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Legal Challenges Regarding the Content of the Sermon of the Orthodox Worship

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Abstract

In the context the traditional values specific to the Romanian society tend to be lost, I considered it useful to present my opinion, during the symposium dedicated to “Freedom of expression and faith”, on the current challenges regarding the content of the sermon in the Orthodox worship. I consider such an analysis useful, given the increasingly shrill voices of different sexual and non-sexual minorities who are shouting their own “rights”, making valuable judgments about how Christians should relate to the various paradigm shifts and how they should not react, because if they do, they will be categorized as backward, obsolete, retrograde, etc. In other words, we, as Romanian citizens and at the same time Christians, must passively accept the education of this nation to whom we belong, in all forms and positions by the promoters of a new way of life, which does not correspond to us at all.

Keywords

sermon, clerics, religious freedom, criminal code, crime, misdemeanor

I. Sermon According to Orthodox Theology

Section 1. About sermon in biblical writings and later religious literature

At some point, the evangelist Luke tells us that “... Jesus *began to preach*, saying, «Repent, for the kingdom of heaven is at hand»” (Matt

4, 17). Interpreting the biblical text, we can deduce that the *essential purpose of the sermon is to convey the exhortation to repentance*, and the attainment of this end necessarily entails *the condemnation of sin¹ and the proclamation of the approach of the Kingdom of Heaven*. The specialized theological sciences speak of the Savior Christ as the supreme preacher, because when He preached all were “astonished at his teaching, for *his word was with authority*” (Lk 4, 32). His word was penetrated in the highest way by divine grace, and this power through the word was manifested when *He cast out demons* (Lk 5, 33-36), *healed lepers and paralytics* (Lk 5, 12-14 and 18-26) or *when He performed many other miracles*. But the most significant form of manifestation of power through the word is that of *calling and preparing the apostles for the mission of preaching*. Christ chose the first apostles, Simon Peter and Andrew from among the simple, addressing their call: “Follow me, and I will make you *fishers of men*” (Matt 4, 19), and they forsook their nets, and followed Him (Lk 5, 20). Following Christ meant for the apostles to take on the mission of *continuing the work of preaching the gospel²*, its basis being *the mandate of Christ*. In this regard, Jesus commanded His disciples: “*Go therefore and make disciples of all nations...*” (Matt 28, 19), and from another gospel we learn that He told the disciples: “*Go into all the world and preach the gospel to the whole creation*” (Mk 16, 15). These two New Testament exhortations reveal *the universal feature of the preaching act*, because the evangelization or proclamation of the Kingdom of Heaven is addressed to the whole world.

The sermon is also discussed in later religious literature. For example, Clement of Alexandria says that: “John, *the preacher of the Word*, called men to be ready for the coming of God, of Christ”³. Speaking of the sermon of John the Baptist, the author highlights the *prophetic and eschatological feature⁴* of the sermon (Matt 3, 3) and it should be noted that the two

¹ In this sense, I evoke the beautiful saying of the teacher Nicolae Mazăre: “He who does not strike sin does not respect virtue”.

² Vasile GORDON [coord.], *Omiletică*, Ed. Basilica, București, 2015, p. 49.

³ † Clement ALEXANDRINUL, *Scieri. Partea întâia*, coll. *Părinți și Scriitori Bisericești*, transl. pr. D. Fecioru, Editura Institutului Biblic și de Misiune al Bisericii Ortodoxe Române, București, 1982, p. 76.

⁴ From greek ἔσχατος, η, ον – qui est a l’extremite, extreme, dernier: I. [avec idée de lieu]: I. a: i proper: θάλαμος ἔσχ. Op. la chambre la plus reculée ἔσχατοι ἀνδρῶν, M. A. BAYLLY, *Abrégé du dictionnaire Grec-Français*, Librairie Hachette, Paris, 1901, p. 336; pr. E. BRANIȘTE și E. BRANIȘTE, *Dicționar enciclopedic de cunoștințe religioase*,

features are common to all the sermons spoken throughout history by all the ministers of the holy altars. That is because the sermon shows the consequences of practicing sin and virtue in advance to the believers, and at the same time they are prepared for the transition to the ultimate reality, that is, the Kingdom of God⁵. Speaking about the fact that the sermon is *good news for those who listen and judgment for those who do not listen*, the author states that “this is *the sermon of justice*”⁶, which is why preaching will always be a rebuke to those who persist in sin. Finally, listening to the preaching or preaching necessarily involves the fulfillment of the teachings it contains. In this regard, the Savior Christ says: “Not everyone who says to me, ‘Lord, Lord’, shall enter the kingdom of heaven, *but he who does the will of my Father who is in heaven*” (Matt 7, 21). St. Ignatius Brianchaninov shows that a form of fulfillment of the evangelical words which the sermon contains, is: “the practice of the prayer of Jesus Christ and the hatred of cunning thoughts”⁷. Also related to the fulfillment of the preaching teachings, Saint John Chrysostom says that: “only listening to the sermon without actually fulfilling the words of the sermon is useless”⁸. Therefore, the texts quoted above reveal *the practical feature* of the sermon and, although in secular thought the word differs profoundly from the fact, assuming a certain passivity, however, in the spirit of the Church *the word preaching is understood as carrying in it, in anticipation, the grace to be fulfilled*. The sermon is not an ordinary speech, but it carries a certain load of grace, which urges and empowers the baptized to fulfill it by *good works*. From this perspective, we can consider the moment of the sermon as *an icon of the act of Creation of the world*, the pulpit preacher symbolizing God on the throne of glory, who says: “Let there be light!” (Gen 1, 3), but also an update of the moments when the Savior spoke to the multitudes “His word with authority” (Lk 4, 32).

Ed. Diecezană Caransebeș, 2001, p. 158.

⁵ Ion BRIA, *Dicționar de Teologie Ortodoxă*, Editura Institutului Biblic și de Misiune al Bisericii Ortodoxe Române, București, 1981, pp. 154-158.

⁶ † Clement ALEXANDRINUL, *Scrieri. Partea întâia*, p. 156.

⁷ † Ignatie BRIANCIANINOV, *Cuvinte către cei care vor să se mântuiască*, transl. A. Tănăsescu-Vlas, Ed. Sophia, București, 2000, p. 24.

⁸ † Ioan GURĂ DE AUR, *Scrieri. Partea întâia*, coll. *Părinți și Scriitori Bisericești*, transl. pr. D. Fecioru, Editura Institutului Biblic și de Misiune al Bisericii Ortodoxe Române, București, 1987, p. 32.

Section 2. Canonical, statutory and regulatory provisions regarding the preaching act

Throughout her historical evolution, the Christian Church has felt the need to organize her activity in the various fields of competence, to best serve the people to obtain salvation. Necessarily, canonical provisions regulated various aspects related to preaching. For example, it was stated that: “Let the leaders of the (local) Churches teach every day, and especially on Sundays, the whole clergy and people, the words of the true faith, *gathering from the divine Scripture the meanings and judgments of truths and not to cross (exceed) the boundaries that are set or the tradition of God-bearer Fathers*” (oecumenical canon 19 V-VI)⁹. Analyzing the canonical norm, we can draw the following objective conclusions:

1. It is established for the Heads of (local) Churches the obligation *to teach*;
2. This obligation is required to be fulfilled, *in general, every day and, in particular, on Sundays and public holidays*;
3. The recipients of the sermon can be *both clergy and believers*;
4. The fundamental sources of the sermon are *Holy Scripture and Holy Tradition*;
5. The preaching act presupposes certain *limits, established to protect the preacher from heresy*.

Also, at the level of canonical norms it was established that: “*It is not permitted to be ordained to the Church of another city of the clergy who serve in a Church ...*” (oecumenical canon 20 IV)¹⁰. Although the canon does not *explicitly* refer to the preaching activity, but to the transfer, it *implicitly* considers it¹¹, because the clergyman serves in the Church also through this form of pastoral activity. Thus, we can deduce *a prohibition for the clergyman belonging to a certain church from the circumscription of one diocese, to carry out his preaching service at a church from the circumscription of another*. The interdiction makes the cited canonical

⁹ I. N. FLOCA, *Canoanele Bisericii Ortodoxe Române. Note și comentarii*, Ed. Andreiană, Sibiu, 2005, pp. 128-129.

¹⁰ I. N. FLOCA, *Canoanele Bisericii Ortodoxe Române. Note și comentarii*, Ed. Andreiană, Sibiu, 2005, p. 97.

¹¹ Archdeacon prof. univ. dr. Ioan Floca is also of the opinion that this canon implicitly forbids preaching in a Church other than the one in which the clergy was installed [see arhid. I. N. FLOCA, *Canoanele Bisericii Ortodoxe Române...*, p. 588].

norm *prohibitive*, according to the way of regulating the conduct to be followed¹². Another canonical provision *implicitly* forbids that a hierarch preaches in another diocese: “None of the bishops should pass from his diocese to another diocese, in which there are bishops, without only those who are in it being called brothers” (Canon 3 of Sardica)¹³. This prohibition is one of *principle*, because *by exception*, the bishop may preach in another diocese when called by a fellow bishop, applicable hypothesis, *mutatis mutandis* in the case of priests or deacons too, when the necessary approvals are obtained, as appropriate.

In the canonical legislation there was a need to regulate *the status of lay preachers*, establishing that:

“It is not proper for the layman to speak or teach in public (public), hereby appropriating his teaching service, but to submit to the ordinance transmitted by the Lord, and open his ear to those who have taken the gift of the word of teaching (teaching) and to learn the divine from them” (Canon 64 Trullo)¹⁴.

The following observations can be deduced from reading the canon:

1. *As a rule*, lay people are not allowed to give speeches in church;
2. The sermon has a *public (universal) character*, as does the Liturgy;
3. *Exceptionally*, lay people can preach in church *if they have received the power* (lat. *potestas*)¹⁵ or *the blessing* to carry out this

¹² Imperative rules impose or prohibit action [...]. When they prohibit an action, they are subclassified into prohibitive rules. See: arhid. I. N. FLOCA, *Drept Canonic Ortodox. Legislație și Administrație Bisericească*, vol. I, Editura Institutului Biblic și de Misiune al Bisericii Ortodoxe Române, București, 1990, p. 46. And the general theory of secular law divides the norms of law according to almost the same criteria. Thus, according to the criterion of the way of regulating the conduct, there are the operative norms, which oblige the subject to commit a certain action, prohibitive norms, which oblige the subject to abstain from a certain action and the permissive norms, which neither oblige nor forbid a certain conduct. See in this regard: N. POPA, *Teoria generală a dreptului*, ediția a IV-a, Ed. C.H. Beck, București, 2012, p. 138. Other authors consider that according to the nature of the conduct, the legal norms are classified in: imperative [which are also subclassified in operative and prohibitive] and permissive [which are subclassified in supplementary, stimulus and recommendation]. See: M. NIEMESCH, *Teoria generală a dreptului*, Ed. Hamangiu, București, 2014, pp. 84-85.

¹³ I. N. FLOCA, *Canoanele Bisericii Ortodoxe Române...*, p. 256.

¹⁴ I. N. FLOCA, *Canoanele Bisericii Ortodoxe Române...*, p. 157.

¹⁵ Canon 64 in Trullo uses the phrase “τὸν δοῦλόν”, but with the meaning of receiving the blessing to carry out this activity.

activity¹⁶. For example, it is worth mentioning the fortunate case of Professor Teodor M. Popescu, who was often invited by the parish priest to preach: “Clothed in the sticharion of anagnost, the great theologian poured into the sermon like a river sprouting from the springs of the Holy Scriptures”¹⁷. *The exceptional situation of theological students and seminary students, who preach in chapels or churches, during specialized practice classes*, must also be considered. Since most of them have specialized studies, they cannot be qualified as simple lay people, their situation in this respect being an *intermediate* one, in my opinion, because they are *attached to the Orthodox cult*, being *potential clergy men*. Finally, more recent practice has shown that the Church also allows women to preach. To consider as example: nun *Benedicta* and nun *Silvana Vlad*¹⁸.

¹⁶ “It is not permitted even to the layman who has not received the teaching power in the Church to preach without the consent of those who have this power or to speak any other kind of word in public, appropriating the teaching power. That is, he is not allowed to deal with matters of doctrine in public except with the approval of the Church authority, to which this power has been entrusted by the Savior himself. (Matt. 28:19; Rom. 1: 5; I Tim. 3:2). By order, therefore, even the layman can teach those of the faith, if he knows it, and he has the approval of any bishop or priest; nevertheless, all believers are obliged to confess Christ and the truths of the faith, to which He has called us”. [Matt. 10:32]. Arhid. I. N. FLOCA, *Canoanele Bisericii Ortodoxe Române...*, p. 158.

¹⁷ B. SCORȚEA, “Teodor M. Popescu, un mărturisitor de la catedră și după gratii”, in: *Lumina* from May 22, 2008.

¹⁸ Of course, in a more rigorous vision, and not without some basis, it can be thought that the woman cannot preach in the Church, the recent practice can be seen as a deviation from Church discipline. In fact, it seems that the letter to the Corinthians confirms the prohibition [cf. I Cor. 14:33-35]. In this spirit, Father Lucian Farcașiu concludes in an article published in the newspaper *Lumina*, that: “The woman is not called to preach in the Church, but to listen to the word of God with reverence and faith. On the other hand, she may read prayers and psalms aloud during holy services, and participate in the singing of the Church. That is why, in parishes, the men’s pew can be doubled by a women’s pew, sung and read alternately. Thus, the prohibition regarding the silence of women in the Church refers to the sermon and in no case to their reading or singing in the holy place”. Pr. L. FARCAȘIU, “Sfaturi practice în Biserică: Rolul femeii în biserică”, in: *Lumina* from July 22, 2010. And yet, if this is really the case, what is the unbeatable reason a woman should be excluded from preaching? The simple reason that she has a different ministry, theologians exasperatingly use cannot be considered. If we were to admit the rigorous opinion, it would mean considering the blessings given to the nuns *Benedicta* and *Silvana Vlad* to preach as deviations from church discipline.

At the statutory level, the ecclesiastical legislator considered not to *explicitly relegate* the preaching activity, but there are certain provisions with *implicit* reference to the sermon:

“The Romanian Orthodox Church, through her dioceses, has the responsibility to ensure religious assistance and the personnel related to her development in parishes, in the army, in the penitentiary system, in medical units, in social assistance establishments and in educational units, under the conditions provided by law , protocols or agreements concluded with public authorities or other legal persons” (art. 136 par. (1) from Statute)¹⁹.

The interpretation of the article shows the *positive obligation* of the Romanian Orthodox Church (obligation to do)²⁰ to ensure the general framework for the conduct of religious assistance by specialized personnel, assistance which also *involves preaching*. The preaching activity, limited to religious assistance, may be carried out based on *law, protocol, or agreement*, provided that *the protocol or agreement must imperatively comply with the law*, as a normative act with superior legal force. Also, the preaching activity can be carried out both within the *legal persons of public law* and within the *legal persons of private law* (private schools, private social establishments, associations, etc.).

Regulation of the canonical authorities²¹ also contains *certain provisions with direct reference to the sermon*. Thus, in Chapter 3 of the Regulation, where the *pastoral-liturgical deviations* of the clergy are

¹⁹ The statute for the organization and functioning of the Romanian Orthodox Church was approved by the Decision of the Holy Synod of the Romanian Orthodox Church no. 4768/2007 and was recognized under Law no. 489/2006 on religious freedom and the general regime of cults, by Government Decision no. 53 from January 16, 2008, published in Monitorul Oficial al României, Partea I, nr. 50 from January 22, 2008, being subsequently republished under art. 2 from Order of the Secretary of State of the State Secretariat for Cults nr. 116 din 2019, published in Monitorul Oficial al României, Partea I, nr. 13 și 13 bis from January, 10 2020.

²⁰ For edification see: L. POP [coord.], *Curs de drept civil. Obligațiile*, Ed. Universul Juridic, București, 2015, p. 156; I. R. URS și P. E. ISPAS, *Drept civil. Teoria generală a obligațiilor*, Ed. Hamangiu, București, 2015, p. 79.

²¹ We mean: The Regulation of the canonical disciplinary authorities and of the courts of the Romanian Orthodox Church, approved in the working session of the Holy Synod of February 5-06, 2015 and which is in force since February 6, 2015.

presented, it is spoken about the *neglect or non-fulfillment of the duty to preach* (...) in the Church (art. 33). As a form of guilt, this disciplinary offense has both *guilt* and *intent*, and the act may be committed by *omission* (in case of negligence) or by *inaction* (in case of non-compliance). The applicable *sanction* is alternative and proportional to the consequences of the committed deed, respectively: *hierarchical rebuke, disciplinary move* or even *defrocking*.

II. Sermon from a legal point of view

Section 1. Provisions of state law interfering with the sermon

According to art. 29 par. (1) from the *Constitution of Romania*²²: “Freedom (...) of religious beliefs *cannot be restricted in any way*. According to the way the *freedom of religious beliefs* was consecrated by the constituent legislator”²³, it has two fundamental features: 1. It is an *autonomous, independent freedom*; 2. It is *usually inviolable*, i.e., it is not restricted. The article also enshrines, implicitly, *personal autonomy in religious matters*²⁴, as: *the person’s ability to practice his religious faith as*

²² Amended and supplemented by the Law on the revision of the Romanian Constitution no. 429/2003, published in Monitorul Oficial al României, Partea I, nr. 758 from October 29, 2003. Law on the revision of the Romanian Constitution no. 429/2003 was approved by the national referendum of 18 - 19 October 2003 and entered into force on 29 October 2003, the date of publication in Monitorul Oficial al României, Partea I, nr. 758 from October 29, 2003 of the Decision of the Constitutional Court no. 3 of October 22, 2003 for the confirmation of the result of the national referendum of October 18 - 19, 2003 regarding the Law on the revision of the Romanian Constitution.

²³ In terms of the intimate side, this right is an absolute one, but in terms of its externalization it is relative, in the sense that it may suffer certain limitations. See in this regard: CCR decision no. 845 of June 3, 2009, published in Monitorul Oficial al României, Partea I, nr. 524 from July 30, 2009.

²⁴ “In the field of freedom of religion, personal autonomy, without being stated as such, has been partially protected by the protection afforded to the so-called forum internum. The cause that first explicitly stated personal autonomy as part of freedom of conscience, thought, and religion is the judgment of Jehovah’s Witnesses in Moscow v. Russia. This brings another novelty, namely the connection between the newly affirmed personal autonomy in the field of religious life and the autonomy of the religious community itself, also guaranteed by state neutrality, in an in-depth analysis that we will not find later in the Court’s jurisprudence”. Please consult: pr. I.-G. CORDUNEANU, *Neutralitatea religioasă în jurisprudența Curții Europene a Drepturilor Omului*, Ed. Universul Juridic, București, 2018, p. 207.

he considers and an expression of personal autonomy in religious matters is the free choice of the person to listen to the Sunday sermon. Furthermore, the following is stipulated at constitutional level: “Religious cults are free and are organized according to their own statutes, in accordance with the law”, because of which the State must grant freedom to the religious cult in organizing, through internal norms, the preaching activity²⁵. It should be emphasized, however, that the freedom of worship in organizing itself can be exercised *strictly in accordance with the law*, the law being therefore *the limit of presumed constitutional character*, imposed on it. In other words, according to art. 29 par. (4): “In religious relations any form, means, or act of religious enmity shall be prohibited”, *therefore, such a state cannot be created between religious cults even through preaching.* Also, in the hypothesis in which a clergyman belonging to a religious cult exercises a *nationalist-chauvinist propaganda* through the sermon²⁶, the State may apply a restrictive measure to him in order not to commit such an act. However, it is necessary that the *measure applied by the State be provided by law, to be strictly limited to one of the purposes evoked by art. 53 par. (1) of the Constitution, the restriction should be necessary, the restrictive measure should be proportionate to the situation that determined it, it should be non-discriminatory and should not prejudice religious freedom (art. 53 par. (2) of the Constitution)*²⁷.

Law no. 489/2006²⁸ provides, *inter alia*, that: “Religious freedom includes *the right of every person to manifest his religion individually or collectively, in public or in private, through practices and rituals specific to worship*” (art. 2 par. (1)). The action of the clergyman to preach and the believer to listen to it represent *forms of manifestation of religious*

²⁵ As mentioned above, the Orthodox ecclesiastical legislator considered not to explicitly relegate the preaching activity to the statutory level, but there are certain provisions with implicit reference to the preaching activity [art. 136 par. (1) of the republished Statute].

²⁶ Relatively on the subject, consult Decision of CCR no. 67 din 3 februarie 2005, published in Monitorul Oficial al României, Partea I, nr. 146 din 18 februarie 2005.

²⁷ See also: I. MURARU și E. S. TĂNĂSESCU, *Drept constituțional și instituții politice*, ediția a XV-a, vol. I, Ed. C.H. Beck, București, 2016, pp. 162-163; M. SAFTA, *Drept constituțional și instituții politice. Teoria generală a dreptului constituțional. Drepturi și libertăți*, vol. I, Ed. Hamangiu, București, 2015, p. 246.

²⁸ On religious freedom and the general regime of religions, published in Monitorul Oficial al României, Partea I, nr. 11 din 8 ianuarie 2007, with subsequent amendments and completions.

freedom, and the sermon itself is even a *practice specific to the Orthodox worship*. It should also be noted that the clergyman, as a transmitter of the sermon, is not excluded from the scope of art. 2 par. (1) of the law, in the sense that *the believer also manifests his religious freedom through him*. Therefore, in the case of the Romanian Orthodox Church, in certain situations, the faithful exercise their religious freedom through the clergy.

Seen from another perspective, the sermon given by the clergy represents both his *right*, recognized by the *State*, but also an *obligation*, established by the *Church*. *In principle, the State cannot restrict the clergyman's right to preach nor can he establish such an obligation*, but the Church can establish for the subordinate clergyman both the right and the obligation to preach, as well as the limits regarding the exercise and fulfillment of preach. If the cleric does not fulfill his obligation to preach, the person injured by his conduct may not apply to the state court to bring the civil liability of the cleric. The state court is generally and materially competent to decide on matters relating to the autonomy of religious denominations²⁹, any request to be rejected as inadmissible. However, if the content of the sermon infringes certain social values, protected by various rules, whether of a contraventional or criminal nature, then the state court will be generally and materially competent to judge any request for sanction, and it may even *evaluate the content of the sermon*.

²⁹ "It has been held by the court of constitutional contention that the courts are not competent to exercise the function of administering justice in religious cults for acts of violation of internal discipline, because the legal liability in the matter is not regulated by norms of common law but by legal norms proper to those cults. It was considered that it is fair to establish the disciplinary liability of the clerical staff by the courts of the cults because only they can assess whether the acts of indiscipline committed are compatible with the spiritual role of the cult. It was also noted that the clerical staff of some cults are in different situations from secular citizens, in the sense that the former are subject to special legal and canonical norms and the latter citizens are subject to legal norms of general applicability. Regarding the principle of equality, it was found that the jurisprudence of the Constitutional Court has consistently ruled that different legal treatments can be established by law, objectively and rationally justified, for different situations, in this case different treatment is justified by different status of clergy". Decision CCR no. 640 of June 10 2008 regarding the exception of unconstitutionality of the provisions of par. (1)-(3) of art. 26 from Law no. 489/2006 on religious freedom and the general regime of religions, published in Monitorul Oficial al României, Partea I, nr. 506 din 4 iulie 2008. See also: Decision CCR no. 448 of June 17 2011 regarding the rejection of the exception of unconstitutionality of the provisions of art. 26 of Law no. 489/2006 on religious freedom and the general regime of cults, published in Monitorul Oficial al României, Partea I nr. 424 din 17 iunie 2011.

Section 2. Is the sermon a private or public worship act?

From the perspective of Church legislation, the sermon usually has a public (communal) character, as it appears from the oecumenical canon 19 V-VI, as stated: “The leaders of the (local) Churches should teach the words of the true faith to the clergy and the people, every day, and especially on Sundays” and Canon 64 in Trullo stipulates: “It is not proper for the layman to speak or to teach in public”³⁰.

Art. 2 par. (1) of Law no. 489/2006 stipulates that: “Religious freedom includes the right of every person to manifest his religion individually or collectively, in public or in private, through practices and rituals specific to worship”. *From the perspective of state legislation, this could lead to the conclusion that the sermon can have several characters. Thus, according to the number of people who hear it, it will have a collective character and I think that it cannot have an individual character, because it is not usual to preach to a single person, in the latter case being incident the pastoral advice. According to the state authority involvement in the context of preaching, it can be public or private. From a state perspective, as a rule, the sermon is private and only by exception, public. In the hypothesis in which the clergyman addresses himself, through sermon, in a context that implies the presence of the authority of the State (for example, Te Deum and memorial services), or he preaches in public institutions (schools, hospitals, military units, etc.), it will have a public character. If the respective clergyman will give a sermon inside a privately owned church, then the sermon will have a private character, unless there is an incident or offense related to it. As can be seen, the line of delimitation of the public character from the private one, regarding the sermon, is a very subtle one, the consequences being also, proportionally, deeper, or more superficial, in the hypothesis in which the message transmitted through the sermon harms third parties or the State. Finally, the sermon delivered even in the courtyard of a church is private, unless there is an incident or offense in connection with it and to the extent that the court is the property of the church. But in the hypothesis in which the presence of the faithful at the service of Resurrection or Epiphany requires listening to the sermon beyond the boundaries of the church, the sermon will be public.*

³⁰ I. N. FLOCA, *Canoanele Bisericii Ortodoxe Române...*, p. 158.

III. Criminal and Contraventional Challenges Regarding the Content of the Sermon

Section 1. Where do the challenges to the content of the sermon come from?

The Christian values specific to Romanian society are pushed into a shadow corner and it seems that some members who are part of society tend to legitimize themselves publicly through *new values*, which contradict the first ones. Against the background of this climate appears the major challenge that the clergy of the Romanian Orthodox Church must face, namely that of transmitting the religious message without contradicting the various legislative provisions, enacted to discipline and organize social life in a certain direction or other. In the parting and preparation speech for the preaching mission, the Savior warned His disciples, telling them: “*In the world you have tribulation; but be of good cheer, I have overcome the world*” (John 16:33). For the Orthodox-Christian clergy, the transmission of truths of faith as the impossibility of salvation for those who persist in passions will always mean *the enduring of a milder or more severe form of persecution by those who choose to live a life contrary to Christian teachings*. And this phenomenon of suffering one form of persecution or another, should not be understood as related only to the preaching activity, but it lies in the fact that the whole world is marked by suffering and sin. And the preaching of the clergy causes some to retaliate, because *their own conscience condemns them on hearing the religious truth*. Therefore, *the content of the sermon* is an obstacle for them. And what could be more painful than your own conscience condemning you because of a messy life? Against the background of this spiritual decline, the state, which is composed essentially of people with various falls and disabilities, *enacts legal norms and develops public policies to protect new values, contrary to Christian ones*. In my opinion, these new values do nothing else than *to stifle the conscience of those who persist in passions and to bind the mouths of those who preach*. Maybe this trivial argument disappoints some people, but after 12 years of Church singing and working with people, I cannot give another answer. From a Christian perspective, the passions remain passions and the preaching of the truth remains the preaching of the truth, even if from a legal point of view *they undergo a most pretentious*

metamorphosis and the passions end up being considered rights, and the preaching of the truth a form of hate speech.

Section 2. The criminal challenge

According to art. 369 of the Penal Code: “Incitement of the public, by any means, to hatred or discrimination against a category of persons shall be punishable by imprisonment from 6 months to 3 years or by a fine”. Since *religious freedom is not absolute*, it is obvious that the content of the sermon could also be *subject to a qualitative control* by the prosecutor or the court, in case of suspicion of committing the deed provided and punished by art. 369 of PC. But the control *will not be possible in terms of fidelity to the dogma, because those bodies do not have the necessary tools to perform such a control*, but the control will aim to *elucidate the issue if the social value protected by criminal law is affected by the content of the sermon*. The control will also aim at *identifying the guilt form of the cleric who committed the deed*. At present, there is a *contradictory tension between state and religious values*, which, at some point, will reach a *maximum point*, when it will be established which of the two sets of values will have priority. And *the success of religious values depends on the way clergy retain their own believers*. Returning to the analysis of the crime, I show that the *value protected by the criminal law is a good understanding that must exist between citizens, regardless of race or nationality, ethnicity, language, religion, sexual orientation, etc.*³¹. *The active subject to this crime is un-circumstantiated*, so that even the cleric can have this quality³². *Passive subjects* against whom the action of incitement to hatred or discrimination was carried out are *circumstantiated*, being part of the category of persons concerned on the grounds of race or nationality, ethnicity, language, religion, sexual orientation, etc. In my opinion, in the case of this crime, *a legal plurality of passive subjects is incident*, the non-fulfillment of this condition of *objective typicality* determining,

³¹ A. BOROI, *Drept penal. Partea specială*, ediția a IV-a revizuită și adăugită, Ed. Ch. Beck, București, 2019, p. 721.

³² In the case of certain crimes, such as passive bribery [art. 289 PC], active bribery [art. 290 PC], influence peddling [art. 291 PC.], buying influence [art. 292 PC], embezzlement [art. 295 PC], abuse of office [art. 297 PC] etc., the cleric has the status of a *private clerk* [art. 308 PC].

in the phase of *criminal prosecution*, the classification (art. 314 par. (1) a) reported to art. 315 (1) b) both with reference to art. 16 par. (1) from the Code of Criminal Procedure)³³, and in the *trial phase, acquittal* (art. 396 par. (5) CCP)³⁴. Or, in other words, a person, although belonging to the category of sexual minorities, cannot bring criminal responsibility to the clergyman because he felt hated or discriminated against because of a sermon. But, several persons belonging to sexual minorities can attract such a responsibility of the clergyman in similar conditions and it must be shown that the *action of incitement to hatred or discrimination* against the material element can be committed *using various means*³⁵, including sermon. However, it is essential to the crime of incitement that the deed be committed by the clergyman with the *form of guilt* required by law, i.e. with *direct or indirect intent*³⁶. If the necessary form of guilt does not result from the conduct of the cleric, then, in the phase of the criminal investigation, a *classification* solution will be given. (art. 314 par. (1) a) related to art. 315 par. (1) b) both with reference to 16 par. (1) b) CPP), and in the trial phase an *acquittal* solution (art. 396 par. (5) related to art. 16 par. (1) b) CPP) Regarding this last aspect, the direct intention, *it is generally accepted that no clergyman of the Romanian Orthodox Church seeks to produce the result of hatred or discrimination*. (art. 16 par. (3) a) PC). But in relation to the indirect intention, *the clergy have the obligation to calibrate the religious message so that they avoid the rigors of the criminal law*. This is because, although *they do not pursue the production of the above result, but they reasonably accept the possibility of its production* (art. 16 par. (3) b) PC), because of the transmission of the exciting content,

³³ Law no. 135 of July 1, 2010 on the Code of Criminal Procedure, published in Monitorul Oficial al României, Partea I, nr. 486 din 15 iulie 2010.

³⁴ Par. (5) of art. 396 is reproduced as amended by art. 2 pct. 100 from Government Emergency Ordinance no. 18/2016 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, Law no. 135/2010 on the Code of Criminal Procedure, as well as for completing art. 31 para. (1) of Law no. 304/2004 on judicial organization, published in Monitorul Oficial al României, Partea I, nr. 389 din 23 mai 2016.

³⁵ „The crime can be committed in any way and by any means”. A. BOROI, *Drept penal. Partea specială*, p. 772; see in this regard Framework Decision no. 2008/913 / JHA of the Council of the European Union of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, published in the Official Journal of the European Union, L 328, December 6, 2008.

³⁶ A. BOROI, *Drept penal. Partea specială*, p. 772; T. TOADER, *Drept penal român. Partea specială*, ediția a VI-a revizuită și actualizată, Ed. Hamangiu, București, 2012, p. 470.

things can have a disastrous evolution both for them and for the religious freedom.

Section 3. The circumstance of a “public act” incident in the field of contravention when evaluating the content of the sermon

An extremely important aspect that must be considered to calibrate the religious message or to the eventual appreciation of the clergyman’s form of guilt, if the content of the sermon violated some values, is the phrase “deed committed in public”. In the first situation, when preaching in public, the clergyman is somewhat obliged to calibrate his religious message in such a way that it does not harm the mentioned values. A legitimate question is asked: *Isn’t this general practice of adapting the religious message to the public space a form of gradual renunciation of religious truth?* In the second situation, the phrase is of great importance because, from a contravention point of view, it facilitates the exact establishment of the factual situation.

In essence, the phrase “act committed in public” is a legal *circumstance*³⁷ and in relation to the object to which it refers, namely the deed itself, it can be concluded that it is a *real circumstance*³⁸.

³⁷ “Circumstances have been defined as that complex of data, circumstances, states, qualities or situations which accompany the commission of the act or concern the person of the perpetrator, in connection with his criminal manifestation ... they are related to the act committed, influence the punishment, because of those states, situations that accompany the deed and influence the gravity of the deed and the situation of the perpetrator”. ICCJ decision no. 9 of May 11, 2017 regarding the settlement of the notification formulated by the High Court of Cassation and Justice - Criminal Section in File no. 9.131 / 2/2011, published in Monitorul Oficial al României, Partea I nr. 346 din 11 mai 2017.

³⁸ “Depending on certain factors which differentiate them, the circumstances are classified according to the object to which they relate, in actual circumstances [as regards the act] and personal circumstances [as regards the perpetrator]. Thus, the real circumstances are those circumstances, states, quality situations that are related to the deed and have in view the object and the objective side of the deed provided by the criminal law and affect the participants only as far as they knew them and had them. provided - art. 50 par. (2) of the Criminal Code, art. 28 par. (2) of the Criminal Code of 1969”. ICCJ decision no. 9 of May 11, 2017 regarding the settlement of the notification formulated by the High Court of Cassation and Justice - Criminal Section in File no. 9.131 / 2/2011, published in Monitorul Oficial al României, Partea I nr. 346 din 11 mai 2017; “Depending on the object to which it refers: real and personal circumstances. The real circumstances - are objective and concern the act provided

This circumstance may also be incidental *in the field of contraventions*. In this respect, Government Ordinance no. 2/2001³⁹ stipulates: “The provisions of this ordinance *shall be supplemented by the provisions of the Criminal Code and the Code of Civil Procedure, as appropriate*” (art. 47)⁴⁰. That being the case, the provisions of art. 184 PC⁴¹, must be taken into account according to which: “The deed is considered committed in public when it was committed - a) *in a place which by its nature or destination is always accessible to the public*, even if no person is present; b) in any other place accessible to the public, if two or more persons are present; c) in a place inaccessible to the public, but with the intention that the deed be heard or seen and if this result occurred to two or more persons; d) in an assembly or meeting of several persons, except for meetings which may be considered to be of a family nature, owing to the nature of the relations between the participants”. Of the four hypotheses listed, the one in letter a) is the most relevant for the subject analyzed, because Christians gather to celebrate the Holy Liturgy in *the Church, a space that by its nature is always accessible to the public*. The relevance of this real circumstance in the trial of a misdemeanor case lies in *facilitating the exact establishment of the real situation* in which the harmful message was transmitted through the sermon.

by the criminal law [for example, committing the act during the night]; they affect all participants, to the extent that they knew or anticipated them”. M. UDROIU, *Sinteze de drept penal. Partea generală*, Ed. Ch. Beck, București, 2020, p. 568.

³⁹ Regarding the legal regime of contraventions, published in Monitorul Oficial al României, Partea I, nr. 410 din 25 iulie 2001.

⁴⁰ Art. 47 was modified by pct. 7 of art. 41 from Law no. 76 din 24 mai 2012, published in Monitorul Oficial al României, Partea I, nr. 365 din 30 mai 2012.

⁴¹ The Criminal Code of July 17, 2009 [Law no. 286/2009], published in Monitorul Oficial al României, Partea I, nr. 510 din 24 iulie 2009. Art. 1 of the Government Emergency Ordinance no. 14 of February 5, 2017, published in Monitorul Oficial al României, Partea I, nr. 101 din 5 februarie 2017 annulled Government Emergency Ordinance no. 13/2017 for the amendment and completion of Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Code of Criminal Procedure, published in Monitorul Oficial al României, Partea I, nr. 92 din 1 februarie 2017. Consequently, all the amendments and completions provided by art. 1 of the Government Emergency Ordinance no. 13/2017, published in Monitorul Oficial al României, Partea I, nr. 92 din 1 februarie 2017, are inapplicable. By Law no. 8 of February 24, 2017, published in Monitorul Oficial al României, Partea I, nr. 144 din 24 februarie 2017 Government Emergency Ordinance no. 13/2017, published in Monitorul Oficial al României, Partea I, nr. 92 din 1 februarie 2017, was rejected.

Section 4. The contravention challenges. Preaching and the right to personal dignity (National Council for Combating Discrimination)

Section V which introduces art. 15 of the Government Ordinance no. 137 of August 31, 2000⁴² is called the *Right to Personal Dignity* and in this case the holders of this right are *only natural persons*⁴³. In the field of contravention, the cited article states the following:

“According to this ordinance, if the *deed does not fall under the criminal law*, a contravention is: any *behavior manifested in public*, having the character of nationalist-chauvinist propaganda, incitement to racial or national hatred, or *that conduct which aims at or concerns offending dignity or to create an atmosphere*

⁴² Government Ordinance no. 137 of August 31, 2000 on the prevention and sanctioning of all forms of discrimination, republished pursuant to art. 2 of the Government Emergency Ordinance no. 19/2013 for the amendment and completion of the Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination, published in Monitorul Oficial al României, Partea I, nr. 183 din 2 aprilie 2013, approved with modifications and completions by Law no. 189/2013, published in Monitorul Oficial al României, Partea I, nr. 380 din 27 iunie 2013, giving the texts a new numbering.

⁴³ Although the Civil Code recognizes the possibility of the legal person to be the holder of the right to institutional dignity, in this sense the doctrine shows that: “The Romanian legislator uses the notion of «dignity» in a broad sense, this being applicable to both individuals and legal entities”. K. ZAKARIÁS and K. BENKE, *Demnitatea umană în jurisprudența instanțelor constituționale din Germania, Ungaria și România*, in: *Buletinul Curții Constituționale* nr.2/2012 p. 57. “As the feeling of honor or dignity is characteristic of the natural person, in the same way we can talk about the fame and good reputation of a public institution or authority, attributes that the law defends by sanctioning the deeds provided in art. 2 point 1 of Law no. 61/1991, republished. Although they are not mentioned among the values listed in art. 30 of the Constitution, this does not mean that their violation is allowed. Consequently, the phrase «dignity and honor of public institutions» does not contradict the constitutional provisions, as it subscribes to the scope of applicability of para. (6) and (7) of art. 30 of the Constitution, which enshrines the limits of freedom of expression”. CCR decision no. 74 of March 7, 2002 regarding the exception of unconstitutionality of the provisions of art. 2 point 1) of Law no. 61/1991 for sanctioning the acts of violation of certain norms of social coexistence, of public order and peace, republished, decision, published in Monitorul Oficial al României, Partea I, nr. 283 din 26 aprilie 2002; CCR decision no. 476 of May 10, 2012 regarding the exception of unconstitutionality of the provisions of art. 3 points 1 and 31 and of art. 8 para. (2) of Law no. 61/1991 for sanctioning the acts of violation of certain norms of social coexistence, of public order and peace, published in Monitorul Oficial al României, Partea I, nr. 465 din 10 iulie 2012.

of intimidation, hostility, degrading, humiliating or offensive, directed against a person, a group of persons or a community and related to their belonging to a particular race, nationality, ethnicity, religion, social category or to a disadvantaged category or to their beliefs, sex or sexual orientation”.

In the sense of art. 15 *the preaching is also limited to the general notion of that conduct which has as its object, although a control of its constitutionality would be indicated. The phrase if the deed does not fall under the criminal law indicates the priority of the criminal law over the contravention*, so that if a cleric would be prosecuted or tried for an alleged commission of incitement to hatred or discrimination, the cumulation of the two responsibilities would mean violating the principle *non bis in idem*⁴⁴. Regarding the *form of guilt* required for committing the deed provided by art. 15 of the ordinance, I specify that this is the *direct intention*, qualified by purpose and specific to it is that the perpetrator to foresee and pursue

⁴⁴ “The European Court of Human Rights has analyzed in its jurisprudence the contraventions provided by the O.U.G. no. 195/2002 regarding the traffic on public roads and by Law no. 61/1991 for sanctioning the acts of violation of certain norms of social coexistence, public order and peace, ruling in the sense that the acts sanctioned in contravention of these normative acts fall within the scope of application of the notion of criminal accusation in art. 6 of the Convention, and the guarantees provided in criminal matters, including those deriving from the *ne bis in idem* principle, are applicable. The Court found, therefore, the violation of art. 4 of Protocol no. 7 when the criminal proceedings followed an administrative decision sanctioning acts against public policy, given that the prohibition imposed by the violated legal text was addressed to all persons and that, on the other hand, the purpose of the sanction was to punish and to prevent the commission of similar acts in the future, as well as the norms of incrimination”. Opinion of the National Institute of Magistracy regarding the application of the *ne bis in idem* principle in the case of facts likely to attract both misdemeanor liability and criminal liability, an opinion available on: www.juridice.ro, site accessed on 18.08.2021, time 11:51 [Romanian time]; see also causes: *Ioan Pop vs. Romania*, the decision of inadmissibility of June 28, 2011; *Anghel vs. Romania*, decision of 4 October 2007; *Franz Fischer vs. Austria*, the decision of 29 May 2001; *Gradinger vs. Austria*, decision of October 23 1995; *Tsonyo Tsonev vs. Bulgaria*, decision of January 14 2010; *Nicoleta Gheorghe vs. Romania*, decision of April 3 2012; by Decision no. 8/2016 of the High Court of Cassation and Justice - the court competent for resolving legal issues in criminal matters, analyzing the notification regarding the interpretation of art. 6 C. proc. pen., reference was made to the jurisprudence of the ECHR, showing that the *bis* element can be found in other cases than those deriving from criminal convictions or acquittals, such as the application of sanctions, followed by investigation and prosecution [in criminal matters] of the perpetrator.

the production of the result (cf. art. 16 par. (3) a) C. pen.). Hence the many decisions to reject the requests for sanctioning clergy for the religious message transmitted in public, requests made by various individuals or legal entities that cannot prove, in any way, the direct intention qualified by purpose. In fact, *the existence of such an intention in any clergyman would contravene the priestly mission itself*, which is why when he sanctions certain deviations from Christian values, he does so not for the purpose evoked by art. 15 of the ordinance, but to regain the lost one.

The body for combating the phenomenon of injury to personal dignity is the National Council for Combating Discrimination (CNCD)⁴⁵ and its attributions are: *prevention of discrimination; mediating acts of discrimination; investigation, finding and sanctioning acts of discrimination, etc.* (art. 19 par. (1) a) - c) of O.G. no. 137/2000)⁴⁶. CNCD may sanction the clergy of the Romanian Orthodox Church, when it finds the message transmitted through the sermon violates personal dignity. Therefore, to establish and sanction the alleged contravention, *the Council can assess qualitatively the content of a sermon, whether it harms personal dignity or not*. In this sense, it is worth mentioning the unfortunate case of Patriarchal Counselor Vasile Bănescu, who was investigated by CNCD, because of his statements regarding the wrong form of sex education that is to be implemented in Romanian education. Among other things, he stated the following:

⁴⁵ The National Council for Combating Discrimination [CNCD] is the autonomous state authority, under parliamentary control, which carries out its activity in the field of discrimination. The Council is the guarantor of the observance and application of the principle of non-discrimination, in accordance with the internal legislation in force and with the international documents to which Romania is a party. The National Council for Combating Discrimination operates based on the republished Government Ordinance no. 137/2000, on the prevention and sanctioning of all forms of discrimination. The National Council for Combating Discrimination started its activity in August 2002, with the appointment by the Prime Minister of the members of the CNCD Board of Directors [based on proposals received from the Ministry of Public Information, Ministry of Labor and Social Solidarity, Ministry of Justice, Ministry Health and Family, the Ministry of Public Administration, the Ministry of Education and Research and the Ministry of Interior] and then the appointment of the President of the Council, from among the members of the Board of Directors.

⁴⁶ Government Ordinance no. 137 of August 31, 2000, on the prevention and sanctioning of all forms of discrimination, republished pursuant to art. 4 of Law no. 324/2006 for the amendment and completion of the Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination, published in Monitorul Oficial al României, Partea I, nr. 626 din 20 iulie 2006.

“When this subject (sex education) is absolutized, it becomes independent in all cycles of education and the following question arises that must be answered by those who accuse me: What do we fill the content of sex education classes with, from primary school to high school? With information about homosexuality, transgenderism and other things already ideologized behind the European Union?”.

More recently, His Eminence Theodosie’s statements about women have been the subject of investigations by the Council, all of which ended with the *non-sanctioning of the hierarch*⁴⁷, but *for the press this outcome was not sensational*, which is why I ask myself: *didn’t the creation of the Council have a different purpose?*

Concluding remarks

I hope that the above have clarified to some extent some legal issues that may pose major challenges to the content of the sermon, in a society that so emphatically proclaims *diversity*. Having reached the point of presenting some conclusions, I would like to show the following:

1. The contradiction between religious values and new values is caused by their different finality. The former has a transcendental

⁴⁷ From a legal point of view, the substantiation of the Council’s judgment is an aberration on the ground that the exercise of religious freedom cannot be relied on as a justification if such exercise infringes values protected by contraventional or criminal rules. The Council believed: “in such cases as the one under analysis [only in this concrete case which is the object of the complaint], based on religious freedom and the principle of autonomy of religions recognized by the Romanian state, it is up to the latter to assess and to apply its own regulations when a hierarch in the expression of freedom of conscience and religion may infringe on fundamental human rights and freedoms, in this case the right to dignity of women”. This right and this obligation of the cults recognized by the state results from art. 5 par. (4) of Law 498 of 2006 on religious freedom and the general regime of cults: “In their activity, cults, religious associations, and religious groups have the obligation to respect the Constitution and the laws of the country and not to harm public security, order, health and morals as well as fundamental human rights and freedoms”. According to the press release of June 9, 2021, published on the CNCD website, available at: <https://www.cncd.ro/comunicat-de-pres-a-09-iunie-2021/>, site accessed on 11.08.2021, time 13:29 [Romanian time].

finality, pursuing man's acquisition of holiness, while the finality of the latter is earth-oriented, justifying and defending moral promiscuity.;

2. In such a climate of contradiction the clergy transmit, through the sermon, the religious message;
3. Both preaching and hearing are forms of manifestation of religious freedom, protected by law;
4. The sermon is not eminently private, there may be situations in which it is public;
5. Although preaching, as a form of manifestation of religious freedom, benefits from the protection of the law, nevertheless through it, messages capable of harming social values protected by criminal or contravention norms cannot be transmitted;
6. Although a calibration of the religious message is needed, a balance must be struck between this need and the obligation to convey the truth of the faith;
7. In certain objective situations, state authorities are competent to assess the content of a sermon when it infringes on social values protected by criminal or misdemeanor rules;
8. However, the legislator, still faithful to religious values, enacted the incident rules in such a way as to discourage, from the outset, intimidating steps (complaints, denunciations, notifications, victimizations, etc.).

Therefore, beloved servants of the holy altars, *do not despair!*