UNIVERSITY OF NAIROBI

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THE PRIEST-PENITENT PRIVILEGE AS REGARDS THE CONFESSIONAL SEAL, THE KENYAN LAW AND THE AMERICAN LAW

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PARKLANDS

DEDICATION

In gratitude to God, I dedicate this work to my late mother – Ma Anastasia Ahuzuru Osuala who slept in the Lord during the time of this research.

I also dedicate this work to all who hunger and taste that justice be delivered in our judicial system.

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May you all remain blessed in the Lord!

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CONTENTS

INTRODUCTION

1. The Background

In the course of our lecture on the Law of Evidence, the lecturer raised the question of whether, apart from the several privileges recognised by the provision of the Evidence Act[1], there are other situations where privilege is covered by law. As an example, he singled out religious confession – confession made by a penitent to a priest in order to obtain the forgiveness of sins committed. Light-heartedly, the students were challenged to consider whether such communication enjoys any privilege in law. There being no statutory provision for a priest-penitent privilege, the present writer was filled with curiosity.

2. Statement of the Problem

Imagine the following scenario: A priest – Fr MBEBA SIRI, received a stolen property – a mobile phone from a street kid by name Bwana MWIZI MKUBWA, who confessed to him and handed over the article to the priest as required by the norms of the sacrament. After the priest handed over the mobile phone to the police, they (the police) found the owner – a government minister who pressurized them to find the culprit and have the priest questioned. After investigation they arrested a suspect – MWIZI MKUBWA – was the thief, having been identified within the vicinity of the crime and the church on the day the priest called for the police to recover the stolen

[1] CAP 80, Laws of Kenya

phone. MWIZI MKUBWA is charged to court and Fr MBEBA SIRI was summoned as the main state witness.

Fr MBEBA SIRI knows quite well his obligations as a priest and that matters entrusted to the priest in the confessional by the penitent are absolutely inviolate and should not be revealed under any circumstances. Yet he knew quite well that refusal to appear in court on the day of the hearing or refusal to answer the questions posed to him could earn him the wrath of court.

The dilemma presented by the above scenario is the following: Is Fr MBEBA SIRI protected by law not to divulge confessional secret or is he compellable to give the information gained in the confessional under the pain of the charge of contempt of court?

This research will examine therefore the Priest-penitent privilege, as far as the provisions of the Kenyan law are concerned, if any. It will also make an analysis of the American approach to the matter. In order words, this work would answer the question of whether a priest is a competent and compellable witness with respect to the knowledge gained in the confessional in Kenya as compared to what obtains elsewhere.

3. Research Questions

Following from the above problem-statement, the real questions to be grappled with in this work are the following:

- What is the legal status of the communication between a priest and penitent under the Kenyan law? Is such communication privileged?

- In the absence of statutory provision and case law, what possibly could a judge in Kenya do if such a novel scenario were to confront him/her?
- How have other jurisdictions – especially the American jurisdiction – handled the priest-penitent privilege?
- What possible explanations, if any, accounts for the absence of the priest-penitent privilege in the Kenyan Rules of Evidence?
- Are there any justifiable reasons to make a case for a statutory inclusion of the priest penitent-privilege in Kenyan Rules of Evidence?

4. Justification of the Study

The question, which begs an answer in this study, is whether the law adequately covers all that should be taken care of as far as privileged communication is concerned? This work examines the priest-penitent privilege, its jurisprudential basis and its inclusion under the American legal system and raises the question of whether its non-inclusion in the Kenyan Law of Evidence is justifiable, and whether its inclusion will go a long way in enhancing the law. The present researcher would argue for its inclusion.

This research thus would provide relevant materials for any future investigation on the adequacy, or lack thereof, of the Kenyan Law of Evidence Chapter 5 Part II dealing with Privileges with a view to the inclusion of the priest-penitent privilege.

Moreover, in the face of lack of case law on the subject, this research will equally serve the investigative mind of a judge or lawyer in the face of new situations

dealing with privileged communication made to a religious figure in the normal exercise of his or her religious duty.

5. Literature Review

By way of Literature Review, there have been several previous works in this area.

1. 'Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?' By R. Michael Cassidy, *William and Mary Law Review*. Volume: 44. Issue: 4, 2003, 1627+.[2]
2. 'How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege' By Shawn P. Bailey, *BRIGHAM YOUNG UNIVERSITY LAW REVIEW*, [2002].
3. 'International tribunals and rules of evidence: the case for respecting and preserving the "priest-penitent" privilege under international law' by ROBERT JOHN ARAUJO, S.J[3]

The last article, which we have chosen to focus on in this Literature Review, is a response to discussions by the Preparatory Commission of the Diplomatic Conference of Plenipotentiaries for the Establishment of an International Criminal Court.[4] The Commission's purpose is to generate Rules of Procedure and Evidence for the International Criminal Court.[5] At least one of these rules will address confidential

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[2] <http://www.questia.com/PM.qst?a=o&d=5002015023> accessed on 28 July 2006.
[3] <*http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1*> accessed on 24 July 2004.
[4] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.
[5] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.

privileges. The author encourages that the priest-penitent privilege should be observed in the International Criminal Court. This conclusion is based on a discussion of the history and status of the privilege in criminal justice systems throughout the world.[6]

Initially, the paper describes religious confession as an "ancient tradition in religious thought and practice." The author quotes many biblical and religious sources in support of the preservation of the priest-penitent privilege.[7] He also notes the continued importance of secrecy of words spoken in confession. To this day, it is a violation of Canon Law for a priest to break his vows of secrecy and betray his penitent in any way. Violations result in automatic excommunication.[8]

After the examination of the religious importance of confidentiality in the confessional, the author moves to a discussion of the priest-penitent privilege at common law in Europe, Canada, Australia, and New Zealand. In England, the author finds a strong history of the privilege.[9] The author quotes, for instance, the following conclusion made by the Council of Durham in 1220:

A priest shall not reveal a confession - let none dare from anger or hatred or fear of the Church or of death, in any way to reveal confessions, by sign or word, general or special, as (for instance), by saying, 'I know what manner of men ye are,' under peril of this Order and Benefice, and if he shall be convicted thereof he shall be degraded without mercy.[10]

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[6] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.
[7] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.
[8] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.
[9] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.
[10] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.

The author concludes that the strong history of the priest-penitent privilege in England is, at least in part, a result of the "nexus between the laws of the land and the laws of the Church in [the] Christian country."[11] Further, the author notes that the priest-penitent privilege continued to be enforced by church law even after the formation of the Church of England.

The author recognizes that England did not have a statute preserving the priest-penitent privilege, but does find statute of this sort in both Austria and Germany (citing Austrian Code of Criminal Procedure of 1873 and German Zivilprozessordnung, Section 383 §1). In France, the privilege is not explicitly codified, but was incorporated as a part of the Code Penal by the Supreme Court of Appeal in the case of Lambel-Mayer. The author notes that both Australia and New Zealand have statutes that preserve the privilege.[12] Also, the Supreme Court of Canada has allowed that, in particular circumstances, testimony might be excluded because it is protected by the priest penitent-privilege. The author next discusses the observation of the priest-penitent privilege in the United States. The Supreme Court has recognized the privilege on several occasions as has at least on Circuit Court of Appeals.[13]

Finally, the author turns to the existence of the privilege under international law. He turns first to the Universal Declaration of Human rights, stating, "[i]t would be an incursion on [the] universal right of [freedom in] practice, and observance of religious beliefs that encourage confidential communications about wrongful acts, to require a

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[11] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.
[12] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.
[13] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.

part to such communication to divulge anything about the communication."[14] In 1996 the International Covenant on Civil and Political Rights codified that portion of the Universal Declaration that deals with religious freedom. A 1996 draft of the Trans-national Rules of Civil Procedure and Accompanying Commentary preserves the priest-penitent privilege.[15]

The author concludes his paper by recognizing that in order for the International Criminal Court to be successful it must be credible. Further, the author concludes that incorporation of the priest-penitent privilege into the rules of evidence for such court will assist in creating the credibility necessary for success. The author states that incorporation of the privilege serves to "acknowledge and respect a long-standing principle of criminal evidentiary procedure that exists in numerous legal systems."[16]

For the present work the above two scholarly articles become a point of departure. While Brewer focuses on whether the penitent has the power to release the confessor (priest) from the obligation of the seal both under the Catholic Legal jurisdiction and the American Law, this work examines the competence and compellability of the confessor (priest) under the Kenyan Law in the light of the American Law. While Brewer's essay recognises the presence of the priest-penitent privilege of different nuances in the American Law, the present work examines the reasons for the absence of such privilege in the Kenyan Rules of Evidence. It goes further to give indications on the options available to the lawyer and judge in the face of such a novel scenario in the absence of statutory provisions and Kenyan case law. While

[14] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.
[15] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.
[16] <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 24 July 2004.

Araujo argues for an inclusion of the priest-penitent privilege in the International Criminal Tribunal, the present work argues for its inclusion in the Kenyan Rules of Evidence after evaluating his arguments in the context of the Kenyan situation. While Araujo attempts to examine the Common Law history of the priest-penitent privilege this present work connects the conclusions of such examination in explaining the absence of a statutory inclusion of the privilege in the domestication of the foreign laws in Kenya during the colonial era.

6. Methodology

The legal method of analysis will be employed in order to examine the jurisprudential basis of privileged communications and expose the *ratio decidendi* of landmark cases on priest-penitent privilege. This will be achieved through the examination of some past works on compellability and privilege. The analysis will focus on articles dealing with the basis and extent of the priest-penitent privilege in the American legal system. It will also examine in detail to the argument adduced for the inclusion of the priest-penitent privilege in the rules of evidence of International Tribunals.

The methodology will also be expository as far as it will analyse the American approach with the Kenyan approach to the priest-penitent privilege. From the above analyses the inference would be drawn for an enhancement of the Rules of Evidence in Kenya by the inclusion of the priest-penitent privilege in the Act.

7. Structure of the Dissertation

This dissertation is structured into four expandable chapters. It starts with the General introduction which will deal with statement of the problem, the relevance and scope of the topic, the clarification of relevant terms therein, the methodology employed, the sources and the division of the work.

The First chapter will discuss Privileged Communication in General by situating it within the wider topic of Competence and Compellability of witness. Focus will be placed on statutory provision on privileged communication before an examination of its jurisprudential basis.

The Second chapter entitled 'The Common Law Roots of the Statutory Absence of the Priest-Penitent Privilege in Kenya' will examine the Privileged Communications covered under the Common Law. It will examine the History of the Priest-Penitent-Privilege at Common Law before and after the Reformation by focusing on various Judicial Interventions on the issue. It will then scrutinize the 'domestication' of the post-reformation version of privileged communications in the Kenyan Legal system.

The Third chapter examines the American Response to the challenge posed by the Priest-Penitent Privilege. This chapter will first briefly examine the American Legal System – the federal and state structure – and then proceed to review the latitudes observed in the legislation of the Priest-Penitent Privilege under different state legislations.

The Fourth chapter will draw from the previous chapters' analyses to make a case for a statutory inclusion of the Priest-Penitent Privilege in the KEA. This chapter will argue that the absence of the priest-penitent privilege in the rules of evidence under the Kenyan legal system is due to the inherited English Common Law already prejudiced by the post-reformation political current of anti-Catholicism. It will argue from custom, church autonomy doctrine and religious freedom for an inclusion of the priest-penitent privilege in the Kenyan Evidence Act. It will further argue that the benefits from its inclusion and the negative consequences of non-inclusion further substantiate a case for a statutory codification.

8. Preliminary Definition of Terms

Confessional Seal: This term is known as the 'seal of sacramental confession,' or 'the sacramental seal' or 'the seal of confession'. *Catechism of the Catholic Church* Art.1467 states: 'Every priest who hears confessions is bound under very severe penalties to keep absolute secrecy regarding the sins that his penitents have confessed to him. He can make no use of knowledge that confession gives him about penitents' lives. This secrecy, which admits of no exceptions, is called the 'sacramental seal,' because what the penitent has made known to the priest remains ''sealed'' by the sacrament.'

Confession[17] **– canonical & civil understanding:** Ordinarily, within the ecclesiastical context, when one talks of confession it means an act of confessing

[17] In the Judeo-Christian tradition, acknowledgment of sinfulness, in public or private, regarded as necessary for divine forgiveness. Cf. (*Britannica Ready Reference* – '*Confession'* – Encyclopaedia)

especially a disclosure of one's sins in the sacrament of reconciliation.[18] However, even the Code of Canon law recognises another sense of confession – Judicial Confession, which is defined as 'the written or oral assertion of some fact against oneself before a competent judge by any party concerning the matter of the trial, whether made spontaneously or while being questioned by the judge.'[19] Elements of this definition worthy of accentuating are – the fact that it has to be within the trial process, spontaneously volunteered or admitted in response to questioning; it must be against the interest of the maker who is a party in the trial; it must be pertinent to the issue(s) being investigated.[20]

The civil law understanding of confession is similar to the above canon law definition. Kenyan Evidence Act - 32[2], defines confession as 'any words or conduct, or combination of words and conduct, which has the effect of admitting in terms either an offence or substantially all the facts which constitute an offence.' Section 27 and 28 tended to restrict the circumstances under which a confession is admissible – i.e. – if made before a magistrate or police officer equivalent or above the rank of an inspector. This tends to mirror what the canon terms judicial confession.

As could already be surmised, the interest of this essay is neither the Canonical Judicial Confession nor the Civil Law[21] understanding of confession as admissible evidence in criminal and civil proceedings but the ordinary understanding of confession, which is the disclosure of one's sin to the priest in the sacrament of reconciliation (also

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[18] Britannica Ready Reference – *"Confession"* – Dictionary
[19] Canon 1535
[20] Craig A Cox, commentary on Canon 1535 of Book VII, Processes, in J. Beal, et al., *New Commentary on the Code of Canon Law*, (Theological Publications in India, Bangalore 2003) 1666.
[21] Read – the *'State Law'* – as contrasted with Canon law understood as an ecclesiastical law.

called, sacrament of penance). However, Section 30 of The Evidence Act tends to link the two by deposing that a confession which may be admissible is not rendered inadmissible due to promise of secrecy, deception, drunkenness, etc. By implication any confession, unless it pertains to the privileges recognised by law is admissible in evidence in a court of law. On the other hand, Canon 1550, §2, 2° disqualifies priests as witnesses in ecclesiastical courts when the matters to which they would testify have become known to them in sacramental confession, even if penitents requests that priests reveal those matters.[22] So *religious confession* means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned.[23]

Privilege is a special right or immunity in connection with legal proceedings conferred upon a person by virtue of his rank or office. For example, Members of Parliament enjoy certain privileges in relation to arrest. But more precisely, in the law of evidence, privilege is the right of a witness when testifying to refuse to answer certain types of question or of a party when disclosing documents to refuse to produce certain types of document on the ground of some special interest recognised by law. With respect to privilege we can make the following distinctions. There is *Public interest privilege and private privilege.* The State for an overriding public interest can claim public interest privilege in relation to secrets of the state and other matters whose confidentiality is essential to the functioning of the public service. Private privileges include the privilege against self-incrimination according to which a witness may not be

[22] Dexter S. Brewer, in *The Jurist 54,* (Catholic University of America, Washington 1994) 454.
[23] <http://www.murdoch.edu.au/elaw/issues/v4n3/perr43.html> accessed on 5 June 2005.

asked a question the answer to which might tend to incriminate him. *Legal professional privilege*, which protects confidential communications between lawyers and their clients and between lawyers and third parties with a view to, advising their clients – is also an example of a private privilege.[24] There is also a distinction between *class privilege and case-by-case privilege.* Class privilege enjoys *prima facie* presumption that communications are privileged and inadmissible such that the onus falls on party urging admission to show why not privileged. While in case-by-case privilege, there is no such presumption and the onus falls on the person claiming privilege to show why it is privileged. In this case, when protection is accorded, it is done with reference to the confidential nature of the relationship or the secrecy of the information in question, and not because the relationship or information happens to fall within any pre-determined class.[25] It is also fashionable to make a distinction between *statutory privilege and common law privilege*. The privileges recognized in the statutes are, in this way distinguished from those granted by judicial decisions. Of course, most common law privileges graduate to statutory privileges.[26]

Priests-Penitent privilege: The principle that conversations between a priest and a penitent during confession are considered privileged and not admissible in court.[27]

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[24] Elizabeth A. Martin, ed., *Oxford Dictionary of Law*, (5th edn Oxford University Press, Oxford 2002) *s.v.* 'privilege'.

[25] New Zealand Law Reform Commission, 'Preliminary Paper No 23, EVIDENCE LAW: PRIVILEGE', A discussion paper, Wellington New Zealand, May 1994.

[26] Steve Uglow, Kent Law School, *Law of Evidence,* <http://www.kent.ac.uk/law/undergraduate/modules/evidence/judge_jury.htm> accessed 13 July 2006.

[27] <http://www.legal-dictionary.org/legal-dictionary-p/Priest-Penitent-Privilege.asp> accessed on 24 June 2004.

CHAPTER I

PRIVILEGE IN GENERAL

1. Introduction

As we have seen in the general introduction, when information is privileged a witness may not be compelled to testify about the information and may not be compelled to disclose documents or other materials, which contain the information. Under the privilege rules, relevant information is excluded in order to further social values external to the trial process such as fostering confidential relationships.[28] In this chapter, we shall examine the related concepts of competence, compellability and privilege, and proceed to enumerate the categories of privilege under the Kenyan Statutes. We shall then pose the question why the law accommodates privilege given that the judicial process is essentially a search for truth and justice. Throughout the enquiry, the fundamental conflict between the goal of ascertaining the truth and the goal of protecting confidential relationships by excluding relevant evidence should always be kept in mind when considering whether information should be privileged or not.[29]

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[28] <www.sfu.ca/~palys/JackMacOpinion.pdf> accessed on 23 July 2006.
[29] <www.sfu.ca/~palys/JackMacOpinion.pdf> accessed on 23 July 2006..

2. Competence and Compellability in Respect to Privilege

Discussing privilege within the context of competence and compellability best explains the exception embraced by privileged communication. This is because while the concept of competence deals with the question of – who may be allowed to testify under oath in a hearing – the concept of compellability deals with the corresponding concern of – who may be forced to testify even if unwilling to do so.[30] While on the one hand, the dual concepts of competence and compellability ensure that the trier of facts receives evidence, privilege on the other hand, tends to restrict the evidence to be disclosed to the trier of fact. As Durand puts it, while the determination of competence and compellability is determination of "who may give evidence" and "who may be compelled to give evidence" respectively, the determination of privilege is the determination of "the circumstances under which a competent witness may be relieved from giving evidence".[31]

The *Kenyan Evidence Act* section 125 provides that all persons are competent to testify, unless the court considers that they are prevented from understanding questions because of tender years, old age, disease of mind or body or other similar cause.[32] It is however important to first make a distinction between general competence and particular competence before touching on limitations of competence placed on special classes of witness. As has been noted above, the general principle is that all persons are competent to testify. Nevertheless, there is a distinction between competence to give

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[30] Immigration and Refugee Board of Canada, 'Witnesses: Competency And Compellability' <http://www.irb-cisr.gc.ca/en/references/legal/rpd/handbook/hb12_e.htm> accessed on13 July 2006.
[31] P. P. Durand, *Evidence for Magistrates* (The Government Printer, Nairobi 1969) 92.
[32] Morris H.F., *Evidence in East Africa* (Sweet & Maxwell, London 1968) 170.

evidence in general and competence to give a particular type of evidence. For example, whether a witness to murder is, apart from being competent to testify to what he saw (the action of the accused shooting his victim with a loaded gun), is also competent to testify that the action he saw was the cause of death is a matter distinct from the general subject of competence. The later question belongs to the competence of experts. The said witness can only be a competent witness (an expert witness in this case) if and only if he is also a coroner who has examined and ascertained the cause of death. It is important to note that the court decides both questions of competence of experts (particular competence) and questions of general competence. In the final analysis, a witness is incompetent only if he/she is prevented from understanding the questions put to him/her, or if prevented from giving rational answers to those questions,[33] or prevented from both understanding and giving rational answers. It is the prerogative of the court to determine competency. If, for example, the witness is quite an elderly woman, the judge could ask questions to determine the extent of her intellectual capacity and understanding, and the ability to remember and describe what she has done on particular occasions.[34] According to subsection 2 of the same section 125, the court also determines the competence of a mentally disordered person or a lunatic with respect to whether his condition prevents him/her from understanding the questions and giving rational answers. If his/her mental condition does prevent him/her then the court declares him/her incompetent to testify. As an illustration, in *R v Hill*, (1851) the witness was an inmate of a mental hospital. He was an eyewitness to manslaughter by a

[33] P. P. Durand, *Evidence for Magistrates* (n 31) 93.
[34] P. P. Durand, *Evidence for Magistrates* (n 31) 93.

hospital attendant. Although the witness believed that 20,000 spirits, who sometimes were talking to him, accompanied him in the witness box, medical evidence was presented to show that the witness was rational in other respects and his memory was not affected by the delusions. It was found that the witness understood the meaning of taking an oath and found to be competent to testify.[35]

Another way to understand the distinction between general competence and particular competence is to make a further distinction between non-compellability and privilege against disclosure. A witness who is competent and compellable may nevertheless be entitled to privilege in respect to certain answers, but such privilege does not affect his obligation to give evidence on other subjects.[36] Such witness could be said to be competent and compellable but enjoys privilege with respect to certain matters or issues.[37] Such a witness is in effect claiming limited compellability since he/she tends to be arguing that although he/she is compellable to appear in court and answer questions generally but not with respect to certain matters of which he/she now claims privilege. This is because as Durand[38] puts it:

Compellability means that *a witness shall not be excused* from answering any question as to any matter relevant to the facts in issue in the suit or criminal proceeding.[39] (*Emphasis mine*)

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[35] Immigration and Refugee Board of Canada (n 30).
[36] P. P. Durand, *Evidence for Magistrates* (n 31) 92.
[37] Some legal scholars have held this view as the best available option in the controversy of the priest-penitent privilege, by arguing that in matters touching on the confessional, the priest is competent and compellable, but is at liberty to claim privilege, while in the witness box, to which the judge has to rule on as per each case and circumstances.
[38] P. P. Durand, *Evidence for Magistrates* (n 31) 101.
[39] Durand's description of compellability is directly lifted from the KEA, Section 128.

If compellability implies that a 'witness shall not be excused from answering any question ...' when a witness makes a claim of being excused from answering certain questions then such a witness is claiming limited compellability. It is the prerogative of the judge to rule or decide on the claim to be privileged from answering certain questions on the grounds (of privilege).[40] Such a witness is generally guilty of contempt of court if after such a decision, while in the witness box, he/she refuses to answer questions that are put to him/her.

It is important to note that not all competent witnesses are compellable[41] but all compellable witnesses are usually competent. The principle corollary to the above is that all witnesses must be competent in order to give testimony.[42] Nevertheless, except for a limited number of exceptions, all competent witnesses are compellable.[43] The implication is that, as has already been noted, a witness who is competent to give evidence in court, but refuses to do so for some reason, risks punishment for contempt of court.[44] The risk of punishment for contempt of court is the operation of the concept of compellability, that is – such risk operates as the compellability side of competence. The working principle in the law of evidence therefore is that all witnesses are competent and compellable for either criminal or civil proceedings except for a limited number of cases where the above general principle may be displaced.[45]

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[40] P. P. Durand, *Evidence for Magistrates* (n 31) 92.
[41] P. P. Durand, *Evidence for Magistrates* (n 31) 101.
[42] P. P. Durand, *Evidence for Magistrates* (n 31) 101.
[43] C. J. Carr and John Beaumont, *Law of Evidence* (2nd edn Blackstone Press, Leeds 1989) 25.
[44] C. J. Carr and John Beaumont, *Law of Evidence* (n 43) 25.
[45] C. J. Carr and John Beaumont, *Law of Evidence* (n 43) 26.

Having looked at competence generally, let us now turn our attention to other classes of people who may be affected by the rule of competence either for the defence or for the prosecution.[46] We shall therefore here look at the competence of the accused, the dumb witnesses, the accomplices, husband and wife, and children of tender years.[47]

The Accused

The accused in a criminal proceeding "shall be a competent witness for the defence at any stage of the proceedings, whether such person is charged alone or jointly with any other person". Provided such a person shall not be called as a witness except upon his own application, and provided that the failure of the person to give evidence shall not be made a subject of any comment by the prosecution. These provisos mirror the fundamental principles of the criminal law as enshrined in the Constitution Section 77 subsection 7: "No person who is tried for a criminal offence shall be compelled to give evidence at the trial"[48]

Dumb witnesses

Applying the same principle of understanding and ability to give rational answers to questions, the dumb witness is competent to give evidence as far as he can understand the questions put to him and so long as he can give rational answers to these

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[46] C. J. Carr and John Beaumont, *Law of Evidence* (n 43) 25.

[47] However, it is the opinion of the present writer that in so far as KEA Section 134 states that no advocate shall "at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate", then ipso facto, the client's advocate is not a competent witness in such matters communicated to him/her by the client without the client's express permission even if the advocate so desires to testify.

[48] The Constitution of Kenya, Section 77 (7).

questions by some means other than speaking.[49] Section 126 (1) states that a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as, for example, by writing or by signs. It provides however, that such writing or sign must be in the open court.[50] This provision was illustrated in *Hamisi s/o Salum v R (1951), 18 E.A.C.A. 217 where* the court considered the question arising from a witness who was both deaf and dumb, deciding that such evidence may be admitted subject to the discretion of the court to exclude it if the normal requirements are not, in its opinion, met.

Accomplices

With respect to accomplices, section 141 of the *Kenyan Evidence Act* provides that "accomplices are competent witnesses against an accused person; and a conviction shall not be illegal because it proceeds upon the uncorroborated evidence of an accomplice."[51] However "the court may presume that an accomplice is unworthy of credit, unless he/she is corroborated in material particulars".[52] Generally in law, an accomplice is "one who is a party to a crime, either as a principal or as an accessory."[53] Relying on the leading decision – *Davies v Director of Public Prosecution*, [1967] A.C. 378 – the law of Kenya does not use the expression the 'accessory before the fact', but

[49] P. P. Durand, *Evidence for Magistrates* (n 31) 94.
[50] KEA, Section 126.
[51] KEA, Section 141
[52] P. P. Durand, *Evidence for Magistrates* (n 31) 68.
[53] Elizabeth A. Martin, ed., *Oxford Dictionary of Law*, (n 24) *s.v.* 'accomplice'.

makes every person who counsels or procures or aids or abets the commission of an offence a principal offender.[54]

Husband and Wife

The competency of husband and wife to provide testimonial evidence for either the prosecution or defence has both a civil and a criminal aspect. Section 127 subsection 1 states: "In civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses." This section says nothing of the compellability of either the husband or wife in a civil suit[55] as is enshrined in some other jurisdictions.[56] Section 127(2) provides that in criminal cases, the husband or wife of the person charged is a competent witness for the defence at any stage of the proceedings, provided that, he or she is called as a witness on the application of the defendant's spouse.[57] The section is silent about whether a spouse is a compellable witness for the defence and at the present, it appears that the husband or wife of the defendant cannot be compelled to give evidence on behalf of the accused.[58] With respect to the prosecution, there is no general competency of the spouse to give testimonial evidence. The only time a spouse may give evidence for the prosecution are when the defendant spouse is charged with certain specified offences. Some of these

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[54] P. P. Durand, *Evidence for Magistrates* (n 31) 69; Cf. Penal Code, (Cap. 63).
[55] P. P. Durand, *Evidence for Magistrates* (n 31) 95.
[56] According to Durand, the Tanganyika Evidence Act provides for compellability of the spouses. This has influenced the recommendations in the Report of the Commission on the Law of Marriage and Divorce where it was stated proposed: "In civil proceedings, the parties to the suit and their spouses shall be competent and compellable witnesses;" though never should an evidence of marital intercourse be compelled to be given.
[57] P. P. Durand, *Evidence for Magistrates* (n 31) 103.
[58] P. P. Durand, *Evidence for Magistrates* (n 31) 103.

offences are – bigamy[59] and any offence against morality as stipulated in chapter IV of the Penal Code from section 139 to 169. Others are any offence against the person or property of the spouse (an assault, or conversion of spouse's property[60], for example) or any offence against the person or property of the children of either husband or wife, whether born in marriage or not. The spouse is also compellable as witness in any of the above offences. It is important to bear in mind that after the unfortunate colonial era case – *R v Amkeyo*[61], the term 'husband' and 'wife' is now all-inclusive whether or not monogamous, and 'includes a marriage under native or tribal custom.'[62]

By way of critique, the Commission on the Law of Marriage and Divorce, for the sake of brevity and conciseness, has recommended that the section be redrafted. Among other things the Commission proposed that, for the criminal offences where the spouse is competent and compellable, let there be a requirement that the accused-spouse not be convicted on the uncorroborated evidence of the witness-spouse.[63] The Commission further proposes that let the spouse also be compellable witness for the defence of the spouse and a competent, though not a compellable witness for the

[59] Contrary to Section 171 of the Penal Code.
[60] Penal Code section 273.
[61] [1917], 7 E.A.L.R. 14 – Hamilton, C.J. in the High Court of East Africa Criminal Revision, in the *Amkeyo* case distinguished between marriages contracted under statutory law, which required monogamy, and polygamous marriages under native law and custom, and ended up touching on spousal privileged communication between competency of the wife to give evidence for the prosecution in a criminal case. The colonial judge argued that the polygamous marriage or marriages potentially polygamous, under the African customary law – amounted to something close to wife purchase that does not merit protection by privilege with respect to communication made between the parties during marriage. Cf. Durand, *Evidence for Magistrates* (n 31) 95.
[62] KEA, Section 127 (4)
[63] P. P. Durand, *Evidence for Magistrates* (n 31) 104.

prosecution at every stage of the proceedings where the defendant-spouse is charged with adultery or enticement.[64]

Children of tender years

As for children of tender years, a conversation with the child prior to accepting the evidence of the child should be sufficient to determine whether the child has an acceptable level of understanding of events which would justify receiving the child's evidence.[65] This is called the *voir dire* – a trial within a trial where the trial judge holds a competency hearing to determine the competence of the witness.[66] There is no fixed age limit under which a child must necessarily be precluded from being a witness. Competency depends upon understanding or intelligence and although age is an important factor, it is not the only factor to be considered.

Having said that, it is important to point out that the issues that emerge in the reception of the evidence of 'children of tender years' under the Kenyan jurisdiction concern – what age bracket is meant by 'children of tender years', whether the child in question should give a sworn or un-sworn testimony and whether the child has sufficient intelligence. Although the question of corroboration can be included among the above-mentioned issues, corroboration does not have a direct relevance on the question of competence that is our concern here. There is no definition of 'child of tender years'[67] in the two sections of Acts having direct bearing on the evidence of children. However, although case law stipulates that in the absence of special

[64] P. P. Durand, *Evidence for Magistrates* (n 31) 104 – 105.
[65] Immigration and Refugee Board of Canada(n 30).
[66] Steve Uglow, Kent Law School (n 26).
[67] The Oaths and Statutory Declaration Act (Cap. 15), section 19; KEA, Section 124.

circumstances[68], any child under fourteen years is considered to be of tender years, the court maintains as well that whether a child is of tender years is a matter of the good sense of the court.[69] Furthermore, it is necessary for the magistrate to satisfy himself and to record on the case record whether (or not) the witness is a child of tender years.[70] With respect to the swearing of an oath, it is the duty of the court to ascertain first whether the child tendered as a witness understands the nature of an oath.[71] If after questioning, the court is convinced that the child does in fact understand the nature of an oath, arising from religious beliefs, the child may be sworn or affirmed and may testify.[72] According to the Oaths and Statutory Declaration Act (Cap. 15), if the child does not understand the nature of an oath, before allowing the child to give evidence, the court must determine through questioning the child whether the child possesses sufficient intelligence to justify the reception of the evidence, and whether the child understands the duty of speaking the truth.[73]

In summary, in this section dealing with competence, compellability and privilege, it is important to reiterate that ordinary witnesses who are competent are always compellable to give evidence both in civil and criminal cases whether for the defence or for the prosecution. Furthermore, as section 128 demands, it is not sufficient excuse for the witness to refrain from answering any relevant questions either because

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[68] *Kibangeny v R*, [1959] E.A. 92 (C.A.)
[69] *R v Campbell*, [1956] 2 All E.R. 272. This however has been overtaken with the Children's Act of 4th January 2002 which stipulates 18 yrs as the age of the child.
[70] P. P. Durand, *Evidence for Magistrates* (n 31) 97, 98, 99 citing *Sakila v R*, [1967] E.A. 403, 406 (T).
[71] *R v Surgenor*, [1940] 2 All E.R. 249; *Nyasani s/o Bichana v R.* [1958] E.A. 190, 191 (C.A); *Kibangeny v R*, [1959] E.A. 95 (C.A.); *Oloo s/o Gai v R*, [1960] E.A. 88 (C.A); *Fransisio Matovu v R*, [1961] E.A. 260, 262 (C.A.)
[72] P. P. Durand, *Evidence for Magistrates* (n 31) 98.
[73] P. P. Durand, *Evidence for Magistrates* (n 31) 98, citing *Gabriel s/o Maholi v R*, [1960] E.A. 159, 160 (C.A).

he/she may be incriminated directly or indirectly, or because he/she may suffer penalty or forfeiture of any kind. Same section 128 protects the potential witness from any arrest or prosecution for any evidence given as witness except of course where the charge against him is one of perjury before the court against section 108 of the Penal Code. Privilege is of course considered a sufficient excuse. Husband and wife can rely on privilege to claim non-disclosure of communications during marriage except for the offences such as – bigamy, offences against morality, assault on spouse or spouse's children or conversion of spouse's property or property of spouse's children. Let us now look at all the scenarios covered by privilege under the *Kenyan Evidence Act*.

3. Privileged Communication under the Statutes

A privileged statement is a statement that is made in such circumstances as to be protected from disclosure in court by a witness.[74] According to most classical legal scholars, privilege generally is attached to the following relationships and scenarios – husband and wife, attorney-client, spiritual adviser and communicant (priest-penitent), physician and patient, confidential affairs of State, communications with informers, communications with persons connected with news media, and accountant-client.[75] It is important to bear in mind that not all jurisdictions recognise all these relationships as meriting a privileged status. Sections 129 to section 130 deal with various types of

[74] P. P. Durand, *Evidence for Magistrates* (n 31) 105.
[75] J.H. Buzzard, May, R, Howard, MN (ed). *Phipson on Evidence*, (13th edn Sweet and Maxwell, London 1982.) 743 – 853.

privileged statements.[76] These include – privilege of court, spousal privilege, privilege relating to official records, privilege of official communications, privilege relating to information of commission of offences, privilege of advocates – their interpreters, clerks and servants, communications with an advocate, title deeds and incriminating documents in hand of third party, privileged document in possession of another, bankers' books, and privileges to exclude oral evidence of privileged documents. In this section, we shall briefly look at these provisions before proceeding to enquire into the jurisprudence of privilege itself in the next section.

Privilege of court

According to section 129 of the *Kenyan Evidence Act* no judge or magistrate shall be compelled to answer any questions as to his/her own conduct in court as judge or magistrate or as to anything which came to his/her knowledge in court while acting as judge or magistrate, except upon the special order of a higher court. Judicial privilege extends only to the court's own conduct while in court and anything that came into his/her knowledge while he/her was acting as judge or magistrate in court.[77] Consider the following scenarios:

On a trial in the High Court, the defendant claims that a deposition taken before a certain magistrate was taken improperly. The said magistrate cannot be compelled to answer any question concerning the taking of the deposition because it involves his/her

[76] P. P. Durand, *Evidence for Magistrates* (n 31) 105.
[77] P. P. Durand, *Evidence for Magistrates* (n 31) 110.

own conduct as magistrate, except if a higher court of which he/she is subordinate to makes a special order to that effect.

The defendant is accused in the High Court of perjury in contravention of section 108 of the Penal Code, such perjury having been committed in a case before a certain magistrate. The magistrate cannot be compelled to answer any question concerning the false evidence, since it involves something which came to his/her knowledge in court when acting as a magistrate, except upon special order of a court to which he/she is subordinate.[78]

The above privilege enjoyed by the magistrates in our illustration above does not cover occurrences before/in the presence of the judge or magistrate while acting in his/her official capacity as judge or magistrate. If for example a court drama ensures and the defendant attempts to assault a Police officer during a trial before the magistrate, if this particular incident of assault comes before the High Court, then the magistrate may be examined as to what occurred.[79] However, it is not clear who holds this privilege and whether he/she has right to waive it. It has been argued however, that where the privilege is based upon grounds of public interest, then rather than a right it is a duty that cannot be waived.[80]

Spousal privilege

Section 130(1) of the *Kenyan Evidence Act* states that no person shall be compelled to disclose communication made to him or her during marriage by the other

[78] P. P. Durand, *Evidence for Magistrates* (n 31) 110.
[79] P. P. Durand, *Evidence for Magistrates* (n 31) 110.
[80] *Makanjuola v Commissioner of Police of the Metropolis*, [1992] 3 All ER 617.

spouse. Neither of the spouses is permitted to disclose such communications without the consent of the person who made it or of his or her representative in interest. The section however makes the exception to suits between the spouses themselves or in any of the cases referred to in paragraphs a, b, and c of section 127 subsection 3 – bigamy, offences against morality, assault on spouse or spouse's children or conversion of spouse's property or property of spouse's children. Subsection 2 attempts to describe what marriage means under this act – 'a marriage, whether or not monogamous, which is by law binding during the lifetime of the parties thereto unless dissolved according to law and includes a marriage under native or tribal custom'. This was to counteract the notorious case *R v Amkeyo.*[81]

The phrase – 'within marriage' – tends to restrict those who could be covered by privilege here. The implication is that if one is not legally married as defined in subsection 2 of the Act, one may be a competent and compellable witness to disclose communications since the privilege of non-disclosure extends only to the parties of a valid marriage.[82] Moreover, the protection offered by privilege persists even if the marriage has been dissolved as far as the communication between the parties was made within the subsistence of a valid marriage. Finally, the privilege concerns the communication made within marriage and not communication made between the parties to the marriage before the marriage took place. Therefore, it would appear that the wife could be a competent witness to give evidence only about the communication made

[81] P. P. Durand, *Evidence for Magistrates* (n 31) 105; see n 34.
[82] P. P. Durand, *Evidence for Magistrates* (n 31) 106.

before the marriage.[83] However, not withstanding the protected status of the communication within marriage, a document in the hands of a third party, is not so protected even though it contains a communication from spouse to spouse. Furthermore, a communication made in public in the presence of other persons is not in the nature of communication between spouses and is not protected.[84]

Privilege under Section 131, 132 and 133

Sections 131, 132 and 133 are concerned with privilege relating to official records, official communications and information of commission of offences. Section 131 is a privilege that protects a class of documents termed 'unpublished official records'. It is however required that the protection be activated by a Minister or the Sectary General of the Organisation (read – the East African Community[85]) by signing a statement on oath, or by affidavit or otherwise, stating the following:

1. that he has examined the contents of the document,

2. that the document forms part of the unpublished official records of the Ministry (or the East African Community); and,

3. that he is of the opinion that production of the document would be prejudicial to the public service by reason of the content of the document, or by the fact that the document belongs to the class of documents which, on the grounds of public policy, should be withheld from production.

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[83] P. P. Durand, *Evidence for Magistrates* (n 31) 107.
[84] P. P. Durand, *Evidence for Magistrates* (n 31) 107, citing *R v Mange s/o Mulebi*, [1948], 15 E.A.C.A. 69.
[85] Due to the input supplied by the Act establishing the East African Community [No. 31 of 1967]

Once the above conditions have been met, the court is bound to accept without question the decision of the Minister or Secretary General of the East African Community (EAC).[86] "Minister" in this section means a person appointed and serving as a Minister of the Government of Kenya under the Constitution, or the President, Vice President or the Attorney-General.[87]

Section 132 extends privilege to public officers. As far as a public officer considers that the public interest would suffer by disclosure, such public officer shall not be compelled to disclose. This is further supported by section 144 subsection 2 of the Criminal Procedure Code, which states that nothing in the section, dealing with compelling attendance of witnesses "shall affect the provisions of sections 131 and 132 of the Evidence Act...." In the celebrated case *Raichura Ltd v Sondhi*[88], the President of the Court examined succinctly the length and breadth of this privilege. In the above case, a police officer called in evidence for the defendant – the warehouseman where goods deposited under written terms that included exemption clause were apparently stolen – stated as his conclusion that the goods were stolen without the complicity of the defendant or his servants. Nevertheless, he claimed privilege under section 132 as to the facts upon which he based his conclusion. Analysing both the marginal note – 'privilege of official communication' – with the actual phrase of the section – 'communication made to the official in the course of his duty', the court interpreted the above privilege to refer to 'official communications made to a public officer from an official source'. It

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[86] P. P. Durand, *Evidence for Magistrates* (n 31) 111-112.
[87] Interpretation and General Provisions Act (Cap. 2) – s-3 as amended.
[88] [1967] E.A. 624 (C.A.)

construed 'official' in relation to 'communication' as the communication – whether oral or written – emanating internally from an office or department of state. It argued that anything short of the above restrictive interpretation would imply giving every public officer[89] the right to refuse to disclose information given to him/her in the course of his/her duty if he/she considers that such disclosure would be contrary to the public interest. This will definitely sabotage the basic interest of the State for which the section was enacted to protect. Furthermore, as Durand affirms, if privilege is claimed, the witness may be required by the court to explain the circumstances in which the privilege is claimed to enable the court to decide whether the public interest would suffer by the disclosure. However, the court should not go to the extent of considering whether the communication is in fact one of which disclosure ought not to be compelled.[90]

It is the humble opinion of the present researcher that the dilemma that confronts the court before this apparently absolute privilege is not resolved. On the one hand, the court is expected to require an explanation of 'the circumstances in which the privilege is claimed' to enable it decide whether the public interest would suffer by the disclosure. Yet, on the other hand, the court is not expected to go to the 'extent of considering whether the communication is in fact one of which disclosure ought not to be compelled'![91]

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[89] Public officer – any person holding office, permanent or temporary, paid or unpaid, in the service of Kenya no matter how humble the office may be – according to the Interpretation and General Provisions Act (Ch. 2).

[90] P. P. Durand, *Evidence for Magistrates* (n 31) 113 – 114, citing *Raichura Ltd v Sondhi*, [1967] E.A. 624 (C.A.).

[91] A possible interpretation which makes this provision even more liberal than that of the English Courts is that the court, rather than have a checklist of such communications of which disclosure ought not be compelled, the court considers eligibility for privilege on a case-by-case basis. Be that as it may, the 2 cases *Makanjuola* case [1992] 3 All ER 617 and the *ex Parte Wiley* [1994] reveal the current case law

Section 133 protects judge, magistrate or police officer or revenue officer[92] from divulging the source of information with respect to the commission of any offence. According to Sarkar,[93] the protection afforded by this section does not depend upon a claim of privilege being made but is the duty of the court to exclude such evidence.[94] The rule however has certain limitations:

1. It applies to the identity of the informant and not necessarily to the contents of his statement as such. Neither does the privilege apply to prevent merely the proof of contents that have already been de facto disclosed as may be obtainable in an action against the informer for libel.[95]

2. If the identity of the informant is admitted or known, then there no reason for pretended concealment, and the privilege of secrecy would be merely an artificial obstacle to proof.

3. The rule applies to communications to such officers only as have a responsibility or duty to investigate or prevent public wrongs, and not to officials in general. These categories of people ordinarily signify the police and officials of criminal justice generally, even by extension administrative officials.

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with respect to public policy and privilege. While the *Makanjuola* case retains one class where documents might be subject to public interest immunity – information from investigations into police misconduct for example, the *Wiley* case demonstrates that no class of documents is automatically exempt from inspection in so far as the judge can inspect document and balance public interest in non-disclosure against public interest in proper administration of justice.

[92] Subsection 2 defines 'revenue officer' as 'any officer employed in or about the business of any branch of the public revenue, including any branch of the income tax, customs or excise department.

[93] S. C. Sarkar, *Sarkar on Evidence* (11th edn Sarkar and Sons Ltd, Calcutta1872) 1165.

[94] P. P. Durand, *Evidence for Magistrates* (n 31) 114.

[95] P. P. Durand, *Evidence for Magistrates* (n 31) 113, citing *Bishen Chand Mohindra v Mathra Das*, [1941], 19 K.L.R.(2) 67.

4. The source of information as to the commission of an offence is only prohibited and not the custody of any document or other material objects that might have been seized and tendered in evidence.[96]

Privilege however may end up hindering and frustrating the allegations against the defendant rather than aiding the prosecutor.[97] This is because in order to play a useful part in the detection and prevention of crime police informers must remain unknown, for if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. However, if the prosecution desire the courts to hear the details of the information an informer has given to the police, the informer must be called as a witness.[98]

Privilege of advocates

Under the *Kenyan Evidence Act*, the privilege of advocates is covered in sections 134 through 137. The privilege covers both the advocate and interpreters, and the clerks and servants of advocates (Section 135). The substance of what is covered by this privilege include the following–

1. communications to the advocate,

2. contents or conditions of documents with which the advocate has become acquainted, or advice given by the advocate to his client.

All the above materials are protected only if encountered in the course of, and for the purpose of the advocate's professional employment by or on behalf of the client.

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[96] P. P. Durand, *Evidence for Magistrates* (n 31) 114, citing S. C. Sarkar, *Sarkar on Evidence* (n 93) 1165.
[97] *Njunga v R*, [1965] E.A. 773 (K), where the trial judge dismissed the testimony as hearsay evidence because it came from 'an uncalled, unnamed, un-sworn individual'.
[98] P. P. Durand, *Evidence for Magistrates* (n 31) 116, citing *Njunga v R*, [1965] E.A. 773 (K).

The client is the owner of the privilege and he/she alone can permit disclosure. Furthermore, as has already been argued,[99] it would be even more correct to talk of the incompetence of the advocate to disclose the material of the privilege and the privilege of the client with respect to disclosure. For example, in *Omari s/o Hassani v R*, the appellant had been convicted on two statements by the deceased that he was one of the persons who attacked him. What is more, the judge knowing that they should be accepted with caution, found corroboration in the appellant's refusal to give evidence on oath, particularly as the defending advocate informed the Court that such refusal was against his own advice. Discussing this, the court argued that Section 26 of the Indian Evidence Act states that no advocate shall be permitted, unless with his client's consent, to disclose any advice given by him to his client in the course of his employment. The court ruled that the learned judge should not have permitted the disclosure by the advocate to affect his mind.[100]

It is important to note that the provision does not protect communications made in furtherance of an illegal purpose, or certain facts observed such as the advocate being a witness to a commission of a crime by his/her client. For such matters, the advocate may be compelled to give evidence. The rule of thumb is that if the advocate receives or learns of the facts before the commencement of his/her employment, the information is protected. However, if he receives or learns of the facts after the commencement of the employment, the disclosure is not protected. The consent to disclose must be expressly given. Section 136 clearly states that the mere fact that the client has given evidence

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[99] n 18
[100] [1956], 23 E.A.C.A. 580.

himself either by choice or otherwise, does not mean that he has given consent to disclosure by his advocate. Such consent, could however be interpreted to have been given when the client calls any advocate, interpreter, clerk, or servant as a witness and directs questions on such matters which, 'but for such question, the witness would not be at liberty to disclose.'[101]

Section 137 tends to restrict the scope of privilege enjoyed by the client if the client presents self as witness. If the client offers himself/herself as a witness, the decision rests with the court on the extent (to which) disclosure can be demanded from him/her in order to explain fully the evidence already given by the client-witness. Communication from the defendant's servants to another and from defendant's servant to defendant regarding the suit or for the purpose of obtaining information for future litigation is not privileged, unless it can be shown that the communication was made or prepared for the use of the solicitor.[102]

Privileges of Sections 138 and 139 – testifier's title deeds and incriminating documents, and privileged documents in the hands of a third party

Section 138 protects the compulsory production of the witness's title deed as far as the witness is not a party to the suit. It is however seen nowadays as unnecessary and needless since the modern time now enjoys system of land registration that makes registered owners protected even in the event of loss of title deed.[103] With respect to

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[101] KEA, Section 136 (2)
[102] P. P. Durand, *Evidence for Magistrates* (n 31) 114, citing Ratanlal and Dhirajlal Thakore, *The Law of Evidence*, (The Bombay Law Reporter Ltd, Bombay 1968) 289.
[103] P. P. Durand, *Evidence for Magistrates* (n 31) 120, citing S. C. Sarkar, *Sarkar's Law of Evidence*, (n 93) 1187.

ıcriminating documents adverse to the witness – according to Durand, this does not ɔver books of account nor does the section protect one against the production of any ɔcument that may make one liable for a civil action.[104]

Section 139 provides for the protection of those who are in the possession of ɔcuments which belong to others – attorneys, agents, mortgagees, etc. The person in ɔssession of the document may be allowed to produce the document if he wishes. He annot be compelled to produce it as far as it is within the right of the others to agree or efuse to produce it if the document were to be within their possession. However, this eedom not to be compelled expires once the other person who is entitled to refuse to roduce it gives consent for the production of the document.[105] In addition, of course, o person who is entitled to refuse to produce a document shall be compelled to give ral evidence of its contents.[106]

4. The Jurisprudential basis of Privileged Communication

The enquiry into the jurisprudential foundation of the law of privilege is an nquiry into the rationale of the law of privileged communication. It poses the question vhy does the law recognize privileged communication. This is against the background nat the judicial process itself is a search for truth. Since the general rule is that all elevant evidence is admissible at trial, why should the law shut out from trial any

[4] P. P. Durand, *Evidence for Magistrates* (n 31) 120.
[5] P. P. Durand, *Evidence for Magistrates* (n 31) 120.
[6] KEA, Section 142.

relevant evidence that contributes to the discovery of the truth? On this Zuckerman points out:

It is a fundamental principle in the administration of justice that parties to litigation have a right to bring before the court all evidence relevant to their case and to call on others to produce such evidence as they may have.... When a litigant is denied access to relevant evidence he may understandably feel aggrieved, whether or not such evidence would have affected the actual result of the litigation; whether or not justice has been done, it would not appear to have been done.[107]

The above statement being the case, let us now look at the different explanations offered by legal scholars with respect to the rationale behind making exceptions to the general rule on the ground of privilege. In reference to such exceptions, Chief Justice Burger[108] of the United States Supreme Court stated that:

'Whatever their origins these exceptions to the demand for every man's evidence *are not lightly created nor expansively construed*, for they are in derogation of the search for truth.'

Even Wigmore, one of the most eminent authorities on 'privilege', equally states: 'We start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are truly exceptional'[109]

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[107] Zuckerman A., 'Privilege and public interest' in Tapper C. (ed), *Crime, Proof and Punishment* (Butterworths 1981) 248 at 248-249

[108] *United States v Nixon*, 94 S.Ct. 3090 (1974) 3108.

[109] Wigmore, *Evidence in Trials at Common Law*, vol. 8 (McNaughton rev.) (Boston: Little Brown and Company, 1961), 70.

In this section, the emphasis is not so much as to enquire into the rationale behind each type of privilege but to look at the basic principle behind privilege itself, and the so-called class privileges such as – Solicitor-Client, Spousal, Informant privileges, Priest-penitent – in particular. Such an enquiry is necessary since this research will invariably pose the question whether the categories of privileged communication in the *Kenyan Evidence Act* are a closed list or an open-ended list. If it is an open-ended list, does the subject of our enquiry – priest-penitent privilege – qualify to be included in the list of privileges? Only a lucid analysis of the jurisprudential basis of privilege will reveal the basic criteria for primarily a judicial[110] recognition of privilege and subsequently a legislative provision.

Generally, privileges safeguard the values of privacy, freedom, trust and honour in important personal and professional relationships. The underlying rationale governing the recognition of privileges is the belief that certain relationships, which are valuable to society, foster such a sense of confidentiality or privacy that communications within those relationships should be protected.[111] The compelling interest to be protected can range from the confidentiality between physician and patient to the protection of state secrets.[112] Each of the privileged communication has its objective rationale. The object of the spousal privilege is to ensure that the mutual confidence that ought to exist between husband and wife is not eroded by one spouse

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[110] The present researcher is in no way arguing that there is no judicial recognition of privilege per se, but rather hinting to the normal process of law making where by judicial decisions evolve into legislative codification.

[111] Kimberly L. Schilling, 'Intra-familial Communications: An Analysis of the Parent-Child Privilege', (1999) *Family Court Review* 37 (1), 99-128, <http://www.blackwell-synergy.com/doi/abs/10.1111/j.174- 1617.1999.tb00531.x?journalCode=fcre> accessed on 23 July 2006..

[112] Kimberly L. Schilling, 'Intra-familial Communications…' (n 111).

being compelled to produce a communication from the other.[113] The basis of the privilege of the court appears to be that cross-examination or comment on judicial conduct may be incompatible with the prestige of office.[114] The public policy involved in the privilege of the crime informer is that the names of persons who assist in the detection of crimes through giving information should not be unnecessarily disclosed, for if they were disclosed they would soon either cease to give information or become useless to the police because they would become known to criminals.[115] The solicitor-client privilege rationale is that if a legal advisor is to defend and represent his client to the best of his ability, he must have all the facts concerning the case, including those that are damaging. It is therefore essential that clients feel secure in the knowledge that those admissions that he makes to his advisor are not to be revealed in court.[116] However, the jurisprudential enquiry tends to go beyond the specific objects of the specific privileges enumerated above.

According to Michael Cassidy, the most generally accepted rationale for the adoption of privileges is the utilitarian justification. Privileges are recognized only when necessary to preserve relationships that society values above the truth-finding functions of its courts. Privilege is warranted for the protection of interests and relationships that, rightly or wrongly[117], are regarded as of sufficient social importance to justify some

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[113] Morris H.F., *Evidence in East Africa,* (n 32), 170.
[114] P. P. Durand, *Evidence for Magistrates* (n 31) 110.
[115] P. P. Durand, *Evidence for Magistrates* (n 31) 114, citing S. C. Sarkar, *Sarkar on Evidence*, (n 93) 1165.
[116] P. P. Durand, *Evidence for Magistrates* (n 31) 116.
[117] <http://www.law.harvard.edu/publications/evidenceiii/comment/privileges.htm> accessed 13/7/2006

sacrifice of availability of evidence relevant to the administration of justice.[118] The famous American Jurist John Henry Wigmore (1863-1943) popularized the utilitarian rationale of privilege with his famous 4-test criteria:

1. The communications must originate in a confidence they will not be disclosed;

2. Confidentiality must be essential to the maintenance of the relation between the parties;

3. The relation must be one which the community believes ought to be sedulously fostered; and,

4. The injury that would result from the disclosure of the communication must be greater than the benefit that would be gained by the correct disposal of litigation.[119]

An understanding of the jurisprudential basis of privilege requires not simply a statement of the bare legal principles marshalled out above but also the framework of judicial enquiry in the application of those principles to particular facts. In *A.M.* v *Ryan*[120], Madam Justice McLaughlin summarizes both the general principles and the framework for judicial enquiry in a way that represents an appropriate model for understanding how the modern law of privilege, while building upon traditional foundations, has continued to evolve in the context of modern social realities.[121] Justice McLaughlin reiterates the foundational principle that the primary

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[118] R. Michael Cassidy, 'Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?' *William and Mary Law Review*. Volume: 44. Issue: 4, 2003, 1627+. <http://www.questia.com/PM.qst?a=o&d=5002015023> accessed on 28/07/2006.

[119] *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), sec. 2285

[120] [1997] I.S.C.R.157

[121] Marilyn MacCrimmon and Michael Jackson, Q.C., 'Research Confidentiality and Academic Privilege', A commissioned legal opinion on research confidentiality and academic privilege presented to

purpose of the trial system is the search for truth. The common law principles underlying the recognition of privilege from disclosure proceed from the fundamental proposition that everyone owes a general duty to give evidence relevant to the matter before the court, so that the truth may be ascertained. To this fundamental duty, the law permits certain exceptions, known as privileges, where it can be shown that they are required by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[122] Moreover, the categories of privilege, whether on a class basis or a case-by-case basis, are not fixed in legal stone. It is now accepted[123] that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate. This goes to show that privileges may evolve to reflect social and legal realities.[124]

The facts in *Ryan* were that A.M., when she was seventeen years old, had undergone psychiatric treatment with Dr. Ryan in the course of which Dr. Ryan had sexual relations with her. A.M. sued Dr. Ryan for damages. In order to deal with the problems caused by the sexual assault, A.M. sought psychiatric treatment from Dr. Parfitt. A.M was concerned that communications between her and Dr. Parfitt should remain confidential and Dr. Parfitt assured her that everything possible would be done to ensure that this was the case. Under this jurisdiction each party to an action is

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the Chair of the President's Task Force on Revision of the Research Policy, Simon Fraser University, June 7, 1999.

[122] Marilyn MacCrimmon and Michael Jackson, Q.C., 'Research Confidentiality and Academic Privilege' (n 121).

[123] See rulings – *Slavutych v Baker*, [1976] 1 S.C.R. 254; *R v Gruenke*, [1991] 3 S.C.R. 263, at p. 286.

[124] *R. v. Ryan* [1997] I.S.C.R.157

permitted to examine the other for discovery and to obtain discovery of all documents in the possession of the other party that are relevant to the lawsuit and are not protected from disclosure by privilege or some other legal exemption. During examination for discovery of A.M., counsel for Dr. Ryan requested production of Dr. Parfitt's records and notes. A.M.'s counsel advised that they would not be produced without a court order and accordingly Dr. Ryan's counsel brought a motion to obtain disclosure. Dr. Parfitt agreed to release her reports but claimed privilege in relation to her notes. At the hearing before the Judicial Master it was held that the first branch of the Wigmore Test – that the communications originate in confidence – was not met since A.M. had been fearful throughout that the doctor's notes would be disclosed and Dr. Parfitt promised only that everything possible would be done to ensure that their discussions were kept private. When the issue reached the Supreme Court of Canada the following paragraphs paraphrase how Madam Justice McLaughlin charted the Supreme Court of Canada through the Wigmore principles.[125]

With respect to the first test, the Justice argued that the mere fact that the subject was notified that there is a possibility that the court may order disclosure does not negate the fact that the communication originated in confidence. With respect to the second requirement, she argued that the importance of confidentiality to the maintenance of the relationship is evidenced by harm to the relationship in general and to the specific relationship in issue. This is because the appellant saw confidentiality as essential to her relationship with Dr. Parfitt. She insisted from the first that her

[125] Marilyn MacCrimmon and Michael Jackson, Q.C., 'Research Confidentiality and Academic Privilege'(n 121).

communications to Dr. Parfitt be held in confidence, suggesting that this was a condition of her entering and continuing treatment. The third requirement is equally satisfied. The court assesses the value to society of the relationship due to the fact that victims of sexual abuse often suffer serious trauma, which, left untreated, may mar their entire lives. It is widely accepted that it is in the interests of the victim and society that such help be obtained.[126] Having satisfied the first three conditions requirement for a communication to be privileged, the learned Justice turned to the fourth condition.

The fourth requirement is that the interests served by protecting the communications from disclosure outweigh the interest of pursuing the truth and disposing correctly of the litigation. This requires first an assessment of the interests served by protecting the communications from disclosure. These include injury to the appellant's ongoing relationship with Dr. Parfitt and her future treatment. They also include the effect that a finding of no privilege would have on the ability of other persons suffering from similar trauma to obtain needed treatment and of psychiatrists to provide it. The interests served by non-disclosure extends also to any effect on society of the failure of individuals to obtain treatment restoring them to healthy and contributing members of society. Finally, the interests served by protection from disclosure must include the privacy interest of the person claiming privilege and inequalities that may be perpetuated by the absence of protection.[127] Moreover, the learned Justice recognized that the interest in disclosure of a defendant in a civil suit may be less compelling than the parallel interest of an accused charged with a crime.

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[126] Marilyn MacCrimmon and Michael Jackson, Q.C., 'Research Confidentiality and Academic Privilege'(n 121).
[127] *R. v. Ryan* [1997] I.S.C.R.157.

The defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty. As a consequence, the balance between the interest in disclosure and the complainant's interest in privacy may be struck at a different level in the civil and criminal case. The implication being that documents produced in a criminal case may not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant's interest in production. The result depends on the balance of the competing interests of disclosure and privacy in each case. [128] As we have seen, the cumbersome balancing test is embodied in the fourth aspect of the Wigmore criteria where the court must consider whether the interest served by protecting the communications from disclosure outweighs the interest in getting at the truth and disposing correctly of the litigation.[129]

The utilitarian principle for allowing privilege was also put to the test in the criminal case *Smith v Jones.*[130] In this case, the lawyer of a man charged with aggravated sexual assault on a prostitute referred the accused to a psychiatrist hoping that it would be of assistance in the preparation of the defence or with a submission on sentencing. During his interview with the psychiatrist, the accused described in detail his plan to kidnap, rape and kill prostitutes. The psychiatrist informed defence counsel that in his opinion the accused was a dangerous offender who would, more likely than not, commit offences unless he received treatment. The accused pled guilty to aggravated sexual assault. The psychiatrist inquired of defence counsel whether his

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[128] *R. v Ryan* [1997] I.S.C.R.157.
[129] Marilyn MacCrimmon and Michael Jackson, Q.C., 'Research Confidentiality and Academic Privilege'(n 121).
[130] *Smith v Jones* [1999], 169 D.L.R. (4th) 385 (S.C.C.).

report would be considered in the sentencing of the accused and learned that it was protected by the solicitor-client privilege and would not be disclosed to the sentencing judge. The psychiatrist commenced an action for a declaration that he was entitled to disclose the information he had in his possession in the interests of public safety. The trial judge ruled that the public safety exception to the solicitor-client privilege and doctor-patient confidentiality released the psychiatrist from his duties of confidentiality and concluded that he was under a duty to disclose to the police and the Crown both the statements made by the accused and his opinion based upon them. The Court of Appeal allowed the appeal of the accused but only to the extent that the mandatory order was changed to one permitting the psychiatrist to disclose the information to the Crown and police. The Supreme Court dismissed the appeal and affirmed the order of the Court of Appeal subject to the directive that only those parts falling within the public safety exception would be disclosed. Moreover, public safety is here analysed under the parameters of clarity of victim or victims, seriousness of injury envisaged or threatened, and imminence of attack. In the Smith case, the Supreme Court (at para. 44) not only recognised the solicitor-client privilege as the highest form of privilege, but also emphasized that the public safety exception applies to all privileges.[131]

In contradistinction to the utilitarian instrumentalist justification of Wigmore, some evidentiary scholars have based the rationale of privilege on a human right – the

[131] Marilyn MacCrimmon and Michael Jackson, Q.C., 'Research Confidentiality and Academic Privilege'(n 121). See also the scholarly research of R. Michael Cassidy, 'Sharing Sacred Secrets:…' (n 118).

right to privacy or autonomy.[132] It is argued that privilege is based in part upon the idea that the human being does sometimes have need of a place of penitence and confession and spiritual discipline. When any person enters that secret chamber, this [privilege] closes the door upon him and civil authority turns away its ear.[133] This view suggests that there is intrinsic value to confidences apart from their instrumental ends, and that it would be fundamentally indecent for the law to intrude upon certain intimate relationships.[134] One author describes evidentiary privileges under a rights regime as a right to be let alone, a right to unfettered freedom from the state's coercive or supervisory powers.[135] It has been argued that this rationale cannot be totally bereft of utilitarian calculus since invariably the court would at some point in time have to balance the individual's privacy interest against the societal interest in obtaining evidence.[136]

As has been seen, the jurisprudence drawn from case law suggests that, rather than being a closed list, the common law permits privilege in new situations where reason, experience and application of the principles enshrined in the traditional privileges. In addition, privilege has been gauged in a cost-benefit balancing calculus even when the so-called right to autonomy and privacy is recognized. The inference from the above observations is that any claim that since the priest-penitent privilege is

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[132] Shawn P. Bailey, 'How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege', *BRIGHAM YOUNG UNIVERSITY LAW REVIEW*, [2002].
[133] *Reutkemeier v Nolte*, 161 N.W. 290, 293 (Iowa 1917).
[134] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[135] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).
[136] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).

not provided for in the Evidence Act, such privilege, ipso facto, does not exist under the Kenyan Law, is an overstatement.

5. Conclusion

In this chapter, we have examined the concept of privilege vis-à-vis competence and compellability. We have also briefly elucidated the privileges covered under the Kenyan Statutes and gone to enquire into rationale behind privilege. Having discovered, that it is principally utilitarian justification more than privacy consideration that have dictated the land mark rulings behind the recognition of privileges, we can now attempt an enquiry into the place of the priest-penitent privilege under the Kenyan law.

CHAPTER 2

The Common Law Roots of the Statutory Absence of the Priest-Penitent Privilege in Kenya

1. Introduction

In this research essay, we have thus far focused on privileged communications in its entirety. In this section, we shall focus on the history of the priest-penitent privilege before and after the Reformation and the landmark decisions on the subject. This will enable us enquire why and how the religious and political climate in England at that period of history impacted on the common law approach to the privilege and how the prevalent state of the law in England influenced the Kenyan Legal System through colonialism and reception of the English laws into the then British colony.

2. History of the Priest-Penitent Privilege at Common Law

The generally recognised common law privileges are the following: Attorney-client (including attorney work-product), Spousal privilege, Priest/penitent, Accountant/client, Intra-family. While the Physician/patient was not recognised at common law[137] the Attorney-Client privilege is the oldest and one of the most widely accepted of the known testimonial privileges. Although the priest-penitent privilege is classified as one of the common law privileges, its existence as a common law privilege

[137] <http://www.usdoj.gov/atr/public/guidelines/206696.htm> accessed on 11 August 2006.

is still a topic that is highly debated and it does not apply these days in the UK. This is explainable by the fact that before the Reformation, England was a Roman Catholic country and the Seal of the Confessional had great authority in the English courts. However, the Reformation was followed by a period of, often fierce, persecution of Catholics[138], which definitely left its impact in the English legislation.[139]

2.1 The Priest-penitent Privilege in the Early History of the Common Law

Historically, the Clergy-Communicant Privilege arose in response to the traditional 'Seal of Confession' required by the Catholic Church.[140] The evidentiary privilege was first recognized in England after the Norman Conquest circa 1066, in large part due to deference to the official status of the Roman Catholic Church, and to

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[138] <http://en.wikipedia.org/wiki/Priest-penitent_privilege_in_England_from_the_Reformation_to_the_nineteenth_century> accessed on 5 August 2006

[139] 'Priest-penitent privilege in pre-Reformation England' <http://en.wikipedia.org/wiki/Priest-penitent_privilege_in_pre-Reformation_England> accessed on 10 August 2006.

[140] <http://www.epic.org/privacy/privileges/> accessed on 2 August 2006; Under Canon law[140], the seal of the confessional is "inviolable,"[140] and a priest may be excommunicated for disclosing a matter revealed to him during a sacramental confession. The seal of the confessional was codified in 1917 as Canon 889. The 1917 CODE c.889, § 1 states: "The sacramental seal is inviolable; therefore a confessor will diligently take care that neither by word nor by sign nor in any other way or for any reason will he betray in the slightest anyone's sin." The 1983 revisions to Canon law contain an almost identical reference to the inviolable seal of the confessional, 1983 CODE c.983, § 1, and makes excommunication automatic for any priest who violates the seal. Moreover c.1388, § 1 states: "A confessor who directly violates the sacramental seal, incurs *latae sententiae* [an automatic] excommunication ... he who does so only indirectly is to be punished according to the gravity of the offence." Under the nomenclature of the Catholic Church, it is important to note that the "confessor" is the priest, and the penitent is the church member receiving the sacrament. R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118). *Catechism of the Catholic Church* Art.1467 states: "Every priest who hears confessions is bound under very severe penalties to keep absolute secrecy regarding the sins that his penitents have confessed to him. He can make no use of knowledge that confession gives him about penitents' lives. This secret, which admits of no exceptions, is called the 'sacramental seal', because what the penitent has made known to the priest remains "sealed" by the sacrament."

the fact that priests and bishops staffed the King's courts at the time.[141] However, even before the Norman Conquest there were ancient legislative texts,[142] which make one to conclude that the ecclesiastical law of the secrecy of confession was recognized by the law of the land in Anglo-Saxon England. This is substantiated by the very close connexion between the religion of the Anglo-Saxons and their laws, many of which are purely ordinances of religious observance enacted by the state. Furthermore, the above opinion is further supported by the repeated recognition of the supreme jurisdiction of the Pope, and the various instances of the application in the Church in England of the laws of the Church in general.[143] Finally, it is worthy of some observation that there is not a single reported case, textbook or commentary, during the whole pre-Reformation period which contains any suggestion that the laws of evidence did not respect the seal of confession. These grounds seem sufficient to lead to the conclusion that before the Reformation the seal was regarded as sacred by the common law of England.[144]

The fact that the laws of the Church were so emphatic on the subject, coupled with the fact that the Church was then the Church of the nation, affords good ground for inferring that the secular courts recognized the seal. The recognition of it would not

[141] 'The Law of the Seal of Confession' *Catholic Encyclopaedia*, On-line version <http://www.newadvent.org/cathen/13649b.htm> accessed on 11 April 2005; R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).

[142] The laws of Edward the Elder (921-4), son of Alfred the Great, enjoin: 'And if a man guilty of death (i.e., who has incurred the penalty of death) desires confession let it never be denied him'. This injunction is repeated in the forty-fourth of the secular laws of King Canute (1017-35). These laws are prefaced thus: "This then is the secular law which by the counsel of my 'witan' I will that it be observed all over England". The laws of King Ethelred who reigned from 978 to 1016 declare (V, 22): "And let every Christian man do as is needful to him: let him strictly keep his Christianity and accustom himself frequently to shrift (i.e., confess): and fearlessly declare his sins". Cf. 'The Law of the Seal of Confession' (n 141).

[143] 'Priest-penitent privilege in pre-Reformation England' (n 139).

[144] <http://www.newadvent.org/cathen/13649b.htm> accessed on 7th August 2006.

have rested on any principle of immunity from disclosure of confidential communications made to clergymen. It would have rested on the fact that confession was a sacrament,[145] on the fact of that necessity for it, which the doctrine of the Church laid down, on the fact of the practice of it by both king and people, and on the fact that the practice was wholly a matter of spiritual discipline. More so, it would have rested on a rite about which the Church had so definitely declared the law of absolute secrecy.[146]

2.2 The Reformation and the Removal of the Priest-Penitent Privilege

The priest-penitent privilege ceased to exist sometime after the break from Rome during the Reformation in the sixteenth century and the rise of the Anglican Church. Scholars have debated whether and for how long the privilege continued to exist in England after the Reformation and the break from Rome in 1531.[147]

Confession in the Anglican Church, unlike the Roman Catholic Church, was voluntary and not compulsory. What is most apparent is that as the Anglican Church began to shed certain practices of the Roman Catholic tradition, English law ceased to

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[145] One of the solemn religious ordinances enjoined by Christ, the head of the Christian church, to be observed by his followers.

[146] <http://www.newadvent.org/cathen/13649b.htm> accessed on 7th August 2006.

[147] Tiemann argues that the common law of England continued to recognize the privilege for some years after the Reformation, whether the confession was made to a Catholic priest or Anglican minister. Wigmore also suggests that the privilege endured in England prior to the Restoration. He dates its abolition to the return of the monarchy of Charles II in 1660. R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118) citing Tiemann, William Harold Tiemann & John C. Bush, 'The Right to Silence: Privileged Clergy Communication and the Law' 33-35 (1983).

recognize the clergy-penitent privilege. By the mid-seventeenth century, the clergy-penitent privilege had been eliminated in England altogether.[148]

Sir Edward Coke looked to the *Articuli Cleri*, a statute of parliament enacted in 1315, as the first statutory proof that the privilege was recognized in pre-Reformation England.[149] His commentary on the above statute and his application of his interpretation reveals the status of the confessional seal after the Reformation. The part of the statute referred to above deals with the rights of offenders who abjure the realm and, fleeing to a church for refuge, claim privilege of sanctuary. After stating that such persons are to be allowed to have the necessaries of life and that they are to be at liberty to go out of the church to relieve nature, the statute extended the right to confess their offences to the priest also. The statute however cautioned that confessors (the priest receiving their confession) should beware not to 'erroneously inform such appellors'. However, Sir Edward Coke, the great common lawyer and Chief Justice, seem to have erroneously interpreted the Latin word used – *'informar'* – to mean 'inform against' and subsequently implying that the statute gave the right to confess their offences to only thieves and appellors[150] of whom the priest should not 'inform against', that is, disclose. This erroneous interpretation led to the unfortunate conclusion that the non-disclosure of confessional material was not contemplated for those accused of high treason! Thus, he concluded that by common law a man indicted of high treason could not have the benefit of clergy or any clergyman privilege of confession to conceal his high treason.

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[148] R. Michael Cassidy, 'Sharing Sacred Secrets:…' (n 118).
[149] Edward Coke, *The Second Part of the Institutes of the Laws of England* 629 (1797), cited by R. Michael Cassidy, 'Sharing Sacred Secrets:…' (n 118).
[150] Those who confess the felony committed and accuse their accomplices.

The correct interpretation of the clause would seem to be as one of warning to the confessors not to inform these offenders, when they are admitted to hear their confessions, of what is going on outside,[151] their situation akin to a self-imposed prison where they are denied some liberties. There is no doubt that this correct interpretation – of not divulging what is going on outside to these confessing thieves and appellors – does not imply a declaration of the privilege of the seal of confession. Yet, Coke's comment, even if drawn from an erroneous translation, is nevertheless important. Its importance stems from the fact of it being a statement by him of the existence of the privilege – albeit in respect of felonies. However, as to what he sets out to prove – the exclusion of clergy privilege from cases of high treason – there appears to be no foundation except for the two cases he subsequently quoted to buttress his thesis.[152]

The first of these cases is the case of *Friar John Randolf*,[153] who was the confessor of Queen Joan, widow of Henry IV. Sir Edward contends that the queen's conspiracy was proved by the disclosure of her confession to Friar Randolf. Yet reading from other sources that reported the case the word 'confession' was clearly used in its primary sense of an admission rather than a religious act of confession. While one of the sources claimed that the confessor had conspired with the queen by sorcery and necromancy to destroy the King, another says that he had counselled the queen to her crime to which when he was imprisoned he confessed to his crime.[154]

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[151] 'The Law of the Seal of Confession' (n 141).
[152] 'The Law of the Seal of Confession' (n 141).
[153] cited from the Rolls of Parliament, 7 Henry V
[154] 'The Law of the Seal of Confession' *(n 141)*.

The second case is one that occurred after the Reformation. It is the trial of the Jesuit, Fr. Garnet, on the charge of conspiracy in *the Gunpowder Plot*. It is reported in the records of the state trials. There is not only no mention of any decision by the court that the privilege of confession did not extend to the concealment of high treason, but there is not even the faintest indication of any opinion to that effect by any member of the court. There was no question of the giving of evidence by a witness before a court of justice of matter revealed to him in confession. The issue before the court was whether the accused – Fr. Garnet was a party to the conspiracy – the question of his cognizance and, if cognizant, of his non-disclosure of it was essential. It was not disputed that he had heard the particulars of the plot from Greenwell, one of the conspirators. However, the defence was that he had heard them only in confession, though he had previously received a general indication of the plot from another of the conspirators, Catesby. Not only was the defence not rejected at once by the court as being bad in law, but, to infer from the arguments put to the prisoner upon it by certain members of the court, it was treated with a seriousness which seems surprising in a post-Reformation period, and, especially, at a moment of such strong anti-Catholic feeling.[155]

The court wanted to distinguish the encounter between the priest and the conspirators from religious confession. Lord Salisbury, a member of the court, asked Fr. Garnet if there must not be confession and contrition before the absolution, and, having received an affirmative answer, he observed to him that Greenwell had shown no penitence, or intention to desist. Salisbury's argument could be paraphrased thus:

[155] 'The Law of the Seal of Confession' (n 141).

> So it appears that either Greenwell told you out of confession (*extra confessionem*, that is, not in the context of a 'confession') which would attract no secrecy, or, if it were in confession, he professed no penitence, and therefore, you could not absolve him.[156]

Lord Salisbury further said to the accused that after Greenwell had told him (the accused) in particular what Catesby meant, and he (the accused) then called to mind what Catesby had previously told him (the accused) in general, he (the accused) might have disclosed it out of his general knowledge from Catesby. He further asked the accused why, after Greenwell's confession, when Catesby wished to tell him the particulars, he had refused to hear him, to which Fr. Garnet answered that he was unwilling to hear any more. [157]

Sir Edward Coke, for the prosecution, advanced before the court six arguments on the subject. The first argument was that this particular confession was not sacramental. The fifth was that Fr. Garnet had learned of the conspiracy from Catesby *extra confessionem*. Finally, that by the common law the confession in as much as it concerns a crime against His Majesty ought to be disclosed. There is no indication of any adoption by the court of this last proposition. However, the confession in question was only an item in the evidence brought forward. One infers from the report that the court were not satisfied with the defence, with respect to the fact of the confession, and, that they considered the charge to be proved from the other evidence.[158]

It has been argued that Garnet's case is not a good test on the operating law with respect to priest-penitent privilege after the reformation. This is because, even as cited

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[156] 'The Law of the Seal of Confession' (n 141).
[157] 'The Law of the Seal of Confession' (n 141).
[158] 'The Law of the Seal of Confession' (n 141).

by Lord Coke, inasmuch as Garnet was not called as a witness in the Gunpowder treason trial, it ought not to be considered here. Even if he put forward the obligation of the seal of confession, he did so by way of defence that he was not a conspirator but merely knew what he knew through hearing the confession of the others – an argument that Coke kept debunking by retorting that the confession was one of a crime not yet executed.[159]

The point at stake here is that Sir Edward Coke in his commentary on the *Articuli Cleri*, c. 10, following his own translation and interpretation, says that document declares the position at common law. Furthermore, by the fact that he went ahead to support this position with the then recent case, and coupled with his own arguments, all the foregoing affords strong evidence that this great common lawyer was of the opinion that even in his post-Reformation period the common law of England recognised the privilege of confession except in the case of treason. If that is his view, as seems highly probable, it is profoundly interesting as the opinion of a very distinguished lawyer and a fierce champion of Protestantism.[160]

It is important, however, to bear in mind that by the then English penal laws Catholicism was a proscribed religion.[161] The practice of Catholicism was subjected to severe penal statutes and priests performing its rites were rigorously penalized.[162] More so, as we well know, statute law displaces the common law if the latter is inconsistent

[159] 'The Law of the Seal of Confession' (n 141).
[160] 'The Law of the Seal of Confession' (n 141).
[161] 'The Law of the Seal of Confession' (n 141).
[162] 'The Law of the Seal of Confession' (n 141).

with the provisions of the statute.[163] Granted, there is no statute that expressly declares that religious confession shall not be privileged from disclosure in the witness box.[164] However, so many statutes were passed against the practice of the Catholic religion that it would seem inconsistent with them to hold that such a privilege still prevailed at common law.[165]

2.3 Present State of the Priest-Penitent Communication in English Law

A preponderance of scholars hold to the view that as the Anglican Church began to shed certain practices of the Roman Catholic tradition, English law ceased to recognize the clergy-penitent privilege. By the mid-seventeenth century, the clergy-penitent privilege had been eliminated in England altogether, and presently it does not exist under English law.[166] However, some lone voices claim that the priest-privilege disappeared during the English Reformation, but later reappeared both in England and in the United States.[167] This is substantiated by the Irish cases cited in the case *Johnston*

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[163] 'The Law of the Seal of Confession' (n 141).
[164] 'The Law of the Seal of Confession' (n 141).
[165] <http://en.wikipedia.org/wiki/Priest-penitent_privilege_in_England_from_the_Reformation_to_the_nineteenth_century> accessed on 2 August 2006.
[166] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118) cites many more scholars in support - Blackstone's Commentaries written in 1765 mention no such privilege. WILLIAM BLACKSTONE, 'COMMENTARIES ON THE LAWS OF ENGLAND' 370-71 (U. of Chi. Press 1979) (1768); see also *Regina v Hay*, 175 Eng. Rep. 933 (1860) (upholding contempt for Catholic priest who refused to reveal name of parishioner who had delivered stolen goods to church); *Cook v Carroll*, 1945 Ir. R. 515, 517 (recounting English common law).
[167] Electronic Privilege Information Centre, <http://www.epic.org/privacy/privileges/> accessed on 2 August 2006.

v Church of Scientology Mission of Dublin Limited.[168] In *Cook v Carroll* the learned judge held that communications made in confidence to a parish priest, in a private consultation between him and certain members of his parishioners, were privileged and that such privilege could not be waived by a party without the consent of the priest. In *ER v JR*[169], Carroll J held that communications made to a minister of religion who was acting as a marriage counsellor are privileged in that the four conditions set out by Gavan Duffy J in *Cook v Carroll*[170] were present. She followed, however, the English case of *Pais v Pais*[171] in holding that the privilege was that of the spouses and not of the minister for religion and might be waived by mutual consent of the spouses.[172] The proponents of the resurgence of the evidentiary privilege in English law claim that preserving confidential communications made in the interest of spiritual rehabilitation or solace is deemed to 'overbalance the possible benefit of permitting litigation to prosper.'[173]

Nevertheless, it could be affirmed without exaggeration that the potentiality of the expansion of this part of English Evidence law is quite ripe. In the case of *Wilson v. Rastall*, as in some other cases, the indication is clear. No wonder Lord Kenyon, in giving the judgment, affirmed:

> I have always understood that the privilege of a client only extends to the case of the attorney for him. Though whether or not it ought to be extended farther, I am happy to think, may be inquired into in this cause.[174]

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[168] [2001] 1 IR 682.
[169] *ER v JR* [1981] ILRM 125.
[170] *Cook v Carroll* [1945] IR 515.
[171] [1970] 3 DPP 830.
[172] *Johnston v Church of Scientology Mission of Dublin Limited*, [2001] 1 IR 682.
[173] <http://www.epic.org/privacy/privileges/> accessed on 2 August 2006.
[174] *Wilson v Rastall*, [1792] 4 Term Reports, 753

He meant that the matter would not be definitely concluded, as an appeal would be possible. Moreover, in support of that perception of the wind of change Sir Robert Phillimore asserts:

> It therefore seems to me at least not improbable that, when this question is again raised in an English court of justice, that court will decide it in favour of the inviolability of the confession, and expound the law so as to make it in harmony with that of almost every other Christian state.[175]

In Best's[176] work there is, not only an expression of opinion that the privilege should be accorded, but also one to the effect that there is ground for holding that the right to the privilege is existent.[177]

As could be seen from the above historical insight into the priest-penitent privilege in the English history, the exclusion of the priest-penitent privilege was not as a result of any settled theory of law, but as a result of the bias against Roman Catholicism which existed at that particular moment due to the Reformation backlash. It is true that there is no statute which expressly declares that religious confession shall not be privileged from disclosure in the witness-box. But so many statutes were passed against the practice of the Catholic religion that it would seem inconsistent with them to hold that such a privilege still prevailed at common law.[178] That not withstanding the said exclusion was more in principle rather than in all instances of where the priest-penitent communication becomes an issue. Here once more is seen the extent social and

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[175] 'The Law of the Seal of Confession' (n 141).
[176] Name of work: *The Law of Evidence* cited in 'The Law of the Seal of Confession' (n 141).
[177] <http://en.wikipedia.org/wiki/Priest-penitent_privilege_in_England_from_the_Reformation_to_the_nineteenth_century> accessed on 2 August 2006.
[178] 'The Law of the Seal of Confession' (n 141).

political currents influence legislation and even judicial practice. Let us now proceed to examine the build-up of the case law touching on the priest-penitent privilege in the British legal history.

3. Judicial Interventions on the Priest-Penitent Privilege

Let us now turn to the cases that have cumulatively led to the present state of the affairs in the English law. There are many sources supporting the argument that no clergy-penitent privilege existed at common law. Some academics cite *Normanshaw v Normanshaw and Measham*[179] as the leading authority on this view. In this case, a vicar was compelled by the court to give evidence regarding his conversation with a respondent in a divorce suit as to her alleged act of adultery. The President of the Court of Appeal in the case stated that it was 'not to be supposed for a single moment that a clergyman had any right to withhold information from a court of law'.[180]

Another case – *R v Hay*[181] tried before Mr. Justice Hill at Durham Assizes is often cited as being further authority for the lack of the privilege at common law.[182] The complainant alleged that he had been robbed of his watch by the defendant and another man. A police inspector had subsequently received the watch from Fr. Kelly, a priest in the neighbourhood, when he visited the presbytery. Fr. Kelly was summoned as a witness by the prosecutor, and as the oath was about to be administered to him he objected to its form. He explained that he objected not to that part of it which required

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[179] [1893] 69 L.T. 468.
[180] <http://www.churchstatelaw.com/cases/peoplevphillips.asp> accessed on 14 August 2006.
[181] [1860] 2 F. & F. 4.
[182] 'The Law of the Seal of Confession' (n 141).

him to tell the truth and nothing but the truth, 'but as a minister of the Catholic Church', he said, 'I object to that part which states that I shall tell the whole truth'.[183] The judge answered him:

> The meaning of the oath is this: it is the whole truth touching the trial which you are asked: which you legitimately, according to law, can be asked. If anything is asked of you in the witness box which the law says ought not to be asked, for instance, if you are asked a question the answer to which might criminate yourself, you would be entitled to say, 'I object to answer that question'.

The judge told him that he must be sworn. When asked by counsel from whom he had received the watch Fr. Kelly replied, 'I received it in connexion with the confessional'. The judge pointed out that the question called for evidence of fact and not of communication, which therefore required the priest to give an answer: 'You are not asked at present to disclose anything stated to you in the confessional: you are asked a simple fact: from whom did you receive that watch which you gave to the policeman?'[184] Fr. Kelly protested: 'The reply to a question would implicate the person who gave me the watch, therefore I cannot answer it. If I answered it, my suspension for life would be a necessary consequence. I should be violating the laws of the Church as well as the natural laws.'[185] The judge said:

> On the ground that I have stated to you, you are not asked to disclose anything that a penitent may have said to you in the confessional. That you are not asked to disclose: but you are asked to disclose from whom you received the stolen property on the 25th December last. Do you answer or do you not?[186]

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[183] <http://www.churchstatelaw.com/cases/peoplevphillips.asp> accessed on 14 August 2006.
[184] *R v Hay* [1860] 2 F. & F. 4.
[185] *R v Hay* [1860] 2 F. & F. 4.
[186] *R v Hay* [1860] 2 F. & F. 4.

Fr. Kelly replied, 'I really cannot, my Lord', and he was forthwith imprisoned for contempt of court.[187]

However, the above case is one of the classical examples of an affirmation by denial as Nolan argues. He contends that it may be fairly deduced from Mr. Justice Hill's words that he would not have required Fr. Kelly to disclose any statement that had been made to him in the confessional, and, in this sense, his words may be said to give some support to the Catholic claim for privilege for sacramental confession. The learned judge was making a distinction between what was revealed in the context of the sacramental confession and what was a matter of fact – receiving a watch that happened to be a stolen property.[188] Nolan further observes, 'But we need not wonder that he was not ready to extend the protection to the act of restitution, though, even in the eyes of non-Catholics, it ought, in all logic, to have been entitled to the same secrecy, in view of the circumstances under which, obviously, it was made.'[189]

Similar to the above case is the case of *Butler v Moore.*[190] The case concerned the will of John Butler, styled 12th Baron Dunboyne, who had abandoned the Catholic Faith. He was alleged, however, to have returned to it and, thereby, to have come within the penal law which deprived 'lapsed papists' of the power to make a will. The

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[187] <http://www.churchstatelaw.com/cases/peoplevphillips.asp> accessed on 14 August 2006.

[188] Although from a Catholic perspective, not only the matters confessed but any other matter which may reveal the confessor. The learned judge may not have known that within the Catholic understanding of the sacrament Thomas Aquinas had already, in his *Summa Theologica,* provided an answer to that objection when he faced the question: 'Whether the seal of confession extends to other matters than those which have reference to confession? .... I answer that, The seal of confession does not extend directly to other matters than those which have reference to sacramental confession, yet indirectly matters also which are not connected with sacramental confession are affected by the seal of confession, those, for instance, which might lead to the discovery of a sinner or of his sin.'

[189] <http://en.wikipedia.org/wiki/Butler_v_Moore> accessed on 14 August 2006.

[190] [1802] reported in MacNally's "Rules of Evidence", p. 253.

circumstances under which he abandoned his Faith and those under which he is generally said to have returned to it are as follows. He was Roman Catholic Bishop of Cork at the time of the death of the previous peer. Anxious to be able to transmit in a direct line the title and the headship of an ancient house, the new Lord Dunboyne appealed to the Pope for a dispensation from his vow of celibacy. It was refused him, and, thereupon, he became a protestant and married, but had no issue! It is said that one day while he was driving along a country road a woman rushed out of a cottage, calling for a priest for some one who was laying dangerously ill inside. Lord Dunboyne answered her, 'I am a priest', and, entering the cottage, he heard the dying person's confession. From a certain moment until the end of his life, he conformed again, at least, privately, to the Catholic faith. His sister, Mrs. Catherine O'Brien Butler, on the ground that, having re-conformed to Catholicism, he was by the prevalent law incapable of making a will, disputed his will. In order to prove that fact she administered interrogatories to Father Gahan, a priest who had attended Lord Dunboyne shortly before his death, to the following effect: What religion did Lord Dunboyne profess, first, from 1783 to 1792, and, second, at the time of his death, and a short time before?[191] As to the first question, Fr. Gahan answered that Lord Dunboyne professed the protestant religion. To the second question he demurred on the ground that his knowledge (if any) arose from a confidential communication made to him in the exercise of his clerical functions, which the principles of his religion forbade him to disclose, nor was he bound by the law of the land to answer. The Master of the Rolls

[191] Of course, going by the operating statute, the State would have nullified Lord Dunboyne's will had such been the case – i.e. – if he had returned to the Catholic faith.

held, after argument by counsel, that there was no privilege, and he overruled the demurrer. Fr. Gahan adhered to his refusal to answer and he was adjudged guilty of contempt of court and was imprisoned.[192]

In 1828, the case of *Broad v. Pitt*,[193] where the privilege of communications to an attorney was under discussion, Best CJ said:

> The privilege does not apply to clergymen since the decision the other day in the case of *Gilham*. I, for one, will never compel a clergyman to disclose communications made to him by a prisoner: but if he chooses to disclose them, I shall receive them in evidence.

As a fact, the case of *R. v. Gilham*,[194] tried in 1828, did not decide nor did it even turn on the question of privilege of confession to a clergyman. It turned on the question of the admissibility in evidence against a prisoner of an acknowledgment of his guilt that had been induced by the ministrations and words of the Protestant prison chaplain. The acknowledgment of the murder with which he was charged was made by the prisoner to the jailer and, subsequently, to the authorities. R.S. Nolan writing in the Catholic Encyclopaedia contends that it is 'obvious' that neither of the parties could have regarded the confession as sacramental. He appears to have made no acknowledgment of his crime to the chaplain himself but to have been induced by the ministrations and words of the chaplain to acknowledge his guilt before his jailer, and so the question of confessional privilege did not arise.[195]

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[192] <http://en.wikipedia.org/wiki/Butler_v._Moore> accessed on 14 August 2006
[193] [1828] 3 C&P 518
[194] [1828] 1 Moo. C. C., 186.
[195] 'Priest-penitent privilege in the UK' <http://en.wikipedia.org/wiki/Priest-penitent_privilege_in_the_UK> accessed on 10 August 2006

Similar exclusion of clergyman privilege was implied in *R v. Shaw,*[196] and explicitly stated in *Greenlaw v King.*[197] In *R v Shaw*, a witness who had taken an oath not to reveal a statement that had been made to him by the prisoner was ordered to reveal it. Mr. Justice Patteson who tried the case said, 'Everybody, except counsel and attorneys, is compellable to reveal what they may have heard.'[198] In the case of *Greenlaw v King*[199] Henry Bickersteth, 1st Baron Langdale, Master of the Rolls said:

> The cases of privilege are confined to solicitors and their clients; and stewards, parents, medical attendants, clergymen, and persons in the most closely confidential relation, are bound to disclose communications made to them.

Another case often cited is *Wheeler v Le Marchant,*[200] which dealt with the issue of legal professional privilege. Denying the privilege in his *obiter dicta*, Lord Jessel stated:

> Communications made to a priest in a confessional on matters perhaps, considered by the penitent to be more important than even his life or his fortune, are not protected.[201]

This is considered by McNicol to be the most authoritative argument used by legal commentators and academics who argue that there is no common law privilege of clergy-penitent communications. However, Lord Jessel's statement was *obiter* and not *ratio decidendi.*

However, there does exist some case law which tends to contradict the claim of no clergy-penitent privilege at common law. The most compelling of these is *R v*

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[196] [1834] 6 C& P 392.
[197] [1838] 1 Beav 145.
[198] *R v Shaw,* [1834] 6 C& P 392.
[199] [1838] 1 Beav 145.
[200] [1881] 17 Ch. D. 675.
[201] *Wheeler v Le Marchant* [1881] 17 Ch. D. 675.

Griffin[202] in which a woman was charged with the murder of her infant child. A Church of England workhouse chaplain was called to prove conversations with a prisoner charged with child-murder whom he had visited in his spiritual capacity. The judge, Baron of the Exchequer Sir Edward Hall Alderson, strongly intimated to counsel that he thought such conversations ought not to be given in evidence. He pointed out that there was an analogy between the necessity for privilege in the case of an attorney to enable legal evidence to be given and that in the case of the clergyman to enable spiritual assistance to be given. He added, 'I do not lay this down as an absolute rule: but I think such evidence ought not to be given.' Alderson B upheld the Chaplain's refusal to give such evidence stating:

> I think these conversations ought not to be given in evidence ... because without unfettered means of communication ... the prisoner would not have proper spiritual assistance.[203]

Earlier, in *Du Barré v Livette*[204] the priest-penitent privilege emerged as an *orbiter dictum* that explicitly stated the mind of Lord Kenyon with respect to the admission of a confession made to a clergy. In this case, the learned judge held that privilege would extend to preclude an interpreter between a solicitor and a foreign client from giving evidence of what had passed.[205] The interpreter who was present at conversation between a foreigner and his attorney is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided in him even after the case has ended. Before the trial, the defendant had several conversations with his attorney,

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[202] [1853] 6 Cox C.C. 219.
[203] *R v Griffin* [1853] 6 Cox C.C. 219.
[204] [1791]170 ER 96.
[205] 'The Law of the Seal of Confession' (n 141).

but the defendant being a Frenchman, and Crossley – his attorney not understanding that language, it was found necessary to have an interpreter, which was accomplished by a man named Rimond. Rimond was now called as a witness, to prove that the defendant at those meetings admitted that he had stolen the diamonds. Immediately the witness discovered the wickedness of the transaction, he abandoned the defendant. The defendant's counsel objected to Rimond being permitted to give this evidence, contending that this was a confidence that ought not to be broken. Garrow, the plaintiff's counsel, argued that this evidence ought to be admitted because no confidence was reposed in Rimond: he was merely the organ that conveyed the sentiments of the defendant to this attorney, and those of the attorney to the defendant. When he had done this, his duty was over, and he had no further interest in the matter.[206] He further argued that a case – *King v Sparkes,*[207] much stronger than this, in which the life of the prisoner was at stake, had been lately determined by Mr. Justice Buller, on the Northern Circuit. There the prisoner being a 'Papist'[208] had made a confession before a Protestant Clergyman of the crime for which he was indicted and that confession was permitted to be given in evidence on the trial, and he was convicted and executed. Lord Kenyon upon this remarked, 'I should have paused before I admitted the evidence here admitted.'[209] He further affirmed that the relation between attorney and client is as old as the law itself. It is absolutely necessary that the client

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[206] <http://legalminds.lp.findlaw.com/list/courtinterp-l/msg07419.html> accessed on 14 August 2006.
[207] Cited in *Du Barré v Livette,* [Peake's "Nisi Prius Cases"] 108.
[208] An offensive designation applied to Roman Catholics by their opponents during that period of anti-Catholicism in England.
[209] *Du Barré v Livette,* [1791]170 ER 96 cited in <http://www.churchstatelaw.com/cases/peoplevphillips.asp> accessed on 14 August 2006.

should un-bosom himself to his attorney, who would otherwise not know how to defend him. In a case like the present, it is equally necessary that an interpreter should be employed. Everything said before that interpreter was said equally in confidence as if said to the attorney when no interpreter was present. His Lordship confessed he spoke with some doubt, but as the plaintiff had other witnesses to call, he wished this evidence not to be received, lest a new trial should be granted on account of his having improperly received it.[210]

The case in question – *R v Sparkes*[211] – cited as authority by the plaintiff's lawyer has received many criticisms from evidentiary scholars.[212] In the first place this authority was stated by a Counsel in the case, and is therefore liable to those errors and perversions which grow out of that situation. Secondly, it is the determination of a single Judge, in the hurry of a circuit, when a decision must be made promptly, without time for deliberation, or consultation, and without an opportunity for recurrence to books.[213] Thirdly, it is virtually overturned by Lord Kenyon, who certainly censures it with as much explicitness as one Judge can impeach the decision of his colleague, without departing from judicial decorum.[214] Fourthly, the depositary of the secret was a Protestant Clergyman, who did not receive it under the seal of a sacrament, and under

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[210] <http://legalminds.lp.findlaw.com/list/courtinterp-l/msg07419.html> accessed on 14 August 2006.
[211] N 61.
[212] The articles in Catholic Encyclopaedia (<http://www.newadvent.org/cathen/13649b.htm>) and RJ&L Religious Liberty Archive (<http://www.churchstatelaw.com/cases/peoplevphillips.asp>) have criticised it at length.
[213] <http://www.churchstatelaw.com/cases/peoplevphillips.asp> accessed on 14 August 2006.
[214] <http://www.churchstatelaw.com/cases/peoplevphillips.asp> accessed on 14 August 2006.

religious obligations of secrecy, and would not, therefore, be exposed to ecclesiastical degradation and universal obloquy by promulgating it.[215]

Besides, as the learned judge in the U.S. case – *People v Philips,*[216] pointed out:

> The decision of Mr. Justice Buller, was, to say the least, erroneous for when a man under the agonies of an afflicted conscience and the disquietudes of a perturbed mind, applies to a minister of the Almighty, lays bare his bosom filled with guilt, and opens his heart black with crime, and solicits from him advice and consolation, in this hour of penitence and remorse, and when this confession and disclosure may be followed by the most salutary effects upon the religious principles and future conduct of the penitent, and may open to him prospects which may bless the remnant of his life, with the soul's calm sunshine and the heart-felt joy, without interfering with the interests of society, surely the establishment of a rule throwing all these pleasing prospects into shade, and prostrating the relation between the penitent and the comforter, between the votary and the minister of religion, must be pronounced a heresy in our legal code.

In a similar argument and relying on historical research, Judge Fahy[217] in the 1958 case of *Mullen v United States*[218] made the following significant point:

> It thus appears that non-recognition of the privilege at certain periods in the development of the common law was inconsistent with the basic principles of the common law itself. It would be no service to the common law to perpetuate in its name a rule of evidence which is inconsistent with the foregoing fundamental guides furnished by that law.... [T]he denial was never uniform or resolute, so strong were the claims of reason in support of the privilege.... Sound policy—reason and experience—concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession to him, at least absent the penitent's consent. Knowledge so acquired in the performance of a spiritual function...is not to be transformed into evidence to be given to the whole world.... The benefit of preserving these confidences inviolate overbalances the

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[215] <http://www.churchstatelaw.com/cases/peoplevphillips.asp> accessed on 14 August 2006.
[216] [1843] 1 *Western Law Journal* 109.
[217] R. Araujo, S.J., 'International tribunals and rules of evidence: the case for respecting and preserving the "priest-penitent" privilege under international law', <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 4 June 2004.
[218] 263 F.2d 275 (1958) (upholding the clergy-communicant privilege for a Lutheran minister).

> possible benefit of permitting litigation to prosper at the expense of the…spiritual rehabilitation of the penitent.

Judge Fahy strongly believes that the rules of evidence have always been concerned not only with truth but also with the manner of its ascertainment.[219]

Moreover, in an 1823 case of the *R v Redford*,[220] tried before William Draper Best, the Chief Justice of the Common Pleas on circuit, when a Church of England clergyman was about to give in evidence a confession of guilt made to him by the prisoner, the judge checked him. He indignantly expressed his opinion that it was improper for a clergyman to reveal a confession.[221]

In 1865, the murder trial of *Constance Kent* aroused a number of parliamentary questions whose answers reaffirmed the limited scope of professional privilege in England.[222] The question attracted public attention in England upon the prosecution of Constance Kent for a murder committed five years previously. She made a statement confessing her guilt to a Church of England clergyman, the Rev. Arthur Wagner, and she expressed to him her resolution to give herself up to justice. He assisted her in carrying out this resolution and he gave evidence of this statement before the magistrates. However, he prefaced his evidence by a declaration that he must withhold any further information on the ground that it had been received under the seal of 'sacramental confession'. He was but slightly pressed by the magistrates, the fact of the matter being that the prisoner was not defending the charge. At the Assizes, Constance Kent pleaded guilty and her plea was accepted so that Rev. Wagner was not again

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[219] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217).
[220] [1823] 'The Law of the Seal of Confession' (n 141).
[221] 'Priest-penitent privilege in the UK' (n 59).
[222] 'Priest-penitent privilege in the UK' (n 59).

called. The position that Mr. Wagner assumed before the magistrates – the position that he must withhold any further information on the ground that it had been received under the seal of sacramental confession – caused much public debate in the press.[223] In the House of Lords, Richard Bethell, Lord Chancellor, in reply to George Thomas John Nugent, stated that:

> ...there can be no doubt that in a suit or criminal proceeding a clergyman of the Church of England is not privileged so as to decline to answer a question which is put to him for the purposes of justice, on the ground that his answer would reveal something that he had known in confession. He is compelled to answer such a question, and the law of England does not even extend the privilege of refusing to answer to Roman Catholic clergymen in dealing with a person of their own persuasion.

He stated that it appeared that an order for commitment had in fact been made against Mr. Wagner. If that is so, it was not enforced.[224]

Nolan reports the case of *Ruthven v De Bonn*,[225] tried before Mr. Justice Ridley and a jury in 1901. The judge told the defendant, a Catholic priest – having been asked a general question as to the nature of the matters mentioned in sacramental confession – that he was not bound to answer it. The learned judge then said to the plaintiff, who was conducting his case in person, 'You are not entitled to ask what questions priests ask in the confessional or the answers given.'[226]

All that can be deduced from the above cases is that the issue of clergy-penitent privilege has always been a discretionary matter for judges. Although many legal scholars concede that there never existed a clergy-penitent privilege at common law, it

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[223] 'Priest-penitent privilege in the UK'(n 70).
[224] <http://en.wikipedia.org/wiki/Butler_v._Moore> accessed on 14 August 2006.
[225] Reported "The Times" of 8 February 1901.
[226] 'Priest-penitent privilege in the UK' (n 59).

appears however that their views are inconclusive and the issue ought to be settled through legislative measures.[227] Yet, looking at the Kenyan Evidence Act there was no such attempt. The Kenyan Evidence Act has no provision for the priest-penitent privilege in its rules of evidence. The possible reason for that state of affairs is our next point of interest.

4. Exportation of the Post-Reformation Privileged Communications in the Kenyan Legal System

The sources of the law of Kenya are enumerated in the Judicature Act (Cap. 8) section 3. These sources are – 1) the Constitution of Kenya, 2) the Legislation, 3) Subsidiary Legislation, 4) the substances of the common law, the doctrines of equity and the statutes of general applications in force in England on the 12th August 1897, and, 5) the African customary law[228] - all the above hierarchically considered. Having looked at the history of the priest-penitent privilege at common law and the landmark decisions with respect to the privilege, in this section, we are interested in enquiring on how the Kenyan Legal System is stuck with evidentiary rules bereft of the priest-penitent privilege. We shall thus look at the 'reception clause' and the origin and evolution of the Evidence Act. There is no doubt that an inquiry into the lack of a provision in legislation is an enquiry about the origin of the legislation. As Tudor

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[227] <http://www.murdoch.edu.au/elaw/issues/v4n3/perr43.html> accessed on 11 April 2005.

[228] Tudor Jackson, *The Law of Kenya, An Introduction,* (2nd edn African Literature Bureau, Dar Es Salaam, 1974) 4. Tudor Jackson points out that the above ensemble – the common law, the doctrines of equity, and the previously mentioned statutes only apply as far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. This clause is seen as a relief to most of the laws or lack of laws that is attributable to our colonial political hangover!

Jackson concurs, 'to understand the development of the law of evidence in Kenya, it is, therefore, necessary first to turn briefly to the country of origin.'[229]

When English settlers first came to Kenya, they naturally brought with them the rules of English law as they existed at that time.[230] This was achieved through the African Order in Council promulgated in 1889 under the Foreign Jurisdiction Acts, which provided for the setting up of consular courts in Africa exercising jurisdiction as far as circumstances permitted upon the principles of, and in conformity with, the substance of the law for the time being in force in England. By 1897, the East African Order in Council has replaced the 1889 Order stating that jurisdiction should be exercised by the High Courts in conformity with certain Indian enactments. One of those enactments was the Indian Evidence Act. In 1907, the East Africa Protectorate Applied Acts Ordinance was passed, providing that any Act of the legislature of India amending or substituted for any Indian Act in force in the Protectorate should apply if passed before the enactment of the Ordinance, but not otherwise.[231] In 1921, the Kenya Colony Order in Council confirmed the applicability of English Law, including 'the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th day of August, 1897.'[232] The Order in Council was a form of delegated legislation – an instrument by which the Privy Council

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[229] Morris H.F., *Evidence in East Africa*, (n 32), preface v.
[230] Tudor Jackson, *The Law of Kenya, An Introduction*, (n 228) 8.
[231] Morris H.F., *Evidence in East Africa*, (n 32) 3.
[232] Judicature Act (Cap. 8) section 3.

in the United Kingdom legally controlled the British colonies. Even if a colony had a local legislature, Orders in Council prevailed over local statutes.[233]

The Kenya Evidence Act is based on the Indian Evidence Act of 1872 that was a codification through legislation of the law of evidence as it had developed in England up to that point in time.[234] The Indian Evidence Act – the work of Sir James Fitzjames Stephen – was one of the group of brilliantly drafted codifications of nineteenth-century India which endeavoured to put within a narrow compass the whole of the English law on the subject.[235] Sir James designed the Act in a rationalized form and in one that would be easily comprehensible to the lay magistrates of the Indian Civil Service who would have to administer it.[236] This Act was applied in Kenya until 1963 and in Tanganyika until 1967. The Kenya Evidence Act, which contains 183 sections, is similar in substance with the Indian Evidence Act barring various amendments and new sections added.[237]

The Indian Evidence Act, though it reproduces, in general, the English common law of evidence, contains a number of differences from that law, as do its offspring the four East African Evidence Acts operative in Kenya, Uganda, Tanganyika and Zanzibar respectively.[238] The Act contains some number of differences from the law of evidence of England. These differences touch on confession in police custody, confession of the accused against a co-accused, incriminating answers to questions, corroboration by own

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[233] Tudor Jackson, *The Law of Kenya, An Introduction,* (n 228) 8.
[234] P. P. Durand, *Evidence for Magistrates* (n 31) preface (i); Morris H.F., *Evidence in East Africa*, (n 32) 1 – 10.
[235] Morris H.F., *Evidence in East Africa*, (n 32) 1.
[236] Morris H.F., *Evidence in East Africa*, (n 32) 1.
[237] P. P. Durand, *Evidence for Magistrates* (n 31) preface (i).
[238] Morris H.F., *Evidence in East Africa*, (n 32) preface v.

previous testimony, dying declarations, entries in the course of business, and freedom of the judge to ask any question or ask for any document. The only major change was the replacement of the Indian Evidence Act, in its application, to Kenya Evidence Act of 1963. There was no radical departure from the previous Indian law, although a few new provisions taken from the English law have been introduced and the definition of evidence was broadened. There was no mentioned difference as to the rules of privilege.[239]

The rules of evidentiary privilege provided for in the Act are a reflection of the English statutory law and common law prior to the drafting of the Indian Evidence Act in 1872. We have seen the inconsistent decisions touching on the priest-penitent privilege at common law in the last section. The drafting of the Indian Evidence Act of 1872 came after the enactment of the *Evidence Act* of 1851 (UK) which was later amended by the *Evidence Amendment Act* 1853 (UK). This was later followed by the *Criminal Evidence Act* 1898 (UK) and much later by the *Police and Criminal Evidence Act* 1984 (UK). At the time of drafting the code, anti-Catholicism was then rife, added to the controversy and public indignation,[240] fresh in the minds of people, generated by the *Constance* case of 1865. Actually, it could be said that the *stare decisis* with respect to the priest-penitent privilege was the 1851 decision in *Russell v Jackson*[241] where the learned judge Sir George James Turner declared:

> It is evident that the rule which protects from disclosure confidential communications, between solicitor and client does not rest simply upon the confidence reposed by the client in the solicitor, for there is no such

[239] Morris H.F., *Evidence in East Africa*, (n 32) 8.
[240] 'The Law of the Seal of Confession' (n 141).
[241] [1851] 9 Hare 391.

> rule in other cases, in which, at least, equal confidence is reposed: in the cases, for instance, of the medical adviser and the patient, and of the clergyman and the prisoner.

The above case clearly anticipated the decision in *R v Shaw*[242] and the opinion in the *Constance* case that the law was clear that a priest had no privilege at all to withhold facts that came under his knowledge in confession.[243]

Bearing in mind the provision of the Judicature Act on the fourth source of Kenya law that includes the substances of the common law in force in England on the 12th August 1897, it raises the question of whether the decisions of the English courts are binding on the courts of Kenya. The strict answer would appear to be that only those English decisions made prior to 12th August 1897 would be binding. If that were the case, a judge – faced with a priest-penitent privilege case – has no business looking into neither English cases later than 12th August 1897, nor even other decisions from other common law countries to arrive at a determination of the case.[244] However, what happens in practice is that the Kenya courts tend to be guided by and follow English decisions stating principles of equity and common law irrespective of the date of decision.[245] Similar to the above question and equally relevant to our enquiry on the priest-penitent privilege is the question: To what extent is the colonized supposed to adapt the inherited Common law depositions even in the face of biased legislation due to historical nuances? Spry, V. P.[246] states, 'we shall treat the pre-1897 English

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[242] [1834] 6 C& P 392.
[243] 'The Law of the Seal of Confession' (n 141).
[244] <http://legalminds.lp.findlaw.com/list/courtinterp-l/msg07419.html> accessed
[245] Tudor Jackson, *The Law of Kenya, An Introduction,* (n 228) 17.
[246] *Mayers v Akira Ranch Ltd,* (No.2) [1972] E.A. 347.

decisions on the common law with the highest respect, but I think we have the power to depart from any such decision if we are convinced that it was wrong and that there is no reason of judicial policy for continuing to follow it.[247] It is important to remember the words of the learned Judge Fahy already cited:

> It would be no service to the common law to perpetuate in its name a rule of evidence which is inconsistent with the foregoing fundamental guides furnished by that law.[248]

It is therefore reasonable for Kenya, as a sovereign state, to continue to rely on the substance of English Law so long as it is compatible with the needs of Kenya society[249] and its principles modified, or even repealed, whenever necessary.[250]

Briefly put then, due to the inherent political climate of anti-Catholicism at that particular point in English history, the English law, both in common law and statutory codification, had no place for the priest-penitent privilege during the drafting of the Indian Law of Evidence which is the mother statute of the Kenya Evidence Act.

5. Conclusion

In this Chapter, we have demonstrated how the prevalent religious-political situation of anti-Catholicism in England during the Reformation and Post-Reformation period led to a not-so-uniform denial of the priest-penitent privilege that existed before

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[247] Tudor Jackson, *The Law of Kenya, An Introduction,* (n 228) 18.
[248] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217).
[249] The question will invariably be raised on whether the absence of the privilege in the Evidence Act squares well with the needs of Kenya society. Conversely stated, does the absence of the privilege due to the perceived need of the English state during the post-reformation era that led to the disappearance of the privilege, correspond with the perceived need of the Kenya society today.
[250] Tudor Jackson, *The Law of Kenya, An Introduction,* (n 228) 8.

the Reformation at common law. We have also seen how the state of the English law with respect to the evidentiary privilege at the colonial time led to the bequeathing of rules of Evidence devoid of the priest-penitent privilege.

CHAPTER 3

The American Approach to the Priest-Penitent Privilege

1. Introduction

In this chapter, we shall look into the American legal system and its influence on the rules of evidentiary privilege and the American common law rulings with respect to the priest penitent privilege. This we shall do by examining the landmark cases of the privilege and the different states legislations and their judicial interpretations and applications.

2. The American Legal System in brief

The United States is a federalist system. The national government has specific, enumerated powers, and the fifty sovereign states retain substantial autonomy and authority. Both the national government and each state government are divided into executive, legislative and judicial branches. Written constitutions, both federal and state, form a system of separated powers, checks and balances among the branches of government.[251] The Federal Constitution, federal laws, and international treaties are supreme to state or local law. In a similar manner, the state and local laws that contradict federal laws or treaties are pre-empted and can be declared unconstitutional

[251] <http://www.lectlaw.com> accessed on 15 August 2006.

by a federal court.[252] This is the so-called Supremacy Clause as contained in U.S. Constitution. (Article VI.). No federal or state law, local ordinance, or administrative rule can contradict or override the protections and provisions embodied in the Constitution, first adopted in 1787, and subsequently revised, or amended, through more than 200 years of American history. The first 10 amendments to the Constitution, known as the Bill of Rights, establish the foundation for the protection of individual rights and freedoms in the United States.[253] These amendments, as we shall see later, are crucial to the discussion on the privilege since most decisions have preserved the priest-penitent privilege based on the Free Exercise Clause, Establishment Clause, and the Free Speech[254] Clause of the First Amendment.[255] Some of these Amendments are:

· Freedom of speech, religion, and assembly;

· Freedom from unreasonable searches and seizures of property;

· Right to due process of law when one is accused of a crime

· Prohibition against forced self-incrimination;

The Constitution is the basis for a much larger body of law, regulations, court decisions, precedent, and customary practice that, taken together, make up the legal system of the United States.[256] Included in this larger body of law are the federal and state statutes of which the Federal Rules of Evidence belongs. These statutes may

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[252] <http://www.lectlaw.com> accessed on 15 August 2006.

[253] U.S. Constitution <http://usinfo.state.gov/products/pubs/constitution/constitution.htm> accessed on 29 July 2006.

[254] Free Speech is also interpreted as freedom from refraining from speaking.

[255] Christopher R. Pudelski, 'Comment: The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-communicant Privilege in a Post-Smith World' [Winter, 2004, 98 Nw. U.L. Rev. 703] <www.law.northwestern.edu/lawreview/Sample_Pudelski.pdf > accessed on 29 July 2006.

[256] U.S. Constitution (n 3).

be challenged in federal court.[257] The United States is a common law country. Although typically affected by statutory authority, broad areas of the law, most notably relating to property, contracts, and torts are traditionally part of the common law. These areas of the law are mostly within the jurisdiction of the states, and thus state courts are the primary source of common law. Federal common law is relatively narrow in scope. It is primarily limited to clearly federal issues that have not been addressed by a statute. The role of the judiciary is to decide cases and controversies between adversarial parties, including the government. Through the concept of *stare decisis,* judicial decisions in U.S. jurisdictions can act as binding precedent for subsequent decisions. In most cases, when an appellate court makes a decision it not only decides who wins the specific case, but also provides a detailed written opinion that explains the basis for the court's decision to guide lower courts in handling future cases. State constitutions are the supreme law within the state. State statutes must conform to the respective state's constitution. All state constitutions and legislation can be pre-empted by federal legislation or the federal Constitution.[258]

Given the above two-tiered system – federal and state – the federal legislation usually gives a sense of direction to the state legislation. This explains why apart from drawing from the Federal Rules of Evidence as a general guide, each state has its own evidentiary rules. With respect to privilege, the Federal Rules of Evidence generally makes a provision, which is subsequently adapted according to the circumstances of each state. The question of the American approach to the priest-penitent privilege thus

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[257] <http://www.lectlaw.com> accessed on 15 August 2006.
[258] <http://www.lectlaw.com> accessed on 15 August 2006.

involves – the federal and state statutory provisions on the privilege and the common law decisions – both from the federal and state courts that engendered and keep interpreting these statutes. The Federal Rules of Evidence merely gives a general direction with regard to privilege in the following words:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.[259]

However, federal common law precedents establishing the framework of the clergy-penitent privilege in federal courts is scarce. This is most likely so because a large percentage of criminal and family law cases, wherein the question of privilege frequently arises, are brought in state court where state law of privilege governs. Even in diversity and federal question cases involving state law claims, state privilege law applies in federal court. Recognition of a common law clergy-penitent privilege has thus been slower to evolve in the federal courts, and has followed the trend in most states.[260]

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[259] Federal Rules of Evidence 501.

[260] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).

3. Landmark cases on the Priest-Penitent Privilege

The first acknowledgement of the clergy privilege in the United States was in *People v Phillips*,[261] where the Court of General Sessions for the City of New York recognized a privilege not to give testimony for a Roman Catholic priest who relied on the seal of the confessional.[262] In this case, Daniel Phillips had knowingly received stolen goods. Following the tenets of the Roman Catholic Church, Phillips confessed to Father Kohlman. Determined to right the wrong, Phillips later delivered the goods to Father Kohlman who then returned them to the original owner. Having been intimated by the original owner, the state subpoenaed Father Kohlman to testify regarding Phillips before a grand jury. To prevent Father Kohlman from being forced to choose between an obligation to God and an obligation to the state, the court ruled that the only course is, for the court to declare that he shall not testify or act at all. The Court opined:

> It is essential to the free exercise of a religion, that its ordinances should be administered-that its ceremonies as well as its essentials should be protected. The sacraments of a religion are its most important elements. We have but two in the Protestant Church-Baptism and the Lord's Supper-and they are considered the seals of the covenant of grace. Suppose that a decision of this court, or a law of the state should prevent the administration of one or both of these sacraments, would not the constitution be violated, and the freedom of religion be infringed? . . . Will not the same result follow, if we deprive the Roman Catholic of one

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[261] (N.Y. Ct. Gen. Sess. 1813) The case was not officially reported, but set forth by one of the attorneys who participated as *amicus curiae* and reprinted in WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA (1813). The case was reprinted again in Privileged Communications to Clergymen, 1 CATH. LAW. 199 (1955).

[262] Norman Abrams, 'ADDRESSING THE TENSION BETWEEN THE CLERGY-COMMUNICANT PRIVILEGE AND THE DUTY TO REPORT CHILD ABUSE IN STATE STATUTES', <http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bclawr/44_4/08_FTN.htm> accessed on 20 August 2006.

> of these ordinances? Secrecy is of the essence of penance. The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed: To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman Catholic religion would be thus annihilated.

This conflict between the state's coercive power to collect evidence and the right to maintain confidential certain religious communications lies at the centre of every challenge to the clergy-penitent privilege. The holding in *People v Phillips* is significant because it reflects an important early understanding of the phrase 'free exercise of religion.'[263] The court ruled that the Free Exercise Clause prohibited the state from compelling a Catholic priest to disclose information learned in a confidential confession.[264] The essential aspect of this understanding was that the First Amendment guaranteed state accommodation of religious behaviour that may not conform to generally applicable law.[265]

A few years after the *Phillips* case was decided, in *People v Smith*,[266] the court found that no privilege existed for a Protestant minister who was called to testify about a confession of murder made to him. The later case was distinguished from the *Philips* case because the defendant had approached the minister as a 'friend or adviser,' not in his capacity as a professional or spiritual advisor. Nevertheless, it is important to note that the Protestant priest in *Smith* waived his right to invoke the privilege and therefore

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[263] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).

[264] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132). According to Bailey, this decision to preserve the clergy-penitent privilege on constitutional grounds is the central feature of one of the great stories concerning church and state in America.

[265] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).

[266] 2 City Hall Recorder 77 (N.Y. 1817)) Though not officially reported, an excerpt of *People v Smith* is available in Privileged Communications to Clergymen, 1 Cath. Law.199, 209 (1955).

the judge was not directly confronted with an attempted use of the privilege.[267] According to the Court of Appeals of New York in *People v Carmona,*

> The common thread in these cases [finding some types of clergy-communicant communication not privileged] is that the privilege may not be invoked to enshroud conversations with wholly secular purposes solely because one of the parties to the conversation happened to be a religious minister.[268]

Another court said that the test to determine which non-penitential communications are privileged is whether, according to the practices of a particular church, the clergyman is expected to keep confidential communications from the members of the church.[269]

In a similar case, *Commonwealth v Drake*,[270] it was argued on one hand that a confession of a criminal offence made penitentially by a member of a certain Church to other members, in accordance with the discipline of that Church, should not be given in evidence. These others were called as witnesses. The solicitor-general, on the other hand, argued that religious confession was not protected from disclosure. He also admitted that in this case 'the confession neither was to the church nor required by any known ecclesiastical rule', but was made voluntarily to friends and neighbours. The court held that the evidence was rightly received.[271]

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[267] Christopher R. Pudelski 'Comment: The Constitutional Fate of Mandatory Reporting Statutes...' (n 255).

[268] *People v Carmona,* 82 N.Y.2d 603, 627 N.E.2d 959, 962. (1993).

[269] *Scott v Hammock,* 133 F.R.D. 610 (D. Utah1990).

[270] 15 Mass. 154(1818).

[271] 'The Law of the Seal of Confession' *Catholic Encyclopaedia,* On-line version <http://www.newadvent.org/cathen/13649b.htm> accessed on 11 April 2005

In *Totten v United States*,[272] the Supreme Court voiced its concern about confidential communications and cautioned over litigation that would 'lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.' While *Totten* focused on matters of national security and secrecy, the Court did acknowledge it could not maintain suits that would require the disclosure of confidences of the confessional, in the following words:

> Suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose.

Without the benefit of statutory law supporting its rationale, the Court indicated its deference to and protection of the confidence of secrets revealed during private communications between a priest and a penitent.

Almost a century after *Totten*, the Supreme Court again ratified the priest-penitent privilege in *United States v Nixon*.[273] In finding that not all communications between the chief executive and members of his staff are protected by the doctrine of Executive Privilege, the Court reiterated that communications between a confessor and penitent are protected. The Court noted that, in general, 'an attorney or a priest may not be required to disclose what has been revealed in professional confidence.' In 1980, in the case *Trammel v United States*,[274] the Supreme Court while discussing privilege for adverse spousal testimony favorably referred to other privileges by analogy, including

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[272] 92 U.S. 105, 107 (1875).
[273] 418 U.S. 683, 709 (1974).
[274] 445 U.S. 40 (1979).

the clergy-penitent privilege.[275] The Court stated that evidentiary privileges protecting confidential communications between a 'priest and penitent, attorney and client, and physician and patient . . . are rooted in the imperative need for confidence and trust.'[276] In 1990, the U.S. Court of Appeals for the Third Circuit, in a case involving statements made to a Protestant minister, held that the clergy-communicant privilege exists and this privilege protects communications made to a clergy member, while working in a professional capacity, by a person seeking spiritual counselling believing that the information shared will remain confidential. In *United States v Keeney*,[277] it was stated that 'under the law of the United States privileged communications are strictly limited to a few well-defined categories, such as communications between attorney and client, clergyman and penitent, and physician and patient.'[278]

In *Mockaitis v Harcleroad*,[279] the Ninth Circuit held that the act of tape recording a confession substantially burdened the rights of a priest and archbishop to exercise freely the Roman Catholic religion under the Religious Freedom Restoration Act (RFRA).[280] The court stated that knowledge, belief, or suspicion that freely-confessed sins would become public would operate as a serious deterrent to participation in the sacrament and an odious detriment would befall participation by penitents. When the prosecutor asserts the right to tape the sacrament he not only

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[275] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[276] 445 U.S. 40 (1979).
[277] 111 F. Supp. 233, 234 (D.D.C. 1953).
[278] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[279] 104 F.3d 1522, 1530 (9th Cir. 1997).
[280] <http://www.clsnet.org/clrfPages/pubs/clergyPriv.php> accessed on 26 July 2004.

intrudes upon the confession taped but . . . he invades their free exercise of religion. In the above case, Fr. Timothy Mockaitis, a priest in Eugene, Oregon visited a prisoner Hale on April 22, 1996, and heard his confession. Without the priest's knowledge, prison authorities recorded the confession, which was conducted by telephone while prisoner and priest were separated by a glass partition. Prison officials claim that all conversations of prisoners and visitors are recorded except conversations between prisoners and their lawyers. When it was revealed that the confession had been taped, the bishop of Portland, Oregon, Francis E. George, protested.[281] However, it is unclear whether Hale deliberately sought to deny his guilt in the solemn atmosphere of confession with the hope that he could use the tape at a later date to establish his innocence. The affirmation of innocence made to the priest in such an encounter would theoretically have a certain credibility.[282] The court rejected the State's argument that the taping was in furtherance of a compelling governmental interest pursued in the least restrictive means.[283] It affirmed that the 'ordinary means of proving a case by good police work were "the least restrictive means" of furthering the prosecutor's desirable goal.'[284]

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[281] Supporting the bishop, in a letter to the United States ambassador to the Holy See, the Vatican deplored the recording of the confession. The uproar focused on the prosecutor, Doug Harcelroad, who lamented the taping but seemed to think the tape should not be destroyed if it contained evidence the defendant desired to use for his defense. Somewhere along the line, the Oregon attorney general said that if the tape were not admissible, the government might have to dismiss the charges of murder. The archdiocese moved in state and federal court to suppress and destroy the tape. In the interim, some of the contents of the tape were released. In the confession, Hale sought to blame the murder on his companion in the robbery. <http://www.mosquitonet.com/~prewett/amurderconf.html> accessed on 29 August 2006.
[282] <http://www.mosquitonet.com/~prewett/amurderconf.html> accessed on 29 August 2006.
[283] <http://www.clsnet.org/clrfPages/pubs/clergyPriv.php> accessed on 26 July 2004.
[284] 104 F.3d 1522, 1530 (9th Cir.1997).

Sometimes the point at issue is to determine who possesses the privilege – the clergy or the penitent or both. Most federal courts that have addressed the issue have suggested that the clergy-penitent privilege belongs to the parishioner, following the suggestion of Proposed Rule 506. Only one federal court has suggested that the privilege belongs to the clergy person, and this was a federal question case involving pendant state law claims in which the court was interpreting both federal and state privilege law. In *Eckmann v Board of Education of Hawthorn School District,*[285] the court held that, under federal common law and the law of Missouri, the clergy-penitent privilege belonged to the clergy person involved, and could not be waived by the penitent.[286]

In terms of the types of confidential communications covered, most federal courts have focused not on whether the communication was a confession or a penitential communication, but rather whether it occurred in private with a clergy member in that person's professional capacity as a spiritual advisor. Similarly, *United States v Wells*[287] held that admission into evidence of letter from defendant to priest did not violate privilege, where there was no indication either that the letter was intended to remain confidential or that it was for the purposes of spiritual counseling. These rulings are

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[285] 106 F.R.D. 70 (E.D. Mo. 1985).

[286] BRIEF AMICUS CURIAE OF THE UNITED STATES CATHOLIC CONFERENCE, IN SUPPORT OF PLAINTIFFS-APPELLANTS APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, by JEFFREY HUNTER MOON, Solicitor - United States Catholic Conference, <www.pcusa.org/acl/amicus/am15.pdf> accessed on 30 August 2006; Referring to *Eckmann v Board of Education of Hawthorn School District* 106 F.R.D. 70 (E.D. Mo. 1985) argued that, balancing the broader questions of free exercise protection against the need of litigants to discover all relevant evidence, the court found that a nun, functioning as Spiritual Director to a student seeking admission to a religious congregation, was entitled to exercise the clergy-penitent privilege to protect all communications made to her by that student in her capacity as Spiritual Director.

[287] 446 F.2d 2, 3-4 (2d Cir. 1971).

consistent with the expansive approach of Proposed Rule 506. Under this 'spiritual counseling' approach, the privilege has been applied to protect the contents of draft counseling sessions and group family counseling sessions with clergy members. The comments to Proposed Rule 506(a)(2) suggested that the definition of confidential communication for the clergy-penitent privilege should be consistent with the doctrine of confidentiality under the attorney-client and psychotherapist-patient privilege, and that the presence of a third person should not destroy the privilege so long as the presence of that person was necessary in aid of the communication.[288] The Federal District Court in Utah,[289] applying state law in a diversity case, construed 'confession' in that state's privilege statute broadly to mean any confidential communication for purposes of spiritual advice, essentially following the approach of Proposed Rule 506. This construction was considered necessary in order to avoid a free exercise problem. According to the court:

> It is difficult to believe or concede that the Utah territorial legislature, around 1876, would have intended to limit the term confession to something akin to the Catholic religion where the dominant church in the Territory did not follow that form of religious practice...second... A statute should be construed, if possible, to avoid an unconstitutional application.

There is a paucity of case law on the subject of who constitutes a clergy member under the federal privilege. In the *Verplank*[290] *case*, the district court extended the privilege to members of the college draft counseling staff working with a college chaplain, even though they were not themselves ordained ministers. The court quashed

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[288] PROPOSED FED. R. EVID. 506, advisory committee's notes, 56 F.R.D. 183, 248 (1973).
[289] *Scott v Hammock,* 133 F.R.D. 616 (D. Utah 1990).
[290] 329 F. Supp. 433, 435-36 (C.D. Cal.1971)

a subpoena of grand jury investigating selective services violations directed to Claremont College's chaplain, who was engaged in draft counseling. Relying on advisory committee notes to Proposed Rule 506, the court found that they performed functions 'conforming at least in a general way with those of ... an established Protestant denomination,' and therefore quashed a grand jury subpoena seeking records of both the chaplain and the non-ordained counselor working with him. In applying the functional approach of Proposed Rule 506, the court concluded that the staff member was essentially performing a function similar to the college chaplain. This case was unusual in not insisting that the draft counseling staff member be performing his spiritual counseling functions at either the direction of the chaplain or at least under the authority of the church. This case highlights the dangerous elasticity of the 'similar functionary' language of Proposed Rule 506.[291]

4. Codification of Priest-Penitent Privilege in State Laws

After the *Phillip* case, New York subsequently by statute recognized the result in the following words:

> No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by rules or practice of such denomination.[292]

All the American fifty states and the District of Columbia have now enacted privilege statutes that protect certain communications between parishioners and clergy members.

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[291] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[292] Norman Abrams, 'ADDRESSING THE TENSION BETWEEN...' (n 262).

Although there is significant uniformity in the core value being protected, these statutes differ widely in their definitions and their reach, which makes generalizations about the state of the doctrine difficult. The general prerequisites to the application of the privilege in almost all states require that there be a confidential communication between a person and a minister, in the minister's professional capacity, for purpose of confession, spiritual advice, or counseling. Specific definitions of terms within this construction vary widely from state to state. They differ in their definitions of who constitutes a minister, who holds the privilege, and what types of communications are covered. In most states, the privilege survives the death of the parishioner, and may be asserted by his representative. Notably, only a few states require the parishioner to be a member of the same religious denomination as the clergy member to whom he confides. Although each statute differs based on the type of communication that is privileged, courts generally interpret the privilege broadly to include all religions and anyone who serves a clerical function.[293]

Attempts to unify state law in this area have been relatively unsuccessful. The American Law Institute's Model Code of Evidence adopted in 1942 and the National Commissioners of Uniform State Laws' Uniform Rules of Evidence adopted in 1953 both made a provision for a clergy-penitent privilege, although they were extremely narrow in scope. Common features of these model laws included a narrow definition of priest (only those whose religious discipline recognized secret penitential communications) and a narrow definition of penitential communication (confession of

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[293] Christopher R. Pudelski 'Comment: The Constitutional Fate of Mandatory Reporting Statutes...' (n 255).

culpable conduct). Both model laws defined the holder of the privilege as the penitent.[294]

In 1972, the Supreme Court proposed and approved a version of the Federal Rules of Evidence that contained the privilege.[295] This Proposed Rule 506, adopted by the Supreme Court's Advisory Committee but not enacted by Congress, provided a 'Communications to Clergyman Privilege' which placed the privilege in the hands of the parishioner. Rule 506 would have significantly liberalized the 1942 and 1953 model rules. The terms 'priest,' 'penitent,' and 'penitential communication' were abandoned. Proposed Rule 506 extended the privilege to any 'confidential communication by the person to a clergyman in his professional character as spiritual advisor.' Significantly, the Proposed Rule eschewed any 'discipline enjoined' language, making it irrelevant whether the minister's religious denomination promoted spiritual counseling or required the minister to keep such sessions confidential. Proposed Rule 506 would have also extended the definition of 'minister' to include an accredited Christian Science practitioner, and one who, although not an official minister, was a 'similar functionary' of a religious organization. The phrase 'similar functionary' seems to have been intended to allow for growth in the application of the privilege to new or emerging religions, or to new roles within existing religions.[296]

With the failure of the the Congress to enact the proposed Rule 506 which would have codified the priest penitent privilege into federal law, Congress adopted Rule 501, which created a general and flexible rule that applied to all testimonial

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[294] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[295] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[296] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).

privileges, not just the clergy-communicant privilege.[297] Although Congress did not adopt the Proposed Rule 506 dealing with priest-penitent privilege and other specifically mentioned privileges as recommended by the Supreme Court, Congress neither specifically disapproved of them. It is also important to note that the privilege was one of the least controversial compared to the other specifically enumerated privileges proposed by the Supreme Court and debated by Congress. According to Cassidy, this was most likely because a clergy-penitent privilege was by that time seen as firmly rooted in American law notwithstanding its somewhat dubious history, and because confidential communications with priests and ministers were perceived as beyond secular intervention in any event.[298] In addition, although the Congress never codified the privilege into law, federal courts incorporated the privilege into federal common law based on the language and reasoning of the proposed Rule 506. Today, every federal jurisdiction presented with the issue explicitly or implicitly recognizes the privilege based on federal common law.[299]

In 1974, the National Commissioners of Uniform State Laws amended their Uniform Rule of Evidence to Model Proposed Federal Rule of Evidence 506 eschewing any 'penitential communication' language, and protecting simply confidential communication by a person to a clergyman in his professional character as spiritual

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[297] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[298] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[299] Christopher R. Pudelski 'Comment: The Constitutional Fate of Mandatory Reporting Statutes...' (n 255).

advisor. Since 1974, more than thirty states have enacted or amended their statutes to more closely track this latter version of the uniform state law.[300]

An analysis of these state legislations reveal three basic types of priest-penitent privileges: (1) those that specify the denomination of the religions they protect, (2) those that do not specify a particular denomination, but appear to create a preference toward one or more religions through the adoption of certain words like 'priest', and (3) those that are neutral toward religion.[301] Some states expand the privilege to include penitents and also to protect communications made while a person seeks general spiritual counseling or general spiritual advice.[302] In the following analysis of the nuances in legislation by the different states, we shall follow at length the classification by Cassidy.[303]

4.1 The Discipline Enjoined Requirement by own church

One of the early prerequisites of the privilege, found in both the Model Code and the 1965 version of the Uniform State Laws, was that the confession have been made to a clergy member 'within the sanctity and under the necessity of their own disciplinary requirements.'[304] This phrase suggests that the evidentiary privilege protects communications that would be held confidential under the governing religious code.

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[300] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[301] Christopher R. Pudelski 'Comment: The Constitutional Fate of Mandatory Reporting Statutes...' (n 255).
[302] Christopher R. Pudelski (n 255).
[303] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[304] UNIF. EVID. ACTS 29, 9A U.L.A. 617, 618 (1965); MODEL CODE EVID. 219 (1942); see, e.g., ARIZ. REV. STAT. ANN. § 12-2233 (West 1994); MINN. STAT. ANN. § 595.02 (West 2000).

Yet the term is far from unambiguous. Does the discipline enjoined requirement refer to the communication – that is, the religious discipline must require the confidential communication? Alternatively, does it refer to the minister's obligation of secrecy – that is, church discipline must require the minister to keep the conversation confidential? Only Roman Catholics, Eastern Orthodox, and some Lutheran sects recognize the formal sacrament of confession.[305] Most Protestant denominations and the Jewish tradition do not practice confession, nor do they have religious tenets that mandate professional secrecy. 'The vast majority of ministers, due to personal conscience and the realization that their effectiveness as clergy members would be destroyed, operate under a self imposed duty of confidentiality.'[306] If 'discipline enjoined' is interpreted to mean that the privilege is applied only to mandated auricular confessions[307] would limit its application to members of very few religious denominations.[308] Such a strict interpretation is illustrated in *Sherman v State*[309] where the court held that a letter from a parishioner to a Protestant minister asking for prayer, and implying his guilt of rape, was not privileged in a subsequent criminal prosecution. It was argued that the church member was not under a religious duty to confess his sins according to the doctrine of the church.

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[305] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118). Commenting on 1983 CODE of Canon Law c.983, § 1.

[306] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).

[307] Confession told in the ear, i. e., told privately, as distinguished from General Confession.

[308] *Sherman v State* is an example of a strict construction of this requirement. 279 S.W. 353 (Ark. 1926). The court held that a letter from a parishioner to a Protestant minister asking for prayer, and implying his guilt of rape, was not privileged in a subsequent criminal prosecution, because the church member was not under a religious duty to confess his sins according to the doctrine of the church.

[309] 279 S.W. 353 (Ark. 1926).

Although sixteen states and the District of Columbia still have some remnant of the discipline enjoined requirement in their clergy-penitent privilege statutes,[310] the trend among the states is to remove this requirement from their privilege statutes altogether, making them consistent with the uniform state laws.[311] Although it has become part of the lexicon in this area, there is much confusion surrounding the meaning of the term. So entrenched is the 'discipline enjoined' requirement in the history of the privilege that some courts cite it as a prerequisite to the application of the privilege, notwithstanding the fact that the statute that they are construing contains no such language.[312] Some also wonder if it really adds anything to the other requirements of the clergy-penitent privilege.[313] Some states, such as Minnesota, have construed this phrase broadly to mean simply that the parishioner was confiding to the minister in his professional capacity. These states do not require either that the church mandate the

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[310] ARIZ. REV. STAT. ANN. § 12-2233 (West 1994); CAL. EVID. CODE § 1033 (West 1995); COLO. REV. STAT. § 13-90-107 (2001); D.C. CODE ANN. § 14-309 (2001); FLA. STAT. ANN. § 90.505 (West 1999); IDAHO CODE § 9-203 (Michie 1998); 735 ILL. COMP. STAT. ANN. 5/8-803 (West 1993); MICH. COMP. LAWS ANN. § 600.2156 (West 2000); MONT. CODE ANN. § 26-1-804 (2001); OR. REV. STAT. § 40.260 (2001); R.I. GEN. LAWS § 9-17-23 (1997); TENN. CODE ANN. § 24-1-206 (2000); UTAH CODE ANN. § 78-24-8 (1996); VA. CODE ANN. § 8.01-400 (Michie 2002); WASH. REV. CODE ANN. § 5.60.060 (West Supp. 2002); W. VA. CODE ANN. § 57-3-9 (Michie Supp. 2002); WYO. STAT. ANN. § 1-12-101 (Michie 2001). The recent trend has been for state legislatures to amend their priest-penitent privilege statutes to eliminate any discipline enjoined language. See, e.g., NEB. REV. STAT. § 27-506 (1995). Indiana, Massachusetts, and Minnesota have retained their protections for confessions made in the course of discipline enjoined by the church, but have added protection for communications made for the purposes of religious or spiritual advice, without modifying the latter phrase by the traditional discipline enjoined language. IND. CODE ANN. § 34-46-3-1 (Michie 1998); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 2002); MINN. STAT. ANN. § 595.02 (West 2000).

[311] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).

[312] *Commonwealth v Stewart*, 690 A.2d 195 (Pa. 1997) (finding the "discipline enjoined" requirement satisfied when a statement is made in confidence for the purpose of spiritual guidance or penance).

[313] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).

communication (e.g., confession), or that church rules mandate that the minister keep the confidence secret.[314] States that equate "discipline enjoined" with "professional capacity" render a confidential communication between parishioner and minister privileged so long as the parishioner was seeing the minister for religious reasons.[315] This approach allows courts to avoid the sometimes unwelcome, if not difficult, task of dissecting church doctrine to determine whether the type of communication at issue was required to be made and to be kept confidential. Other 'discipline-enjoined' states have construed their statutes to require that at least one of the following conditions be present in order for the minister to be acting in the course of discipline enjoined by the church: (1) The doctrine of the church requires the minister to hear confidences and give spiritual advice. (2) The doctrine of the church requires the minister to keep confidences secret.[316] In these states, some doctrinal obligation on the part of the clergyman

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[314] The frequently cited case of In *re Swenson* began the trend of liberalization of the "discipline enjoined" requirement. 237 N.W. 589 (Minn. 1931). The Minnesota Supreme Court held that a Lutheran minister could not be compelled in a divorce proceeding to testify as to what the defendant's husband said to him about extramarital affairs, even though such confidential communications occurred not in confession but in a private counseling setting. Although at the time the applicable Minnesota statute referred to confession, the court interpreted this term broadly to include any confidential spiritual advice.

[315] *State v MacKinnon*, 957 P.2d 23, 28 (Mont. 1998) (holding that a conversation in which group leaders of a church facilitated discussion between the defendant and his estranged wife about child visitation was not privileged under Montana clergy-penitent privilege statute in later sexual assault prosecution). Although the court interpreted the term 'confession' in the state statute broadly to include confidential conversations for the purpose of spiritual advice, "nothing in the record suggests that they were acting as ministers or counselors at the time they facilitated the [conversation]'.

[316] *State v Martin*, 975 P.2d 1020, 1025-28 (Wash. 1999) (affirming reversal of an order of contempt against an ordained Evangelical minister for refusing to answer deposition questions about confidential communications with father suspected of shaking to death his three-month-old child). The Washington Supreme Court interpreted the phrase 'confession made ... in the course of discipline enjoined by the church' in the state privilege statute to refer to the doctrinal obligations of a clergy member in hearing confidence, not the doctrinal obligations of a parishioner in making the confidence.

regarding the confidential communication is necessary before the privilege attaches. For example, an appellate court in Illinois ruled that where a clergyman seeks to testify despite the parishioner's objection, the court would presume that the disclosure is not prohibited by church doctrine, absent evidence to the contrary.[317] Some churches have reacted to the discipline enjoined doctrine by specifically recognizing in their charters that ministers are required to keep secret confidential spiritual counseling sessions.[318] The most traditional view suggests that both of the foregoing elements must be met in order for the priest to be acting in the course of discipline enjoined by the church. This implies that the minister must be required under church doctrine to hear confidences, and must be required under church rules to keep them secret.[319] This is the most conservative construction of the term, and it has fallen out of favor. As noted already, Legislatures are either deleting the 'discipline enjoined' requirement from their statutes altogether,[320] or courts faced with such language are applying the requirement with less rigor.[321]

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[317] *People v Diercks*, 411 N.E.2d 97, 101 (Ill. 1980).
[318] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[319] UTAH CODE ANN. § 78-24-8(3) (1996), superseded by UTAH R. EVID. 503; *Ball v State*, 419 N.E.2d 137, 139-40 (Ind. 1981) (holding that Baptist minister was allowed to testify about parishioner's admission to murders, where constitution of church did not require pastoral confession, or confidential pastor-parishioner discussion with respect to crime).
[320] *People v Carmona*, 627 N.E.2d 959, 962 (N.Y. 1993) (discussing history of New York privilege and legislature's abandonment of "discipline enjoined" language, expanding the privilege to protect all confidential communications with religious ministers for purposes of obtaining spiritual guidance or advice).
[321] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).

4.2 What Communications are Protected?

All states require that the communications be made in private, with an expectation of confidentiality, to a minister in his or her professional capacity as a member of the clergy. The communication must be made in private but the presence of third parties will not necessarily defeat the privilege where those third parties are essential to the objective of the conversation, such as in joint marital counseling sessions.[322] The State statutes differ in terms of what topics of conversation are covered. The most conservative approach to the privilege is to protect only confessions made in the course of discipline enjoined by rules of the church.[323] This narrow interpretation is

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[322] *State v Martin*, 975 P.2d 1020, 1029 (Wash. 1999) (holding that the presence of defendant's mother who brought him to preacher and urged him to confess did not necessarily vitiate privilege). However, see *Commonwealth v Drake*, 15 Mass. 161, 162 (1918) (holding no privilege existed where defendant 'confessed' to charge of lewdness before entire congregation). In re Grand Jury Investigation, 918 F.2d 374, 386-88 (3d Cir. 1990) (holding that the 'modern view of the privilege is more expansive than the traditional one,' and remanding for consideration of whether family members' group consultation with a Lutheran minister was privileged, considering practices and doctrines of particular denomination and utility of having family members present for spiritual objective to be achieved). Some states explicitly provide in their statutes that the privilege applies even when third parties are present, so long as those third parties are essential to the objective of the confidential communication. See FLA. STAT. ANN. § 90.505 (West 1999); WIS. STAT. ANN. § 905.06 (West 2000). The 'discipline enjoined' language does not mandate that the church at issue require the parishioner to make a confession or disclose a wrongdoing; the 'discipline enjoined' language of the Washington statute requires only that a church doctrine require the minister 'to receive the confidential communication and to provide spiritual counsel.' (quoting *State v Martin*, 91 Wash. App. 621, 629 (Ct. App. 1998)); see also *People v Johnson*, 75 Cal. Rptr. 605, 607 (Ct. App. 1969) (holding there was no privilege where an armed robber fled into church and made statements to minister dressed in civilian clothes, absent showing that minister 'was authorized or accustomed to hear such communications, or that he had a duty to keep any such communications secret under the discipline, practice or tenets of his church') ; *Scott v Hammock*, 870 P.2d 947, 955 (Utah 1994) (holding that a non-penitential communication between father and bishop was privileged because it was intended to be confidential and was made for the purpose of seeking spiritual counseling, guidance, or advice from a cleric acting in his professional role and pursuant to the discipline of his church).

[323] IDAHO CODE § 9-203 (Michie 1998); MICH. COMP. LAWS ANN. § 600.2156 (West 2000); MONT. CODE ANN. § 26-1-804 (2001); UTAH CODE ANN. § 78-24-8 (1996); WASH. REV. CODE ANN. § 5.60.060 (West 1995); WYO. STAT. ANN. § 1-12-101 (Michie 2001). Some states

seen in the case *Killingsworth v Killingsworth,*[324] where it was held that a church pastor who had discussed marital troubles with parties in a divorce action did not have the privilege to refuse to answer questions as to whether husband had stated that his wife had threatened his life. Another traditional formulation of the privilege is to protect 'penitential' communications.[325] Penitential communication is broader than confession, because the term sweeps within its reach any confidential communication admitting a perceived moral transgression, regardless of whether the minister is empowered under church doctrine to absolve the parishioner of his sin. In California, for example, courts have included conversations seeking spiritual healing and forgiveness for past acts, whether in the Catholic Church or some other denomination, but have excluded from

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whose statutes expressly apply only to confessions nonetheless have interpreted the word broadly to include any communications for the purpose of spiritual counselling or advice that are required to be kept confidential under the doctrines of the religion involved, undoubtedly to avoid constitutional challenges based on the Free Exercise or Establishment clauses of the First Amendment; *State v MacKinnon,* 957 P.2d 23, 28 (Mont. 1998) (interpreting the term "confession" in Montana's statute to encompass any private conversation for purposes of spiritual counselling, 'in order to minimize the risk that § 26-1-804 ... might be discriminatorily applied because of differing judicial perceptions of a given church's practices or religious doctrine'); *Scott v Hammock,* 870 P.2d 947, 954 (Utah 1994) According to the Scott court, 'a narrow construction of the statute would raise serious questions under Article I, section 4 of the Utah Declaration of Rights, which provides for freedom of conscience and religion.' Scott, 870 P.2d at 954. *Martin,* 975 P.2d at 1028 (holding that even though Washington's statute uses the word 'confession,' this word means any 'confidential communication between a clergy and a penitent' for the purposes for spiritual advice).

[324] 217 So. 2d 57, 63-64 (Ala. 1968)

[325] Although California and Kansas use the terms 'penitent' and 'penitential communication' in their clergy privilege statutes, the phrase is defined differently in the two states. California defines 'penitential communication' as a confidential communication made to a clergyman 'who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret.' CAL. EVID. CODE § 1032 (West 1995). The Kansas privilege statute defines 'penitent' as 'a person who recognizes the existence and the authority of God and who seeks or receives from a regular or duly ordained minister of religion advice or assistance in determining or discharging his or her moral obligations, or in obtaining God's mercy or forgiveness for past culpable conduct.' KAN. STAT. ANN. § 60-429 (1997).

protection marital counseling sessions[326] and private pastoral counseling or problem-solving sessions conducted for purposes other than seeking forgiveness for sin.[327]

The more modern approach, which has become the majority position, is to discard any requirement of confession or penitential communication as a precondition to the application of the privilege. The privilege thus protects any confidential communication with a clergy member whenever the parishioner is 'seeking spiritual counsel and advice,'[328] or communicating with the clergy member 'in his professional capacity as a spiritual advisor.'[329] This approach avoids issues of which religious denominations require auricular confession, and whether the parishioner was undertaking the communication for the purposes of forgiveness of sin. Instead, it focuses simply on the minister's role in providing spiritual advice, and whether the confidence was shared in that context. This is the construction recommended by

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[326] *Simrin v Simrin*, 43 Cal. Rptr. 376, 378-79 (Ct. App. 1965) (refusing to allow wife to call rabbi in child custody proceeding to testify about statements made by her husband during joint counseling session because both parties had agreed at the outset of counseling that rabbi would not be forced to testify). The court held the conversations excluded by advance agreement, not because they were legally privileged.

[327] *People v Edwards*, 248 Cal. Rptr. 53, 56 (Ct. App. 1988) (stating that parishioner who sought out parish priest for advice involving embezzlement from parish guild was 'seeking counseling and not absolution,' and therefore, conversation did not constitute a penitential communication).

[328] VA. CODE ANN. § 8.01-400 (Michie 2002).

[329] MO. ANN. STAT. § 491.060 (West 1996); see also FLA. STAT. ANN. § 90.505 (West 1999); GA. CODE ANN. § 24-9-22 (1995); IND. CODE ANN. § 34-46-3-1 (West 1998); MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (2002); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 2002); N.H. REV. STAT. ANN. § 516:35 (1997); N.Y. C.P.L.R. § 4505 (McKinney 1990); N.C. GEN. STAT. § 8-53.2 (2002); TENN. CODE ANN. § 24-1-206 (2000); see also *People v Carmona*, 627 N.E.2d 959, 962 (N.Y. 1993) (finding that statute protects conversations for purposes of spiritual guidance and providing that 'the privilege may not be invoked to enshroud conversations with wholly secular purposes solely because one of the parties to the conversation happened to be a religious minister'); *Simpson v Tennant*, 871 S.W.2d 301, 306 (Tex. App. Ct. 1994) (finding privilege where communicant was 'seeking spiritual solace and guidance,' and ruling that communication need not be strictly penitential to qualify for protection).

Proposed Federal Rule of Evidence 506 and the 2000 version of the Uniform State Laws that have already been mentioned. Under this approach, any private conversation with a clergy member that is related to the spiritual well-being of the parishioner would be protected by the privilege, even if the source of the underlying problem pertained to employment, financial issues, family matters, or physical and mental health.[330] For example, most states that protect communications 'for the purposes of spiritual advice or counseling' or similar language have interpreted their privilege statutes to protect marital counseling sessions.[331] These states tend to restrict the above interpretation of communication with the emphasis that the confidence must also be shared with the minister in his professional capacity.[332] This implies that when the parishioner confides in the clergy member due to friendship, kinship, business association, or some other relationship, the communication is not privileged.[333]

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[330] Cf. *United States v Isham*, 48 M.J. 603, 605 (1998) (interpreting privilege broadly under Military Rule of Evidence 503 to include discussion of mental depression with Navy chaplain, where conversation had 'obvious religious overtones').

[331] *Pardie v Pardie*, 158 N.W.2d 641, 645 (Iowa 1968); *LeGore v LeGore*, 31 Pa. D. & C.2d 107, 108 (Ct. Com. Pl. 1963); cf. *Rivers v Rivers*, 354 S.E.2d 784, 787 (S.C. 1987). Other states expressly include marriage counseling sessions in their clergy-penitent privilege statutes. See, e.g., D.C. CODE ANN. § 14-309 (2001); N.J. STAT. ANN. § 2A:84A-23 (West 1994).

[332] COLO. REV. STAT. ANN. § 13-90-107 (West 2001); CONN. GEN. STAT. ANN. § 52-146B (West 1991); D.C. CODE ANN. § 14-309 (2001); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 2002).

[333] *People v Thompson*, 184 Cal. Rptr. 72, 76 (Ct. App. 1982) (holding that Christian Science "ethics officer" hired by business as sales consultant was not acting in capacity as clergyman in hearing confession of murder); *People v Police*, 651 P.2d 430, 431 (Colo. Ct. App. 1982) (holding that the conversation between the father of a murder victim who also happened to be a minister and the defendant at the jail house was not privileged because there was no evidence that the minister was acting as the defendant's spiritual advisor or providing pastoral counselling to him); *People v Bole*, 585 N.E.2d 135, 147 (Ill. App. Ct. 1991) (finding no privilege where cleric had informed defendant accused of sexually assaulting his stepdaughter before disclosure that he would not act as defendant's pastoral counsellor because in that situation defendant could not have been confiding in minister 'in his professional capacity'); *Christensen v Pestorious*, 250 N.W. 363, 365 (Minn. 1933) (denying privilege where witness told minister about accident when he visited her in the hospital, but there was no spiritual component or purpose to the confidence); *State v Cary*,

The broadest construction of the privilege, but still the minority position, is to protect all confidential communications made to a minister 'in his professional capacity,' without any limitation as to the spiritual purpose or nature of the conversation.[334] A few states have apparently concluded that parishioners frequently turn to clergy members with a wide variety of problems and attempts to restrict the privilege to spiritual advice is just as problematic as limiting the privilege to confessions or penitential communications. In these jurisdictions, a wide variety of counseling sessions are protected, including, among others, child rearing advice, employment counseling, and personal problems such as alcoholism or sexual dysfunction, so long as they are directed to the minister in his professional capacity. The problem is that states that protect any confidential communication to a minister in his professional capacity run the risk of excluding from their reach matters relating not to the counseling needs of the parishioner alone, but also matters relating to the business or employment affairs of the religious organization.[335] For example, in Illinois the

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751 A.2d 620, 626 (N.J. 2000) (holding that the cleric-penitent privilege did not apply to confession made to Baptist deacon who was also a New Jersey State Trooper, when defendant told his pastor he wanted to surrender on charge of murder, and pastor thereafter summoned the deacon/trooper to take his statement in his role as a police officer and take him into custody); *State v Barber*, 346 S.E.2d 441, 441-45 (N.C. 1986) (finding no privilege where rape suspect confided in minister as friend); *Masquat v Maguire*, 638 P.2d 1105, 1106 (Okla. 1981) (holding that no privilege existed where hospital patient 'contacted and consulted with a Catholic nun in her capacity as a hospital administrator and not in her capacity as a "clergyman"').

[334] 735 ILL. COMP. STAT. 5/8-803 (West 1993); IOWA CODE ANN. § 622.10 (West 1999); N.J. STAT. ANN. § 2A:84A-23 (West 1994); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985).

[335] *Commonwealth v Stewart*, 690 A.2d 195, 197-200 (Pa. 1997) (affirming order of trial court requiring production for in camera inspection of church records pertaining to personnel records of priest and investigation into allegations of drug and sexual abuse by him with the records being privileged only if 'spiritual or penitential' in nature); *Hutchison v Luddy*, 606 A.2d 905, 909-12 (Pa. Super. Ct. 1992) (ordering church to comply with discovery requests for personnel

applicable clergy-penitent privilege statute was held to protect conversations between a youth group counselor and a Lutheran minister about the counselor's alleged molestation of a youth in his charge.[336] Although these charges bordering on work-related misconduct could readily have been termed an employment matter rather than a spiritual matter, the court concluded that the session was privileged because the defendant was summoned to speak with the minister in his 'professional character' under the express terms of the Illinois statute.[337]

Going by most of the State statutes and their judicial interpretation, the form of communication protected is now broadened to include non-sacramental non-penitential communications where the parishioner, while seeking spiritual counsel and advice, communicates in confidence with the clergy member in his professional capacity as a spiritual advisor. It goes without saying, that given the present state of the law, sacramental confession enjoys a higher level of protection by its very nature there is the remote possibility of its being muddled up with any of the conditions that may warrant a loss of privilege. More so, it enjoys this without risking any constitutional challenges based on the Free Exercise or Establishment clauses of the First Amendment.

4.3 Who Holds the Privilege?

States are split on who holds the privilege, but substantial majority recognize that the privilege belongs to the parishioner just as the attorney-client privilege and the

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documents and internal investigatory reports of suspected child abuse because Pennsylvania statute limits privilege to discussions of 'spiritual' matters).

[336] *People v Burnidge*, 664 N.E.2d 656, 659 (Ill. App. Ct. 1996).

[337] In Illinois, the clergy-penitent privilege statute applies to confidential communications made to a clergyman in his professional character or as a spiritual advisor. 735 ILL. COMP. STAT. 5/8-803 (West 1993).

doctor-patient privileges rest in the hands of the client and not the professional.[338] A common formulation in these state statutes provides that the parishioner or the clergyman on behalf of the parishioner may assert the privilege, and that the clergy member is presumed to have authority to assert the privilege on behalf of the parishioner in the absence of evidence to the contrary.[339] In states where the parishioner holds the privilege,[340] he can choose to waive the privilege and thereby force the minister to testify.[341] This can lead to some seemingly harsh results, such as holding a priest in contempt for refusing to reveal a private conversation with the defendant even after the defendant has waived the privilege and called the priest to testify.[342] However, the question has been posed: If one of the purposes of the privilege is to protect

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[338] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).

[339] DEL. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West 1999).

[340] ARIZ. REV. STAT. ANN. § 12-2233 (West 1994); CONN. GEN. STAT. ANN. § 52-146b (West 1991); D.C. CODE ANN. § 14-309 (2001); IDAHO CODE § 9-203 (Michie 1998); IOWA CODE ANN. § 622.10 (West 1999); LA. CODE EVID. ANN. art. 511 (West 1995); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 2002); MINN STAT. ANN. § 595.02 (West 2000); MONT. CODE ANN. § 26-1-804 (2001); NEV. REV. STAT. ANN. § 49.255 (Michie 2002); N.H. REV. STAT. ANN. § 516:35 (1997); N.Y. C.P.L.R. 4505 (Consol. 1990); N.C. GEN. STAT. § 8-53.2 (2002); OR. REV. STAT. § 40.260 (2001); R.I. GEN. LAWS § 9-17-23 (1997); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985); TENN. CODE. ANN. § 24-1-206 (2000). As a variation on this approach, some states follow Proposed Rule 506 and place the privilege in the hands of the parishioner, but these states also provide that the cleric is presumed authorized to assert the privilege on behalf of the parishioner unless there is evidence to the contrary, such as an affirmative waiver. ARK. R. EVID. 505; DEL. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West 1999); ME. R. EVID. 505.

[341] *De'Udy v De'Udy*, 495 N.Y.S.2d 616, 618-19 (Sup. Ct. 1985). With perhaps the strongest religious justification for the privilege in light of its Roman Catholic traditions, even Ireland has recognized that the privilege belongs to the penitent, not to the clergyman as in *Johnston v Church of Scientology*, 1999 Ir. R. 682 (Ir. H. Ct.) (recognizing that although seal of confessional may be absolute, counseling session outside of confession "would always be capable of waiver unilaterally by the person being counseled")

[342] *Commonwealth v Kane*, 445 N.E.2d 598, 602-03 (Mass. 1983) (holding priest in contempt and fining him for refusing to reveal contents of private, non-penitential conversation with defendant in murder case); *De'Udy*, 495 N.Y.S.2d at 618 (denying minister's motion to quash subpoena and forcing him to testify in contested divorce proceeding after both husband and wife waived privilege in marital counseling sessions with clergyman).

religious freedom, why is it not equally abhorrent to require a minister to violate what he or she perceives to be a sacred duty of confidence, even when the parishioner has waived the privilege?[343]

In these circumstances and others where the clergyman is required as a matter of religious law to maintain confidentiality, the privilege directly affects a religious obligation of the one giving and receiving the communication, in comparison to merely protecting the client in the attorney-client relationship and patient in the doctor-patient relationship.[344]

Cardinal Bevilacqua, the Catholic archbishop of Philadelphia, explained that 'although the good of the penitent is the 'obvious' purpose of sacramental confession, the other, more fundamental, purpose of the sacramental seal is the protection of the Sacrament of Penance itself.' Accordingly, the privilege should belong either exclusively to the clergyman or to both the clergyman and communicant in a fashion requiring their concurrent agreement to render any waiver of the privilege effective.[345]

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[343] That is why Cassidy points out that those statutes that place the privilege in the hands of only the parishioner create a direct conflict with the seal of confession of the Roman Catholic Church because priests are required under Canon law to keep sacramental confessions secret, notwithstanding any waiver of the confidence by the parishioner. R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).

[344] 'Clergy privilege' <http://www.christianlegalsocietv.org/> accessed on 15 August 2006.

[345] Michael J. Mazza (Comment), *Should Clergy Hold the Priest-Penitent Privilege*? 82 MARQ. L. REV. 171 n.175-77 (1998).

Two courts declined to reach the question of who holds the privilege.[346] One court stated that its common law analysis shows that communications made by or to a member of the clergy in his or her religious capacity is privileged from disclosure (whether the disclosure was sought from the clergyperson or communicant), a privilege that is heavily influenced by the First Amendment.[347] The Supreme Court of New Jersey found that its statutory clergyman-communicant privilege was held solely by the clergyperson, because legislative history revealed a deep desire 'to protect the clergyperson's free exercise of religion' and 'curb the potential manipulations of a penitent who, through waiver, could compel a clergyperson to reveal communications that were given purposely to mislead.'[348]

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[346] *Church of Jesus Christ of Latter-Day Saints v Superior Court In and For Maricopa County*, 764 P.2d 759, 767-68 (Ariz.App. 1988) (declining to decide whether a clergyman has constitutional grounds to assert a privilege independent of the penitent's, where the record allegedly did not reveal that breaking confidence would violate the religious obligations of Mormon church officials); *State v Martin*, 975 P.2d 1020, 1027 (Wash. 1999) (*en banc*) (declining to address clergyman's constitutional challenge where issue was resolved in his favour based on statutory construction).

[347] *Rosado v Bridgeport* Roman Catholic Diocesan Corp., 1995 WL 348181, *13 (1995) (although not construing the First Amendment as dispositive of a communicant's right to assert the clergy-communicant privilege because it was not raised as such, 'neither can judges in divining the common law be blind to constitutional mandates which politically and otherwise continue to define us as a people. 'The Free Exercise Clause commits government itself to religious tolerance. . . .'). See also *Cimijotti v Paulsen*, 230 F.Supp. 39 (N.D. Iowa 1964) (Based upon the common law as explained in the previous ruling and on the First Amendment the allegedly slanderous statements made by the defendants to priests of the Catholic Church . . . are absolutely privileged against an action for defamation.)

[348] *State v Szemple*, 640 A.2d 817, 830 (N.J. 1994) ('The principle underlying both the seal of confession and the statutory privilege was not concern for the penitent but rather concern that the clergyperson would be compelled in violation of his or her religious vows to disclose such confidences.'), superseded by statute as recognized in *Corsie v Campanalonga*, 721 A.2d 733 (NJ.Super. 2000).

A smaller number of jurisdictions provide that both the penitent and the priest hold the privilege.[349] Where both parties to the communication hold the privilege, both must consent before the minister may testify. This means that a minister may refuse to testify to the substance of a confidential communication even if the parishioner wishes him to reveal the confidence.[350] States that place the privilege in the hands of the minister as well as the parishioner recognize that the privilege serves not only to protect the parishioner's expectation of privacy and confidentiality, but also the clergyman's status as repository of spiritual information.[351] This approach suggests that the free exercise rights of the minister are an important value underlying the privilege,[352] and that even a participant to the conversation and the presumed beneficiary of the confidential relationship should not be allowed to require a minister to violate a sacred oath or mandate of his church.[353] New Jersey is unusual among the states in differentiating the holder of the privilege depending on the type of confidential

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[349] ALA. R. EVID. 505; CAL. EVID. CODE §§ 1033-1034 (West 1995); COLO. REV. STAT. ANN. § 13-90-107 (West 2001); 735 ILL. COMP. STAT. 5/8-803 (1993); KAN. STAT. ANN. § 60-429 (1997); N.J. STAT. ANN. § 2A:84A-23 (West 1994); 42 PA. CONS. STAT. ANN. tit. 42, § 5943 (West 2000); *Eckmann v Bd. of Educ.*, 106 F.R.D. 70, 73 (E.D. Mo. 1985) (interpreting Missouri law under pendant state law claims). The wording of Pennsylvania's statute is interesting because it provides that a minister shall not 'be compelled, or allowed without consent of such person' to disclose confidential communications. 42 PA. CONS. STAT. ANN. tit. 42, § 5943 (West 2000). The use of the disjunctive 'or' suggests that a priest may not be compelled even if the penitent waives the privilege.

[350] *People v Pecora*, 246 N.E.2d 865, 872-73 (Ill. App. Ct. 1969), 397 U.S. 1028 (1970) (upholding a ruling that a clergyman did not have to answer questions relating to conversations between himself and the defendant because a clergyman cannot be compelled to disclose in any court any confession or admission made to him in his professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of his religious body).

[351] *Eckmann v Board of Education of Hawthorn School District* No. 17, 106 F.R.D. 73 (E.D. Mo. 1985)

[352] In *People v Phillips*, the first case in America to recognize the clergy-penitent privilege, the New York court founded its decision on the free exercise rights of the subpoenaed priest. 1 W.L.J. 109 (1843).

[353] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).

communication at issue. For most spiritual counseling sessions, both the clergyman and the parishioner hold the privilege; that is, both have to consent before either can testify.[354] However, for communications occurring in a spiritual counseling setting that pertain to a future criminal act, only the minister holds the privilege.[355] The minister may choose to testify or not testify about the content of such communications depending on his own moral judgment and the applicable religious doctrine of his church. As discussed more fully below, New Jersey is thus unique among the states in that it carves out conversations pertaining to future crimes for special treatment in its clergy-penitent privilege statute. This legislation was in response to a decision by the New Jersey Supreme Court that upheld the prosecutor's use of a confession at trial. New Jersey subsequently amended its statute in 1994 because under the old statute, only the priest held the privilege. Thus, a 'minister of visitation' from a Baptist church was allowed to testify that a prisoner had confessed to him the murder of a sixteen-year-old boy.[356] Public outrage over this decision, and the fear that priests could unilaterally disclose even confessions about past crimes led New Jersey to amend the statute.[357]

Finally, some states place a complete bar to clergy testimony about certain qualifying confidential communications.[358] By the Revised Statutes of the State of Indiana, 1897 (S. 507), certain classes of persons are enumerated who are 'not to be competent witnesses', which classes include 'clergymen as to confessions or admissions

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[354] N.J. STAT. ANN. § 2A:84A-23 (West Supp. 2002).
[355] N.J. STAT. ANN. § 2A:84A-23 (West Supp. 2002).
[356] *State v Szemple*, 640 A.2d 817, 825-29 (N.J. 1994).
[357] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[358] In Vermont, a priest or minister of the gospel 'shall not be permitted to testify in court [about] statements made to him by a person under the sanctity of a religious confessional.' VT. STAT. ANN. tit. 12, § 1607 (1973).

made to them in course of discipline enjoined by their respective churches.'[359] Similarly, in the State of Missouri (Revised Statutes, 1899, S. 4659), 'a minister of the gospel or priest of any denomination, concerning a confession made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination,' is to be incompetent to testify.[360] In these states, such clergy testimony is not privileged, but rather is deemed incompetent.[361] Even if the parishioner calls the minister to testify and the minister wishes to testify, he is not allowed to do so. This is a minority position. Ohio and Oregon statutes contain variations of this incompetence rule. Statutes in these states provide that the parishioner is the holder of the privilege, but declare a minister incompetent to testify despite parishioner consent if the minister's testimony would constitute a violation of a sacred trust, such as with an auricular confession in the Roman Catholic tradition.[362]

4.4 Who Qualifies as Cleric

State statutes also differ widely in terms of what types of religious clerics and functionaries are entitled to invoke the privilege. The most traditional approach is to confine the privilege to confidential communications with priests or members of the

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[359] 'The Law of the Seal of Confession' n. 23.
[360] 'The Law of the Seal of Confession' n. 23.
[361] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).
[362] Ohio and Oregon statutes render a clergyman's testimony incompetent if disclosure would be a 'violation of his sacred trust,' OHIO REV. CODE ANN. § 2317.02 (West 1994), or if he 'has an absolute duty to keep the communication confidential.'

clergy without further specification or definition of these terms.[363] Some states attempt to ensure the cleric is bona fide by protecting only those officially affiliated with a religious organization, such as those ordained or licensed by the church.[364] This limits the privilege to ministers who have achieved official status in their church through ordination or accreditation.[365] Another approach is to focus not on the bona fides of the minister, but on the bona fides of the church; some states limit the privilege to practitioners of an 'established' or 'legally recognizable' religion.[366] The requirement that the church be 'established' suggests that one of the legislative objectives in crafting the privilege in these states was to ensure that the religion indeed played a meaningful

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[363] ARIZ. REV. STAT. ANN. § 12-2233 (West 1994); IDAHO CODE § 9-203 (Michie 1998); IOWA CODE ANN. § 622.10 (West 1999); MONT. CODE ANN. § 26-1-804 (2001); NEV. REV. STAT. ANN. § 49.255 (Michie 2002); N.Y. C.P.L.R. 4505 (Consol. 1992); R.I. GEN. LAWS § 9-17-23 (1997); WYO. STAT. ANN. § 1-12-101 (Michie 2001). Georgia's statute is the most traditional and specific of all in this regard, limiting the privilege to a 'Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister.' GA. CODE ANN. § 24-9-22 (1995). Because this statute excludes clerics in many non-Western religious traditions, it might be found unconstitutional if challenged. Cf. R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).

[364] MASS. GEN. LAWS ANN. ch. 233, § 20A (West 2002); N.H. REV. STAT. ANN. § 516:35 (1997); OHIO REV. CODE ANN. § 2317.02 (West Supp. 2002); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985); TENN. CODE ANN. § 24-1-206 (2000).

[365] *State v Barber*, 346 S.E.2d 441, 445 (N.C. 1986) (denying privilege to 'exhorter' of Church of God who had never been ordained and whose ten dollar license from Christian Ministry of Tennessee had expired at time of confidential conversation). Few states actually license ministers, except to solemnize marriage; even in those states, authority to conduct marriages flows automatically from ordination and/or official recognition as a minister by the ecclesiastical body of the denomination. N.Y. RELIG. CORP. LAW, § 2 (Consol. Supp. 2002); OHIO REV. CODE ANN. § 3101.08 (West 2000).

[366] States following this 'official status' approach include Ohio, which limits the privilege to ministers of an 'established and legally cognizable church,' OHIO REV. CODE ANN. § 2317.02 (West 1994), and Alabama, which limits the privilege to a practitioner 'of any bona fide established church or religious organization,' ALA. R. EVID. 505. See also KY. R. EVID. 505; MD. CODE. ANN., CTS. & JUD. PROC. § 9-111 (2002); N.C. GEN. STAT. § 8-53.2 (2002).

role in the lives of some citizens, rather than being a sham created solely for the purposes of obtaining secular or legal benefits.[367]

Although somewhat dated, one of the few cases to thoughtfully address the issue of who constitutes a minister for purposes of state privilege law is *Reutkemeier v Nolte*,[368] a civil action in tort by a farmer against his neighbor for allegedly debauching the farmer's minor daughter and impregnating her. The defendant attempted to impeach the victim by inquiring into her alleged confession of sexual activity to a Presbyterian minister and elders within the church. Through his inquiry, the defendant hoped to prove that the fourteen-year-old victim had sexual relations with other men thereby casting much uncertainty upon the paternity of the child.[369] The trial court refused to allow this cross-examination, and the Iowa Supreme Court affirmed. Interpreting Iowa Code section 4608, the court confronted the issue of whether a group meeting among the victim, the minister, and three ruling elders of the church constituted a confidential communication with a 'minister of the gospel' within the meaning of the state privilege statute. The court reasoned that in order to determine who constitutes a minister within a particular religious denomination, the court must look to church doctrine.[370] What is a 'minister of the gospel' within the meaning of this statute? The law as such sets up no standard or criterion. That question is left wholly to the recognition of the 'denomination.' The word 'minister,' which in its original sense meant a mere servant,

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[367] *Church of the Visible Intelligence That Governs the Universe v United States*, 4 Cl. Ct. 55, 64 (1983) (citing Remarks of IRS Commissioner Jerome Kurtz, PLI Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), reprinted in Fed. Taxes (P-H) P54, 820 (1978)).
[368] 161 N.W. 290 (Iowa 1917).
[369] 161 N.W. 290 (Iowa 1917).
[370] 161 N.W. 290 (Iowa 1917).

has grown in many directions and into much dignity.[371] The court looked to the 'Confession of Faith' of the Presbyterian Church and determined that elders were actual officers of the church with the power to preach in the minister's absence, to exercise church discipline, and to 'inquire into the knowledge and Christian conduct of the members of the church', and thus that they were ministers of the gospel.[372]

Rather than generally applying the privilege to clergy or ministers of the gospel, some states protect communications with designated clergy, typically priests, rabbis, ministers, or any 'similar functionary' of a church.[373] This is the more modern scope of the privilege and has become the majority view. Some states have interpreted the term 'similar functionary' broadly to include those in roles such as deacons, nuns, or elders who perform officially recognized church functions, whether they are employed full-time or part-time, for compensation or as a volunteer.[374] Extending even broader protection, Oklahoma, Nebraska, North Dakota, South Dakota, Texas, and Wisconsin apply their privileges to confidential communications with persons 'reasonably

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[371] 161 N.W. 290 (Iowa 1917).

[372] 161 N.W. 290 (Iowa 1917).

[373] ALA. R. EVID. 505; ARK. R. EVID. 505; CAL. EVID. CODE § 1030 (West 1995); DEL. R. EVID. 505; HAW. R. EVID. 506; LA. CODE EVID. ANN. art. 511 (West 1995); ME. R. EVID. 505; MISS. R. EVID. 505; MO. ANN. STAT. § 491.060 (West Supp. 2002); NEB. REV. STAT. § 27-506 (1995); N.J. STAT. ANN. § 2A:84A-23 (West Supp. 2002); N.M. R. EVID. 11-506; N.D. R. EVID. 505; OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); S.D. CODIFIED LAWS § 19-13-16 (Michie 1995); TEX. R. EVID. 505; VT. R. EVID. 505; WIS. STAT. ANN. § 905.06 (West 2000).

[374] *Eckmann v Bd. of Educ.*, 106 F.R.D. 70, 72-73 (E.D. Mo. 1985) (holding that a Catholic nun acting as the spiritual director of a congregation met the statutory definition of 'minister' under the Missouri privilege statute, because the statute includes 'a minister of the gospel, priest, rabbi or other persons serving in a similar capacity,' and the nun in question undertook many aspects of Catholic ministry engaged in by priests and sisters alike).

believed' by the parishioner to constitute such a religious cleric.[375] Other states have taken a more moderate approach and have excluded 'helpers' in the church who have a subsidiary role to the official clergy.[376]

States have struggled with the issue of whether to protect conversations with self-proclaimed ministers who have not gone through any formal training or ordination ceremony,[377] lay officers of a church,[378] and even peer counseling groups such as Alcoholics Anonymous.[379] An overly broad interpretation of the term 'minister' would encourage cult leaders and self-appointed spiritual healers[380] to avoid testifying by

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[375] NEB. REV. STAT. § 27-506 (1995); N.D. R. EVID. 505; OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); S.D. CODIFIED LAWS § 19-13-16 (Michie 1995); TEX. R. EVID. 505; WIS. STAT. ANN. § 905.06 (West 2000); see also TIEMANN & BUSH, supra note 7, at 115.

[376] In *re Murtha*, 279 A.2d 889, 893 (N.J. App. Div. 1971) (holding that a Roman Catholic nun could not claim the privilege because she was not authorized to receive penitential communications according to the discipline of her church); *State v Buss*, 887 P.2d 920, 922-24 (Wash. Ct. App. 1995) (holding that conversations with an assistant to a Catholic priest acting as a 'family minister' did not qualify for the Washington privilege because the 'family minister' was non-ordained and there was no record that the religion required disclosure to such a functionary of the church).

[377] *State v Hereford*, 518 So. 2d 515, 516 (La. Ct. App. 1987) (although the Louisiana statute does not define 'clergyman,' denying privilege to a 'self ordained minister,' noting that simply because the preacher 'studied the Bible and took it upon himself to give religious guidance to others does not make him a clergyman'); *State v Barber*, 346 S.E.2d 441, 445-46 (N.C. 1986) (finding the clergy-communicant privilege inapplicable to conversations with a non-ordained 'licensed exhorter').

[378] *People v Johnson*, 497 N.Y.S.2d 539, 539-40 (App. Div. 1985) (recognizing that confidential communications with a Muslim brother may in some instances be privileged); *Ellis v United States*, 922 F. Supp. 539, 541-42 (D. Utah 1996) (finding that even assuming that the 'ward' and the 'stake' leaders of the Church of Latter Day Saints were clergy within the meaning of the Utah privilege statute, their investigation about a drowning during a church-sponsored youth trip was not a communication for the purposes of spiritual counseling.

[379] *Cox v Miller*, 296 F.3d 89, 110 (2d Cir. 2002) (reversing lower court's determination that petitioner's communications with fellow Alcoholics Anonymous (A.A.) members were protected by clergy-penitent privilege; although 'Twelve Step' methodology of A.A. is religiously based, petitioner did not seek A.A. counseling for purposes of 'spiritual advice' within the meaning of the state privilege statute).

[380] *People v McNeal*, 677 N.E.2d 841, 852-53 (Ill. 1997) (holding defendant's statements to his brother, who was a self-proclaimed minister of the 'Church of the Second Coming' were not privileged because they were not made for purposes of spiritual counseling).

claiming the privilege, thus opening the doors to fraud and abuse.[381] Pennsylvania's statute, which some have argued reflects an obvious Judeo-Christian bias, excludes from the protections of the privilege any communications with 'clergymen or ministers, who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers.'[382] Ohio is another example of a jurisdiction that appears to have drafted its privilege statute in an attempt to withhold protection for conversations with ministers of emerging or fringe religions. Ohio defines 'minister' for the purposes of its privilege statute as a 'member of the clergy, rabbi, priest, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect'.[383] Under the terms of Ohio's statute, the court can thus look to either church doctrine or to church licensing to determine whether a person is a 'minister' for the purposes of its privilege statute.[384]

Whether courts apply a broad or narrow construction of 'minister' for purposes of the privilege depends on not only the precise wording of the applicable state statute,

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[381] Georgia has interpreted its privilege statute to exclude communications with a 'spiritual advisor' or 'psychic,' ruling that such a person is not a 'minister of the gospel' within the meaning of the applicable statute. *Manous v State*, 407 S.E.2d 779, 782 (Ga. Ct. App. 1991). Georgia's statute does not have a catch-all provision protecting conversations with a 'similar functionary' of a church, or a person performing functions 'similar to' a minister. GA. CODE ANN. § 24-9-22 (1995).

[382] 42 PA. CONS. STAT. ANN. § 5943 (West 2000). For example, Jehovah's Witnesses believe that all members of the church are called to the ministry and that the church constitutes a 'society of ministers. Statutes like those in effect in Pennsylvania would not construe private conversations between two Jehovah's Witnesses as privileged unless one played a leadership role in the church.

[383] OHIO REV. CODE ANN. § 2317.02(c) (West Supp. 2002).

[384] In *re Grand Jury Investigation*, 918 F.2d 374, 387 n.21, 388 (3d Cir. 1990) (directing the lower court to look to church doctrine and practices to determine whether group counseling was accepted as an efficacious form of spiritual advice, and holding that 'inquiring into the pastoral counseling practices of a particular denomination would appear to pose no such threat to first amendment rights').

but also on what types of relationships the court feels inclined to promote. If the court views the privilege as a means to promote spiritual counseling in general, it is likely to apply the privilege broadly to any religious functionary who, by way of training or experience, is in a position to provide spiritual aid and comfort to the parishioner.[385] If the court views the privilege as a means only to foster relationships which may lead to redemption and spiritual salvation, it is likely to apply the privilege only to that narrower class of church professionals who are directly responsible for spiritual healing under the established tenets of the religion—usually the pastor or leader of the congregation.[386] The arguments in favor of interpreting 'minister' broadly are the same as those advanced for abandoning the 'discipline enjoined' requirement; that is, to avoid distinguishing between and among religions, and avoid inquiring into religious doctrine.[387] Another reason to interpret 'minister' broadly, however, is that spiritual guidance, unlike mental health care, does not typically cost money. Applying a testimonial privilege to psychiatrists, but not to religious counselors or lay ministers, favors those who can afford to pay for therapy. This is because less affluent individuals quite frequently turn to various functionaries within their church for the same types of problems for which the elite turn to psychiatrists. Applying a broad definition of 'minister' may avoid not only difficult problems of line drawing between religious

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[385] In *re Murtha*, 279 A.2d 889, 892 (N.J. App. Div. 1971) (construing 'minister' to include priests, but not nuns).
[386] In *re Murtha*, 279 A.2d 889, 892 (N.J. App. Div. 1971) (construing 'minister' to include priests, but not nuns).
[387] R. Michael Cassidy, 'Sharing Sacred Secrets:...' (n 118).

sects, but also class-based disparities that could result from recognizing some forms of therapeutic professional privileges but not others.[388]

All the above legislative nuances of the different American states notwithstanding, the standards set in order to qualify for protection by the privilege – whether with respect to what is communicated, or with respect to the recipient of the communication, or with respect to the church's code itself – is quite surpassed with respect to the sacramental confession of the Catholic Church.

5 Conclusion

In this chapter, we have seen how the very first landmark case – *People v Phillips* – dictated the way forward – both in Common Law and Statutory legislation of the approach to the priest-penitent privilege in the American jurisdiction. There is observed a genuine attempt to protect the value of utmost secrecy regarding the confessional seal without risking the constitutionality of the privilege based on the First and Fifth Amendments. Although rooted in the Common Law tradition inherited from the British colonisers, the American legal system, with respect to the priest-penitent privilege, has succeeded in stamping its authority based on sound policy and experience. For as Judge Fahy rightly said, 'so strong were the claims of reason in support of the privilege …that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession to him.'[389]

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[388] R. Michael Cassidy, 'Sharing Sacred Secrets:…' (n 118).
[389] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217).

CHAPTER FOUR

The Case for a Statutory Inclusion of the Priest-Penitent Privilege

1. Introduction

In this final chapter, we shall look at some of the arguments for the codification of the priest-penitent privilege and address the arguments marshalled against it. We shall argue that the gains in providing for the privilege far outweigh any negative consequences that may arise from having the privilege. We shall conclude this by proposing a priest-penitent bill in order to demonstrate that the definitional obstacles usually presented are surmountable.

2. Arguments in Support of the Priest-Penitent Privilege

Let us now look at the principal arguments used to support the view that religious ministers should not be compelled by a court of law to divulge the confidential communication received in the practice of the faith.

2.1 Argument from Custom or Usage

May it be argued that the inviolability of the confessional seal is so much of general knowledge that the court should take judicial notice of it in accordance with the Kenyan law? Under the Kenya Evidence Act Section 60 (1), it is stated that 'the court

shall take judicial notice of ...all matters of general and local notoriety'.[390] The argument here is that the practice of the sacrament and the secrecy that is attached to it is a custom that is universally known to accompany the Catholic Christian religion of which a great number of follower-ship is obtainable under the Kenyan jurisdiction. It is of public knowledge that Catholics, all over the world, have the custom and usage of the sacrament of confession, which from time immemorial is known to be sacrosanct.

Durand defines custom as 'a rule which is recognized in a particular family or district and which has, usually from long usage, obtained the force of a law.'[391] Moreover, as required by Section 51 (1), 'the opinions as to the existence of such custom or right of persons who could be likely to know of its existence if it existed are admissible' in order for the court to form an opinion as to the existence of such general custom or right. Such 'general custom or right' includes customs or rights common to any considerable class of persons (Section 51(2)). In this case, that 'considerable class of persons' are those who practice the Catholic faith of which is their personal law. Personal law may be defined as limited to the law as regards personal rights, obligations and actions as controlled by the religion of the individual.[392] From the foregoing, let us now establish a long history of the tradition of the seal of the confessional as it pertains to the Catholic faith.

The practice of religious confession has enjoyed an ancient tradition in religious thought and practice. The Bible indicated that in the early days of the Christian Church, the resurrected Christ exhorted his Apostles: 'If you forgive the sins of any, they are

[390] P. P. Durand, *Evidence for Magistrates* (n 31) 143.
[391] P. P. Durand, *Evidence for Magistrates* (n 31) 306.
[392] P. P. Durand, *Evidence for Magistrates* (n 31) 304.

forgiven them; if you retain the sins of any, they are retained.'[393] After the Church survived its initial persecution, the early Patristic period saw rites of confession, forgiveness, and penance mature. Around 244 A.D., Origen in his homilies, instructed the faithful that sins could be remitted through penance and one should not withhold from declaring their sins to a priest of the Lord.[394] As early as the first half of the Fourth Century, the confidentiality of the confessional was recognized somewhere between the years 336 and 337. Aphraates in his *Treatises* wrote about a priest's duty concerning confession in the following fashion:

> You physicians . . . who are the disciples of our illustrious Physician, you ought not deny a curative to those in need of healing. And if anyone uncovers his wound before you, give him the remedy of repentance . . . And when he has revealed it to you, do not make it public....[395]

Further examples come from the doctrinal writings of Saint Ambrose and Rufinus, who acknowledged the importance of the forgiveness of sin around the years of 397 and in 404 respectively.[396] During the First Council of Constantinople in 381, the early church confirmed the principles of faith established earlier at Nicea in 318, which included the 'forgiveness of sins.' In his letter to the bishops of Vienna and Narbonne written in 428, Pope Celestine I furnished pastoral instruction on the desirability of providing reconciliation to those who were approaching death and asked

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[393] *John* 20:23.

[394] R. Araujo, S.J., 'International tribunals and rules of evidence: the case for respecting and preserving the "priest-penitent" privilege under international law', <http://www.kentlaw.edu/jicl/abstracts/spring2001-print.html#1> accessed on 4 June 2004.

[395] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217) citing WILLIAM A. JURGENS, 'THE FAITH OF THE FATHERS' 207 (1970) (setting forth the instructions given to the faithful on forgiveness of sins).

[396] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217) citing THE CHRISTIAN FAITH: IN THE DOCTRINAL DOCUMENTS OF THE CATHOLIC CHURCH (Neuner & Dupuis eds., Alba House, New York, 1981.)

for it. In one exhortation to his brother bishops, he asserted that because God knows the heart, penance could not be denied to anyone who asks for it.[397] In the fifth century, the secrecy and confidentiality of the confessional was taking hold. During this period, Theodore of Mopsuestia acknowledged the confidential nature of confessional communications and encouraged the faithful with this exhortation:

> It behooves us, therefore, to draw near to the priests in great confidence and to reveal to them our sins; and those priests, with all diligence, solicitude, and love, and in accord with the regulations . . . will grant healing to sinners. [The priests] will not disclose the things that ought not be disclosed; rather, they will be silent about the things that have happened, as befits true and loving fathers who are bound to guard the shame of their children while striving to heal their bodies.[398]

Pope St. Leo I recommended the practice of private confession and ordered confessors to stop revealing penitents' sins publicly. In his letter of 452 to Theodore, Bishop of Frejus, Pope Leo explained that the role of the priest is indispensable to the rite of reconciliation and this sacrament constitutes the Church's official intercession to reconcile sinners, through penance, with God. A few years later in 459, the same Pope wrote to the bishops of the Roman rural districts and instructed them on the need for secrecy in confession in order to safeguard the reputation of the penitent and to promote greater reconciliation between God and the penitent. The importance of the secrecy of the confessional continues to be observed in the present day under the 1983 Code of Canon Law of the Catholic Church, which obliges those who know the

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[397] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217) citing THE CHRISTIAN FAITH: IN THE DOCTRINAL DOCUMENTS OF THE CATHOLIC CHURCH (Neuner & Dupuis eds., Alba House, New York, 1981.)

[398] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217) citing Michael Mazza, 'Should Clergy Hold the Priest-Penitent Privilege?' 82
MARQ. L. REV. 171, 174 n.20

contents of penitential communications to maintain the secrecy.[399] The Code clearly establishes that the sacramental seal is inviolable. Accordingly, it is criminal for a priest in any way to betray the penitent for any reason whatsoever whether by word or in any other fashion. If an interpreter is present, this third party is also obliged to observe this secret, as are all others who learn of the sins from a confession. Moreover, Canon Law forbids church authorities from using knowledge obtained from a confession for other purposes within the church.[400] As the *Catechism of the Catholic Church* points out, a priest is bound to keep in absolute secrecy any confession that he hears.[401] This secret is without exception and is called the sacramental seal. Anyone who betrays the seal of the confessional faces a stringent penalty of automatic excommunication.[402] This long-standing respect for the confidentiality of priest-penitent communications is not only evident in canon law and the practice of the faithful. It also appears in the foundation on which the secular law conducted evidentiary hearings that might involve witnesses who were parties to various confidential communications. It is evident in both

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[399] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217) citing RITES OF THE CATHOLIC CHURCH, Rite of Penance, para. 10(d) (emphasizing secrecy). The Rite of Penance states: '[c]onscious that he has come to know the secrets of another's conscience only because he is God's minister, the confessor is bound by the obligation of preserving the seal of confession absolutely unbroken.' THE CODE OF CANON LAW, A TEXT AND COMMENTARY, commentary, Canon 983 (James A. Coriden et al. eds., 1985) (indicating the relationship between the seal of confession and the civil law). The commentary to Canon 983 states: '[t]he obligation of the canon is not affected by a contrary disposition of civil law in jurisdictions where communications to an ordained minister, whether sacramental or extra-sacramental, are not considered privileged at law.' In other words, the minister has a principal duty to observe the seal of the confession even where the civil law does not exclude or excuse the testimony of the confessor.

[400] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217).

[401] CATECHISM OF THE CATHOLIC CHURCH. para. 1441

[402] 1983 CODE OF CANON LAW, at Canon 1388, secs. 1, 2

the Anglican and Catholic traditions that Church officials unequivocally contended that a cleric could not divulge any information garnered from a confession to a third party.[403]

Moreover, here in Kenya, religion has not altogether lost its grip and fascination on the society. The Catholic population forms about twenty percent of the Kenya's 30 million people. Religious affiliations are classifiable thus: Christian 57% (Protestant 32%, Roman Catholic 24%); African indigenous 24%; Muslim 6%; other 2%.[404] Moreover, among this Roman Catholic population about sixty percent do practice actively their faith and do use the sacrament of confession. In the Catholic Church, confession is an obligatory sacrament as is the case with some Anglican ministers who choose to take a similar vow. The Catholic Church imposes a duty on every faithful member to confess his or her sins to a priest at least once a year. It is the confidentiality of the confessional, which the church promotes as sacrosanct, that encourages, if not ensures, penitents faithfully receive the sacrament. It would be a grave violation of this confidence if communications given in the confession were later subject to inquiry by a court of law or any other person. As an obligatory sacrament there are also duties placed on members of the clergy to respect the relationship of trust and confidence that exists in religious confessions. In each of the churches where confession exists as a sacrament, disciplinary action may be taken against those members of the clergy who violate their penitent's trust and confidence. This means that a Catholic priest who chooses, with full knowledge of the above-mentioned penalty, to divulge the contents of a confession to any person, even if required to do so by an order of any court of law, faces immediate

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[403] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217).

[404] <http://www.library.uu.nl/wesp/populstat/Africa/kenyag.htm> accessed on 2 September 2006.

excommunication from the Catholic Church. This penalty does not require the authority of the Pope to execute. It is immediate and permanent, and can only be lifted by means of a lengthy and difficult appeal to the Apostolic See.[405]

2.2 Argument from the Constitutionally guaranteed Religious Freedom

Forcing a clergy member to testify or reveal information that violates his or her religious beliefs raises constitutional issues under both the Free Speech and Religion Clauses.[406] The Constitution of Kenya in its bill of right grants to its citizens the freedom of conscience, freedom of a religion, freedom to manifest, propagate one's religion or belief in worship, teaching, practice and observance, both in public and in private.[407] The priest-penitent privilege is covered by the bill of right on religious freedom. Just as in the celebrated American case – *People v Phillips* – where the court held that provisions of the New York State Constitution protecting free exercise of religion prevented the court in a criminal case from forcing a Roman Catholic priest to testify as to what a penitent told him during confession regarding where and how he had received stolen goods. The court ruled that such compulsion would infringe upon the priest's right to practice freely his religion.

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[405] Michael A Perrella, 'Should Western Australia Adopt an Evidentiary Privilege Protecting Communications Given In Religious Confessions?' Evidence (Law), Volume 4, Number 3 (September 1997), <http://www.murdoch.edu.au/elaw/issues/v4n3/perr43.html> accessed on 26 October 2004.

[406] Christopher R. Pudelski, 'Comment: The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-communicant Privilege in a Post-Smith World' [Winter, 2004, 98 Nw. U.L. Rev. 703] <www.law.northwestern.edu/lawreview/Sample_Pudelski.pdf> accessed on 29 July 2006.

[407] Constitution of Kenya, 78.(1)

The confidence of the confessional is a highly significant factor for a penitent deciding whether to receive the sacrament. The possibility of the court eavesdropping on the confessional may have a substantial deterrent effect or possibly even a prohibiting effect for those otherwise inclined to receive the sacrament.[408] More cogent is the argument that compulsory disclosure may be an unnecessary restriction on the free exercise of religion protected by 78 (1) of the Constitution of Kenya, which protect freedom of thought, conscience and religion and the manifestation of a person's religion or belief. At least in those religions where regular confession is essential for those practicing the faith, it could be said that the law's intrusion into the sanctity of the confessional unduly interferes with the practice of the faith. More generally, it may be said that if it becomes generally known that the secrets of the confessional have been passed on to other persons, even under compulsion of law, the relationship between a minister and church members could be severely damaged.[409] Moreover, in churches where the sacrament is obligatory the consequences could be seen to be so significant as to actually prohibit the free practice of these religions. This would rightly be interpreted as prohibiting the free exercise of one's religion.[410] This is because penitents who have committed offences against the State may be less inclined to confess such sins if they are aware that the courts have the power to force disclosure of the contents of any confession. This presents a particularly grave dilemma for penitents who have committed a serious offence against the State and in most need of the spiritual guidance

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[408] Michael A Perrella, 'Should Western Australia Adopt...' (n 405).
[409] New Zealand Law Reform Commission, Preliminary Paper No 23, EVIDENCE LAW: PRIVILEGE, A discussion paper, May 1994 Wellington, New Zealand.
[410] Michael A Perrella (n 16).

offered in a religious confession. For a penitent whose religion considers the sacrament of confession as obligatory, it could hardly be said that such a person is not prohibited from practicing his or her religion. Furthermore, legally compelling members of the clergy to disclose the contents of a confession without approval from the penitent places them in an inexplicable dilemma, which can clearly prohibit the free exercise of their religion. The Rules of Evidence should provide constitutional safeguards to members of the clergy who give spiritual guidance and forgiveness to those who may have fallen by the wayside. This practice could not be freely carried out if it were accepted that members of the clergy could be obliged to give evidence of confidential communications they have received from persons consulting them for spiritual purposes. It is therefore argued here that a statutory provision for the privilege secures a constitutional guarantee for the priest-penitent privilege. It achieves this by allowing – a) the free exercise of religion by the penitent by not discouraging or possibly even prohibiting penitents from going to confession, and b) a clergy's religious role in protecting and sealing a penitent's confidence without the real dilemma or fear of penal sanctions.[411] The argument adduced by the New Zealand Law Reform Commission for the inclusion of the privilege in their jurisdiction appears to be cogent in the Kenyan situation. The commission argued that absence of privilege would become an unnecessary restriction on the freedom of worship. In 1963, such unnecessary restriction was examined by the Supreme Court in the American Jurisdiction in the case *Sherbert v Verner*[412] adopted a three-prong test to determine whether a state

[411] Michael A Perrella, 'Should Western Australia Adopt...' (n 405).
[412] 374 U.S. 398 (1963).

regulation unconstitutionally burdened an individual's right to the free exercise of religion provided under the First Amendment of the American Constitution. The test required a court to consider whether the regulation prohibited the free exercise of religion; if so, the state had to demonstrate that a compelling state interest supported the regulation. If the state can prove a compelling state interest, it then must show that there was no less restrictive way to accomplish its interest.[413]

The late Basil Cardinal Hume, Archbishop of Westminster, wrote to the British Secretary of State in 1997 regarding a possible effect of pending legislation, the Police Bill, on the confessional seal. In asking for a clarification on how the Home Office would interpret and apply such legislation, the Cardinal stated that an individual penitent who goes to confession to a priest has to be certain that, whatever the crime, not only will the priest never reveal what is said, but that the state will not conspire to undermine the Church's guarantee of absolute secrecy.[414] Such certainty can be guaranteed by a statutory provision rather than leaving the matter at the discretion of the judge in a judicial process. Cardinal Hume noted further that if a sacramental confession can be bugged, worse still, used in evidence, a fundamental right to the practice of

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[413] Christopher R. Pudelski, (n 17); However, in 1972 in *Employment Division v Smith,* the Court expanded the Sherbert test by adding an inquiry into the sincerity of a person's religious belief. The application of the compelling state interest test in free exercise cases continued for over thirty years until the Court, in *Employment Division v Smith,* abandoned the compelling state interest test in a remarkable shift in constitutional jurisprudence. The Court held that a law does not violate the Free Exercise Clause if it is a generally applicable and neutral law that has the incidental effect of burdening a religion. The situation in Smith involved a conflict between the religious use of peyote and an Oregon statute that criminalized the use of the drug. The Court upheld the Oregon law because it was neutral and generally applicable to all religions. It also only incidentally burdened the petitioner's religious rights because the object of the state law was not to directly target religion, but to criminalize the use of peyote (a drug). The Smith decision sparked tremendous debate among scholars and courts, and it is not clear that some or all of Smith remains good law today.

[414] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217).

religion is put in jeopardy.[415] In addition, the constitutional provision for freedom of expression,[416] which it is argued includes both the positive right to speak freely and the negative right not to speak is also compromised by a denial of the priest-penitent privilege[417] since it would imply his divulging what he would rather not like to reveal based on religious conviction.

2.3 Argument Based on a Comparatively Higher Standard of Confidentiality Than the Attorney-Client Privilege

A lucid jurisprudential comparative analysis of the priest-penitent privilege on the one hand and the attorney-client privilege on the other shows that there may be more rationale to protect the priest-penitent privilege even more than the attorney-client privilege. Under the utilitarian framework as per Wigmore, some similarly compelling grounds justify the legal recognition of the priest-penitent privilege and attorney-client privileges. Communications between clergy and penitents and attorneys and clients are both accompanied by a significant expectation of confidentiality. In addition, forcing either an attorney or a member of the clergy to act as an informant for the state would be likely to render 'full and satisfactory maintenance of the relation between the parties' impossible.[418] In addition, public support of these privileges can be inferred from their continued existence in laws of many jurisdictions in both the civil and the common law

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[415] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217).
[416] Section 79, Constitution of Kenya.
[417] Christopher R. Pudelski, (n 17); citing *Haig Bosmajian*, The Freedom Not to Speak 193 (1999) (arguing that the right not to speak can be constitutionally grounded in concerns for basic human dignity, including humiliation and degradation).
[418] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).

countries – United States inclusive.[419] While both privileges merit preservation due to the significant social benefits they provide, a side-by-side comparison of these benefits reveals that their value to society is not identical. The heightened value of the social utility provided by the clergy-penitent privilege may be appreciated in light of a simple hypothetical.

Assume an individual consults both an attorney and a member of the clergy regarding behaviour that is both legally and morally suspect. While the attorney will address the client's legal concerns, the member of the clergy will address the moral or spiritual well-being of the penitent. Although the attorney will facilitate an efficient and fair disposition of any legal problems, he/she is not likely to concern himself/herself with the underlying causes of the behaviour that made legal representation necessary in the first place. In contrast, the cleric specifically addresses the underlying causes to help the penitent overcome them. To state the point differently, resolution of legal problems, although important, should not be valued above a lasting moral change in an individual that may prevent many (potentially more serious) legal problems in the future. Since the justification of the clergy-penitent privilege under Wigmore's analysis is stronger than that generally asserted in defence of the attorney-client privilege, the current statutory recognition of the attorney-client

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[419] 'The Law of the Seal of Confession' *Catholic Encyclopaedia,* On-line version <http://www.newadvent.org/cathen/13649b.htm> accessed on 11 April 2005; R. Michael Cassidy, 'Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?' *William and Mary Law Review.* Volume: 44. Issue: 4, 2003, 1627+. <http://www.questia.com/PM.qst?a=o&d=5002015023> accessed on 28 July 2006.

privilege and non-statutory recognition of the clergy-penitent privileges cannot be explained on utilitarian grounds.[420]

Under the privacy rationale jurisprudence, the analysis of the two privileges reveals so much to be desired under the present statutory state of affairs. Since the privacy rationale's inherent persuasiveness may lead it to provide the basis for future legislation or judicial decisions, it merits consideration in relation to the clergy-penitent and attorney-client privileges. As far as both privileges concern activities that are highly personal, the clergy-penitent and attorney-client privileges appear to satisfy the fundamental requirement for protection under the privacy rationale. However, the strength of the privacy rationale for the clergy-penitent or attorney-client privileges may be distinguished by the nature of the communications they protect. When an individual seeks legal advice, he/she seeks to obtain knowledge regarding his/her legal relation to the state or other individuals. Thus, confidential attorney-client communications allow individuals to order their legal relations without surrendering to the state or other individuals a significant advantage. In contrast, an individual seeks to confess to a member of the clergy due to concern for her relationship with God. Thus, confidential clergy-penitent communications allow individuals to order their spiritual lives without state interference. The state must concern itself with its legal relation to

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[420] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132). Bailey arguing against the imposition of the mandatory-reporting law on the priest-penitent privilege, points out that the hypothetical referred to above could involve an individual who fears that his behaviour constitutes abuse. If such an individual had the misfortune of living in a state that had simultaneously abrogated the clergy-penitent privilege and maintained the attorney-client privilege, he would be placed in a precarious position. This shows the absurdity of providing for the solution of legal problems, but not the underlying causes of harmful behaviour and highlights the grave fallacy of the current attack on the clergy-penitent privilege as a fall-out from the Clergy Sex abuse scandal.

individual citizens and the legal relations of its individual citizens. Therefore, the attorney-client privilege creates privacy in an area of public concern. Since the state has no interest in regulating an individual's relationship with God, the clergy-penitent privilege maintains privacy in an eminently private area. Whereas it protects an activity that is inherently more private, the clergy-penitent privilege claims stronger support from the privacy rationale than does the attorney-client privilege. Thus, the privacy rationale does not justify providing for the attorney-client privilege and leaving out the clergy-penitent privilege.[421]

2.4 Argument from Church Autonomy

It is said that the most fundamental basis of Clergyman-Communicant Privilege is the Church Autonomy Doctrine. Although modern courts do not recognize it, the clergyman-communicant privilege is best understood as grounded in church autonomy principles. The church autonomy doctrine recognizes that the church, with respect to ecclesiastical matters, possesses a sphere of authority into which the state may not intrude. This is well buttressed in the *Phillips* case where the Court of General Sessions of the City of New York refused to compel a priest to testify or face criminal punishment. The opinion of the Court was resolute. The ordinances and sacraments of the church are essential for the free exercise of its religious beliefs and as such have to be protected and not interfered with. The Court gave example with Baptism and the Eucharist. Any law of the State or decision of the Court that 'should prevent the

[421] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).

administration of one or both of these sacraments' would be violating the freedom of religion already granted in the Constitution. Therefore, any intrusion in the sacrament of confession would be an infringement of the freedom of religion.[422]

The freedom of religion enshrined in the constitution 'presupposes a constitutional model consisting of two spheres of competence: government and religion. It therefore sets apart from the sphere of civil government and thereby leaves to the sphere of religion those topics regarding the establishment of religion, the resolution of its doctrines, the composition of prayers, and the teaching of religion.[423] This point was well captured by Thomas Jefferson when he made the following observations:

> I consider the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, and exercise. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government.... Every religious society has a right to determine for itself the times for [it religious] exercises, & the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the constitution has deposited it.[424]

As alluded to in *Phillips*, a number of hierarchical churches impose an absolute clerical vow of silence concerning confessional communications, sometimes unaffected by the waiver of the penitent himself.[425] Other churches not subject to canon law also

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[422] Christian Legal Society, 'THE FIRST AMENDMENT BASIS FOR THE CLERGYMAN-COMMUNICANT PRIVILEGE' <http://www.clsnet.org/clrfPages/pubs/clergyPriv.php> accessed on 25 July 2006.

[423] Christian Legal Society, (n 33).

[424] Christian Legal Society, (n 33). Citing Thomas Jefferson Letter to Rev. Samuel Miller (1808) from THOMAS JEFFERSON: WRITINGS, 1186-87 (Merrill D. Peterson ed. 1984).

[425] As Cannon Law declares, the sacramental seal is inviolable; 1983 CODE OF CANON LAW, at Canon 983, secs. 3, 4. The use of the Latin construction *ne fas* ('absolutely wrong') shows how seriously the norm of this canon is regarded. Put simply, the priest is strictly forbidden to reveal by any means whatever anything the penitent may have disclosed to him. Even the penitent

require that communications be kept confidential. The church autonomy doctrine dictates in both of these scenarios, but especially in the former, that courts not interfere with the disciplines of the church.[426] The contention here is that the denial of priest-penitent privilege would amount to a State intrusion into the 'sphere of autonomy' reserved to the religious body by the constitution. In general terms, this sphere of autonomy includes ecclesiastical governance, the resolution of doctrine, the composing of prayers, and the teaching of religion. It also entails the admission and guidance of members, directing them on expected moral behaviour, and excommunication of members as the case may be.[427]

2.5 Argument from Utilitarian Benefits of the Privilege and the Consequences of lack of Privilege

On the one hand, it is argued that the negative consequences that attend the non-inclusion of the priest-penitent privilege as one of the statutory privileges outweighs the positive, while on the other hand, the gain by inclusion outweighs the attendant loss by far.

Although, the Cost Benefit balancing analysis of the priest-penitent privilege is grossly inadequate, it does appear that the benefits society enjoys from the clergy-

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cannot release him from this obligation. The Canon Law Society of Great Britain and Ireland, the Canon Law: Letter & Spirit 535 (1995). As commentary to Canon 983 points out: Neither the canon nor earlier interpretations admit exceptions to the norm: this is the meaning of the expression: 'in any way. . . by word or in any other manner or for any reason.' No distinction is made among the matters confessed, whether the sinful action itself or attendant circumstances, or the acts of satisfaction of penances imposed, etc. The secrecy concerning the penitent and his or her confession of sins that is to be maintained is properly described as total. Cited in R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217).

[426] Christian Legal Society, (n 33).

[427] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).

penitent privilege outweigh the limitation it imposes on the state's power to collect evidence.[428] Since gathering empirical evidence to support or refute this claim is probably impossible,[429] this conclusion follows from a few general observations. Although the estimated social cost of the clergy-penitent privilege is presumably significant as Wigmore[430] indicates, with respect to the potential costs imposed on society by evidentiary privileges because the whole life of the community, the regularity and continuity of its relations, depends upon the coming of the witness. Yet this cost is probably not as great as one might first expect. This is so because the cost of a privilege measured in undiscoverable evidence would not properly include information that would not exist but for that privilege.[431] Thus, the cost imposed on society by the clergy-penitent privilege consists only of information that would be volunteered to the clergy in the absence of the clergy-penitent privilege.[432] Which of course would not take into account the amount of information which would have been volunteered to the clergy had there been a privilege.

Shawn argues that balanced against these costs, the sustained legitimacy and eminently positive social behaviour that the state derives from the clergy-

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[428] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).

[429] It's impossibility stems from the fact that no solid empirical data exists to support the estimates of either critics or proponents as to either the costs or the benefits of privileges. This lack of empirical evidence on either side is likely to persist due to the presumably insurmountable difficulty inherent in proving the non-occurrence of an event. That is, in proving the extent to which people would communicate in the absence of the privilege. ('Developments in the Law: Privileged Communications', 98 HARV. L. REV. 1450, 1473 (1985) at 1474, cited by R. Michael Cassidy, (n 30)

[430] JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286 (John T. McNaughton rev. ed. 1961; cited by R. Michael Cassidy, (n 30).

[431] That is to say, that the existence of the privilege itself or at least people's presumption that such a privilege exists makes it possible for more confidential information to be volunteered to the priest compared with its non-existence.

[432] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).

penitent privilege carry considerable weight. Perhaps more than any other privilege, the clergy-penitent privilege protects communications that are likely to be withheld from the state even in the face of serious legal consequences.[433] In such circumstances, attempts to compel clergy to reveal the content of confidential communications may lead to highly visible spectacles of clergy imprisonment without actually providing more evidence available to society.[434]

Although, the above state of affair alone – the will to defy a legal requirement on the part of some members of society – does not justify an exception to that requirement. However, when imposing specific duties, the state must consider its general ability to ensure compliance. In addition to broad public disapproval, episodes of clergy imprisonment may cause public doubts about the state's ability to compel compliance to rules of evidence. Such disapproval and doubts may diminish the state's ability to operate in other less controversial areas. Therefore, by maintaining the clergy-penitent privilege, the state sustains its own legitimacy. Society also benefits from the clergy-penitent privilege as individuals improve their lives in the process of confidential confession and similar spiritual counselling with clergy. When effective, such confession and counselling instils in penitents a sense of responsibility, provides penitents with the encouragement to abandon behaviour that is condemned by church and state alike, and in the process, imparts moral understanding that leaves penitents

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[433] One author illustrates this situation by alluding to Antigone's decision to simultaneously obey the gods and disobey King Creon. Cf. Shawn P. Bailey, (n 29); Fr Brian Lucas, a non-Catholic minister, made this observation quite clear when he said, 'It does not really matter what you blokes do in Parliament. No Catholic priest will break the seal of the confession.' Cf. New South Wales Parliament Parliamentary Debates, 1989, 12757 (16 November 1989), cited by Michael A Perrella, 'Should Western Australia Adopt...' (n 405).

[434] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).

better than they were before committing the acts that caused them to seek clergy assistance in the first place. Confidential confession or counselling with clergy may be particularly effective because people longing to improve their behaviour wilfully submit themselves to it (rather than being compelled as in the case of state-imposed rehabilitation).

Confidential confession or counselling may also be particularly effective because it motivates penitents through reference to deeply held religious beliefs and the related moral imperatives—a means of motivating desirable behaviour generally not available to the state. Thus, to the extent that confidential confession and counselling lead people to overcome abusive behaviour, the clergy-penitent privilege is consistent with the goal of preventing child abuse, which has been used as a pretext by some States in the United States to abrogate the privilege with the obligatory child sexual abuse reporting laws.[435] The cumulative result of many people's efforts to overcome their harmful behaviour through confidential communications with clergy will naturally translate into broad social benefits.[436] Many evidentiary scholars share Shawn's opinion

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[435] Statutes enacted in nine states in the US achieve a complete abrogation of the clergy-penitent privilege in relation to the duty to report suspected abuse. Cf. CONN. GEN. STAT. ANN. §§ 17a-101, -103 (Lexis 2001); MISS. CODE ANN. § 43-21-353 (Lexis 2001); N.H. REV. STAT. ANN. §§ 169-C:29, -C:32 (Lexis 2000); N.C. GEN. STAT. §§ 7B-301, -310 (Lexis 2000); OKLA. STAT. ANN. tit. 10, §§ 7103, 7113 (Lexis 2000); R.I. GEN LAWS §§ 40-11-3, -11 (Lexis 2001); TENN. CODE ANN. § 37-1-411 (Lexis 2001); Act of June 7, 2001, sec. 1, 2001 Tenn. Pub. Acts 351 (to be codified at TENN. CODE ANN. § 37-1-403); TEX. FAM. CODE ANN. § 261.101 (Lexis 2000); W. VA. CODE ANN. §§ 49-6A-2, 7 (Lexis 2001), cited by Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).

[436] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132). Shawn argues that abrogating clergy-penitent privilege is counterproductive in the fight to protect children from sex abuse: First, even facing imprisonment, many religious leaders are not likely to disclose confidential information learned in confession or similar counselling. Second, abrogation of the clergy-penitent privilege through an abuse-reporting law will almost certainly deter potential abusers from confessing. Thus, the benefits society derives from the preservation of the clergy-

with respect to the utilitarian benefit of the priest-penitent privilege. The New Zealand Law Reform Commission affirms:

> It is also possible to make an argument that society as a whole benefits from the practice of hearing confessions. Guilty persons can be helped by religious advisers to become reconciled with themselves, their family and society. This process may even involve a confession to law enforcement authorities.[437]

Concurring to the above Michael Cassidy writes:

> Relationships with clergy are thought to be socially desirable because they may lead to repentance and spiritual salvation, a non-secular goal, and because they may lead to reform of errant conduct, a secular goal. Apart from the individual's interest in spiritual health and redemption, society has an interest in fostering a morally-grounded and well-behaved citizenry.

Even Wigmore, a general critic of privileges, made a strong argument for recognizing the clergy-penitent privilege on utilitarian or instrumental grounds[438] of preventing disclosures that would tend to inhibit the development of a confidential relationship that society has decided is socially desirable. For these reasons, respect for clergy confidences can be seen as instrumental in safeguarding the important role that religion plays in a civil society.[439]

Pudelski has applied this utilitarian instrumental argument to the hotly debated issue of child abuse vis-à-vis the priest-penitent privilege by arguing that spiritual confessions may actually prevent child abuse. Because of their proximity to penitents, clergy members are in a 'unique' position to be the first or only individuals exposed

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penitent privilege outweigh any benefits that might be derived from abrogation of that privilege.

[437] New Zealand Law Reform Commission (n 20).

[438] R. Michael Cassidy, (n 30).

[439] R. Michael Cassidy, (n 30).

to knowledge of incidents of abuse. This argument contends that the clergy member can prevent future incidents of child abuse by providing meaningful counselling and advice that improves the likelihood that an individual will not commit such acts again. In this way, the overall benefit of counselling, which has the potential to reach repeated child abusers, can outweigh the state's interest in prosecuting one individual in one trial in one state or federal court.[440]

Firstly, this privilege excludes a negligible amount of information to the courts. Secondly, the clergy may not divulge even if legally obliged; and finally, the attempt to compel disclosure would create unnecessary conflict between the Church and the State that would present the State in a bad light. As pointed out by the New Zealand Law Reform Commission, 'the amount of information lost to the courts by recognition of the privilege will be small. Not only are clergy unlikely source of relevant and admissible evidence, but they may also refuse to give evidence of confessions to them as a matter of conscience - irrespective of any legal obligation. The bulk of authority suggests that a member of the clergy would not give way to any State law which conflicts with Church law. As one Catholic priest put it, the issue being dealt with here is two completely different jurisdictions – that of God and that of the State. On many occasions clergy have made it quite clear, they would obey God's law where it conflicts with the laws of humankind.[441] It takes a minimal amount of intuitive practical reasoning to conclude that most priests – especially those whose faiths codify absolute confidentiality on confessional matters – would make a choice between what they see as the laws of God

[440] Christopher R. Pudelski, (n 17).
[441] Michael A Perrella, 'Should Western Australia Adopt...' (n 405).

and the laws of the state.[442] It is clear then that the lack of a clergy-penitent privilege in these circumstances places some clergy in an unfair and inescapable dilemma.[443] As Bailey puts it, laws that interfere with the clergy-penitent privilege force clergy members to choose between loyalty to God and the state.[444] Experience has shown that in such a conflict the state looses.[445] Moreover, if the benefits of access to the information are at best marginal, denying protection risks creating a largely unnecessary conflict between church and state.[446]

Therefore, this justification for the clergy-penitent privilege, unrelated to the concern for fostering confidences or protecting privacy, is a practical one. Society pays cost collateral to the inhibition of the clergy-penitent relationship by not recognizing the privilege. If a priest or minister resists a call to testify about a confidential conversation, society cannot obtain such testimony without compulsion. Such compulsion of a minister, either in the form of a fine or imprisonment, would engender public backlash or perhaps undermine public faith in government. The community feels uncomfortable when ministers are forced to testify despite deeply held religious objections. Moreover, as we have seen, such compulsion may be ineffective, leading to public sentiment that the secular state has punished a cleric simply for adhering to religious convictions. Legislative enactments of the clergy-penitent privilege may thus be seen as nothing more than a pragmatic recognition that the costs to society in enforcing a duty to

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[442] New Zealand Law Reform Commission (n 20).
[443] Michael A Perrella, 'Should Western Australia Adopt...' (n 405).
[444] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).
[445] Shawn P. Bailey, 'How Secrets Are Kept...' (n 132).
[446] New Zealand Law Reform Commission (n 20).

disclose are too high to warrant the effort. Even Jeremy Bentham,[447] a sharp opponent of privileges, supported the clergy-penitent privilege, not on instrumental or privacy grounds, but rather for reasons of religious tolerance. 'But, with any idea of toleration, a coercion of this nature [forced clergy testimony] is altogether inconsistent and incompatible.'[448]

3. Arguments Against the Privilege

Let us now look at some of the arguments against enshrining the priest-penitent privilege in the Rules of Evidence especially as presented by Michael A Parrella.

3.1 The Privilege would hardly be invoked

Given the lack of case law over the last few centuries to support any conclusive common law rule on the issue of clergy-penitent privilege, it would be fair to say that the issue has not been and will probably not be raised very often. For this reason, some argue that there is no need for a statutory privilege, instead the issue should remain in the realm of judicial discretion. However, the other side of the coin then is, if it is not going to be used often what is the harm in having it? Moreover, enshrining the privilege

[447] Professor Wigmore referred to Bentham as the "greatest opponent of privileges." cited by R. Michael Cassidy, (n 30)

[448] Although Bentham was himself a Protestant, he argued on religious liberty grounds that government should have no part in undermining auricular confession, which is so central a part of the discipline of the Roman Catholic Church, 588-91; JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 588 (Rothman & Co. 1995) (1827). Cited by R. Michael Cassidy, (n 30).

in the Kenya Evidence Act would strengthen the relations between Church and State. There is much to be gained from the State securing the rights of its citizens who engage in religious confessions by legislating for their right to unfettered confidentiality between clergy and penitent.[449]

Alternatively, by not having the privilege legislatively provided for, one may only cause undue pressure on faithful members who receive confession, whether as an obligatory sacrament or not. One may also create undue tensions for members of the clergy attempting to abide by the spiritual and the temporal, and in some cases see clergy receive a needless conviction and possibly go to prison for their religious beliefs. Legislating for a clergy-penitent privilege provides a real opportunity for the State to strengthen its relations with the Church.[450]

3.2 **Privilege Proliferation**

Many professions seek to have their relationships of confidence covered by an evidentiary privilege and may put many claims forward. These include, among others: doctor-patient; accountant-client; psychotherapist-patient; journalist-informant etc.[451] It is feared that this would open the floodgates for other professions and groups in society who also feel their confidential communications ought to be privileged.[452] It is further

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[449] Michael A Perrella, 'Should Western Australia Adopt...' (n 405).
[450] Michael A Perrella, 'Should Western Australia Adopt...' (n 405).
[451] Michael A Perrella, 'Should Western Australia Adopt...' (n 405).
[452] Michael A Perrella, 'Should Western Australia Adopt...' (n 405).

argued that many jurisdictions are moving for the amelioration of privileges such as the marital communications privilege.[453] What is the wisdom in terminating or restricting some and enshrining more privileges, it is asked.[454] However, it is important to remember that the relationship, which exists in the confessional, is unique in that it deals with matters of the conscience, of acknowledging guilt and seeking spiritual absolution - it is not concerned with physical or material welfare or temporal punishment. It exists on a different level to a privilege protecting marital communications and to some faithful; it may even be considered a privilege of greater importance.

Moreover, there is this mistaken assumption that 'in all situations involving privileges, a deliberate decision has been made by legislators and judges that testimonial exemptions are valued more highly than the pursuit of justice'.[455] The present researcher feels that the above assertion tends to juxtapose illegitimately 'provision for privilege' and 'pursuit of justice'. Conversely, it could even be asserted that denial of certain privileges such as the priest-penitent privilege is tantamount to a denial of justice.

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[453]Australian Law Reform Commission 1987 (ALRC) and New Zealand, have all made an extensive study on the spousal privilege with a view to restrict it

[454] Michael A Perrella, 'Should Western Australia Adopt...' (n 405).

[455] *Jennifer Elrod,* 'Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute' (\\server05\productn\N\NYL\7-1\NYL109.txt unknown Seq: 62 15-JAN-04).

3.3 Hindering Police Investigations

A legitimate argument mounted in relation to rules of evidence and particularly the law of privilege is the concern that a privilege may hamper police investigations by creating an obstacle to fact finding. However, as already discussed above, history has shown that there are very few situations where a member of the clergy would be compelled to answer questions asked in relation to the contents of a confessional. Furthermore, there are other means available to law enforcement agencies to obtain the evidence they require without the need to question members of the clergy.[456]

3.4 Problem of Definitions and Discrimination against non-Catholic confessions

Criticism has been raised against the definitional problems associated with terms such as 'religious confessions' and 'cleric', 'priest' in that they will inadvertently result in discrimination against some religions. In particular, arguments have been raised that such a privilege will end up discriminating against those religions that do not have a ritualised form of confession.[457]

As we have seen in chapter 3, complex definitional problems arise, as with many legislative provisions, and that in particular, the use of the words '... according to the

[456] Michael A Perrella, 'Should Western Australia Adopt...' (n 405).
[457] Michael A Perrella, 'Should Western Australia Adopt...' (n 405).

ritual of the church ...', 'discipline enjoined', etc, may, in operation, only apply to Catholic confessions. However, the fact that the sacramental nature of the Catholic confession renders it different in character to that of other denominations and religions does not make that an insurmountable definitional obstacle. Furthermore, most members of the clergy who receive the sacrament not only abide by a strict code of ethics, but also the self-regime to enforce that code. If other religions or any other class of people have a history of a strictly enforced code, then perhaps the legislature should be made aware of the importance placed on that particular relationship and legislate accordingly. If any religion has a ritual, which involves confidences that are extremely important to their particular belief system, then the State should recognise these and legislate the privilege accordingly. If the rite deals with genuine conscience issues and not merely a private clergy-parishioner conversation, then the legislature, as representatives of people's interest limited only by the ends of justice, should recognise and legislate for a form of clergy-penitent privilege that corresponds with the reality.[458]

With respect to definitions, it has been suggested that given the above difficulties, the privilege should be separately defined for those classes of communication where the need for absolute secrecy is clear and well understood by the clergy. This is in contradistinction to a general, discretionary privilege for confidential relationships.[459] It is also relatively simple to formulate an absolute rule as the communications are all of the same character and relatively easily defined in contrast with communications to a spouse or doctor, for example, where the breadth of

[458] Michael A Perrella, 'Should Western Australia Adopt...' (n 405).
[459] New Zealand Law Reform Commission (n 20).

the matters that may be covered makes it difficult to go for an absolute rule. An additional benefit from an absolute rule is that it will provide a fixed reference point for argument by analogy under the general discretion.[460]

The term 'confession' should be defined widely to include a person confessing in order to seek some spiritual response for himself. The other term used in the definition, 'minister' should refer to a minister of religion. However, for a religious body the constitution or tenets of which do not recognise the office of minister of religion, the term should include a person for the time being exercising functions analogous to those of a minister of religion. The term 'religion' need not itself be defined. Ideally, it should include all forms of religious belief and be widely interpreted. Nevertheless, there are limits. It could be argued that a group, which propagates ethical beliefs not based on the existence of some Deity or higher being, does not qualify under this definition. Further, the definition implies that there must be some form of organised religious structure or hierarchy. The mere self-constituted relationship of teacher and disciple would not be enough.[461]

The provision should be broadened to include religious and spiritual communications in a general sense, whether or not they involve atonement for sin, and regardless of whether they are made within a structured religious community. The important criteria are that the communications must be made for the religious or spiritual benefit or comfort of those making them. Moreover, those to whom

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[460] New Zealand Law Reform Commission (n 20).
[461] New Zealand Law Reform Commission (n 20).

communications are made should be qualified because of their status within an established community of worship, or their special position of trust for the person making the communication, to receive communications of that kind. The privilege would apply to the communication itself, and to all other discussions that reasonably relate to the communication. This definition would not include, however, communications for purely temporal purposes (such as advice on the control of a wayward child). Nor would it comprehend rationalist systems of ethical conduct, which do not depend on the belief in some god, divine force or other spiritual basis for life.[462]

A proposed bill will look like this:

Privilege for communications with ministers of religion

(1) A person has a privilege in respect of any communication between that person and a minister of religion if the communication was

(a) made in confidence to or by the minister in his or her capacity as a minister of religion; and

(b) made for the purpose of the person obtaining or receiving from the minister religious or spiritual advice, benefit or comfort.

(2) A person is a minister of religion for the purposes of this section if he or she has a status within a church or other religious or spiritual community, which requires or calls for that person to receive confidential communications of the kind referred to in subsection (1) and to respond with religious or spiritual advice, benefit or comfort.[463]

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[462] New Zealand Law Reform Commission (n 20).
[463] New Zealand Law Reform Commission (n 20).

4. Conclusion

In this chapter, we have presented arguments in support of a statutory provision of the priest-penitent privilege by showing that the penitent, the priest, the church and the State stand to benefit by such provision. We have also addressed the arguments against the privilege by demonstrating how the State stands to loose if it does not make exempt priests from giving compulsory testimonial evidence in a court of law, and by proposing a priest-penitent privilege bill.

GENERAL CONCLUSION

One may rightly ask – why such a storm in a teacup? What is the need of wasting ink on the issue since in the first place, the issue of compelling a priest to testify with respect to what he comes to know at a sacramental confession does not really arise.[464] Courts, as we have seen in other jurisdictions, are rightly reluctant to require clergy to testify about what takes place in the confessional.[465] However, if indeed the issue arises under the Kenyan jurisdiction, the presiding judge most likely would follow the pre-1897 English decisions on the Common Law. On the other hand, if the presiding judge is of the same school with Spry, V. P.,[466] he/she may also depart from any such pre-1897 decision if convinced that it was wrong and that there is no reason of judicial policy[467] for continuing to follow it; then he/she may look to other Common Law jurisdictions for guidance. What is more, that, definitely would guarantee a positive outcome to the priest being subpoenaed to give evidence. Second, why bother for a statutory inclusion when the judges themselves can apply their discretion whenever such a case arises.[468] This is based of course on the assumption that the categories of

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[464] There seems to be not even a single case under the Kenyan jurisdiction that has judicially considered this privilege.

[465] New Zealand Law Reform Commission (n 20).

[466] *Mayers v Akira Ranch Ltd*, (No.2) [1972] E.A. 347.

[467] Tudor Jackson, *The Law of Kenya, An Introduction*, (n 228) 18.

[468] This is an adaptation of the contention that the law of privilege goes beyond the law-as-statute perspective. That is to say, there is more to the law of privilege than what is provided in the statutes as seen in these cases, *Slavutych v Baker*, [1976] 1 S.C.R. 254; *R v Gruenke*, [1991] 3 S.C.R. 263; and *Ryan* in particular, emphasize that the categories of privilege are not closed and that the identification of new relationships that meet the Wigmore criteria is possible – Cf. John Lowman and Ted Palys, 'Going the Distance: Lessons for Researchers from Jurisprudence on Privilege' – A Third Submission to the SFU Research Ethics Policy Revision Task Force, 7 May 1999.

privilege are not closed in view of the Kenya Evidence Act Sections 129 to section 130. In jurisdictions where there no statutory provision of the priest-penitent privilege, like Kenya, the relevant law in protecting the priest-penitent privilege is the common law.[469]

Nevertheless, in response to the two objections above, it has to be said that there is a lot of unclear and doubtful situations and the nature of law is to foresee and provide for the same. In addition, should such a privilege as important as the priest-penitent privilege be left to the vicissitudes of the judge's decision when there is not much guidance in this case under the Kenyan jurisdiction? If it is an important privilege, as has been shown, then to avoid uncertainty and the vagaries of the judiciary, there is need to make a statutory provision of the priest-penitent privilege.

According to Tudor Jackson, the common law, the doctrines of equity, and the statutes of general application only apply as far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. [470] The fundamental problem however is the question of whether most of the statutes transplanted into Kenya by the colonizers, harmonizes with the circumstances of Kenya and its inhabitants. According to William Twining, the mother of the Kenya Evidence Act – The Indian Evidence Act – might be cited as 'an example that many transplants survive for long periods almost unchanged and without any significant

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[469] John Lowman and Ted Palys, 'Going the Distance: Lessons for Researchers from Jurisprudence on Privilege' - A Third Submission to the SFU Research Ethics Policy Revision Task Force, 7 May 1999.

[470] Tudor Jackson, *The Law of Kenya, An Introduction,* (n 228) 4.

relation to local social economic and political changes and conditions.'[471] That notwithstanding, it has clearly been integrated into the professional life of generations of the Bar in India, Kenya and elsewhere and has become a stable part of their intellectual capital.[472] With respect to the priest-penitent privilege, it appears that the American legal system has adapted and harmonized the inherited British legal system into their social economic political and religious framework. In its historical past, there is no political climate of anti-Catholicism. What is more, not only that a good percentage of the population practices the Catholic faith, but also a good number of the established churches have some form of clergy-penitent relationship. With respect to Kenya, there was no history of anti-Catholicism in its past; about seventy percent are Christians of which about thirty percent are Catholics, not to talk of other religious groups which enjoy some kind of clergy-penitent affiliation. It appears that proceeding without providing for the privilege in the evidentiary rules of Kenya would be tantamount to perpetuating a rule of evidence inconsistent with the fundamental guides furnished by the Common Law itself.[473]

However, it is not as if the argument is that of looking for safety[474] in a statutory provision in order to guarantee unlimited confidentiality of information received at the

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[471] William Twining, 'Generalizing About Law: The Case Of Legal Transplants' The Tilburg-Warwick Lectures, 2000 General Jurisprudence, Draft For Comment www.ucl.ac.uk/laws/jurisprudence/docs/twi_til_4.pdf - accessed on 2 September 2006.

[472] William Twining, 'Generalizing About Law: The Case Of Legal Transplants' The Tilburg-Warwick Lectures, 2000 General Jurisprudence, Draft For Comment www.ucl.ac.uk/laws/jurisprudence/docs/twi_til_4.pdf - accessed on 2 September 2006.

[473] R. Araujo, S.J., 'International tribunals and rules of evidence:...' (n 217).

[474] And if such safety is not guaranteed, then all the Church can do is alert potential penitents about a risk to which they would expose themselves – under the Kenyan Law – if they come to confess their sins to a priest and he is summoned to give evidence!

confessional. The guarantee of unlimited confidentiality is already assured within the religious code and in the lives of the bearers of the confidences irrespective of statutory provisions and judicial decisions.[475] The gain of law reform is to look at the loopholes in the law and remedy it in order to save the State and the citizens from embarrassment.

[475] John Lowman, (n 469); Lowman brought out this point of view well by citing Chair of the American Sociological Association (ASA) Committee on Professional Ethics (COPE) on the issue of researcher – subject privilege, which appears not to have any such legal guarantee.

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