. The plaintiff’s appeal was dismissed and the question whether or not the priest had been in contempt again was answered later in Dublin by Duffy J. who held that no contempt had occurred.

Duffy J. recognised an absolute privilege over confidential communications made by a parishioner to a priest and rejected reference to English common law which gave no recognition to sacerdotal privilege\(^{20}\). Duffy J. looked to Wigmore for assistance in his reasoning and approved his four elements for a test of the presence of privilege:

1. The communications must originate in confidence that they will not be disclosed;
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation;

---

\(^{17}\) *Cook v Carroll* [1945] 1 I.R. 515
\(^{18}\) *R v Gruenke* [1991] 3 S.C.R. 263
\(^{19}\) Canon 983 (n5) §1
\(^{20}\) For example, *Wheeler v Le Marchant* (1881) 17 C.D. 675 at 681 ‘Communications made to a priest in the confessional on matters considered by the penitent to be more important than his life or his fortune, are not protected’.
(3) The relation must be one, in the opinion of the community, ought to be sedulously fostered; and

(4) The injury which would ensue to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. 21

Duffy J. pointed out the special recognition of the Constitution toward the Catholic Church 22 who repudiated the Reformation as heresy 23. An aspect not receiving coverage, was the fact that canon law is foreign law to be proved. Kennedy C.J. made this clear when he stated ‘Canon Law applicable to the case must be proved as fact by expert witnesses as foreign law in these Courts’ 24. Whether the same decision would occur today is doubtful 25.

Later cases have not shown facts as or more applicable than Cook in terms of the specificity required to consider sacerdotal privilege in equal or more detail. In ER v JR 26 a priest, who was also a marriage counsellor, claimed privilege. Held by Carroll J. that communications made to a minister of religion and acting as a marriage counsellor are privileged in that the four conditions set out by Duffy J. (The 4 Wigmore principles) are present. The privilege is that of the spouses and not of the minister for religion and may be waived by mutual consent of the spouses. This finding while interesting, in terms of an example of the use of the Wigmore principles, drills into the matter no further than that. Noteworthy is the reference to ministers of religion in general and the extra weight given to the fact that the counsellor was also a priest. Carroll J. reserved the question whether if the counsellor had been a layperson there would have been a similar decision.

21 Wigmore, Anglo-American system of Evidence (3rd Edition., volume viii Boston, 1940) at 2380-91
22 No longer applicable since the 5th amendment to the Constitution 1973
24 O’Callaghan v O’Sullivan [1925] 1 IR 90 at 119
25 Friel., Family and Personal Relations Law Privilege for Marriage Counsellors.1998 Family Law Review. at 1
26 ER v JR [1981] ILRM 125, see also Johnston v Church of Scientology [2001] 1 IR 682
The Absolute Nature of Sacerdotal Privilege

Canon 983 § 1 is clear: ‘The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way betray the penitent, for any reason whatsoever, whether by word or in any other fashion’. There are several canons which relate directly to Canon 983 and are worthy of mention. Canon 984 provides that any knowledge obtained by the confessor during confession cannot be used at any time later to the detriment of the penitent.27 Canon 985 provides that confessions by students to their teachers in a seminary should not occur save where the student specifically requests it.28 Canon 990 allows a penitent to confess through a translator where Canon 983 is not prejudiced.29 The privilege, as it extends to witness and testimony in the civil courts, is provided for in Canon 1548 in which witnesses are compelled to tell the truth to a judge lawfully questioning them.30 There are exemptions including clerics and matters revealed to them by reason of their sacred ministry.31 Canon 1550 extends the exemption to a class that are deemed incapable of being witness to a priest in respect of what has become known to him in sacramental confessions.32 Punishments for breaking the seal of the confessional include a latae sentiae (excommunication) against the confessor.33

In consideration of these canons, a release from the seal of the confession seems unlikely. Zubacz looks to the writings of Aquinas who states that no one, not even the Holy Father, can release the confessor from the seal of the confessional.34 Aquinas is also accepted as having offered an erudite description of penance itself in terms of three constituent parts: contrition, confession, and satisfaction. The Council of Trent supported this when they declared: ‘the acts of the penitent, namely contrition, confession, and satisfaction, are the quasi materia of this sacrament’.35 Woods further examines these three parts of confession giving consideration to the veracity of the claim that the seal of the confessional is absolute. He also looks toward the writings of Aquinas who states ‘The parts of

---

27 Code of Canon Law 1983, Canon 984 § 1.2  
28 ibid at 985  
29 ibid at 990  
30 ibid at 1548 § 1. Chapter III.  
31 ibid at 1548 § 2.1°, 2°. Chapter III.  
32 ibid at 1550 § 2. 2°. Chapter III. Article 1  
33 ibid at 1550 § 1, § 2.  
34 Zubacz (n 11) at 2.3.6  
35 The Catholic Encyclopedia.
a thing are those which the whole is composed. Now the perfection of Penance is composed of several things, contrition, confession and satisfaction’. Woods concludes the point stating that the pivotal element may be absolution but the three acts of the penitent are also required\textsuperscript{36}.

Privacy Matters Corollary to Sacerdotal Privilege

Privacy is a broad nebulous concept in which there are many sub-areas\textsuperscript{37}. Under Irish law privacy is a constitutional right, albeit un-enumerated\textsuperscript{38}, and the courts give consideration on a case by case basis. Recognition of a right to privacy was analysed in McGee v Attorney General by virtue of the human personality\textsuperscript{39}. Ten years later in Norris v AG\textsuperscript{40} the court held the same right to find unconstitutional a ban on certain sexual activity between men. An individual right to privacy was definitively recognised three years later in the Kennedy phone-tapping case\textsuperscript{41}. While there is no Statute specifically covering privacy, there are privacy protection provisions in other Statutes\textsuperscript{42}. Ireland is also a signatory to the International Covenant on Civil and Political Rights\textsuperscript{43}, which in turn enshrines the United Nations’ Universal Declaration on Human Rights\textsuperscript{44}. Ireland ratified the European Convention on Human Rights (ECHR) in 1953 and has since expressed support for the European Convention in the form of Statute\textsuperscript{45}. Article 8 of the ECHR provides explicit protection for persons’ privacy though this protection is not absolute\textsuperscript{46}. An Irish Privacy Bill is awaiting enactment\textsuperscript{47}.

\textsuperscript{36} Woods, Morales v Portuondo. Catholic Lawyer. 2002 at 113
\textsuperscript{37} Dudgeon v. United Kingdom (1981) 4 E.H.R.R. 149 at ‘Partially dissenting decision of Judge Walshe’. Part 8 where the judge defined privacy as ‘the right to be let alone’, quoting Warren and Brandeis.
\textsuperscript{38} Bunreacht na hEireann, Art 40.3.1°, 40.3.2°
\textsuperscript{39} McGee v Attorney General [1974] IR 284 at 325
\textsuperscript{40} Norris v Attorney General [1984] IR 36 at 99
\textsuperscript{41} Kennedy v Ireland [1987] IR 587

\textsuperscript{43} Article 17 (1)
\textsuperscript{44} Article 12
\textsuperscript{45} European Convention on Human Rights Act 2003
\textsuperscript{46} European Convention on Human Rights, Article 8 s.2(1)
\textsuperscript{47} Privacy Bill 2006. Note though that s.1 does not define ‘privacy’. 
Freedom of Religion

Freedom of religion receives explicit constitutional protection in Ireland\(^{48}\) and is thought to find its origins in the U.S. first amendment\(^ {49}\). This freedom is not reflected in an historically consistent flow of caselaw. In *McGee v A.G.*, the applicant was successful on privacy grounds but the argument of private conscience did not receive recognition as it was held to relate solely to religious conscience, thereby effectively excluding secular humanists\(^{50}\). In *Murphy v IRTC*, Barrington J. held a claim that a statute to prohibit advertising of religious content was unconstitutional. The Judge acknowledged the effect of limitation upon the manner in which the citizen may profess his religion but denied it was an attack on a citizen’s right to practise his religion\(^ {51}\). The utility of the Statute was also considered\(^ {52}\) and recognised that religion is both a private and public affair in that a citizen will wish to convert others to his own religion as well as influence the evolution of society\(^ {53}\). Public order and religion was considered in *People (DPP) v Draper*\(^ {54}\) where an appeal against conviction in the case of a man convicted of damage to religious statues in the belief that he had been sent by God failed. Doyle questions the effective reach of this area of religious freedom in terms of the extent to which it is protected from state interference. He further queries whether a specific criminal offence is sufficient to remove the Constitutional shield protecting religious freedom\(^ {55}\). Irish caselaw shows a trend of state support for religious freedom. In *Mulloy v Minister for Education* Butler J. stated: ‘The scheme confining it to lay teachers creates a difference and distinguishes between them and teachers of a different religious status. It is also clear that the ground of such discrimination is the difference in religious status’\(^ {56}\). In this case a priest who was denied teaching credits because he was a priest received support from the Court.

\(^{48}\) Bunreacht na hEireann, Art 44., 44.2. 1°.
\(^{49}\) The United States Constitution 1788. First Amendment. (1791)
\(^{50}\) *McGee v A.G.* (n 47) at 316
\(^{51}\) [1999] 1 IR 12 at 23
\(^{52}\) ibid at 22
\(^{53}\) ibid at 23
\(^{54}\) *People (DPP) v Draper*, 24 March 1988, The Irish Times
\(^{55}\) Doyle, *Constitutional Law*. 2008 at 10-06
\(^{56}\) [1975] IR 88 at 92- 93
Legislation Corollary to Sacerdotal Privilege

The Courts find much of their authority to decide upon privilege by application of common law. These Court decisions are made according to the rights and public interests which have developed under the Constitution\(^{57}\) and Statutes\(^{58}\). Legislation is proposed with the intention of further protecting children and vulnerable adults from arrestable offences including sexual offences\(^{59}\). The thrust of the proposal is to compel all those who possess knowledge that an arrestable offence has been committed against a child or vulnerable adult to report such to the Gardai as soon as practicable. This effectively places a positive onus upon a third party to disclose information obtained in a privileged setting. A defence of ‘reasonable excuse’ is included in the Bill\(^{60}\). Current legislation in Ireland relating to citizens’ duty to inform falls into two categories. First, a duty to inform is provided for in the Offences against the State (Amendment) Act 1998 s.9 covering serious crime but not sexual crimes. The Criminal Justice Act 1994 s.57 relates to knowledge in the area of money laundering and Criminal Justice Act 2011 s.19 covers knowledge in white collar crime. Protection for whistleblowers remains at Bill stage at the time of writing\(^{61}\). The Protections for Persons Reporting Child Abuse Act 1998 provides for protection of people reporting suspected abuse of a child in good faith\(^{62}\) but does not provide for reporting abuse of vulnerable people. At present, whistleblower protection is sectoral and therefore fragmented in its application\(^{63}\).

There is an area of ecumenical, canon and divine law which may help facilitate the modification of established sacerdotal confessional practice known as epikeia\(^{64}\). Epikeia provides for a type of equitable interpretation where good cause is shown and there is established recognition of its worth in

\(^{57}\) Healy (n 3) at 13-02

\(^{58}\) For example: Bunreacht na hEireann Article 15.12 and the Criminal Justice Act 1924 s.1.(f)

\(^{59}\) Criminal Justice (Withholding Information on Crimes against Children and Vulnerable Adults) Bill 2011 ibid Head 3(b)

\(^{60}\) ibid Head 3(b)

\(^{61}\) Whistleblowers Protection Bill 2011

\(^{62}\) Protections for Persons Reporting Child Abuse Act 1998 s.3 (1) (b)

\(^{63}\) Examples of sectoral whistleblower protection are: Labour Services (Amendment) Act 2009 s.7, National Asset Management Agency Act 2009 s.222, Consumer Protection Act 2007 s.87.

\(^{64}\) New Catholic Dictionary defines Epikeia as ‘ law not applying in a particular case because of circumstances unforeseen by the lawmaker. The lawmaker cannot foresee all possible cases, and it is therefore reasonably presumed that were the present circumstances known to the legislator he would permit the act’.
religious settings. Behrens describes epikeia as a practice of observing an exception to a rule of human law where such a rule conflicts with the law of God or the law of reason.

Discussion

The criteria for the absolute privilege of the confessional seal requires that the three acts of the penitent be present. Canon 964 provides that a proper place for hearing sacramental confessions is a church or oratory which includes a structure with a fixed grille between the penitent and the confessor. Canon 964 includes an exception that for a ‘just reason’, confessions are not to be held elsewhere than a confessional. The words ‘just reason’ are not defined in canon law so the strict facilitation of the confession may be susceptible to confusion and error, inadvertently breaching the canon.

Irish commentators on evidence are cautious on the subject of the absolute application of the privilege. McGrath acknowledges arguments in favour of sacerdotal privilege: the strong ethical obligations and the serious consequences on ministers of religion not to reveal confessions. Furthermore, he adds that there is a strong argument to be made that a priest is the ultimate holder of the privilege which cannot be waivered by the penitent. Fennell opines that the courts have been drifting away from the reasoning in Cook and analyses Forristal v Forristal & O’Connor in support. She asserts that, in Forristal, the Court has selectively avoided application of attaching a private privilege to certain confidential relationships in satisfaction of the Wigmore principles. Further, she

65 St. Thomas Aquinas, Summa Theologica, Secunda Secundae Partis, Question 120.
67 Code of Canon Law 1983, Canon 964 §1
68 ibid 964 §2
69 ibid 964 §3
70 McGrath, Evidence (Thompson 2005)10-198
71 In Forristal v Forristal & O’Connor (1966) 100 ILTR 182 Deale J. distinguished Cook v Carroll on the facts. A priest had possession of a letter which he gave to the defamed party and in subsequent proceedings the priest was summoned to give evidence and claimed sacerdotal privilege. Held: No sacerdotal privilege attached to the letter.
asserts that this may be because the courts find this preferable in the interests of the administration of justice though a residue of an anomaly of the privilege, as it attaches to priests, indicates that any reform of the law should lead to the abolition of that privilege. Heffernan cryptically invites questioning of this area of law in the context of the possibility of interesting questions arising now in contemporary society and the possibility of extension of the privilege to other spiritual and counselling areas. Most compelling of all is the commentary from Healy who states:

‘In light of the significant expansion of the courts’ constitutional jurisprudence since Cook, the juridical recognition of constitutional imperatives, and the yielding of the private privileges to constitutional considerations, this aspect of the sacerdotal privilege remains appropriately amenable to reconsideration.’

It is clear that the Church cannot permit any breach of the confessional seal under their laws and practices, so where the civil powers wish to impact upon this in defence of citizens, corollary issues in respect of the sacerdotal privilege must be considered. There are obvious privacy issues for both the penitent and priest which must be balanced.

A contradiction emerges in relation to freedom of religion where the state apparently infringes the requirements of non-discrimination. For example, in Quinn’s Supermarket v Attorney General a groceries order which exempted Jewish kosher shops from restrictions on opening hours was declared unconstitutional. The Court was of the opinion that the exemption was disproportionate but added that a less restrictive exemption would have been permitted. According to Walshe J. religious discrimination, which is necessary for the free practice of religion, is constitutional where a conflict emerges. In the matter of endowment of religion, Campaign to Separate Church and State v Minister for Education received criticism. The Supreme Court ruled that it was constitutional to fund salaries of religious chaplains working in state-run schools reasoning that in doing so, the state was supporting the free choice of parents to decide the religious formation of their children as provided for

---

72 Fennell, The Law of Evidence (Tottel 2006 2nd Edition) 8.68
73 Heffernan, Evidence. Cases and Materials (Thompson 2005) 8.18
74 Healy, Irish Laws of Evidence (Thomson 2004) 13-50
75 [1972] IR 1 at 27
76 [1998] 3 IR 321
in Article 42.4. Doyle cannot reconcile this decision opining that in this situation there is also a direct benefit to the religious institution: their core religious mission is being advanced\textsuperscript{77}.

Child abuse cases involving the Church in recent years has focused a very bright spotlight on the issue of privilege as it relates to the confessional\textsuperscript{78}. A tension between the Church and State has developed in respect of the manner in which the Church has dealt with offenders and the perceived use of sacerdotal privilege as a shield by the Church\textsuperscript{79}, although the State is apportioned blame also\textsuperscript{80}. A series of enquiries into child abuse by priests has amplified the need for the State to act to protect the citizenry from harm as it is obliged to by the Constitution and Statute. Further difficulties have developed where church authorities gave primacy to it’s own laws when dealing with complaints against it’s clerics and where canon law was used selectively when dealing with offending clergy to the disadvantage of victims. Furthermore, the invocation of canon law to do justice to victims could not be verified\textsuperscript{81}.

It does not seem possible to isolate canon law and civil law into separate areas of governance. The Church is deeply embedded in secular society, in matters spiritual, educational and marital, so there can be no surprise when tensions surface\textsuperscript{82}. Canon law apperceives the seal of the confessional to be firmly rooted in ecclesiastical law and at a more intrinsic level, in divine and natural law. By contrast, civil law views the exclusion of confidential communications from it’s courts as a privilege emanating in and granted by man-made law.

A critical analysis of Cook v Carroll is a prudent starting point toward a holistically applicable legal model. This case was of it’s time and cannot stand up to scrutiny now because of change to the

\textsuperscript{77} Doyle (n 56) at 10-17


\textsuperscript{79} Dáil Éireann Debate Vol. 739 No. 11 Page 13 Commission of Investigation Report in the Catholic Diocese of Cloyne: Motion. Wednesday, 20 July 2011

\textsuperscript{80} ibid

\textsuperscript{81} Murphy Report (n 2) at 4.3.

\textsuperscript{82} Brewer, The Right of a Penitent to Release the Confessor from the Seal: Considerations in Canon Law and American Law (The Jurist 54 1994) at 472.
Constitution which removed the special position of the Church, an historical bias of anti-English sentiment and a failure to forensically analyse the sacrament of confession to establish it’s validity. This case is silent in respect of whether the three required elements of the sacrament of confession; contrition, confession and satisfaction, were present.

The inclusion of the words ‘Withholding Information’ in the Witholding Information (Crimes Against Children and Vulnerable Adults) Bill 2011 directly covers the nature and form of sacerdotal privilege and is a direct challenge to the seal of confession. The equitable administering of epikeia will be critical to break through the canonical restrictions presently providing for the absolutism of the sacrament. The argument that the state must consider a staged approach and legislate in a manner which respects privacy for all relevant parties is also valid.

The protection of children and vulnerable adults is paramount in a civilised society. Any perception of a hidebound ecclesiastical system which directly or indirectly dilutes the efficacy of this protection is self-defeating. Likewise, the State must do it’s part to create an environment for change in an assertive manner and thereby progress legislative engines incrementally. The state has responsibility for all citizens; Catholics and the ½ million non-Catholics in Ireland.

According to Townsley, the State should be compelled to reconsider the justifications for viewing the Church in isolation thus permitting a culture of crime to be perpetuated, and must intervene or potentially be complicit in the concealment of these crimes. Should no real progress be made in a reasonable timeframe, this position may be tested by the Courts in the not-too-distant future.

---

83 census.cso.ie/Census (2006) 84 Townsley (n 23) at 32-33
Conclusion

The Withholding Information (Crimes Against Children and Vulnerable Adults) Bill 2011 may be premature in respect of sacerdotal privilege. The lack of clear empirical data relating to the efficacy of the confessional privilege, whether supporting or not, is noticable by it’s absence. Research is required into the ameliorating effect of confessors upon penitents and society, and any related deterring effect on present or future criminal behaviour and acts. Also, empirical studies to determine whether penitents would be dissuaded from confessing their crimes, in the knowledge that there was a possibility that their confessions may be divulged, should be considered seperately by both Church and State. The obvious defence against such studies is the risk of breaching the seal of the confessional in it’s present form. This problem will need the invocation of epikeia, with balance and respect for privacy, to be overcome.

The element of circular reasoning used to justify the validity of the seal of the confessional cannot continue to rotate. The medieval arguments are surely finding increasingly less traction in contemporary society, thereby challenging Wigmore’s third evidential element (i.e. The relation must be one, in the opinion of the community, ought to be sedulously fostered) of privilege. A critical area of supervisory need occurs where the confessional itself ceases to be fit for purpose in that a confessor has misused or abused sacramental power. Radical thinking and action by the Roman Curia and the respective civil power will be crucial to effect cessation, censure and protection of citizens from offenders.

The strictness of canon law must be reflected by equal rigidity of civil law to provide a balanced foundation of enquiry as to the appropriateness whether the privilege of the seal of the confession is to be held as absolute. Given the systematic collapse of society’s support of the Church in light of it’s abuse offences and it’s handling of the abuse, the long term survival of absolute privilege must surely be in doubt.
Bibliography

Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008) 10-06

Cases

*A.G. v Guardian Newspapers Ltd.* (No. 2)[1988] 3 W.L.R. 776
*Anderson v Bank of British Colombia* [1875] L.R. Ch. D. 2 644
*Annie Cook v Thomas Carroll* [1945] 1 I.R. 515
*Attorney General Applicant v The Honourable Mr. Justice Hamilton* [1993] 3 I.R. 227
*Broad v Pitt* (1828) Moody and Malkin 233 173 E.R. 1142
*Calcraft v Guest* [1898] 1 Q.B. 759
*Campaign to Separate Church and State v Minister for Education* [1998] 3 IR 321
*Du Barré v Livette* (1791) Peake 108 170 E.R. 96
*ER v JR* [1981] I.L.R.M. 125
*John J. Forristal v. Forristal and O’Connor* [1966] 100 I.L.T.R 182
*Kennedy v Ireland* [1987] IR 587
*Mary Johnston v Church of Scientology Mission of Dublin Limited* [2001] 1 IR. 682
*McGee v Attorney General* [1974] IR 284 at 325
*Mulloy v Minister for Education* [1975] IR 88
*Murphy v IRTC* [1999] 1 IR 12
*Norris v Attorney General* [1984] IR 36 at 99
*O’Callaghan v O’Sullivan* [1925] 1 IR 90
People (DPP) v Draper, 24 March 1988, The Irish Times

Quinn’s Supermarket Ltd. v Attorney General [1972] IR 1


Wheeler v Le Marchant (1881) L.R. 17 Ch. D. 675

Legislation


Criminal Justice Act 1924

Criminal Justice Act 1994

Non Fatal Offences Against the Person Act 1997

Offences against the State (Amendment) Act 1998

Protections for Persons Reporting Child Abuse Act 1998

Data Protection Acts 1988-2003


European Convention on Human Rights Act 2003

European Convention on Human Rights Act 2003

Garda Siochana Act 2005

Broadcasting Act 2009

Whistleblowers Protection Bill 2011

Criminal Justice (Withholding Information on Crimes against Children and Vulnerable Adults) Bill 2011

Articles


Dexter Brewer, The Right of a Penitent to Release the Confessor from the Seal: Considerations in Canon Law and American Law (The Jurist 54 1994)

Ashley Jackson, The Collision of Mandatory Reporting Statutes and the Priest-Penitent Privilege. 74:4 University of Missouri Kansas City School Law Review 2006

Reports


Emily Logan, Ombudsman for Children, Advice of the Ombudsman on the Draft General Scheme for the Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill 2011. Available at www.oco.ie

Gerry Whyte, Seal of confessional is already protected under Irish civil law Fri, Jul 22, 2011© 2011

The Irish Times. Note: Gerry Whyte is an associate professor at the Trinity College Dublin law school, a fellow of Trinity College and dean of students

Disclosure of Information: duty to inform and whistleblowing. No. 7 of 2011 (Published 16 December 2011) Accessed 10 January 2012


http://www.oco.ie/