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Protection of religious freedom in the digital era

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Abstract

The duty of confidentiality is considered one of the highest and oldest obligations of ministers of religion, and in line with its great importance, it has been protected by numerous legal provisions, within the framework of the protection of religious freedom, since confessional secrecy requires procedural support in the form of rights to refuse to testify and prohibitions on arrest searches, otherwise it would degenerate into a de facto 'empty shell', due to the general obligation to testify in court or the possibility of seizing documents. But society, with the rapid and universal development of digital techniques, is undergoing a revolution, the consequences of which are likely to alter the current paradigms resulting from the industrial revolution. Society will be transformed in the same way it was transformed in the 19th century, during the industrial revolution. This ongoing revolution will change our view of public and private freedoms. The legislation put in place by the French Revolution to define and protect the rights and freedoms of man and citizen must evolve in the face of the contribution and influence of new technologies and their consequences on these freedoms. If public freedoms are affected by the digitization of society, so are individual freedoms. By unifying the laws of the Member States, the General Data Protection Regulation is a first step towards universal protection throughout the European Union.

Keywords: *Privacy, religious freedom, confessional secrecy, digital era.*

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Introduction

The idea, the *utinam*, the desire on the part of power, of the constituted authority (Angeli – Mesnier, 2014), to know everything, to control everything in order to be able to prevent everything (with alternating fortunes: from Armodius and Aristogitones to the conspiracy against Julius Caesar, to the conspiracy of the dust, etc.) has very ancient roots; from the myth of the dog Argus, controller with a hundred eyes, sung by Ovid in the first book of the *Metamorphoses*, to the Panopticon designed by Jeremy Bentham, to the infinite number of spies that Alexandre Dumas attributes to Cardinal Richelieu, to the law on suspicions of 17 September 1793, during the period of the Terror initiated by Robespierre to the secret police born in the 20th century, from the Tsarist Ochrana to the Leninist Čeka, with the subsequent evolutions, consecrated in the cinema by the famous films *‘Enemy of the State’*, 1998, and *‘Das Leben der Anderen’*, 2006 (with the DDR’s STASI), and in literature by the paradigmatic *‘Nineteen Eighty-Four’* by George Orwell (Watt, 2021; Ramonet, 2024).

The world imagined by Orwell in 1949, with “*Big Brother*” permanently “*is watching you*”, has today substantially become a reality: between surveillance cameras (Cherqaoui, 2024) and mobile phones, in fact, we are nowadays really being watched all the time (Vitalis, 2024; Sofski, 2021): where we are, what we are doing, and above all what we are saying, both through verbal communication in presence, which can be picked up by bugs, and through telephone communication *stricto sensu*, and through telephone communication *lato sensu*, i.e. through apps that allow us to phone and send messages (Veliz, 2024; Wojnowska-Radzinska, 2023).

The progressive computerization of world society, the advances in technology that make bugging ever smaller and more easily concealable, and the omnipresence of mobile phones, which can in turn - wisely used - become real bugs, making ‘traditional’ ones superfluous, do indeed pose problems of scenario, which, however, essentially are not (yet) substantially perceived by the population, which, on the contrary, voluntarily inserts in their homes household appliances increasingly capable of capturing and collecting information (and transmitting it), up to the apotheosis of devices such as Alexa, which listen to everything, know everything about the house and the family around them, but do not transmit any information outside the home, as their manufacturers assure (Guerrier, 2021; Lindau, 2023).

There is therefore, at least for the moment, a certain trivialization of widespread surveillance, which has become a cliché: the internet has become part of people’s daily lives, giving them access to knowledge and exchanges, and allowing them to participate in the constant flow of information, often without taking into account that the internet does not work one way: it is certainly a prodigious tool that - on the inbound side - brings us the information we need, but - on the outbound

side - it also brings our information to the outside world, from our purchases to the programmes we watch, to the topics we research on, to the possibility of transmitting to unauthorized eyes and ears the speeches and images we pick up (Arendt, 1976)².

In our globalised and digital society, the defence of freedoms and privacy remains an ongoing struggle. Technology *per se ipsa* is neutral, as is the Internet: in the European Union, in fact, the principle of net neutrality is enshrined in legislation, Regulation (EU) 2015/2120 of 25 November 2015.

Surveillance is a worldwide phenomenon and has become institutionalized in contemporary societies. It has even become the main feature of contemporary culture in crisis, and it seems almost as if this was the price paid, more or less consciously, to permanently enjoy what Arendt called 'the leisure industry confronted with gargantuan appetites' (Arendt, 1976): in that case, however, if people had really sold their confidentiality, their privacy, ultimately their freedom (Maclay, 2010), in exchange for more conveniences (domotics in the home, the possibility of watching films and TV series, playing games (Ferenbach, 2023; Porcedda, 2024), etc. even outside the home, practically anywhere, to receive a constant and immense flow of information, which 90% are not interested in (Montalban, 2024; Benkler, 2024; Simitis, 1995; Schütz, 2021), one would perhaps have a repetition of the gesture of Esau, who sold his birthright for a plate of lentils³.

Overview of the situation in Albania

After the Second World War, Albania became a socialist State, but its first post-war Constitution, that of 1946, still provided for religious freedom (Art. 18)⁴; and

² It caused a stir years ago when a photograph was taken of the founder of Facebook, a person who was certainly knowledgeable about the subject and who had the means to procure the best protection systems, but who preferred to entrust his privacy to the adhesive tape with which he had covered the camera and microphone of his computer: <https://www.rainews.it/archivio-rainews/media/Che-succede-Mark-Zuckerberg-mette-scotch-anti-hacker-su-videocamera-e-microfono-30c4da69-e49c-4f1d-aeab-dbd68977137.html>

³ Gn, XXV, 30-34, https://www.vatican.va/archive/ENG0839/___PR.HTM

⁴ "All the citizens are guaranteed the freedom of conscience and of faith.

The church is separated from the state.

The religious communities are free in matters of their belief as well as in their outer exercise and practice.

It is prohibited to use the church and religion for political purposes. Political organisations on a religious basis are likewise prohibited.

The State may give material aid to religious communities.

For all Albanian Constitutions cited, see M. SCHMIDT-NEKE (ed.), *Die Verfassungen Albaniens*, Wiesbaden, 2009, pp. 40 ff.

likewise, that of 1950, both in its initial version (Art. 18)⁵ and in the amendments of 1955 and 1958 (Art. 18)⁶.

In the 1976 Constitution, on the other hand, a preamble⁷ is introduced that also formally expresses a decisive alignment with Marxism-Leninism: if Marx's ideas on religion are famous (Codevilla, 1973; Ocariz Braña, 1976; Pellicani, 1988; Frosini, 2014; Cottier, 1959; Böckenförde, 2019; Feuerbach, 2021.), Lenin's are perhaps less well known (Bociurkiw, 1969; Krupskaia, 1956; Carrère d'Encausse, 2013.), but no less assertive:

“Religion is one of the forms of spiritual oppression which everywhere weighs down heavily upon the masses of the people, over burdened by their perpetual work for others, by want and isolation. [...] Religion is opium for the people. Religion is a sort of spiritual booze, in which the slaves of capital drown their human image, their demand for a life more or less worthy of man [...]” (Lenin, 1905), as well as “The philosophical basis of Marxism, as Marx and Engels repeatedly declared, is dialectical materialism, which has fully taken over the historical traditions of eighteenth-century materialism in France and of Feuerbach (first half of the nineteenth century) in Germany—a materialism which is absolutely atheistic and positively hostile to all religion. [...] Let us recall that in his essay on Ludwig Feuerbach, Engels reproaches Feuerbach for combating religion not in order to destroy it, but in order to renovate it, to invent a new, ‘exalted’ religion, and so forth. Religion is the opium of the people—this dictum by Marx is the corner-stone of the whole Marxist outlook on religion. Marxism has always regarded all modern religions and churches,

⁵ “Il est garanti à tous les ressortissants la liberté de conscience et de religion. L'église est séparée de l'Etat.

Les communautés religieuses sont libres dans les questions ayant trait à leur confession ainsi qu'à son exercice et sa pratique extérieure.

Il est interdit d'abuser de la religion et de l'église à des fins politiques.

Les organisations politiques, fondées sur la religion, sont également interdites.

L'Etat peut aider matériellement les communautés religieuses.”

⁶ “All the citizens are guaranteed the freedom of conscience and of faith.

The church is separated from the state.

The religious communities are free in matters of their belief as well as in their outer exercise and practice.

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The State may give material aid to religious communities.

⁷ “[...] the triumph of the great October Socialist Revolution and with the spread of communist ideas, which marked a decisive turning point for the fate of the Albanian people, too. [...] In the fire of the war for freedom, on the ruins of the old state power, the new Albanian state of people's democracy emerged as a form of the dictatorship of the proletariat. [...] The people's revolution triumphed and a new epoch, the epoch of socialism, was opened. [...] The foundations of religious obscurantism were smashed. [...] The Albanian people have found constant inspiration in the great doctrine of Marxism-Leninism [...]’.

and each and every religious organisation, as instruments of bourgeois reaction that serve to defend exploitation and to befuddle the working class” (Lenin, 1909).

On the basis of these theoretical premises (Riegel, 2005; Beljakova – Bremer – Kunter, 2016), therefore, and the unfolding of historical events (Skarovsky, 2003; Roccucci, 2011; Fouilloux, 2016), we see that the Preamble to the 1976 Constitution continued by stating that in the new Albania “*The foundations of religious obscurantism were smashed*”, secondly, it stated, ex art. 37, that “*The State recognises no religion whatever and supports atheist propaganda for the purpose of inculcating the scientific materialist world outlook in people*”, and finally, ex art. 55, established that: “*The creation of any type of organisation of a fascist, anti-democratic, religious, and anti-socialist character is prohibited. Fascist, anti-democratic, religious, war-mongering, and anti-socialist activities and propaganda, as well as the incitement of national and racial hatred are prohibited*”.

After the fall of the Communist regime, however, Albania began a progressive rapprochement with the European Union and its regulatory principles (Lamçe, 2020; Kellermann, 2016; Mesi, 2006; Töpfer, 2023; Mückl, 2017; Ventura, 2008; Ivaldi, 2012; Fede, 1994), initiating numerous legislative changes also in the area of religious freedom (Cavana, 2000; Cimbalo, 2015; Santoro, 1990; Dammacco, 2015; Messineo, 1950), yet another demonstration of the fact that “*It would be very simple to say that politics and religion proceed on different levels, that it is better to keep them separate. This is in fact not the case, because both deal with human life, one immanently, the other transcendently, that is, responding to two different needs*” (Tedeschi, 1996; Ayuso Guixot, 2022).

The previously very hostile regulatory framework towards religion and the Churches becomes friendlier (Musaj, 2011; Biscaretti di Ruffia, 1985; Belgiorno De Stefano, 2014; Rance, 2007; Senko, 2008). In the new Constitution of 1998 (*Ligji nr. 8417, datë 22.11.1998*), in fact, already in the Preamble we find two important differences: there is talk of “*faith in God*” and “*religious coexistence and tolerance*”, which is also included under Article 3 among the fundamental values of the State. Individual and collective religious freedom, *secondly*, is guaranteed under Articles 10 and 24; the organisations of religious communities can directly appeal to the Constitutional Court (under Article 134, paragraph 1, letter g); finally, any explicit reference to atheism (now comprehensively included in the “*philosophical beliefs*” protected under Article 18) has disappeared (Bellini, 1987; Bellini, 1985; Croce, 2013; De Lubac, 1992; Bushi, 2009; Del Re, 1995).

In this changed legislative-constitutional framework, therefore, here is the protection of religious freedom in the digital age: Article 226, paragraph 2 of the Code of Criminal Procedure establishes that the interception of *conversations*

or communications of those who are obliged to keep the secrecy because of their profession or duty may not be used, except when such persons have already testified on the same facts or have disclosed such information in any other way’ (Piwica, 2017; Ventre - Guillot, 2023; Brink - Mitsdörffer, 2018; Grifantini, 2024).

Article 159(1)(a) of the Code of Criminal Procedure, in first place in the list of protected professional secrets, the widest area in which - given the influence of canon law in European law (Fumagalli Carulli, 1988; Bellini, 1991; Erdö, 1995; Erdö, pp. 687 ff.; Erdö, 2022)- it is generally included in the legal systems of European countries (Boni, 2021; Palomino, 2021; Pree, 2021; Torfs, 2005; Du Puy-Montbrun, 2012; Anderle, 1956; Almeida Lopes, 2006) and those with European legal roots (Zubacz, 2010; Jenkins, 2021; Carnì, 2021; Rothe, 2021): “1. *They cannot be forced to testify as far as they know because of their profession, except in cases where they have the obligation to refer to the prosecuting authorities: a) representatives of religious beliefs, whose statutes are not contrary to the Albanian legal order*’.

The professional secrecy of clergy

Although this protection, as a phenotype of individual religious freedom, concerns and embraces clergy of potentially all religious denominations (d’Arienzo, 2021; Stein, 1998; Hambroer, 1928; Martin Luther, 1883; Martin Luther, 1888), *stricto sensu* confessional secrecy has been and always is central to the law of the Catholic Church (d’Arienzo, 2018; Cappello, 1929; Gaudemet, 1985; Gaudemet, 1984; Munier, 1984; Bernhard, 1984; Tarantino, 2016), of which confession (Catechism of the Catholic Church, no. 1467) is one of the seven sacraments (d’Arienzo, 2005; Arrieta, 2000; Berthe, 2020; Ferrari da Passano, 1993; De Paolis, 1990; Miragoli, 1990; Pighin, 2014; Ponce, 2012; Condorelli, 2012; Ventrella Mancini, 2008; Testa Bappenheim, 2020).

The point of great importance is not so much the recognition of professional secrecy *per se*, since this (for lawyers and doctors) is envisaged to protect professionals in two sectors, Justice and Health, which are internal to the State apparatus and necessary for its proper functioning; but rather the recognition of the social-religious factor, which was also envisaged in the legal systems of some other socialist states (Tedeschi 1969; Kaczynski – Tedeschi, 1986; Consorti, 1987).

It is worth noting the extreme delicacy of the situation in which a priest⁸ finds himself. On the one hand, he must certainly protect the secret of the believer who has confided in him, but on the other hand, he could ensure that a crime - perhaps violent, perhaps lethal - is not committed, or, again, he could help Justice to identify

⁸ By ‘priest’ and ‘clergy’, unless otherwise specified, is meant ministers of Catholic, Protestant, etc. worship.

and convict the guilty party, thus avoiding the conviction of an innocent person, a hypothesis that should be all the more distressing for a priest if he were the real culprit: it is a situation masterfully described by the two priests that Graham Greene made the protagonists of his *The Power and the Glory*.

Indeed, the protection of confessional secrecy, *amplius* of the professional secrecy of clergy, on the one hand responds to the constitutional principles of protection of religious freedom, pursuant to Articles 10 and 24 of the Constitution, on the other hand, however, if it made it impossible to prevent a crime that might still be committed, it could develop friction with the constitutional principle of the protection of life (Article 21 of the Constitution) or of private property (Article 11 § 2 of the Constitution), just as the impossibility of making a Catholic priest or a Protestant pastor reveal what he had learned as such could compromise the right of defense and the right to a fair trial, ex art. 31(b) of the Constitution (Gullo, 2014; Filippi, 2021; Benvenuto, 2021; De Stasio, 2010).

The right to religious freedom

The fundamental right to freedom of religion is one of the most traditional fundamental rights in the European legal tradition, as well as one of the original fundamental rights of humanity (Tedeschi, 1989).

Today, no catalogue of fundamental rights can do without the guarantee of the rights summarized under this collective term, since they are part of the oldest corpus of fundamental rights and are fundamentally linked to human dignity and the sphere of personality: faith, conscience and religion, in fact, are existential phenomena that do not exist outside the human being (Tedeschi, 1993).

Article 10 of the Constitution, in conjunction with Article 24, obliges the Albanian State to remain neutral in matters of religious or ideological confession and not to jeopardize the religious peace in society, which has been regained after decades of dictatorship (Alicino, 2008).

The particularly high status accorded to the fundamental right to religious freedom today is also due to the strenuous developments of recent decades, reinforced by the experience of past persecution of individuals and institutions in Albania on the basis of their religious beliefs (De Gregorio, 2002; Morozzo della Rocca, 1990).

In addition to the fundamental values of the human personality and its *forum internum*, therefore, freedom of testimony and confession are also protected, since faith, conscience and religion belong to the processes that take place within a person; they would, however, be legally irrelevant if they could not find outward phenotypical expression, and this public form of religion has become one of the

most powerful forces in the universe, both culturally and spiritually, politically and legally.

The fundamental right to freedom of religion, as defined by Article 10 in conjunction with Article 24, is a fundamental right that must be understood comprehensively: after the religious persecution by the Communist regime, in fact, the intention of the constitutional legislature was probably to restore and fully guarantee religious freedom.

The terms used can no longer be clearly distinguished from one another, but overlap, or overlap in some respects: the freedom to form a belief, for example, presupposes its communication and practice (Gerosa, 2011).

The definition of religion as the object of religious freedom is neither clear nor unambiguous (Croce, 2019). The Constitution itself does not provide one: in fact, in the preamble it speaks of God (“*with faith in God*”) without specifying which one.

The difficulties of a definition derive from the fact that the self-understanding of believers and the Church plays an important role: in principle, a State without an official religion (ex-Article 10(1)) has no right to judge the theological content and spiritual value of a potential denomination.

The self-conception of the holder of the fundamental right must, therefore, be taken into account, since the state authorities must be able to make a binding judgement on the application of the Constitution in order to protect the certainty of fundamental rights, which include the fundamental freedom to form one’s own concept of religion, to define a connection between beliefs and actions, and thus to qualify actions as the practice of religion. It is therefore contrary to the protection of the self-concept of the members of a religion under the Constitution if a belief formed within this framework or an action performed within this framework, such as the sacrament of confession, were to be denied recognition as a religious activity.

Article 24 paragraph 2 of the Constitution also guarantees freedom of confession, i.e. the freedom to proclaim, express and disseminate religious content: ‘*Everyone is free to choose or to change his religion or beliefs, as well as to express them individually or collectively, in public or private life, through cult, education, practices or the performance of rituals.*’ About the object of confession, then, reference can be made to freedom of belief. The differences are not in the content, but in the manner of conduct. Freedom of religion goes beyond the *forum internum* and concerns the *forum externum*. In addition to ‘*having and holding*’ (*confiteri*), the ‘*expression and proclamation*’ (*profiteri*) of religious conviction is also guaranteed, i.e. the manner of speaking and proclaiming. This can take place both privately and publicly, either alone or in community.

The performance of all legally possible ritual acts, as well as the observance and practice of religious customs, is guaranteed, as is the possibility of aligning one’s

entire behaviour with the teachings of one's faith and acting in accordance with one's inner conviction of faith, and since religion is directed towards realization in practical life, the realization of religious conviction in individual life conduct is an indispensable component of religious freedom (Jaeger, 2016).

In addition to numerous other religiously motivated behaviours, then, confession is also a ritual act and a protected religious custom: both the penitent and the confessor practice ritual acts or religious customs in the context of the confession or spiritual counselling session, and thus act within the framework of the freedom to practice religion.

Maintaining the secrecy of confession also undoubtedly falls within the aspect of faith-based conduct of life and thus within the scope of *religious practices* protected by Article 24 paragraph 3: "*No one may be compelled or prohibited to take part in... religious practices...*".

It is worth noting that this protection is linked to religious freedom: if the Catholic priest or a Protestant pastor were to learn of news of a crime in preparation or that had already taken place, not in his capacity as Catholic priest or a Protestant pastor, but as a simple citizen, by pure chance, this would not entail any difficulty as regards the obligation to testify.

In general, however, clergy, especially the Catholic one, which has the sacrament of confession as its own, are bound by special obligations of confidentiality about what has been confided to them by the faithful in this context, which stand in the way of a general duty to testify in court.

Clergy, therefore, must not only abide by the state laws that apply to all, but also the obligations of the respective religious law: these religious teachings about God, man and the world are protected within religious communities by freedom of religion and the principle of the absence of a state church, hence protection against state interference and coercion to conform. In the common secular legal sphere of pluralist society, however, including its universally valid constitutional order, Catholic priests or Protestant pastors are citizens of a state without an official religion, so they are bound to observe the Constitution and laws: it is clear that if the legal requirements of the secular and religious sides diverged, clergy could find themselves in a difficult situation of conflict (Incitti, 2021).

The general obligation to give evidence, pursuant to Article 157(1) of the Code of Criminal Procedure (except in the cases provided for in Articles 156, 157(2) and 158 of the Code of Criminal Procedure) is diametrically opposed to the duty of confidentiality laid down in the religious law.

This initial situation is a harbinger of great potential for conflict, as monotheistic religions traditionally link the attribution of meaning to a claim to absoluteness (sometimes stronger, sometimes weaker). This claim extends not only to the spiritual realm, but often also to the secular one. Even state law has such a claim to

rule in the secular sphere, so religion and law are two systems that claim absolute validity, at least for some areas of human life. If the legislature were to accept this legal situation and take no further legal precautions to eliminate this conflict, it would be left to the Catholic priest or a Protestant pastor alone to decide which law to break and which to remain faithful to, plunging them into a conflict of conscience (Martens, 2002).

The professional secrecy of lawyers and doctors: differences

We must bear in mind, however, that not even lawyers (Article 159(1)(b) of the Code of Criminal Procedure), doctors and all those engaged in the health profession (Article 159(1)(c) of the Code of Criminal Procedure), nor - with certain limitations - journalists (Article 159(3) of the Code of Criminal Procedure) are required to disclose what they have been entrusted with, and in these cases their right to professional secrecy cannot be based on religious freedom.) are obliged to disclose what has been entrusted to them in this capacity, and in these cases their right to professional secrecy cannot be based on religious freedom: we must therefore search for an *ubi consistam* that goes beyond the dichotomy between Church and State (Jemolo, 1983; Saja, 1983).

In order to assess the possible differences in the professional status of clergy compared to the other professional categories protected by Article 159(1), however, it is necessary to take a closer look at these professional groups.

Lawyers are independent organs of the administration of justice, and the exercise of the legal profession is subject to the free and unregulated self-determination of the individual lawyer. The personal relationship of trust between lawyer and client refers to a profession that excludes state subordination: as an organ of the administration of justice, the lawyer has an independent function in the 'fight for justice' in a liberal constitutional state (Ferrajoli, 2011).

It is an independent organ of the administration of justice, with a status equal to that of the public prosecutor and the court. The institution of criminal defense is guaranteed by the principle of the rule of law, pursuant to Articles 28(1) and 31 of the Constitution. The relationship of trust is considered an indispensable basis for effective criminal defense also in the relationship between lawyer and client. Measures that may disturb or exclude this basis and create collisions in conflict with the effective representation of the client's interests by the defendant therefore interfere with the defendant's freedom to exercise his profession. At first sight, therefore, there are many parallels between the position of a Catholic priest or a Protestant pastor and that of lawyers and defense counsel.

Doctors and therapists in general are also subject to confidentiality obligations in a special way, provided not only by law, but also by professional ethics: *'I WILL RESPECT the secrets that are confided in me, even after the patient has died'*, as stipulated in the Hippocratic Oath, or Geneva Declaration of 1948, in its revised version of 2017. This modern version of the Hippocratic Oath is a global code of ethics, taken from the International Code of Medical Ethics⁹, and obliges doctors to confidentiality; doctors all over the world refer to this document, which in many countries is part of the medical code of ethics and in some even has the character of law.

If, as we have seen, the professional secrecy of doctors and lawyers responds to the internal functioning needs of the State apparatus, i.e. Justice and Health, we can perhaps say that the professional secrecy of clergy responds to the needs of the State-community: in fact, since religious freedom is not only a matter of weighing earthly and tangible goods and duties, but also of taking into consideration extra-legal aspects that, yes, play a not insignificant role in other professional groups, but lacking the transcendental reference.

The spiritual and religious mission is a specific characteristic of the Churches and their ministers of religion, which distinguishes them from other large social groups; ministers of religion, moreover, and especially Catholic priests, understand their spiritual ministry as a holistic existence. On the basis of the ordination, they have received (or a similar call to ministry), they have publicly committed themselves before their God and the assembled people, according to the teachings of their religion, to devote their lives entirely to the service of preaching and of their neighbors. Thus, to this end, they adopt a lifestyle that also gives a visible sign that they are dedicating their lives entirely to the ecclesiastical ministry (Licastro, 2016; Milani, 2008; Palomino, 1999).

This is therefore a fundamental difference from, for example, lawyers or doctors: however passionately they may exercise their profession and however close it may be to a vocation, it remains a professional activity, by its very nature limited in time, which serves to create and maintain a livelihood, and which in principle can be interrupted or modified at will. The activity, then, always takes place in a context that is definitively regulated by the applicable state law and is not influenced by extra-legal obligations.

The special professional ethical standards governing the practice of law and medicine, and the position these professional groups occupy due to the undoubted importance of their activities, are not equivalent to the understanding of the office and duties of a priest.

⁹ "In concordance with the WMA Declaration of Geneva: The Physician's Pledge and the WMA's entire body of policies, it defines and elucidates the professional duties of physicians towards their patients, other physicians and health professionals, themselves, and society as a whole".

The moral obligation to influence the person seeking spiritual comfort by attempting to make him or her desist from the intention to commit a crime or to induce the offender to turn himself or herself in and confess is to be seen from a transcendental perspective, as it has a stronger degree of obligation than the lawyer and the doctor (Nykiel, 2019; Piacenza, 2021).

Protective functions of the professional secrecy of clergy

This provision of the Code of Criminal Procedure, according to doctrine, has a dual protective purpose: individual and collective.

On the one hand, in fact, it is intended to protect the relationship of trust between the parties involved in pastoral care (i.e. the bearer of the secret and the Catholic priest or Protestant pastor) as individuals, but, on the other hand, one could also consider the protection of the social functions associated with relationships of trust, and thus see in it a collective protective purpose. There are arguments in favor of both positions, as we shall now see.

Proponents of the idea that the rule pursues an individual protective purpose see the basis of the rule in the relationship of trust between the professional, here the priest, and the person who, as it were, requests spiritual counselling, to whom the privilege is linked. The rule reflects the particular conflicts of interest that exist because of the professional obligation on the one hand and the obligation to testify on the other. Taking into account the principle of proportionality, this conflict is resolved in favor of the clergyman and his duty of confidentiality. Accordingly, Article 159(1)(a) of the Code of Criminal Procedure pursues the protection of the individual interests of those involved in pastoral care, and thus the rule serves the interest in confidentiality of both the person seeking spiritual counselling and the cleric, in accordance with the CIC and the Catechism of the Catholic Church

Other authors, *in secundis*, hypothesize, conversely, that the rule pursues a collective protective purpose: there would, in fact, be a predominant need for protection in order to allow secrecy, since otherwise socially important institutions such as pastoral care in situations of personal crisis, or effective criminal defense, etc., would not function; Art. 159 para. 1 lett. a of the Code of Criminal Procedure would therefore protect the social functions and institutions associated with pastoral care, which are so important because the State has the task of providing guidance and help in answering the question of how to live, but - since it has no State religion - it would not be able to do so. would thus protect the social functions and institutions associated with pastoral care, which are so important because the State has the task of providing guidance and help in life to answer the question of how to live, but - not having a State religion - it is no longer able to deal with the

question of meaning and contingency on its own, and therefore can no longer be certain of religious truths (Bon Valsassina, 1960).

The state must therefore rely on the (various) religious communities in these areas, and this provision in the Code of Criminal Procedure strengthens public confidence in the members of these socially valuable professions, so that the tasks incumbent on them can actually be performed.

Firstly, therefore, the absolute confidentiality of information entrusted to clergy in the context of pastoral work is protected. This is typically considered part of the confidant's private sphere, which is thus protected.

The protection of the relationship of trust is closely linked to the protection of professional freedom. The relationship of trust is the basis for the exercise of pastoral care and listening to confessions. These in turn are an essential part of the 'profession' of a priest. An obligation to disclose in court, following an obligation to testify, could undermine this basis, i.e. the relationship of trust, to such an extent that it would undermine the scope of protection of Articles 10 and 24 of the Constitution.

If this were to happen, trust in the clergy would be deeply shaken. This, in turn, would limit the clergy's ability to exercise their profession, and thus would be a violation of Articles 10 and 24 of the Constitution.

It is true that the public interest is also great, which is why the legislature has also taken into account the strengthening of general trust in the members of this professional group, which should enable professionals to perform their tasks effectively in the public interest: the State, which has no official religion and is therefore religiously neutral, relies on religious forces and institutions to instill in its citizens the ability and willingness to adhere to certain moral standards. In part, the values of the churches are congruent with the constitution; in part, the churches also assume tasks of general welfare.

The purpose of Article 159(1)(a) of the Code of Criminal Procedure, moreover, is in particular to avoid existential conflicts of duties, i.e. between the duties to testify at trial and the moral duties arising from the relationship between the cleric and the faithful.

The latter regularly rely on the absolute confidentiality of the clergyman and can only disclose information for that reason. On the other hand, the duty of disclosure is also in significant conflict with the clergyman's obligations of religious confidentiality. The latter, in particular, may give rise to an existential unease of conscience on the part of the clergy. This is due, in no small measure, to the consequences that confessional law (especially canon law) imposes on clergy in the event of a breach of the duty of confidentiality.

The exemption of the clergy from the collision of duties through exemption from the obligation of revelation is in turn closely related to the protection of the freedom

to practice religion. Confession as the original form of pastoral counselling, at least in Christianity, is an important part of their religion for both clergy (listening) and faithful (confiding and confessing). If what is confided in were no longer protected, neither the priest nor the faithful could practice confession in the form prescribed by their religion without violating the law of the State, so that this form of religious practice is protected by Article 24, paragraph 3 of the Constitution.

The individual and collective protective purposes potentially pursued are, as we have seen, closely interconnected. This applies in particular to the protection of the existing relationship of trust and avoidance of a conflict of interest on the part of the priest, as an individual protective purpose, and to the trust of the general public in the functionality of socially important institutions, as a collective protective purpose. A decision in favor of one and against the other would amount to drawing an arbitrary boundary, and this should be avoided.

Article 159(1)(a) of the Code of Criminal Procedure thus pursues several protective purposes: among them, the protection of pastoral care in its form of 'professional activity' and religious practice, the trust of the general public in the professional and personal status of clergy, the protection of the privacy of the person entrusting the matter and the confidentiality of information, the relationship of trust *in se ipso* and, in particular, the prevention of an existential conflict of duties on the part of clergy.

Since confession and pastoral care are constitutionally protected by Articles 10 and 24 of the Constitution, it follows that the respective components of these forms of religious practice are also covered by constitutional protection, namely the privacy of the confidant, the confidentiality of information and the relationship of trust itself. If the protection of these individual components were waived, the institutions of confession and pastoral care would not enjoy the protection provided by the constitutional text. The avoidance of the clergy's existential need for conscience is also based on the protection of religious freedom. This is because the duty of confidentiality is as much an elementary component of confession and pastoral care as the other aspects mentioned (Allred, 1953).

The constituent elements

Article 159(1)(a) of the Code of Criminal Procedure is an exception, as it grants ministers of religion the privilege of silence and makes an exception to the general duty to testify at trial; as a *lex specialis*, therefore, the rule is generally interpreted restrictively. On the other hand, however, the purpose of the rule is to provide comprehensive protection for confession and pastoral care, which precludes a restrictive interpretation. Consequently, there is a tension between comprehensive

protection and the exceptional nature of the rule, and this tension must be resolved by taking reasonable account of all aspects.

The group of persons covered by the term ‘ministers of religion’ pursuant to Article 159(1)(a) of the Code of Criminal Procedure benefit from exemption from the obligation to testify, it is therefore essential to clearly define the term ‘priest, or clergy’.

This, however, is proving to be a difficult challenge, since, especially in the light of structural changes in the Churches, many uncertainties arise in this context, which ultimately work to the detriment of those working in pastoral care, because their legal status is often unclear. Indeed, due to the shortage of priests in recent times, there has been an increasing need in the Catholic Church to entrust lay people with tasks that fall within the core area of pastoral care (Baura, 2011; Valdrini, 1987; Arrieta, 1985). The functions of pastoral care are therefore increasingly being performed by other people working in church organizations who do not hold clearly defined, full-time priestly positions. They often perform their duties independently and are thus equated in function and responsibility with full-time clergy in the area of pastoral care, falling under the protection of Articles 10 and 24 of the Constitution, not least because, on the other hand, confessional/professional secrecy is also extended to ministers of religion of confessions that do not have the sacrament of confession (Visioli, 2024).

With regard to laypersons working full-time (Schoupe, 1998), in fact, the doctrine holds that a lay person, although not sacramentally ordained by the Catholic Church, but who nonetheless performs tasks on behalf of the Church (e.g. as a prison chaplain) directly related to pastoral care is a minister of religion within the meaning of criminal procedural law, since in this case too, an independent relationship of trust is created between the pastoral counsellor and the person seeking pastoral care. Lay persons working in this way perform their duties on behalf of the ordained clergy and may be exposed to the same difficult pastoral situations. Their responsibility in this field is therefore comparable to that of a Catholic cleric or an ordained Protestant pastor. This may justify extending the personal scope to non-ordained persons under the conditions mentioned above.

Therefore, the State, recognizing that there is nothing to prevent a clergyman from fulfilling his duty to God, recognizes his right not to reveal what he learns as a priest, not as a privilege to this or that Church (which would have no reason to exist, since Albania does not have a State religion), but as protection of the religious freedom of the State-community, and specifically of the concrete persons who make it up.

The faithful can only be effectively encouraged to go to confession if they can rely on confidentiality and trust in the pastoral care of their Church: confession is described as a conversation between the person concerned and God before a

human witness, and it, as a rite and (for the Catholic Church also) sacrament, lives on the credibility of its fulfilment: the believer is obliged to confess his sins in full, and this freedom is given to him by the absolute confidentiality of the clergy (Congregation for the doctrine of the faith, 1988: 1367).

Maintaining this confidentiality is therefore essential for confession. Even if this initial situation cannot be transferred to general pastoral talks without a sacramental character (the faithful are not required to fully disclose their transgressions), the result is nonetheless valid: the reason why a person can open up fully in pastoral talks lies in their trust in the confidentiality of the person they are talking to. Any exception to this confidentiality, to whatever extent and for whatever purpose, would compromise this trust to the utmost: it would inevitably mean that those seeking spiritual counselling could no longer rely on the confidentiality of the priest, and we would have a violation of religious freedom.

The content of pastoral conversations, moreover, is subject to the special protection of the general right of personality: according to the doctrine, in fact, there is a central area of private life that is protected by the guarantee of human dignity, provided for in the Preamble and Articles 3 and 28 of the Constitution, a guarantee that includes the possibility of expressing inner processes such as sensations and feelings, thoughts, opinions, points of view and experiences of a highly personal nature without the fear of being controlled by state authorities, and this freedom also includes communication with other trusted persons.

It follows, according to the doctrine, that these internal processes of a highly personal nature are traditionally discussed with the clergy, so that the protection of confession or conversations of a confessional nature is part of the constitutional content of the human dignity of the exercise of religion.

Conclusions

The focus on the religious social factor, not bound to a specific confession, is a fundamental achievement of European history, from Augsburg to Westphalia, and is a characteristic of all legal traditions rooted in European history.

One of the phenotypes of this attention is the protection of the professional secrecy of ministers of religion, which embraces not only Catholicism, which has its own ad hoc sacrament, but all religions.

After several decades of governments attempting to wipe out any religious feeling in the population, and despite a general secularization that has called into question the concepts of secularism and neutrality of the State (Tedeschi, 2002; Rivéro, 1949) and that of religious freedom, here is that the protection of the professional secrecy of ministers of religion, also under the new case of eavesdropping, is included in

the new code of criminal procedure by Albania, progressively moving closer to the EU, because Europe has historical-cultural roots and values linked to religion (Schillebeeckx, 1965; López Alarcón, 1989; Ratzinger, 1992).

It is important to bear in mind a further specificity of professional secrecy linked to the pastoral activity of a priest: the knowledge he obtains from the person seeking pastoral assistance is additional knowledge. Without the offer of confession or pastoral assistance and the protection of confidentiality guaranteed by the Church, this information would probably not be revealed before the crime is committed, nor afterwards.

In such a case, the person who was planning the crime would not be offered the opportunity to go back and reflect on his or her criminal plans, and possibly desist from them, just as in an interview following their implementation, the possibility of inducing repentance, repentance and the possibility of turning oneself in to prevent the conviction of an innocent person would be lost.

The clergy should be able to influence those who are planning to commit or have committed an offence, also because, in general, it can be assumed that those who seek to speak with a moral authority on their own initiative are in any case open to a conversation from a spiritual perspective and are interested in receiving guidance on how to remedy the wrong committed.

In this case, in fact, the initiative to turn to the priest on comes from the person who has already - or not yet - committed the offence, and the very fact that this person has felt the need to turn to a priest means that the decision to act (in this case to commit the offence) is therefore presumably not yet so binding, or that she feels an inner turmoil as a result of her action, which could lead her to repair the damage done by the offence, and possibly to turn herself in to avoid the conviction of an innocent person, like Jean Valjean in Victor Hugo's *Les Misérables* (Ladaria, 2020).

From this perspective, then, we see that the confessional secrecy of ministers of religion is an instrument that can be useful both to the State-community as a whole (if it succeeds in avoiding the execution of the crime), and to the State-court, namely the service of Justice, (if it avoids the conviction of an innocent person).

It is equally evident that society would lose this opportunity for influence if denominational secrecy, the professional secrecy of ministers of religion, were to be abolished. If the person seeking spiritual counselling could not be sure of the absolute confidentiality of the clergy to whom he or she would turn, he or she would probably not even seek an interview, because it is precisely the bond of confidentiality that creates the necessary basis of trust.

A person who seeks pastoral assistance before committing a crime, or immediately after committing a crime, is open to moral appeals and alternatives, and in such cases the clergy can exert the influence he has on the believer through

his role and religious function, since a clergyman has - or should have - a higher feeling, a higher conception of moral duty (Puig, 2014), even if the child abuse scandal has eroded trust in the clergy (d'Arienzo, 2022; Lo Iacono, 2023; Comotti, 2021; Bettetini, 2019; Rimoldi, 2012).

The options of the clergy to influence the person seeking spiritual assistance may, therefore, be more useful to Justice than an obligation to testify, and to give up these additional possibilities 'on principle', so to speak, by repealing professional secrecy for ministers of religion would therefore be a matter of pure principle of aggressive secularism (Visioli, 2020)¹⁰ and would probably do more harm than good to the State and potential victims (Jaeger, 2015; Corso, 2020).

In a democratic State, digital techniques can be used to spy on people's conversations, but they can also be used by the State for untargeted mass surveillance, as revealed by Edward Snowden. Laws introduced to combat common crime, organized crime and terrorism restrict the fundamental freedoms of individuals in the name of the general interest and the public good. If their enforcement is controlled, they can coexist with a democratic regime. These democratically passed laws could be used during a change of authoritarian executive regime to muzzle any opposition, benefiting from this 'democratic anointing'. The great dictatorships of the last Century came to power in a constitutionally compliant manner or at the behest of the people, and only after coming to power did, they unfold their dictatorial character: what could the secret police of the now defunct dictatorial regimes not have done if they had had today's wiretapping techniques and technology?

In a society that spies on every movement, every move, every written word of an individual, what remains of free will and freedom? Knowing they are being watched, individuals will try to hide or censor their actions. Freedom under surveillance is no longer freedom.

While the digitization of society has a strong economic value, it may be a vehicle to consolidate certain public freedoms, but it may reduce the protection of an individual's freedom and his or her private and family life. The General Data Protection Regulation considers the technical developments of the 21st century. This generalized protection in the European Union must remain effective in the face of the increasing intrusion of connected objects.

But the individual remains the central figure in this protection. He must be aware of the risks inherent in digital techniques that, to improve certain aspects of his life, obtain information on his habits, health, feelings and desires. No text, not even the most restrictive, can force a person to disclose this information.

¹⁰ See APOSTOLIC PENITENTIARY, Note on the Importance of the Internal Forum and The Inviolability of the Sacramental Seal {The Seal of Confession}, 29 Juny 2019, <https://t.ly/zZiCi>

If the digital society can limit public and individual freedoms, it is up to individuals to react and governments to protect them: a clear barrier to the police State is the religious freedom, here declined in the essential aspect of the absolute confidentiality of information revealed to a minister of religion, thus comes in handy once again as a barrier to the police State, to the plunge into the abyss of the Orwellian perspective, because “if you look too long into an abyss, the abyss will also look into you” (Nietzsche).

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