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Aequitas canonica and Access to the Sacrament of Penance during the First Wave of COVID-19 in 2020 in the Light of the Principles of Canon Law

Abstract: Epidemiological measures during the first wave of the coronavirus epidemic in 2020 significantly affected the realization of religious freedom, including religious services and sacraments. This paper deals with one narrower topic in this area, namely, the regulation of access to the sacrament of penance in response to measures of secular law. It focuses mainly on the modalities of allowing access to this sacrament in the Catholic Church, both in terms of universal law and in terms of particular law and proposals for its formulation.

Keywords: Churches and religious societies, religious freedom, restriction of rights, Catholic Church, sacraments, Sacrament of Penance, canon law, analogy

Introduction

Epidemiological measures during the first wave of the 2020 COVID-19 epidemic significantly affected the exercise of religious freedom. This paper explores one narrower topic in this area, namely, the regulation of access to the sacrament of penance as part of spiritual ministry and care. In contrast to my first paper on

this topic, which was written in Czech and focused more descriptively,¹ I intend to focus this English-language paper on the fundamental theological issues related to the extraordinary manner of conferring the sacraments. This paper is largely inspired by the ideas of Professor Remigiusz Sobański, especially in his work *Nauki podstawowe prawa kanonicznego* [Basic Doctrines of Canon Law].²

The first section of the present article briefly delineates the situation created by the decrees of state authorities in the Czech Republic (which is very similar to the situation in other Central European countries). First, I will briefly summarize the basic data on the first wave of the COVID-19 epidemic, then I will present the measures leading to the restriction of access of clergymen to patients and clients of health, social and prison facilities and the measures leading to the restriction of the movement of the population.

Afterwards, I will discuss the regulations of the Catholic Church from a broader perspective. Assuming knowledge or easy traceability of the basic regulations regarding the ordinary and extraordinary modalities of the conferral of the sacrament of penance (individual absolution and collective absolution), I will focus on a special measure for the coronavirus epidemic: the note of the Apostolic Penitentiary of March 19, 2020, regarding the conferral of the sacrament of penance, especially the modalities of collective absolution, and its application in selected Catholic dioceses.

The third section synthesizes the findings of the two previous sections and shows the modalities of enabling access to the Sacrament of Penance actually implemented both in the Czech Republic and in other countries. On the basis of a critical evaluation, it presents some proposals for solutions to access to the sacrament of penance in this emergency situation, as well as examples of their implementation, including briefly the debate around them.

Sections four to seven represent the essential part of the work: a discussion of the various fundamental theological and canonical issues related to the proposals for extraordinary solutions to access to the Sacrament of Penance around Easter 2020.

¹ Damián Němec, “Přístup ke svátosti pokání v katolické církvi během první vlny epidemie koronaviru v roce 2020” [Access to the Sacrament of Penance in the Catholic Church during the First Wave of the Coronavirus Epidemic in 2020],” in *Právna politika a legislatíva v oblasti konfesného práva: Zborník z medzinárodnej vedeckej konferencie v rámci online medzinárodného vedeckého kongresu Trnavské právnické dni, 24–25 septembra 2020* [Legal Policy and Legislation in the Field of Religion Law: Proceedings of the International Scientific Conference of the Online International Scientific Congress Trnava Law Days, 24–25 September 2020], ed. Michaela Moravčíková (Trnava: Právnická fakulta TU v Trnave, 2020), 33–51. Available on-line at <http://publikacie.iuridica.truni.sk/too>.

² Remigiusz Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 1, Teoria prawa kanonicznego (Warszawa: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2001); and Remigiusz Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 2, Teologia prawa kościelnego (Warszawa: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2001).

In the conclusion, I summarize the results achieved, bearing in mind that no generally accepted solution has yet been found, while the solution that I propose in this paper can be implemented.

1. Brief Summary of Actions during the First Wave of COVID-19 in the Czech Republic with a Focus on Access to the Sacrament of Penance

In this section, I will limit myself to a minimalist description of the most important legal measures in relation to the first wave of COVID-19 in the spring of 2020, with a narrowed perspective: focusing on access to the sacrament of penance, especially around Easter.³ In 2020, Palm Sunday was April 5, and Easter Sunday itself was April 12.

Although the first air traffic measures were taken in early February 2020, the most important measure was the introduction of a national emergency (for the first time since the Czech Republic was formed in 1993!) on March 12, 2020, for a period of thirty days, which was repeatedly extended and only ended on May 17. Even after that, however, many restrictions continued, being relaxed in large part by early July 2020.

Even before the declaration of the state of emergency, the Ministry of Health decided on March 9, 2020, with effect from the following day, to ban visits to patients in inpatient health care facilities, residential social services facilities and residential respite social services facilities. Exceptions to this blanket ban were made: in the case of inpatient health care facilities, for visits to minors, patients with limited capacity, parturients, hospice patients and other patients in the terminal stage of terminal illness; in the case of social services facilities, for visits to minors, users with limited capacity and users in the terminal stage of terminal illness (the presence of fathers during childbirth was banned on March 18 and gradually relaxed).

As early as March 13, the Government issued a ban on visits to the accused, the convicted, and inmates in detention centres, prisons, and institutions for the execution of security detention for the duration of the state of emergency, effective March 14, from which individual exceptions could be granted by the Minister of Justice. It was only in connection with the end of the state of emergency that the the Ministry of Health issued a mandate to the Prison Service of

³ Emergency measures in connection with the COVID-19 disease in the Czech Republic are systematically reported, including short comments, on the website www.fulsoft.cz/33/prehled-pravnich-predpisu-sbirky-zakonu-a-dalsich-zdroju-souvisejicich-s-prokazanim-vyskytu-koronaviru-oznacovaneho-jako-sars-cov-2-zpusobuje-onemocneni-covid-19-uniqueidgOkE4NvrWuMkmaNigtjQulrL-J1k5knUT6QQQea68B8/, accessed August 5, 2022.

the Czech Republic to decide on visits on May 15, 2020. Restrictions on visits were relaxed by further decrees of June 18 and June 30.

Only after the end of the state of emergency did the the Ministry of Health allow visits to inpatient medical facilities and residential social services facilities from May 25, usually for a maximum of two persons preferably in an outdoor area. These restrictions did not apply to visits to persons in the terminal stage of terminal illness. Following further modifications, these restrictions were lifted as of July 4.

From March 16 to March 24, the Government of the Czech Republic banned the free movement of persons, with the exceptions of travel to and from work and for the provision of essential needs and tasks; among these were also occupational tasks providing individual spiritual care and spiritual services. This prohibition was repeatedly extended from March 23 until the end of the state of emergency.

Also on March 16, a Government resolution banned persons in social care institutions (homes for people with disabilities, homes for the elderly, homes with special treatment) from going outside the premises or grounds of the institution for the duration of the state of emergency, and on the same day, a Government resolution recommended that seniors aged seventy and over should not go outside their homes for the duration of the state of emergency, except to visit a medical facility to receive urgent medical care.

The ban on the free movement of persons from March 16 effectively meant a complete ban on public worship, modified by allowing limited attendance at funerals from March 23. Further relaxations came after Easter. On April 15, the Minister of Health permitted weddings with attendance of up to ten people, effective April 20, and on April 17, effective April 27, public services with attendance of up to fifteen people, while maintaining strict sanitary measures, including a ban on singing. The Minister of Health, by decision of April 30, increased the number of participants in public services to 100 persons with effect from May 11. Following the end of the state of emergency, the Ministry of Health authorized 300 persons to attend on May 19, 2020, with effect from May 25, 500 persons to attend on June 2, with effect from June 8, and 1,000 persons to attend on June 18, with effect from Monday June 22. The requirement to wear facemasks was lifted on June 29 with effect from July 1. The Ministry of Health then lifted the restriction on holding services on July 3 with effect from July 4, but already in the middle of the summer holidays, on July 23, with effect from July 27, it again restricted the number of persons to 500.

The restrictions on the movement of people were eased by the Ministry of Health measures on June 12 with effect from June 15, 2020, then on June 18 with effect from June 19, and effectively lifted on July 3, 2020.

2. Church-wide Measures of the Catholic Church Regarding the Administration of the Sacrament of Penance

In the situation of a de facto sanitary crisis, especially in Italy and Spain, resulting from the coronavirus epidemic, the Apostolic Penitentiary issued on March 19, 2020, a Note on the Sacrament of Reconciliation in the situation of the current pandemic (hereinafter “the Note”).⁴ On the one hand, the Note recalls the traditional teaching and discipline of the Catholic Church that individual confession, coupled with individual absolution, is the only proper form of celebrating the Sacrament of Penance, and that perfect contrition for sins, available to all Catholics, remains the extraordinary way of achieving the forgiveness of sins. On the other hand, it elaborates on the possibility of granting general absolution to multiple penitents without personal confession of sins.

The Note recalls that in the current epidemic situation, the case of grave necessity foreseen in can. 961 § 2 CIC/1983⁵ can (and need not) arise. The discernment of whether a case of such necessity has arisen belongs to the diocesan bishop in accordance with the principles agreed with the other members of the conference of bishops, and individual priests are to act accordingly. The bishop is to determine, according to the degree of pandemic contagion, the cases of grave necessity in which it is permissible to grant general absolution. Should a priest come to believe that a grave necessity so defined has occurred, he is to notify the diocesan bishop in advance or, in an urgent case, to inform him as soon as possible in retrospect of the granting of general absolution. In doing so, the penitents should be led to examine their conscience and repent. In all this, the Note repeats the existing teaching and practice of the Catholic Church.

The only more specific specification is as follows: “For example, the entrance to hospital wards where there are infected faithful who are in danger of death, using as much as possible and with the necessary precautions, means of vocal amplification so that the absolution may be heard.”⁶

At the same time, the Note also encourages the appointment of extraordinary hospital chaplains (that is, priests appointed according to can. 564 of the CIC/1983), of course in collaboration with the receiving institution.

⁴ Apostolic Penitentiary, *Note on the Sacrament of Reconciliation in the Present Emergency of the Coronavirus* (19.03.2020), accessed August 5, 2022, https://www.vatican.va/roman_curia/tribunals/apost_penit/documents/rc_trib_appen_pro_20200319_decreto-speciali-indulgenze_en.html#NOTE.

⁵ *Code of Canon Law: Latin-English edition* (Washington: Canon Law Society of America, 1983).

⁶ Note of the Apostolic Penitentiary, specified in footnote nr. 4, unnumbered seventh paragraph.

3. Modalities of Access to the Sacrament of Penance in Central Europe

From the description of the measures against COVID-19 in section 1 of this paper, it is clear that the situation regarding access to the sacraments, especially the Sacrament of Penance, in the Czech Republic differs significantly from Italy and Spain. It must be stated that, although we will not give specific references for this statement, a similar situation to the Czech Republic applies to all the countries of Central Europe.

The fundamental difference lies in the fact that in Italy and Spain, there were more Catholics in one place (usually in a health care facility) without the possibility of normal access to a priest, whereas in Central Europe, Catholics were mostly confined or isolated in the places of their normal residence: in their homes, in social service facilities and partly in health care facilities, without forming groups there comparable to those in Italy or Spain. Thus, it is clear that the Note is overly charged with the Italian situation, which is unfortunately not an exceptional situation.

The restriction on the free movement in the Czech Republic did not concern the provision of individual spiritual care and service. It was therefore possible for clergymen to go out to individual recipients of spiritual care and service while maintaining strict regulations regarding sanitary protection. However, only a limited number of the faithful could be served in this way: often the elderly or their relatives were so afraid of contagion that they did not receive visitors at all; moreover, a significant number of Catholic priests fell into the category of the elderly. Another restriction was the prohibition of visits to patients and clients of health and social welfare institutions and prisons, which explicitly allowed clerical ministry (except for minors, of whom there are few in such institutions, and hospices) only in the terminal stage of irreversible illness.

In practical terms, it has proved easier in health care institutions to provide spiritual care by duly appointed healthcare chaplains, who are very often in the position of employees of the health care institution (either under an employment contract or under agreements for work outside the employment relationship), while observing hygiene measures. The situation in hospitals varied; in some, even hospital chaplains were not allowed to visit patients, let alone outside priests.

It was therefore necessary to look for solutions, in our case for the Czech Republic. I was personally involved in this search and thus was able to become acquainted with the proposals of other Czech canonists: Josef Jančář, Libor Botek, and Jiří Dvořáček (although in the last case the proposal was prepared for the diocese of Görlitz).

Josef Radim Jančář OCarm. drafted a proposal for a directive of the conference of bishops, which was based very faithfully on the Note, with the proviso that it was applicable only during the epidemic of COVID-19 and to persons affected by this disease. Since the Czech Bishops' Conference had not developed criteria for implementation, it offered as a provisional starting point the text of nos. 4–5 of the Apostolic Letter of John Paul II *Misericordia Dei* on some aspects of the celebration of the Sacrament of Reconciliation.

Jiří Dvořáček, in his proposal of principles and a concrete solution (which does not take the form of a legal document), stated that there was no adequate regulation for the situation, ergo a situation called *lacuna legis* had arisen. He did not see the appropriate solution in the use of general absolution for physically present persons, but proposed that it be granted by telephone or by means of secure electronic communication (e.g., Skype, WhatsApp, Viber), based on the use of the *analogia legis* principle in order to contribute to the salvation of souls.

Libor Botek drafted a directive to the individual diocesan bishop. In addition to the possibility of “classic” general absolution, it offers the possibility of using absolution without individual confession for physically present groups of penitents as well as for individual penitents, also by means of telephone or other forms of remote communication.

Similarly to Jiří Dvořáček, I brought forward a proposal of principles and a concrete solution without the form of a legal document. The starting point was also the use of the principle of *analogia legis*. In this proposal, I exclude the possibility of using means of remote communication for individual confession connected with individual confession of sins, because of the guarantee of the sacramental seal. Therefore, I propose as the only feasible solution a general absolution granted by means of remote transmission, as instructed by the diocesan bishop, either by the diocesan bishop himself, possibly on behalf of other diocesan bishops or the entire conference of bishops, for example, through Christian TV Noe and Radio Proglas, or by a priest or priests appointed by him, in conjunction with a penitential service preceded by proper catechesis in the media.

There was no consensus among the bishops in the Czech Republic, and therefore none of the proposals described above were finally implemented. On the contrary, the Czech Bishops' Conference website mentioned as a possible model the Slovak practice of emphasizing the extraordinary extra-penitential way of perfect contrition,⁷ which corresponds to the statement of the Regent of the Apostolic Penitentiary, Mons. Krzysztof Nykiel in an interview with Vatican

⁷ “Jak je to nyní se svátostí smíření? Inspirace ze Slovenska [How Is It Now with the Sacrament of Reconciliation? Inspiration from Slovakia] (18.03.2022),” accessed August 5, 2022, www.cirkev.cz/cs/aktuality/200318jak-je-to-nyni-se-svatosti-smireni-inspirace-ze-slovenska.

News on March 20, 2020, in which he does not mention any other options than those given in the note of March 19, 2020, without any mention of the analogy of the law.⁸

Different modalities have been used in other countries. In addition to the retention of the “classic” confession when church space was drastically altered to meet sanitary requirements, there was the practice of confession given to penitents sitting in their cars, with the confessor either sitting on a chair outside or in a garage, or inside the building and confessing through an open window, or the practice of “window confession” to “non-motorized” penitents, always observing prescribed distances and other sanitary precautions.⁹

In addition to these more or less classical ways, new proposals are emerging, albeit with question marks: is, for example, physical presence and contact the only type of truly personal presence and contact, or can it be supplemented in these times (and even more so in exceptional situations) by other ways of presence, as developed by the study group Lawyers for Pastoral Care led by Giorgio Giovanelli, professor of canon law (and before that, doctor of moral theology) at the Lateran University? Professor Giovanelli himself states that there remain open and unresolved questions.¹⁰

Perhaps the most radical solution (and, of course, the one affecting the largest number of penitents) was chosen by the Archbishop of Berlin, Heiner Koch: as announced in advance,¹¹ he granted general absolution to all prepared

⁸ Krzysztof Nykiel. “Confessione e riconciliazione al tempo del coronavirus (20.03.2020),” accessed August 4, 2022, www.vaticannews.va/it/vaticano/news/2020-03/confessione-riconciliazione-coronavirus-24-ore-signore.html.

⁹ Cf., for example, Marie-Danielle Smith, “Taking Confession In a Time of Coronavirus—One Driver at a Time (7.04.2020),” accessed August 5, 2022, www.macleans.ca/news/canada/taking-confession-in-a-time-of-coronavirus-one-driver-at-a-time/; Kacper Pempel, “Priest Takes ‘Drive-in’ Confessions as Coronavirus Spreads in Poland (7.04.2020),” accessed August 5, 2022, www.reuters.com/article/us-healthcare-coronavirus-poland-confess-idUSKBN21P325; Mark Armstrong, “Church in France Introduces Drive-in Confession during Coronavirus Lockdown (3.05.2020),” accessed August 5, 2022, www.euronews.com/2020/05/03/church-in-france-introduces-drive-in-confession-during-coronavirus-lockdown.

¹⁰ “Giuristi per la pastorale: Intervista a Don Giorgio Giovanelli (4.02.2020),” accessed August 5, 2022, agenparl.eu/giuristi-per-la-pastorale-intervista-a-don-giorgio-giovanelli/; Lucio Brunelli, “Fedeli senza confessione? Una soluzione c’è (17.03.2020),” accessed August 5, 2022, www.vita.it/it/article/2020/03/17/fedeli-senza-confessione-una-soluzione-ce/154506/; Cindy Wooden, “Confession by Phone: Priest Says It Could Be Right in Some Situations (18.03.2020),” accessed August 5, 2022, cruxnow.com/church-in-europe/2020/03/confession-by-phone-priest-says-it-could-be-right-in-some-situations/.

¹¹ Cf. Kath. Kirchengemeinde Herz Jesu Zehlendorf, “Newsletter vom 02. April 2020. Mitteilung des Erzbischofs zur Generalabsolution (4.04.2020),” accessed August 5, 2022, www.herzjesuberlin.de/unsere-newsletter/#Newsletter_vom_13_Maerz_2020.

penitents at the conclusion of the Good Friday liturgy, broadcast online (as a live-stream with a recording).¹²

4. The Question of the Goal of a Norm

Sobański gives a twofold approach to the goal of canonical norms. On the one hand, they are to guarantee the realization of subjective rights in the Church, since the Church does not exist in itself, but as a community of individual natural persons. On the other hand, the canonical norms are to protect the authenticity of the elements that contribute to salvation in the community, especially the Word of God and the sacraments—and these realities are given to the Church by their very nature, as they are not formed and shaped by the will of the faithful and according to their ideas. The fundamental goal of canon law is the salvation of souls,¹³ as explicitly stated in the last text of CIC/1983, can. 1752: “Canonical equity is to be observed, and the salvation of souls, which must always be the supreme law in the Church, is to be kept before one’s eyes.”

The Note itself recalls (with explicit reference to can. 1752 CIC/1983) the salvation of souls as a guideline for the application of the provisions of the Note by diocesan or eparchial bishops, since the reception of the Sacrament of Penance significantly promotes the salvation of souls (subjective right). On the other hand, it places strong emphasis on the preservation of the very nature of the sacrament, the sacramental seal and the necessary discretion (authenticity of the God-given elements).

Very importantly, the Note leaves necessary room for the discretion of the bishops in the use of the extraordinary means of communal absolution. This is necessary for the fulfilment of the commitment to pastoral care which can. 383 CIC/1983 strongly recalls and which obliges the bishops to seek the necessary means of pastoral action. In this respect, the Note clearly corresponds to the fundamental requirements of the norms of canon law.

¹² The recording of the Good Friday liturgy was available on the website of the Archbishop of Berlin at www.erzbistumberlin.de/wir-sind/veranstaltungskalender/event/event-title/liturgie-am-karfreitag-im-livestream-4376/ in September 2020 yet, unfortunately, it is no longer available. The general absolution itself on this recording began at 1h 16min.

¹³ Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 2, 114–115.

5. The Question of Acceptance and Obligation of the Norm in a Situation Only Partially Identical to the Hypothesis of the Norm

The fundamental problem with the application of the Note in the Central European area is the fact that the real situation in this region coincides very little with the hypothesis of the norm (see section 2). In this situation, an important question arises: Can such a norm be realistically binding if it cannot be assumed to be widely accepted by the addressees of the norm?

The question of the binding nature of a norm is dealt with quite extensively by Sobański: he first presents different forms of autonomous justification for the binding nature of a norm, and then different forms of heteronomous justification. He points out that in the tradition of canon law, emphasis has always been placed on the adequacy of the norm (*aequum*) as the source of its binding force. At the same time, he points out that only such a norm can bind in conscience and achieve genuine acceptance by its addressees.¹⁴ He also states that in St. Thomas Aquinas's conception (which I share), the law is the rule of practical reason, which participates in the knowledge of the eternal law that comes from the wisdom of God.¹⁵

The fundamental question is therefore to what extent the Note is a norm that is adequate (*aequa*) to the real situation in the Central European region. As can be seen from the description in section 3, the opinions of both canonists and bishops are far from unanimous on this matter. There are clear differences in the approach to the norm and to the interpretation of the law.

It is indisputable that general absolution is an exception to the rule, which is stated both by general sources, the Catechism of the Catholic Church¹⁶ in no. 1484 and the CIC/1983 in can. 960, as well as the Note which seeks to specify the application of the exceptional circumstances generally referred to in can. 961 § 1, para. 2. It is therefore still an exceptional situation and so—legally speaking—the rule set out in can. 18 should apply: “Laws which establish a penalty, restrict the free exercise of rights, or contain an exception from the law are subject to strict interpretation.” This interpretation is clearly preferred by the text of the Note itself, since it offers for the individual believer an individual path of perfect contrition, coupled with the desire to receive sacramental absolution (*votum confessionis*). This interpretation is also underlined by the semi-official interpretation of the Regent of the Apostolic Penitentiary, Mons. Krzysztof Józef Nykiel, in his interview published on Vatican News on the day of the publication of the Note, that is, on March 20, 2020, where he offers only and exclusively the

¹⁴ Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 1, 69–114.

¹⁵ Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 1, 45–49.

¹⁶ *Catechism of the Catholic Church* (New York: Doubleday, 1994).

path of personal, perfect contrition for the individual, referring to the words of Pope Francis's homily delivered the day before, on the Solemnity of St. Joseph on March 19, 2020.¹⁷

On the other hand, it is a fact that the situation caused by the COVID-19 disease and the associated limitations is different from the situations experienced so far. So the question necessarily arises: are the solutions offered so far really adequate to the goal of the norm, which is the salvation of souls? Therefore, in this new situation, are not new solutions or modified solutions to those used so far to be sought and should the bishops not use them? If we want to follow this path, we must use other legal instruments and leave the solid ground offered above all by legalism.

Since I am personally of the opinion that it is rather necessary to look for new ways, I will try to elaborate in the following section the considerations towards this solution.

6. The Question of the Application of Analogy and Epikeia

Sobański deals with analogy in his treatise on canonical equity (*aequitas canonica*), although not in detail. He reminds us that this approach to law is characteristic of canon law, especially as a tool against the harshness of law, even in cases where it is contrary to written law. Moreover, analogy, applied in the situation of the absence of a legal norm (*lacuna legis*), is a distinctive tool of canonical equity. In this way, canonical equity becomes a tool that allows for a correspondence between mercy and severity. A principle for canonical equity is the realization of the adequacy of law (*aequitas*), which is demonstrated over time by the acceptance or rejection of the norm by its addressees.¹⁸

Elsewhere, Sobański deals with epikeia, in the context of a treatise on observance. He reminds us of its fundamental nature: acting in an individual and concrete case in contradiction to a general and abstract norm. It is always linked to the realization of the common good (*bonum commune*), based on a proper judgment of conscience that considers not only the subjective good, but with full seriousness the norm itself and its goal. Since individual action in exceptional situations is at stake here, epikeia cannot be a source of law because law must be relatively general. It is therefore primarily the subject of moral theology because of its connection with the proper judgment of conscience (properly formed), and only secondarily is it discussed by law, in connection with the observance of law.¹⁹

¹⁷ Cf. note no. 7.

¹⁸ Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 1, 97–100.

¹⁹ Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 1, 129–133.

Related to the notion of *aequitas* is a concept used in the Eastern tradition: *oikonomia* in contrast to *acribia*. Sobański recalls that the semi-Latin term *oeconomia* appeared in patristic literature and in the Latin Church²⁰; but he does not pay any more attention to it. In the tradition of the Eastern Churches, the approach to the implementation of the law distinguishes between acrimony as the application of the law exactly in accordance with its wording and *oikonomia* as an application modified in relation to particular conditions, and as an expression of pastoral charity with regard to the goal of the norm, all the more so the greater the number of beneficiaries of such an action. In its content, then, *oikonomia* is more akin to *epikeia*.²¹

In the Latin Church, *oikonomia* and *acribia* are not spoken of, and therefore these terms do not appear in official Church documents. There is not a single mention of them in the CCEO.²² Recently, however, they were explicitly mentioned in the *motu proprio* of Pope Francis *Mitis et misericors Iesus*,²³ amending the procedural norms in matrimonial matters in the CCEO (in a manner almost identical to the amendment to the CIC/1983 in the *motu proprio* of the same pope *Mitis iudex Dominus Iesus*²⁴). The *motu proprio* addressed to the Eastern Catholic Churches explicitly states in the fifth unnumbered paragraph of its introductory text, with reference to Eastern traditions:

For indeed the Bishop—having been constituted a model of Christ and standing in his place (*eis typon kai topon Christou*)—is above all a minister of divine mercy; therefore, the exercise of juridical power is a privileged place where, using the laws of *oeconomia* or *acribia*, he himself imparts the Lord’s healing mercy to the Christian faithful in need of it (p. 2).

If we were to take the *analogy* route, what analogous texts could we draw on? In the first place, it is the Catechism of the Catholic Church, which states: “Individual, integral confession and absolution remain the only ordinary way for

²⁰ Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 1., 98.

²¹ Johannes Madey, *Quellen und Grundzüge des Codex Canonum Ecclesiarum Orientalium: Ausgewählte Themen*. (Essen: Ludgerus Verlag, 1999), 165–170; *Handbuch der Ostkirchenkunde, Band III* (Düsseldorf: Patmos Verlag, 1997), 155–158.

²² *Code of Canons of the Eastern Churches: Latin-English Edition* (Washington: Canon Law Society of America, 2001).

²³ Francis, *Apostolic Letter Motu Proprio Mitis et misericors Iesus by which the canons of the code of canon law pertaining to cases regarding the nullity of marriage are reformed* (15.08.2015), accessed August 6, 2022, https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-et-misericors-iesus.html.

²⁴ Francis, *Apostolic Letter Motu Proprio Mitis Iudex Dominus Iesus by which the canons of the code of canon law pertaining to cases regarding the nullity of marriage are reformed* (15.08.2015), accessed August 6, 2022, https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-iudex-dominus-iesus.html.

the faithful to reconcile themselves with God and the Church, unless physical or moral impossibility excuses from this kind of confession” (no. 1484). How can the restrictions due to COVID-19 be evaluated from this perspective? The individual believers who were not allowed to leave their homes were not, as a rule, in a situation of physical impossibility to go to a priest, nor were they prevented from doing so by moral considerations that applied primarily with respect to a particular confessor. Their situation had some features of both variants of impossibility, but did not coincide with either of them. Rather, in my view, one can speak here of “social impossibility” or “social necessity.” If they were believers living in various social institutions, their situation would have been similar, with the difference that there was a larger number of persons in the location—then the question is to what extent these persons were of the Catholic faith and desired the conferral of the sacrament; especially in the conditions of the Czech Republic, this is usually only a small minority. In any case, it was forbidden for visitors to come to these establishments—and priests are not employed in these establishments, nor do they usually perform the ministry of chaplain. As a result, it is practically the same situation as for the faithful living in their homes.

CIC/1983 in can. 961 § 1, paragraph 2 states:

There are not enough confessors available to hear the confessions of individuals properly within a suitable period of time in such a way that the penitents are forced to be deprived for a long while of sacramental grace or holy communion through no fault of their own.

Around Easter 2020, the problem was not usually the small number of confessors, but the measures radically restricting the faithful’s access to the priests, the result of which was that they would, through no fault of their own, have to be without the Sacrament of Penance (and the Eucharist) for a prolonged period of time.

In the case of the use of the way of *epikeia*, this general and abstract norm is above all the Note, which in most of its text repeats the general norms previously laid down, giving a more specific application only for a situation which practically did not occur in Central Europe. However, it is difficult to make generalized judgements here, as this is an individual action.

The use of the means of general absolution seems to me to be justified on this basis, above all, with the use of analogy, not only from the point of view of the salvation of souls, but also from the point of view of the mitigation of the severity of the law and the realization of mercy, which Pope Francis himself constantly emphasizes.

7. The Question of Physical Presence in the Administration of the Sacraments

However, there is still the unanswered question of the necessity of the physical presence of the confessor and the penitent in the same place.

In section 3 I have mentioned the efforts to use means of remote communication for confession. This alternative is usually strictly rejected. This is also stated by Mons. Nykiel in the interview mentioned above: “Sacramental confession may not take place by telephone or email or other means of communication for reasons related to the protection of the sacramental seal.” It can be argued that other means of remote communication are better secured against access by third parties, but this security is not so difficult to break for persons with above-average computer skills. The protection of sacramental secrecy, however, does not play a role in the case of general absolution, since these are not individual confessions of sins.

Mons. Nykiel continues:

Above all, it requires the physical presence of the penitent. Through these means of communication, on the other hand, the priest can possibly provide useful spiritual advice to the faithful, console them or restore their hope, but not impart sacramental absolution.

I myself asked two teachers of dogmatic theology whether and to what extent this is a binding teaching of the Church, and they were unable to substantiate the binding nature of this teaching. Some objections may be raised against the necessity of physical presence. First of all, the physical presence of the bride and groom in the celebration of marriage is not strictly required in the Catholic Church; the possibility of a proxy is mentioned in can. 1104 CIC/1983 and can. 837 CCEO (albeit only on the basis of particular law). As summarized in no. 1623 of the Catechism of the Catholic Church, in the Western tradition the betrothed are considered to confer the sacrament on each other, while in the Eastern tradition it is by the blessing priest; in both conceptions, there is no presence of one recipient (and perhaps conferrer) of the sacrament in the case of proxy. In addition, there is also the question of the degree of physical presence: after all, at major celebrations, priests often concelebrate at a greater distance from the altar, and moreover, the Note itself allows for a very limited presence of the confessor in the case of a general absolution, requiring necessarily only that his voice be audible, even with the use of amplification equipment. Moreover, it is the COVID-19 situation that has led to the widespread use of the practice of various meetings, even remote voting, and yet this is understood as valid participation coupled with a different modality of presence.

Considering these facts, it cannot be said with certainty that a general absolution using means of remote communication is necessarily invalid; there is certainly no threat to the sacramental seal and discretion. However, the solution of this question does not fall within the realm of canonical science, but within the realm of dogmatic theology.

Conclusion

Already the first wave of the coronavirus epidemic has shown both the vulnerability of our civilization and existence, and has made us to pose— many serious questions.

In the area we are addressing, the main questions are: how to reconcile the necessary protection of the health of both clergy in the provision of spiritual ministry and care, and of the faithful in receiving it, considering critical aspects (especially the so-called critical populations)? How to try to ensure as much as possible the spiritual service in view of the implementation of the necessary state health measures, without falling into one of the extremes: recklessness or over-caution? To what extent and in what way to go the way of extraordinary canonical measures?

Especially in the matter of the Sacrament of Penance, these difficult questions present themselves: to what extent is the physical presence of the conferrer and the recipient of the sacrament necessary in general, and for this sacrament in particular? Are not modified modes of personal presence appropriate in view of the development of modes of communication? To what extent can the guidelines on general absolution be applied in a completely new situation which can be called “social impossibility” or “social emergency”? To what extent do we draw on a tradition that could not deal with some of the questions now raised? To what extent to apply canonical equity, especially analogy? How to consider the principle that the highest law is the salvation of souls? How would Christ and the apostles have acted in our present situation and in our place?

The solution proposed by the author of this paper consists in granting a general absolution by means of long-distance communication, after proper catechesis and adequate personal preparation of the recipients of the sacrament of penance (it was used in the Archdiocese of Berlin). The author identifies this solution as not only valid, but possible and appropriate on the basis of the use of canonical equity.

Obviously, the new situation will require further examination and decision. This paper seeks to stimulate and contribute to that search.

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Damián Němec

Aequitas canonica et accès au sacrement de pénitence
lors de la première vague de COVID-19 en 2020
à la lumière des principes du droit canonique

Résumé

Les ordonnances épidémiologiques lors de la première vague de COVID-19 en 2020 ont affecté de manière significative l'exercice de la liberté religieuse, y compris le culte et les sacrements. La présente étude aborde un sujet plus restreint de ce domaine, à savoir la réglementation de l'accès au sacrement de pénitence. Elle se concentre en particulier sur la manière dont l'accès à ce sacrement a été rendu possible dans l'Église catholique, tant en termes de droit commun que de droit particulier, ainsi que sur les propositions visant à le formuler, et surtout, elle évalue ces propositions du point de vue des principes du droit canonique.

Mots-clés: églises et associations religieuses, liberté religieuse, limitation des droits, Église catholique, sacrements, sacrement de pénitence, droit canonique, analogie du droit

Damián Němec

Aequitas canonica e accesso al sacramento della penitenza
durante la prima ondata di COVID-19 nel 2020
alla luce dei principi del diritto canonico

Sommario

Le normative epidemiologiche durante la prima ondata dell'epidemia di coronavirus nel 2020 hanno influenzato in modo significativo l'uso della libertà religiosa, compresi il culto e i sa-

cramenti. Il presente lavoro affronta un argomento più ristretto in questo campo, vale a dire la disciplina dell'accesso al sacramento della penitenza. In particolare, si focalizza sulle modalità per consentire l'accesso a questo sacramento nella Chiesa cattolica, sia in termini di diritto universale che di diritto particolare, e di proposte per la sua formulazione, e soprattutto valuta queste proposte in termini di principi del diritto canonico.

Parole chiave: Chiese e associazioni religiose, libertà religiosa, limitazione dei diritti, Chiesa cattolica, sacramenti, sacramento della penitenza, diritto canonico, analogia del diritto