A Case for Priest-Penitent Privilege in Nigerian Jurisprudence

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Abstract

Law is an instrument of human development. Its principles touch on every aspect of man's endeavour. The science of jurisprudence enquires into all these areas with a view to prescribing an adequate role for law. This paper has examined the Nigerian evidence law of privilege which inures in certain specified human communications. The study has discovered that such privilege does not cover the confidential interactions between a priest and a penitent, and which lacuna is detrimental to the religious rights and lives of many a Nigerian. Besides, under this legal regime, a priest is rendered vulnerable to some form of prosecutory and court torments that would nevertheless be met with conscientious objections. After a critical and comparative analysis of issues, this paper has suggested a review of the relevant Nigerian legislation in order to vest the all-important priest-penitent communications with privilege.

Key Words: Religious Freedom; Priest; Penitent; Jurisprudence; Privilege; Law

Introduction

Time and time again, many socio-legal systems treat certain forms of interpersonal communications with great respect and dignity. Doctor-patient, lawyer-client, husband-wife, priest-penitent relations are just few instances thereof. Often times, these relationships which the law sometimes calls *fiduciary*, have enormous implications for the administration of justice in the relevant jurisdictions. For instance, under the Nigerian law of contract, the law assumes that in this type of relationship one person is in a superior position to the other and the trust and confidence of that other is reposed in him. This assumption, no doubt, triggers off some legal consequences. Thus, in every contract between persons in fiduciary relationship, the law, at the event of litigation *prima facie*, reads undue influence from the part of the superior party over and against the other unless an independent advice is proved. This is perhaps as a result of what Lord Denning calls 'Inequality of Bargaining Power'[1] on account of which there is a duty imposed on the superior *ab initio* to disclose all relevant facts associated with the contract; otherwise, the said contract may be vitiated by misrepresentation.

In the same manner, the law treats communications between persons in some of the above relationships and more as privileged and thus cannot be required to be tendered in evidence in any proceeding save and except where there is a waiver. Hence, in Nigerian evidence law and practice, a judge cannot be compelled to answer any questions as to anything which came to his knowledge in court in his capacity as a judge.[2] Similarly, "no public officer

[1]I E Sagay, *Nigerian Law of Contract*(Ibadan: Spectrum Books Ltd., 1993) 345.

[2]*R v Harvey* (1858) & Cox .C.C. 99 at 164; *Buccleuch (Duke) v Metropolitan Board of*

shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure".[3] In the same vein, a husband or wife is not a compellable witness whether in civil or criminal proceeding except in few instances with regard to communications between the spouses during the pendency of the marriage.[4] But more notable is the confidentiality attached to the communication between a lawyer and his client. Thus, a legal practitioner in Nigeria, for instance, is not allowed to disclose any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client.[5] The implication is that a counsel cannot be called to give evidence that would infringe the client's privilege of secrecy. And by way of extrapolation, this provision is also applicable to interpreters, clerks and agents of the legal practitioner[6], and which obligation not to disclose continues even after the employment has ceased.[7] It does not however seem that under common law generally, communications between a doctor and his patient is that privileged.

Be that as it may, it is most appalling, or shall we say, surprising that the privilege attached to the above mentioned communications does not extend to the priest- penitent relationship under the Nigerian law. One serious consequence is that a catholic priest, for instance, may be subpoenaed under relevant circumstances to testify as to the confessions made to him by a penitent. Yet, such a priest is absolutely forbidden under inviolable seal, by canon law, from letting out such an ultra-confidential communication. Again, under the Nigerian criminal law, a priest may, given the present position of the evidence law, be charged for the offence of accessory after the fact to the offences committed by the relevant penitent who confessed to him.

This paper seeks to examine the effect of the real conflict between the Nigerian evidence law and the provisions of the canon law with regard to the confidentiality attached to the confessions made to priests by penitents. Will it just suffice on the part of civil law to immediately dismiss, with the wave of the hand, the canon law provision as mere customary failing of course, as it were, the incompatibility test of validity?[8] What of the religious

Works (1872) L.R.5 H.L. 418 at 433. See also Nigerian Evidence Act 2011, section 188.

[3] Section 191 of Evidence Act, (supra)

[4] Evidence Act 2011, section 187. Exceptions are however found as specified in section 182(1) of the Act.

[5]Ibid, Section 192

[6]Ibid, Section 193.

[7]Ibid, Section 192 (3).

[8] In Nigeria, enforceability of a custom depends on whether or not such custom passes the validity tests of repugnancy to natural justice, equity and good conscience, incompatibility and public policy. In the instant case, the provision of the Code of Canon Law 1983is quite incompatible with the provision of *EvidenceAct,* (supra), and as such can be said to fail the incompatibility test (High CourtLaw, Cap.61, Eastern Nigerian Laws, 1963, section 20 (1). This law has been adopted in High Court Laws of the states that were in the former Eastern states, namely, Abia, Anambra, Ebonyi, Enugu, Imo, Rivers, Cross-River, Bayelsa, and AkwaIbom. See also High Court Law, No 9 of 1964, Mid-Western Nigeria, section 13 (1), presently applicable in Delta and Edo states. But also see generally AOObilade, *The Nigerian Legal System*, (Ibadan: Spectrum Books Ltd, 2002)108.

beliefs of millions of Catholics the world over in the absolute inviolability of the confessional seal? The paper will therefore, make a case for the legal recognition of the privilege attendant to the priest-penitent communication by suggesting that it be accorded a statutory flavour. We are, however, not unaware of the multi-religious character of Nigeria for which the fruit of our study can, *mutatis mutandis*, be extended to other forms of spiritual communications made to any priest in the exercise of his priestly duties. The high point of the paper is the argument that the denial of privilege to such a communication will, no doubt, tantamount to an infringement on religious freedom of both the priest and the penitent.

Meaning of Priest-Penitent Privilege

Priest-penitent privilege, otherwise known as clergy privilege (*privilegiumclericale*), is an application of the principle of privileged communication that protects the contents of communications between a member of the clergy and a penitent, who share information in confidence. ForCatholic Encyclopedia, this privilege, which concept is distant from confidentiality as in non-disclosure agreement, stems from the principle of the seal of the confessional.[9] Again the Black's Law Dictionary refers to this as a privilege barring a clergy member from testifying about a confessor's communication.[10] All these definitions regard the privilege as the right of a clergyman to refuse to divulge confessional information received from a person during confession.

Hence, it seems that the Encyclopedia and the Law Dictionary are rather more restrictive of the concept in tracing its origin to the principle of confessional seal, thereby confining it to the Catholic Church penitential practice. But later descriptions extend it to communications made by a person to a priest, rabbi, cleric or minister in the course of not only confessions but also of similar course of discipline by other religious bodies, that are privileged from disclosure.[11] Besides, these communications to clergy members must be made while acting in the professional capacity of a spiritual adviser and with the purpose of dispensing religious counsel, advice, solace, or absolution.[12] Some descriptions have even broadened the privilege to include all forms of individual or group counseling for marital and other personal problems.[13]

Thus, the meaning of priest-penitent privilege where it exists is that the communication between a priest and a penitent cannot, under any circumstance, be required to be disclosed to a third party for whatever reason. What however varies in some descriptions is whether the privilege belongs to the priest or to the penitent or both. If it is a clergy privilege as recognized by the Encyclopedia and the Black's Law Dictionary above, then it means that it is only at the waiver by the clergyman in question that the content of the communication can be disclosed. If it is

[9]<http://en.wikipedia.org/wiki/priest - penitent _ privilege>. Accesses on 13th November 2014.

[10]B A Garner (ed.), *Black's law Dictionary* (7th Ed., Minnesota:West Group, 1999) 1216 – 1217.

[11]<http://www.answers.com/topi/priest-penitent-privilege- 2>. Accesses on 13th November 2014. .

[12] Ibid.

[13] Ibid.

that of the penitent, then any possible disclosure must be made with the consent of the penitent. If it belongs to both, then mutual consent is required.

Be that as it may, under Canon Law, and in Pre-Reformation England, priest-penitent privilege is coterminous with the confessional seal in which no disclosure of the confessions can be made in spite of any waiver from the penitent. In this sense, the confessions are absolutely inviolable. Today, this inviolability is still absolute perhaps only in the Roman Catholic Church. But while this privilege is recognized in some civil jurisdictions, it is not so in others. Although the issue of priest-penitent privilege has perhaps not arisen in Nigerian case law, exclusion of it from the Evidence Act 2011 provisions on privileged communications amounts in our own view to denial of it.

'Privilege' in Nigerian Evidence Law

The word 'privilege' derives from the Latin *privilegium* meaning a right or favour that is granted by law though contrary to the usual rule. Privilege as a term is adorned with various shades of meaning in law. Under Roman law, privilege is a special right especially one given priority to a creditor. Privilege can also refer to an affirmative defence by which a defendant acknowledges at least part of the conduct complained of but asserts that the defendant's conduct was authorized or sanctioned by law. For instance, in the tort of defamation, privilege, absolute or qualified' can be a complete defence. Again, privilege designates a special right, exemption, or immunity granted to a person or class of persons exempting him especially from a duty. This is the type of privilege or immunity granted to diplomats and certain members of the executive arms of national governments. However, for the purpose of this paper, we are restricted to the meaning of privilege as it refers to confidential communications taking place in certain relationships.

According to Black's Law Dictionary, privilege refers to an evidentiary rule that gives a witness the freedom to not disclose the facts asked for, even though it might be relevant. It is therefore the right to prevent disclosure of certain information in court, especially when the information was originally communicated in a professional or confidential relationship.[14] In Nigerian law of evidence, Nwadialo argues that the subject of privilege is concerned with cases where a witness has a right or duty to refuse to disclose a relevant fact by answering a question or produce a relevant document[15] Although the exclusion of such matters from disclosure or proof is, no doubt, apparently detrimental to the party who is thereby handicapped in the presentation of his case, privileged matters may still not be proved however material they may be. Certainly, this adjectival practice has been justified on the basis of the avoidance of an evil to society or third parties when the injury resulting from disclosure of a fact would outweigh the advantage derived from the disclosure.

Specifically, the Evidence Act 2011[16] groups those privileged matters into two

[14]B.A. Garner (ed.), (n 11) 1215 & 1217.

[15]FNwadialo, *Modern Nigerian Law of Evidence* (2nd Ed., Lagos University Press, 1999) 100.

[16] This Act repealed the Evidence Act that was first enacted in 1943 and took effect from 1st June 1945. With regard to the subject of privilege, both Acts are in *parimateria*. Matters on evidence fall within the Exclusive Legislative List contained in part I of Second Schedule to

classes, namely, official communications and records of state matters, on the one hand, and privileged communications between private persons, on the other. In common law, they are respectively described as state privilege[17] or privilege on ground of public policy[18], and private privilege.[19] State privilege refers to affairs of the state, judicial and other official information, and information leading to the detection of crimes. The jurisprudential reason is that their disclosure may affect the security of the state or the good administration of public affairs or justice.

Thus, far back in 1966, the court in the case of *Moronu vBenson & others*[20]stated that State privilege is not necessarily premised on the confidentiality or official nature of relevant information alone, but more importantly on the fact that the information cannot be disclosed without injury to the public interest. On the other hand, private privilege protects from disclosure matters which affect a person in his private capacity. The person that may be affected can either be the witness himself or the party for whom the witness testifies. In either case, none is compelled or allowed to disclose the relevant matter by way of oral evidence or tendering documents.

There are however important distinctions between the two classes of privilege enunciated above. While a private privilege may be waived by the person to whom it belongs or, with his consent, by his agent, a state privilege is not waived in the interest of public security or policy. Under the Evidence Act, however, the head of a department or the public officer concerned may, in certain cases, permit a privileged fact to be given in evidence.[21] In private privilege, where the subject-matter is a document and which document or secondary evidence of it has been obtained independently by the opposition party, either is admissible.[22] Hence, in the English case of *Rumpling v DPP*[23], a husband who was charged with murder wrote a letter to his wife in which he confessed the crime to her. Even though such a letter is regarded by law as a privileged matter between them being a communication between spouses, the letter happened to be interrupted and got to the hands of the prosecution. The House of Lords held that the letter could be tendered and admitted in evidence as part of the prosecution's case. Under state privilege, however, such a document is absolutely privileged so that not even secondary evidence of it is admissible.[24]

As we insinuated above, instances of state privilege relate to that attached to the "affairs of state". This includes the privilege to prevent from disclosure unpublished official records, official communications to public officers and matters that are of public interest under relevant conditions.[25] It also includes

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the Constitution of the Federal Republic of Nigeria 1999 (as amended). Evidence is item 23 therein.

[17]Nokes, *An Introduction to Evidence* (4th Edition)184 –194

[18]Phipson, *Evidence* (11th Ed) Chapter 13.

[19]*Moronu v. Benson &Ors* (1966) N.M.L.R. 66.

[20]*Supra*

[21]Evidence Act 2011, Section 190.

[22]*Calcraft v Guest* (1898) I O.B. 759

[23](1964) A.C. 814.

[24]*Hughes v Vargas* (1893) T.L.R. 92.

[25]Evidence Act 2011, Section 190 (1).

judge,s privilege not to disclose, *inter alia*, anything which came to his knowledge in court as such a judge.[26] Similarly, in Nigeria, there is a state privilege attached to information as to commission of offence by virtue of which no magistrate, police officer, or officer employed in or about the business of any branch of the public revenue shall be compelled to say from where he got information as to the commission of any relevant offence.[27] On other hand, instances of private privilege under the Evidence Act refer to communication between a solicitor and his client, husband and wife, and so on.

Surprisingly and unfortunately, none of the above classes of privilege refers to priest-penitent communication. Thus, the Evidence Act does not include the communication between spiritual advisers and their penitents or communications as privileged, and such a privilege cannot either directly or by implication be read into the provisions. This is particularly true as "*expressiounusestexclusioalteris*" is a canon of statutory interpretation understood to mean that express mention of one thing is the exclusion of the other. Therefore, since among all the professional privileges it is only the lawyer-client privilege that is recognized by the *Evidence Act*, it follows that the confidential information that pass from a penitent to the priest even in confessional is not privileged in spite of the enormous socio-religious and psychological consequences associated with its disclosure. In what immediately follows, our study shall focus, as a case study, on the nature of the inviolability of the "confessional seal" as it is understood under the provisions of the 1983 code of canon Law, which is the church law in force governing church practice and discipline for the whole Catholic world.

The Confessional Seal and Its Inviolability under Canon Law

According to the teaching of the Catholic Church, confession is the method used by the church by which individual men and women may confess sins committed after baptism and have them absolved by a priest. While official church publications refer to this practice as Sacrament of Penance or Sacrament of Reconciliation, many lay people still use the term 'confession' in reference to the Sacrament. Catholics believe that priests have been given the authority by Christ to exercise the forgiveness of sins here on earth, and it is in the name of the Father, the Son and the Holy Spirit that the penitent is absolved. In strictly theological terms, the Catholics believe that the priest acts *in persona ChristiCapitis*(in the person of Christ the Head) and receives from the church the power of jurisdiction over the penitent. While a catholic confesses his sins, mortal or venial, he feels strongly assured that the priest will not disclose any matter heard at the confessional. This is what is known as the confessional seal, which is adequately protected by provisions of the canon law.

In order to examine closely the canonical features of the confidentiality of confessions, it may be appropriate to copiously quote the relevant canons:

> Canon 983(1) – The Sacrament seal is inviolable; therefore it is a crime for a confessor in any way

[26]Ibid, Section 188.

[27]Ibid, Section 189.

to betray a penitent by word or in any other manner or for any reason.

(2) An interpreter, if there is one present, is also obliged to preserve the secret, and also all others to whom knowledge of sins from confession shall come in any way.

Canon 984(1) – Even if every danger of relationship is excluded, a confessor is absolutely forbidden to use knowledge acquired from confession when it might harm the penitent.

(2) One who is placed in authority can in no way use for external governance knowledge about sins which he has received in confession at any time.

A profound study of the provisions will reveal that the two canons deal with distinct aspects of confidentiality which the priest and others who may obtain similar knowledge from the confessional must maintain with regard to matters learned from the individual confession of sins by penitents. Canon 983 is concerned with any inviolable sacramental seal. Canon 984, on the other hand, is concerned with other use of knowledge obtained from confessional even when there is no disclosure of a person's sin. It is observed that the canons do not touch other forms of confidentiality to which the priest, nonetheless, is bound as is any recipient of confidences, and bound even more so as the relationship of the priest to the individual is analogous to that of professional counselor.

It is good to note that paragraph (1) of canon 983 which gives a definition of the confessional seal is almost *in parimateria* with paragraph (1) of canon 889 of the Code of Canon Law 1917. But in order to stress the gravity of the violation of the norm, the 1983 code uses the strong word '*nefas*' meaning 'crime'. Thus, neither the canon nor interpretations of it admit of any exception to the norm. This is the meaning of the expression 'in any way … by word or in any other manner or for any reason'. Again, no distinction is made among the matters confessed, that is to say, the sinful action itself, attendant circumstances, or the penances imposed, etc. Hence, the secrecy concerning the penitent and his/her confession of sins that is to be maintained is total.

However, in relation to the canonical sanctions at the event of breach, a distinction is made between direct and indirect violation of confessional confidentiality. While the former, namely, one in which the penitents identity is known or may readily be known circumstantially or by implication is punished by *lataesententiae* (automatic) excommunication of the priest and remission of which penalty is reserved only to the Apostolic See in accordance with canon 1388 (1), the later, that is, one in which there is only a slight danger that the penitent may be betrayed "is to be punished in accordance with the seriousness of the offence". But in any event, canon 983(1) prohibits both direct and indirect violations of confessional confidentiality. Corriden, Green and Heintschel remark that 'the 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.'[28] It is opined that in criminal matter, a priest may encourage the penitent to surrender to authorities. However, this is the extent of the leverage he wields; he may not directly or indirectly disclose the matter to civil authorities himself.[29]

Further, the duty to observe the confessional confidentiality extends not only to interpreters through whom canon 990 permits penitents to confess their sins but also to all who deliberately or indeliberately, accidentally or in any other way, come to a knowledge of sins from confession. But there are some notable distinctions. Canon 889 (2) of the 1917 code had been replaced in the 1983 code so that the obligation of confidentiality which persons other than priests have is no longer called sacramental seal. Again, at the event of betraying a penitent, these other persons are to be punished with a just penalty, not excluding excommunication in accordance with can 1388(2).

Nevertheless, the implication of canon 984 is that other use of knowledge gained from a penitent's confession of sins may be allowed or tolerated only if there is no danger of revealing the matters disclosed in the confession and the identity of the penitent, and if no harm will befall the penitent from the confessor's use of the information. Apart from this, any other use of the information is entirely proscribed by Canon 984 (1). In paragraph (2), the prohibition against the use of knowledge about sins obtained from the confessional is directed towards church authorities, lest they employ such knowledge in external governance. This prohibition is applicable whether or not the action of the authority is beneficial to the penitent. In point of fact, provisions of Canon 894 are *in parimateria* with those of Canon 890 of the 1917 code.

No doubt, the effect of the above canonical provisions is that the confessional seal is absolutely inviolable irrespective of the provision of every other law, civil or otherwise. Violation of it is regarded as grievous crime and attracts heavy penalty under church law. What then is the position with respect to the Nigerian evidence law which does not regard the confessed matters as privileged communication? Before we turn to this important consideration, let us see what obtains in other jurisdictions.

Confessional Seal and Priest-Penitent Privilege in other Jurisdictions

The issue of priest-penitent privilege has been a controversial subject-matter of many judicial interpretations in some foreign jurisdictions. In the United States of America, the earliest and most influential case acknowledging the priest-penitent privilege was *People v Philips*[30], where the court of General Sessions of the city of New York refused to compel a priest to testify or face criminal punishment. The court opined:

> It is essential to the free exercise of a religion, that its ordinances should be administered – that its

[28]JACorriden, TJ Green & DEHeinstschel (eds.), *The Code of Canon Law: A Text and Commentary,*(Bangalore: Theological Publications in India, 2001) 691.

[29]'Confessions' in *Wikipedia, the free encyclopedia*, <http//en.wikipedia.org/wiki/confession>. Accesses on 13th November 2014.
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[30](1813) I West L.J. 109.93.

> ceremonies as well as its essentials should be protected. 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…

It is to be noted, however, that a few years after *Philips* was decided, *People vSmith*[31] distinguished the case on the grounds that the defendant had approached the minister as a 'friend or adviser', not in his capacity as a professional or spiritual adviser. Therefore, in United States of America, the priest-penitent privilege is assured though the debate still exists about the circumstances under which the privilege applies. It seems that the capacity in which the clergyman is acting at the time of the communication is relevant and material in many American jurisdictions.

Nonetheless, in 2006, a bill was presented before the New Hampshire State legislature urging it to remove the priest-penitent privilege that has traditionally been honoured by the courts for over 200 years. Specifically, the bill sought to mandate all members of the clergy to report instances of suspected child abuse to the authorities. Although the earlier proposal of a similar bill was made in January 2003 and was not passed, the present writer does not know if the present bill was eventually passed. Be that as it may, a beehive of criticisms barraged the press against the object of the bill. Commenting on the bill, the Catholic League President, Bill Donohue, said 'the Sacrament of Reconciliation is conditioned on confidentiality, much like lawyer-client, doctor-patient,reporter-source relationships.'[32] He further stated that the Bill was flawed in three ways:

> It is an unconstitutional encroachment by the state on religion; it based on the deposition that child molesters are going free because priests are shielding them from the authorities, and; it is premised on the fatuous notion that priests would violate the seal of the confessional before ever going to prison.[33]

In the same vein, Jane De Haven argued that the bill strikes at the very heart of the constitutional protection of religious practice. It is the 'essence of state intrusion into religions affairs, and should not be even contemplated, as it is a serious breach of church and state separation, as well as outrageous act of anti-Catholic bigotry'.[34] And as if soliloquizing, Cameron McCormick observed that 'when I confess to a priest, I know that his lips are sealed, that he will never reveal my sins to anyone. That is the joy of confession.'[35] There are so many other comments either for or against the passage of the bill. But there is no doubt that up till today, many

[31](1817)2 N.Y. City Hall Rec. 77.

[32]'Catholic League Says New Hampshire Bill Targeting Confessional should Not Pass' in *Catholic News Agency,*<http//www.catholicnewsagency.com/new.php>. Accesses on 13th November 2014.

[33] Ibid.

[34]Ibid.

[35] Ibid

states in America have a statutorily entrenched priest- penitent privilege in their body of laws. In fact, under Rule 219 of American Law Institute's Model Code of Evidence, a penitential communication, that is a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of the discipline or practice of the church or religious denomination or organization of which the witness is a member" is privileged. What is however not uniformly settled was the issue of who enjoys the privilege. Is it the priest or the penitent or both? It is reported that in twenty-five states, the clergyman-communication privilege, statutory though, does not clearly indicate who holds the privilege. In seventeen states, the privilege was properly stated to belong to the penitent, while in six states, both the penitent and the clergy are expressly permitted by law to hold the privilege.[36]

In the United Kingdom, the position of the law at any point in time had been a matter of history and the peculiar circumstances of each case. Thus, generally, before the Protestants Reformation, the seal of the confessional had great import in the English civil courts. At this period, England was a Catholic country and Canon Law was highly influential. Therefore, the privilege seems indisputable from ancient writings which expounded the common law. Accordingly, 'there cannot be doubt that, prior to the Reformation, statements made to a priest under the seal of confession were privileged, except, perhaps, when the matter thus communicated amounted to high treason.'[37] Coke, also in his commentaries on the sources of Common Law accepted the existence of the privilege recognizing an exception in the case of high treason.[38] Let it however be noted that Canon Law recognizes no exception with regard to the principle of confessional seal once disclosure can lead to the knowledge of the identity of the penitent even in matters of high treason. But after the Reformation, the matter with regard to privilege attached to confession became different.

It could be reminisced that during the Reformation, the Church of England was established at the event of the breaking away of King Henry VIII from the Roman Catholic Church. Consequently, the respect of the courts for the seal of the confessional waned and became less compelling even without any contrary provision by statute. Therefore, the attitude of the courts in the Reformation and Post-Reformation England was greeted with ambivalence. Sometimes, it depended on the personal conviction of the judge presiding over a relevant case. Hence, during the trial of Reverend Father Henry Garnet for "conspiracy" in the "Gunpowder Plot", the defence that the plot had been communicated to him by Robert Catesby, the accused, under the seal of the confessional was not rejected out of hand by the court, an attitude which the Catholic Encyclopedia regarded as surprising given the political climate as at the time.[39]

[36]'Priest-Penitent Privileges' in Wikipedia, *The Free Encyclopedia*, <http//en.wikipedia.org/wiki/priest-penitent privilege>. Accesses on 13th November 2014.

[37]*Best on Presumption Evidence*, 569.Cited in the *Commentary to R v Hay* (1860) 2 F & F. 4.

[38]*Commentary to R v Hay* (Supra).

[39]'Seal of the Confessional' in *Catholic Encyclopedia (1913).*

Similarly, a good number of court decisions and judicial altitudes were respectful of the priest-communication privilege even after Protestant Reformation. In *R vRedford*,[40] which was tried on circuit, a Church of England Clergyman was about to tender in evidence a confession of guilt made to him by the accused and the Judge, William Draper Best, 1st Baron Wynford and the Chief Justice of the Common Pleas, checked him and indignantly expressed his opinion that it was improper for a clergyman to reveal a confession. Again *R v Griffin*[41], the accused was charged with willful murder of her infant child. The Church of England chaplain to the workhouse to which the accused was taken after she had inflicted the injuries, was subpoenaed to prove certain conversations which he had with the accused in connection with the transaction. The chaplain stated that he had visited her as her spiritual adviser to administer to her the consolations of religion. The Judge, Baron of the Exchequer, Sir Edward Hall Alderson strongly intimated to the counsel that he thought such conversations ought not to be given in evidence. The Judge opined that there was an analogy between the necessity for privilege in the communication between a solicitor and client on the one hand, and the conversation between a priest and a penitent in the course of rendering spiritual assistance. He further stated that although he was not laying this down as an absolute rule, he thought such evidence ought not to be given in evidence. This intimation eventually made the prosecution not to tender the evidence. It should however be observed that the case of *Griffin* was not dealing with communication received in a confessional but with conversation which took place in the course of giving spiritual advice. In other words, according to Okonkwo, the judge was prepared to extend the scope of the privilege perhaps, to extra-sacramental conversation.[42] It can thus rightly be assumed that the existence of the privilege in respect of communications made in a confessional was not in dispute.

Moreover, this assumption is subterranean to yet another decision of the court in *R v Hay*.[43] In this case, the accused, Hay, robbed the complainant of his watch and some money on the Christmas Eve. He was subsequently apprehended and charged with the offence. The Policemen who arrested him stated that from information he received, during investigation he went to the house of Rev. Father John Kelly, a Roman Catholic Priest, from whom he recovered the watch. The priest was then called as a witness *ad testificandum*. The priest appeared in court but objected to the form of the oath which was about to be administered to him. The following conversation took place.

Judge: What is the objection?

Priest: Not that I shall tell the truth, and nothing but the truth, but as a minister of the Catholic Church, I object to the part

[40](1823) cited in *Wikipedia, The Free Encyclopedia* (Supra).

[41](1853) 6 Cox CC 219.

[42]CO Okonkwo, 'The Privileges and Immunities of a Catholic Priest under Nigerian Law' in C.C. Nweze& C.O. Ugwu (eds.), *The Catholic Clergy under Nigerian Law* (Enugu: Hamson Publishing 1998) 46.

[43] Supra

that states that I shall tell the whole truth.

Judge: It is the whole truth touching the trial which you are asked; which you legitimately, according to law, can be asked. (He explained the priest's right to object to improper questions such as incriminating questions). You can, therefore, have no objection as a loyal subject, and in duty to the laws of the country, to answer the whole truth touching the case which may be lawfully asked. Therefore, you must be sworn. The priest then took the oath in the usual form and answered:

Priest: I have been twelve years a Catholic Priest at the Felling. On December Day, I receive the watch produced.

Prosecutor: From whom did you receive the watch?

Priest: I received it in connexion with the confessional.

Judge: You are not asked at present to disclose anything stated to you in the confessional. You are asked a simple question – from whom did you receive the watch which you gave the policeman?

Priest: The reply to the question would implicate the person who gave me the watch; therefore, I cannot answer it. If I answer it, my suspension for life would be a necessary consequence. I should be violating the laws of the church as well as natural laws.

Judge: I have already told you plainly I cannot enter into this question. All I can say is, you are bound to answer: from whom did you receive the watch? On the ground 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 stolen property on the 25th of December last. Do you answer it or do you not?

Priest: I really cannot, my lord.

Judge: Then I adjudge you to be guilty of contempt of court, and order you to be committed to gaol.

The priest was then taken into prison custody. However, this case impliedly assumes the existence of a privilege in respect of statements received in a confessional. Indeed, the headnote states that:

> Statements made to a priest or clergyman in sacramental or quasi-sacramental confession are privileged, but anything said or done out of confession is not so, even though its disclosure may incidentally disclose the identity of the party.

Be that as it may, we hold, with due respect that the failure to accord privilege also to anything said or done out of confession even if its disclosure

would reveal the identify of the penitent makes mess of the entire privilege. There need not be any distinction between statements made to priest in confessional and anything said or done out of confessional. This is because in the instant case, if the priest had answered the question, he would have stated that he received the watch from Hay. The only reasonable inference would then be that Hay went to confession and then surrendered the watch to the priest by way of restitution. Once it was demonstrated that he received the watch from Hay, then by the doctrinal of recent possession, Hay would be presumed to be the robber. Consequently, Hay would be convicted because of what transpired in the confessional, and the privilege under question would have been negated and denied. Therefore, it is our view that anything which might directly or indirectly tend to disclose what had been divulged in confession should rightly be within the privilege; otherwise, we should be sticking to form and not substance. It is therefore strongly suggested that in a case of this nature, the Judge should disallow the question. This will no doubt protect and give full effect to the privilege. To hold otherwise will impede the willingness to make restitution through a priest or even at all; and yet restitution is an essential part of not only criminal justice system but also of the sacrament of penance at least in the Catholic practice. Hence, even as privilege is assumed in *R v Hay*, such an assumption is not a real one, and based on the effect of the priest's refusal to testify as to from whom he received the watch, namely, putting him in prison due to contempt of court, the prosecutor could even have at least charged him also with the offence of receiving stolen property, compounding felony, and accessory after the fact of robbery.

Further, in *Ruthven v De Bonn*[44], *coram* Mr. Justice Ridley and a jury in 1901, the defendant, a Catholic priest, was asked a general question as to the nature of the matters mentioned in sacramental confession. The judge told the priest that he was not bound to answer it, and 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". Again in *Broad v Pitt*[45] where the privilege of communications to an attorney was under discussion, Best C.J. said that "although the privilege does not apply to clergymen, I for one, will not compel a clergyman to disclose communications made to him by an accused. But if he chooses to disclose them, I shall receive them in evidence".

While the above cases and judicial altitudes display respect for or at least sympathy for priest-penitent privilege, there are post-reformation cases which outrightly deny the privilege even in the absence of statutory stipulations. In *R vSparks*[46], the accused was a papist, that is, a Roman Catholic who in the course of his trial, was shown to have made a confession of his capital crime to a protestant clergyman. This confession was later received in evidence by the Judge and the accused was convicted and executed. Again, though it is doubtful that any of the parties had regarded the confession as sacramental, Lord Kenyon in *Du Barre vLivette*[47] in

[44] (1901) Reported in *Catholic Encyclopedia(Supra).*

[45](1828) 3 C & P, 518.

[46]*R v Sparkes* (C 1790) Unreported but cited in *Dubarre v Livette* (1791) I Peake 108; 70ER 96

[47](1791) Peake 77.

which *R vSparkes* was cited referred to Catholic confessional and remarked:

> The Papist religion (Roman Catholicism) is now no longer known to the law of this country, nor was it necessary for the prisoner to make the confession to aid him in his defence. But the relation between attorney and client is as old as the law itself (bracket mine).

Thus, in *Du Barre*, the court outrightly refused to accord privilege to catholic confessional seal and which judicial attitude was applied in so many cases. In *Greenlaw v King*[48], Henry Bickersteth, 1st Baron Langdale, M.R. said that "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 him." Again, in *R vShaw*[49], a witness who had taken an oath not to reveal a statement which had been made to him by the accused, was ordered to reveal it. Patterson J. held that 'everybody who tried the case except counsel and attorneys is compellable to reveal what they may have heard'. More, in *Wheeler v Le Marchant*[50]Jessel, M.R. stated that 'communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than the care of his life or his fortune, are not protected'. This is also the effect of the dictum of Denning, M.R. in *Attorney-General v Mulholland*[51]

> Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed to by a judge. Let me not be mistaken. The judge will respect the confidence which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only is it relevant but also it is a proper and, indeed necessary question in the course of justice to be put and answered.

Thus, in spite of the respect accorded the confidences received by a clergyman, and other relevant professionals, the confidence as stated in the instant case are not privileged if they are relevant to a particular case or administration of justice. Furthermore, the case of *R v Gilham*[52] concerned the admission of evidence against an accused of an acknowledgement of his guilt which had been induced by the ministrations and words of the protestant prison chaplain. The acknowledgement of the murder with which he was charged was made by the accused to the jailer and, subsequently to the authorities. It is, however, considered that in this case the accused appears to have made no acknowledgement of his crime to the chaplain himself. Therefore, the question of confessional privilege need not arise.

However that may be, in Republic of Ireland, priest-penitent privilege was recognized under the common law of the Republic as the privilege of the priest in

[48](1838) I Beav 145.

[49](1834) 6 C & P, 392.

[50](1881) 17 CL.D, 6 75, 44 Lt. 632.

[51](1963) 2 QBD.477, 489.

[52](1828) 1 Moody CC 186, CCR; 168 ER. 1235

the case of *Cook vCaroll*.[53] In this case, it was held by the court per Gavan Dufty, J that communications made in confidence to a parish priest in a parish consultation between him and certain of his parishioners were privileged and that such privilege could not be waved by a party thereto without the consent of the priest. It is also appropriate to note that in the Republic of Ireland, the subject matter of priest-penitent privilege transcends matters received at the confessionals. Hence, in *ER v JR*,[54] Carol J. held that communications made to a minister of religion who was acting as a marriage counselor are privileged. But in *Pais vPais*,[55] it was held that in marriage counseling, rather than being that of the minister, the privilege is that of the spouse and can only be waived by the mutual consent of the spouse. Furthermore, in the recent case of *Johnston vChurch of Scientology Mission of Dublin Ltd*[56], certain developments emerged. In this case, there was the issue of whether or not an order for discovery can be made in relation to counseling notes arising from spiritual practices of the 1st defendant, known as 'auditing' and 'training' which were conducted on a one-to-one basis. Geoghegan J. did not only extend the issue of privilege to other bodies other than Catholic Church, but also held that while there could be situations where a privilege might arise in relation to counseling by a priest or minister, or in relation to secular counseling, any such privilege might always be waived by the person being counseled. Therefore in Ireland, the privilege under discussion seems to be undergoing some shifts, firstly from being that of the priest to becoming that of the parishioner, and secondly from being strictly in relations to spiritual affair to that of becoming even a secular reality. In any event, privilege seems to be rest assured in Ireland. The Irish case of *Butler v Moore*[57] per Michael Smith, M.R. is rather surprising wherein a priest, Rev. Fr. Gahan, was imprisoned for contempt of court for refusing to answer whether John Butler, 12th Baron Dunboyne, professed the Catholic faith at the time of his death. While statute would have nullified Lord Dunboyne's will had such been the case, it is however doubtful whether the issue of privilege arose at all.

A profound study of the above discussions would reveal that both confidential matters and other forms of communication between a priest and parishioner are lumped together. It is also clear that in some presentations, reference is made to a catholic priest and in others to protestant clergy. Certainly, this is not to mean that there is no distinction between the Roman Catholic practice of the inviolability of confessional seal and other forms of confidential communications in other Christian denominations. Rather, it is to indicate that often the courts do not make distinctions among these forms of priest-communications, partly as a result of the fact that the practice of confessions did not automatically stop even in the post-Reformation Church of England. Even till date, evidences are that private or auricular confession is still practised by Anglicans even as it is especially common among Anglo-

[53](1945) 1R 515.

[54](1981) ILM R. 125.

[55](1970) 3 DPP, 830.

[56](2001) 1 IR, 682.

[57]*Butler v More* .Reported in MacNally's Rules of Evidence (1802), 253.

Catholics.[58] Private confessions were also evident in Lutheranism before the 18th and 19th centuries when practices eventually fell into disuse. But even at the present time, private confession and absolution in Lutheran church are still used when specifically requested by the penitent or suggested by the confessor.[59] Again, in certain serious cases such as adultery, fornication, other sexual transgressions and devices, etc, private confessions may be required to an authorized priesthood leader (Bishop) in the Church of Jesus Christ of Latter - day Saints (Mormonism).[60] Therefore, this near universal practice of private confession in many religious bodies may after all constitute an added fillip to the argument in favour of recognition of priest-penitent privilege in many jurisdictions.

Confessional Seal, Priest-Penitent Privilege, and Administration of Justice in Nigeria

Having gone thus far, it now remains for us to inquire into the possible attitude of Nigerian courts to a claim of privilege by a priest in relevant situations. There is no doubt that priests whether Christian, Islamic or Traditional, are generally respected by a people known for their deep religious sentiments. This explains why often at police check-points, priests are let alone to go their way on account of not only the fact that they are presumed to be law abiding but also as a result of the respect accorded to the hallowed vocation. It is also this respect that describes the situation whereby children and adult alike especially in the South East of Nigeria, greet priests, '*fadaafadaa*…'[61] almost with funfair and joy that knows no bound. Equally, it is this respectful attitude that enhances people's confidence and belief that priests are capable of proffering solution to almost any human problem in such a way that people always flood to churches and mosques seeking for advice from the priests in view of solution to their teething problems.

But in spite of this well of respect and adulation, can a priest invited to testify in a court proceeding have a recourse to any Nigerian law in a claim to privilege with regard to communications between him and his parishioner, penitent, or advisee? Okonkwo has argued that such recourse can be made to the common law.[62] For him, since priest-penitent privilege existed at common law, and which law had been incorporated in Nigeria as part of Received English law, together with doctrines of equity and statutes of general application, it follows that the common law position can guide the Nigerian courts in construing the issue of priest- penitent privilege when raised.[63] No doubt, Okonkwo's argument seems compelling. But that can scarcely be sound as it is an elementary study in Nigerian Legal System that once there is an autochthonous legislation on a subject matter, such legislation would supersede

[58]'Confession'in *Wikipedia, The Free Encyclopedia*. Accesses on 13th November 2014..

[59] Ibid.

[60] Ibid.

[61]*Father! Father*! This means greeting the priest with joy.

[62]CO Okonkwo(n 43) 47.

[63]Ibid. Received English Law made up of the Common Law, Doctrines of Equity, and Statutes of General Application as received in Nigeria by virtue of section 45 of Interpretation Act. See also Ordinance No 3 of 1863.

whatever is the position in common law or other parts of received English law. Therefore, since the Nigerian *Evidence Act* which took effect from 1945 contains provisions which it deems exhaustive on the issues of privileged communications, and since such provisions do not cover priest-penitent conversations, it appears that the better interpretation of the law would be that priest-penitent privilege is not recognized in Nigeria. Among all the canons of statutory construction, the rule that "express mention of one thing excludes the other" expresses the relevant position in Nigeria. Hence, since the Evidence Act mentions all the communications that it recognizes as privileged and fails to include communication under discussion, then the most compelling result is that there is no priest-penitent privilege in Nigeria. It would therefore appear ludicrous for Okonkwo to argue that there is no Nigerian statute which restricts or derogates from the privilege attached to statements received in a confessional. Nor will it suffice for him to maintain that the Evidence Act's recognition in its section 170, of privilege in connection with solicitor/client communication and silence on the communication under discussion is a mere ploy to avoid the post-Reformation doubt that existed in the cases at the time the Act was first prepared.[64] The truth is that if the Evidence Act had intended to include priest-penitent communication as privileged, it would have said so. Besides, in spite of being a creature of the colonial government, the Evidence Act which has undergone some amendments in some of its provisions would have included priest-penitent privilege if it had intended to do so. Therefore, Eze seems to be more correct in holding that 'despite the confidential relationship between the priest and who confesses their sins to him, it would appear that our law does not concede any privilege to such communication'.[65]

Yet, the implication of the exclusion of this privilege is quite enormous. Although there seems to be no reported case yet on priest-penitent privilege in Nigeria, one may decide, wrongly or rightly, to exploit the legal situation albeit, in future by subjecting the priest to legal crucibles in any one or more of the following circumstances. First and foremost, a situation may arise that may warrant the court to issue an order, *suomotu* or at the application of a party, to a Catholic priest to come and testify as to the content of the conversation between him and a penitent in the confessional. This order is what is technically known in law as "*subpoena ad testificandum*". At this event, what will be the likely reaction from the priest? Will the court succeed in extracting, even if *vi et armis*, the information sought? Well, one may hold that it depends on the priest's individual commitment to his calling which demands, *inter alia*, total obedience to church law and discipline. Canon law has provided for the absolute inviolability of confessional seal with the threat of automatic excommunication at the event of breach. The result is that the priest would be placed at the crossroad of choosing to obey the human law rather than God's law or vice versa. It is thus submitted that any Catholic priest worth the salt will definitely opt to re-enact the effect of *R v Hay* and other such cases where the priest was gaoled

[64]COOkonkwo, (n 43) 48.

[65]OC Eze, 'The Priest, the Confessional and Problems of Administration of Justice' in CC Nweze& COUgwu (Eds.), (n 43) 102.

for failure to disclose a confessional matter rather than violate a confessional seal at the pain of excommunication among other consequences. We are not unaware of the possibility of arguing that after all canon law is a custom that is susceptible to validity tests just as any other custom[66], and when subjected to this scrutiny, may be found to fail the test of compatibility. Thus, the effect may be that canon law provision on the matter is incompatible with the provisions of the Evidence Act and which effect renders the canon law provisions on the matter unenforceable in Nigeria. Be this argument as it may, yet it stands to reason that religion and its practices constitute an important and very deep aspect of human life. And there is no doubt that law should be made in order to enhance human potentialities rather than suppress them. Law is made for man and not man for the law. Besides, in our view, public policy may seem to favour priest-penitent privilege. It is therefore strongly suggested that this privilege be statutorily recognized in Nigerian justice system.

Further, a prosecutor may decide to charge a priest with the offence of 'receiving stolen property' as with scenario created in *R v Hay* where a priest received a stolen watch from a penitent who confessed to him. This offence is defended in the section 427 of the Nigerian Criminal Code[67] thus:

> Any person who receives anything which has been obtained by means of any act constituting a felony or misdemeanor, or by means of any act done at a place not in Nigeria, which if it had been done in Nigeria would have constituted a felony or misdemeanor, and which is an offence under the laws in force in the place where it was done, knowing the same to have been so obtained, is guilty of a felony.
>
> If the offence by means of which the thing was obtained is a felony, the offender is liable to imprisonment for fourteen years, except in the case in which the thing so obtained was postal matter, or any chatter, money or valuable security contained therein in which case the offender is liable to imprisonment for life. In any other case the offender is liable to imprisonment for seven years.
>
> For the purpose of proving the receiving of anything, it is sufficient to show that the accused person has either alone or jointly with some other person, had the thing in his possession, or has aided in concealing it or disposing of it.

A careful study of the above provision would show that the facts of *R v Hay* would perfectly fit into the definition of the offence in spite of the fact that a priest can in good faith receive the stolen property in order to deliver it to the owner in line with the privilege of restitution as part and parcel of the sacrament of penance. Yet in *R v Hay*, the priest's *bona fide* intention can be misconstrued as he delivered the stolen

[66]High Court Law of Legos State, Cap 52, Laws of Lagos State 1973, section 26(1). See General AOObilade, (n 9) 100 – 110.

[67] Cap C 38, Laws of the Federation of Nigeria, 2004. This is the criminal law applicable in and adapted by the states of the former Southern Nigeria.

watch to the authorities only when the police man went to his house and received it. Hence, it is clear that both the *actusreus*, namely receiving and having possession, and the *mensrea*, that is, knowing the property to have been obtained by stealing (a felony) are complete in the action of the priest. But then, this is a clear case of where the law can poignantly be shown as an ass insofar as a purely salutary act is now metamorphosed into a criminal act. In any event, however, while a priest can be ordered to come and deliver the stolen property via a *subpoena ducestecum* and may be bound, rightly so, to carry out the order, he need not be ordered by way of *subpoena ad testificandum* to testify as to the related confessional communications which may directly or indirectly reveal the identity of the penitent/suspect, and which communication ought to be privileged. Furthermore, it may also be possible to charge a priest, even if unsuccessfully, with the offence of being an 'accessory after the fact' to the offences which formed the subject matter of the confession made by the penitent/suspect to the priest. But will the prosecution actually succeed? A brief analysis of the offence as created in section 10 of the Criminal Code may be helpful. The section provides that 'person who receives or assists another who is, to his knowledge guilty of an offence, in order to enable him to escape punishment is said to become an accessory after the fact to the offence'. The relevant punishment for this offence depends on the punishment meted to the principal offender and on whether or not the principal offence is a felony, misdemeanor or simple offence. Thus, the computation is such that if the principal offence is a felony, then the punishment for the accessory after the fact to the felony is two years maximum imprisonment; otherwise it will be one-half of the punishment for the principal offence. At any rate, no charge with the offence in section 10 of the Criminal Code directed on a Catholic priest on account of hearing the confession of a penitent under a seal of secrecy ought to succeed if all the elements of the offence are considered. Thus, the word "receiving" should not be given a literal interpretation so as to include receiving a confession from a penitent. No doubt, the receiving as understood by law denotes the physical receiving of the whole person, not merely his words. However, even if a priest may be said to receive the penitent/suspect, assuming it is conceded, the priest cannot be said to do so in order to enable the penitent escape punishment even as he knows that the penitent is guilty. He rather refuses to disclose the penitent's confession because of the fact that both natural law and canon law prohibit the revelation to any third party of such confidences as obtained in the confessional.

More still, a malicious prosecutor may resolve to charge a priest with the offence of 'compounding felony' on the ground that the priest refused to open up with the information he received from the penitent at the confessional, the effect of which may lead to the exoneration of the felon-penitent. But is it likely that the charge would succeed? The offence of compounding is created in section 127 of Criminal Code thus:

> Any person who asks, receives, or obtains, or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person, upon any agreement or understanding that he will

> compound or conceal a felony, or will abstain from, discontinue or delay a prosecution for a felony, or will withhold any evidence thereof, is guilty of an offence. If the felony is such that a person convicted of it is liable to be sentenced to death or imprisonment for life, the offender is guilty of a felony, and is liable to imprisonment for seven years. In any other case, the offender is liable to imprisonment for three years.

A close look would show that the substance of the offence is agreement for certain considerations to conceal or refuse to prosecute a felony. But this is quite far from what a priest intends in the confessional even if he receives a property in restitution as sometimes required by the sacrament of penance. In the first place, there is no agreement whatsoever between the priest and the penitent. In the confessional, the penitent appears and accuses himself of his sins and transgressions before a priest who at the end of the day under relevant conditions absolves him. The priest is thus exercising an act quite different from, unconnected and parallel to the administration of criminal justice even if such an act is deemed to obstruct, delay or prevent the prosecution of the felon who confessed to him.

Secondly, the pivot of the provision gravitates around a temporal benefit, whether material or otherwise. Hence, sacral benefit which perhaps might accrue to the priest as a result of withholding evidence in accordance with the tenets of his religious faith and law is never contemplated by the legislator in creating the offence of compounding felony. Therefore, it is quite unlikely that a priest would ever fall within the ambit of the offence under discussion on the basis of his dancing to the tune of the confessional seal.

Be that as it may, the susceptibility of the priests to the above possible charges even if they succeed may rightly be considered by them as occupational hazards insofar as they derive from the demands of the seal of the confessional. Therefore, civil jurisdictions which fail to accord privilege to priest-penitent communications should rather be also prepared to jail catholic priests who will never reveal the confessional matter. It is a matter of conscience and religion. Certainly, in Nigeria, such a failure to provide for such privilege would amount to the denial of the priests'/penitents' fundamental right to freedom of religion, thought and conscience as guaranteed in section 38(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

> Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

There is no doubt that confession and its seal is part of the practices and observances of many religions especially Roman Catholic Christianity. Therefore, any attempt to puncture the demands of those practices and observances will necessarily lead to the denial of the adherents' religious freedom and conscience. The restrictions and derogations in section 45(1) of the

Constitution on the basis of interest of defence, public safety, pubic order, public morality, or public health, and which restrictions also affect religious freedom should be read in a way that should not touch the confessional seal which, as it were, is part of the warp and woof of Catholic Christian religion. It is thus strongly suggested that priest-penitent communications generally be privileged by statutory recognition in view of criminal and evidence law and practice in Nigeria. Undoubtedly, as Rupert Cross[68] observes, there seems to be better reason for recognizing this privilege than other recognized privileges. It is indeed on a higher pedestal than solicitor/client privilege or other privileges conferred by Evidence Act.[69] The needs of man are rather comprehensive than lopsided. Seeking for the satisfaction of his temporal needs for which confidential communication between him and his lawyer or doctor should be privileged, man should also see to it that his spiritual needs are also catered for by, for instance, according privilege to his confidential conversations with his spiritual adviser or confessor. In any event, the law precisely as made for man, should aid him to do so. The *raison d'etre* of the rule protecting solicitor-client communication as stated by Brouham and Vaux in *Greenough vGaskell*[70] can as well go for priest-penitent confidential conversations. The law lords had held that the privilege is founded on the necessity of having the aid of men skilled in jurisprudence for the purpose of administration of justice rather than on any particular importance which the law attributed to the business of people in the legal profession or of any particular disposition to afford them protection. Therefore, as they also held that it is not easy to see why a like privilege was refused to others, the force of their argument can equally be leverage unto recognizing similar privilege for priest-penitent communication which necessity is germane for the goal of religion.

Conclusion

This study was commenced with the aim of making a case for statutory recognition of priest-penitent privilege in Nigeria as it is specifically implicated in the Catholic Church law on confessional seal. However, as the study progressed, it was discovered that the privilege may after all be relevant to similar practices of other religious bodies especially as Nigeria is a multi-religious society. This ache is bellied by the findings in other jurisdictions where priest-penitent privilege was in issue even in non-catholic enclaves. However, we had returned off and on to our case study, namely, Catholic Confessional Seal, after excursions to similar, though non-catholic practices. But all in all, we arrived at the ultimate point where we strongly noted that the consequence of continued exclusion of the recognition of priest-penitent privilege in Nigeria is an infringement on the religious and conscience freedom of relevant citizens coupled with the embarrassments resulting from possible charging of some priests with certain offences in the Criminal Code. Therefore, to reiterate the need for proper recognition of priest - penitent privilege in Nigeria, it may be *ad rem* to align with the argument of Jeremy Bentham on the same subject matter.

[68]R Cross, *Evidence* (3rd Ed, London: Butterworths, 1967) 245 – 246.

[69]As already shown above.

[70](1833) 1 Mylne& Keen, 103. See also *Russell v Jackson* (1851) S. Hare 391.

Bentham while writing in the early years of the 19th century devoted an entire chapter to a serious, considered argument entitled "Exclusion of the Evidence of a Catholic Priest, Respecting the Confession Entrusted to him Proper" and which gist is that Roman Catholic confession should be exempted from disclosure in judicial proceedings, even in Protestant countries. He noted thus:

Among the cases in which the exclusion of evidence presents itself as expedient, the case of Catholic confession possesses a special claim to notice. In a political state, in which this most extensively adopted modification of the Christian religion is established upon a footing either of equality or preference, the necessity of the exclusion demanded will probably appear too imperious to admit of dispute . In taking a view of the reasons which plead in favour of it, let us therefore suppose the scene to lie in a country in which the Catholic religion is barely tolerated: in which the wish would be to see the member of its votaries decline, but without being accompanied with any intention to aim at its suppression by coercive methods. Any reason which pleads in favour of the exclusion in this case will, *a fortiori*, serve to justify the maintenance of it, in a country in which this religion is predominant or established.[71]

Bentham further argues that the advantage gained in the exclusion of priest-penitent privilege in the shape of assistance to justice would be casual and even rare, while the mischief produced by it as a result of decrease in the practice of confession would be constant and all-extensive. In other words, the temporal advantages that flow from such exclusion would in a great degree be lost and this loss would be quite extensive. This is because repentance from past misdeeds and consequent abstinence from future wrong acts, which invariably derive from the confessional, would indeed be rendered unfashionable.[72]

Therefore, the failure of any civil jurisdiction to protect the confidential communications between its priests and their penitents strikes at the very heart of the constitutional guarantee of religious practice. Such a failure in connection with the Catholic penitential practice would, no doubt, be creating an offence that can rightly be called 'being a catholic priest'. It is thus necessary that Nigeria which prides itself as the largest black democracy should consider recognizing statutorily this privilege in this era of nation building.

[71] 'Rationale of Judicial Evidence' in Bowring, *Works of Jeremy Bentham*, VII, BK IX, Pt. II, CA VI, Section 5, pp 366 – 368.

[72] Ibid.