

Jurisprudential approach and theory of Article 196 Penal Code on ecclesiastical office abuse

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Abstract

The existence of religious communities in the public sphere could enhance the foundations of a harmonious coexistence but could also spur towards intolerance and racism on the other hand. The creation of social unrest concerning the criminal law is the main focus of this article. Our aim is to make known the legal terms describing the religious minister; in which occasions he is reacting in the framework of exercise of his religious duties, when in public and the acts that constitute provocation or excitement to an animosity. Finally, the potential subjects undergoing the consequences of these acts are referred through the vision of the theory and the jurisprudence, if any.

Keywords: abuse of power, religious ministers, exercise of his duties, public, animosity, state power, citizens

Introduction

Following incidents occurring in the daily life of Greek citizens, it was imperative to follow the route of article 196 Penal Code that refers to a particular crime, entitled ecclesiastical office abuse. Initially, after we define the protected legal interest and the protection of the law, we will look at the structural elements of the crime that is the subject/actor, the subject/victim and criminal behavior/act with the necessary conceptual declarations required by the article's special terminology. The the-

ory on ecclesiastical and criminal law, and any law for that issue will help us draw the necessary conclusions for the current feasibility of the article and its further exploitation as a defensive “weapon” for social peace especially during times of crisis.

The Protected Legal Interest of Social or Public Peace

The article 196 of the Penal Code entitled “ecclesiastical Abuse” included in the sixth chapter of the Special Part of the Penal Code that intends to protect against the threats of public order in order to maintain social peace. The protected legal interest in article 196 Penal Code is the social or civil peace as enshrined both in the Constitution and international treaties in which the Republic of Greece is a contracting member. The legal interest of social peace is the underlying purpose and *raison d’être* of the legal system. In the Greek Constitution, in particular, there is reference on the protection of social peace at the article 2§2: “Greece, adhering to the generally recognized rules of international law, pursues the strengthening of peace, justice, and the development of friendly relations between peoples and the States’. We believe that social peace is being protected not only by the entire spirit of the Constitution but also by the entire legal system, without the need to make special reference to it.

Reference to the word ‘peace’ in Article 2§2 of the Constitution shall be interpreted in two ways: on the one hand, social peace among persons living in Greek territory and peace as an all-humane good between peoples and states, on the other. The protection of social peace in the Greek legal order is achieved through particular pieces of legislation, beyond the Constitution and the systematic interpretation of the spirit of the law, which analyze the specific violations in different branches of law. Criminal law devotes an entire chapter in order to enhance social peace. In the sixth chapter of the second book of Penal Code which is entitled “threats of public order” the terminology ‘public order’ is another way of saying social peace. The legislature seems to use two terms without distinction, equating the term “public order” to “social peace”. In our opinion the term social peace is a broader and

a more comprehensive than the public order.¹ Public order is the most important and characteristic facet of social peace.

In article 196 of Penal Code the legislator favors that the criminal offense and conduct of the religious worker against the state power or other citizens thus disturbing the peaceful coexistence. Hostility could create factionalism to the society resulting in a flurry. At this point it is advisable to try to give some conceptual directions concerning the existing terms in the abovementioned article of Penal Code.

Conceptual Determinations

The terms that require further analysis, before proceeding to the constituent elements (Objective and Subjective) of crime, are “ecclesiastical office” and “religious minister”. The ecclesiastical law will serve as a useful interpretative tool in clarifying the previously mentioned terms.

The article 196 of the Penal Code is entitled a crime committed on “ecclesiastical office abuse”. Throughout the layout of the text, the legislator tries to describe what constitutes the abuse of “ecclesiastical office” and by whom it is committed. The ecclesiastical office can not be examined separately from the concept of religious minister since it may lead to erroneous conclusions.

The legislator considers punishable only crimes committed in ecclesiastical office abuse by religious ministers, namely the clergy and especially the higher priesthood. Precisely, the term religious minister was employed by the legislature to cover all “known religions” present and active in the Greek territory beyond the prevailing Eastern Orthodox Church.

Since the Constitution has protected all known religions², rather, for

¹ Social peace shall also be associated with other vague legal terms like morality, public health, for the common or general or public interest which have as their ultimate goal the peaceful co-existence of people.

² “Known religion” is defined as the one that highlights declared dogmas, worship, organization and aims and is being safeguarded towards freedom of worship based on Article 13 paragraph 2-3 of Constitution.

the freedom of worship of article 13§2-3 of Constitution. The concept of religious minister includes all religious ministers of known religions. The content of religious freedom, however, first and foremost involves the freedom of (religious) conscience in article. 13§1 S. and then the freedom of worship, which in turn involves known religion. In the most correct opinion, religious ministers of an unknown religion that does not fall under the freedom of worship, but under the freedom of religious conscience are covered by the term of “religious ministers”.

The religious minister of the Orthodox Church, which is the dominant Church in Greece, includes only the higher clergy. It is worth mentioning the concept of the word priest in the Orthodox Church since it constitutes an overwhelming majority of the population. The clergy in accordance with ecclesiastical law is divided into higher and lower clergy.

The clergy in the strict sense of the term – or higher priest- are divided into three ranks: Bishops, Presbyters and Deacons.³ A common characteristic of these three ranks of higher priesthood is that they take place during a mystical formal act called ordination,⁴ Consequently, the higher ranks of priesthood which we have already mentioned – with its individual facets of the three ranks of priesthood constitute the religious ministers of article 196 of the Penal Code pertaining to the Orthodox Church.

If the legislature itself did not interpret in the first clause of article 196 of the Penal Code whom it considers to fall under the concept of ecclesiastical office thus only the religious ministers, criminal offence would have a broader sense and apply to a larger group of people. A question would arise whether the lower clergy or ecclesiastical com-

³ Clerical ranks are very ancient and respond to the Tradition of the Church starting from the early years of its establishment. They are distinguished into the three ranks that we have previously mentioned in the middle of the 2nd century (Konidaris 2011: 117).

⁴ Ordination takes place during the Divine Liturgy and depending on the clerical rank meaning deacon, presbyter or bishop, at different intervals during the mystery of the Holy Eucharist.

missioner are included in the category of ecclesiastical office.

According to the Tradition of the Church and the sources of ecclesiastical law, subdeacons, church readers, chanters, church janitors and sacristans constitute the lower ranks of priesthood (Konidaris 2011:117). The difference between lower and higher priesthood lies on two important elements: first, in the different roles each one has, where the lower priesthood assists in the celebration of the divine mysteries and second, in the way in which they were obtained their *officio* by a simple ceremony which takes place anytime during a service. The legislator aims at including only the higher ranks of priesthood that is the Bishops, Presbyters and Deacons.

The Church council consists of five members and is comprised of one priest who is presbyter and President and four members of laity,⁵ called “commissioners” of the parish. The members of ecclesiastical council are the four members of laity comprising the church council of the parish. They are chosen and appointed from a list of the members of the parish, by the Metropolitan Council following the Metropolitan’s recommendation to serve for three years (Konidaris 2011: 156-160). The property of the “commissioner” (the member of the church council) constitutes an ecclesiastical office that is honorary and without pay. Therefore, the article 196 of Penal Code (abuse of the ecclesiastical office) could apply to the members of the church council (the commissioners) if the legislator did not restrict criminal offence only to religious ministers in the first paragraph of the article.

In conclusion, we would claim that the aforementioned crime based on article 196 of Penal Code can be committed only by a religious minister of a known religion who can gather according to the teachings and the tradition of his Church or his religion the elements and requirements of the religious minister. In the Orthodox Church the higher priesthood gathers the properties of the religious ministers

⁵ Laity (*laikoi*, *λαϊκοί*) is considered to be the members of the Church who enter therein through the mystery of Baptism and Chrismation. Therefore are not religious ministers since they do not belong to the clergy office with its aforementioned features.

namely, clergy who are Bishops, presbyters and deacons. Finally, it would be appropriate to add the term “religious” to the title of the crime referred to in article 196 of Penal Code in order to create a new one – “Ecclesiastical or religious office abuse”– so that the religious ministers of all known religions can also be included.

The Constituent Elements (Objective and Subjective) of Crime

The crime of the ecclesiastical office abuse is a genuine and special crime for its subject is only the religious minister. The legislator himself is self-contained since it is only referred to as religious minister. The crime in objective grounds is analyzed in the following four points that have to concur cumulatively.

- a) *“Subject of the crime should only be a religious minister”*. The special traits of the religious minister within a community of faith, particularly in the Orthodox Church are analyzed in the following three offices, the ritual, the didactic and the administrative. The higher rank of priesthood, as we have already mentioned (Bishop, presbyter, deacon), includes the three aspects – offices (ritual,⁶ didactic⁷ and administrative⁸) which can be spread to every religious minister of a known religion. Based on the teachings of common experience every religious minister of any religion (community of faith) in the framework of his responsibilities has the role of performing rituals (in order to celebrate certain rituals), didactic (teaches beliefs and interprets the theology and tradition of his faith) and administrative (administration of people and things). In the article the priests who preach are also included. We cannot support the same

⁶ Ritual power refers to the power of the religious servant granted by the Church (or by his religion) with the procedures laid down, to serve the mysteries and holy rituals.

⁷ Didactic power is the power the religious minister exercises in order to teach the doctrine, tradition and beliefs of the Church or proportionally to every religion.

⁸ Administrative power is the power to administer the staff and estate of the church community, parish or generally the community of faith (whatever the religion may be).

for laity preachers or catechists. The quality of the religious minister is judged by the canons of his religion (Troianos, 'Lectures' [1984], p. 395 note 1).

- b) *"During the performance of his duties or publicly with his function"*. The religious minister is the Subject of criminal act based on the article 196 of Penal Code when he proceeds to a criminal act during his duties. The duties of the religious minister are the ones that were previously mentioned as they were analyzed, in the framework of his activities that is, during the practice of his ritual, didactic and administrative office.⁹For example, during a ritual or preaching or during the selling of an object which belongs to the parish or more extensively to the community of faith where he is in charge. Furthermore, the religious minister can commit the crime when he is out in public sphere and practices with his role as a religious minister, not necessarily by exercising his duties. For instance, if he finds himself in a public place in his capacity as a religious minister (he should be visible) in order to convince, then he is subject to the law. If his role is not apparent, then we cannot claim that he committed the crime (Kontaxis, Penal Code, p. 1680, Kaifa, Simeonidou, Penal Code, p. 115). For example, if he finds himself among a narrow circle of people or if he attends a social event or protest as an individual (Kontaxis, Penal Code, p. 1680, Kakkalis, Kourakis, Magganas, Frsedakis, Penal Code, p. 936-937). The religious minister can exercise his duties anywhere ie within the church, home, in a square and the means that will be used is of no significance (for example verbal –written communication or movement). In addition, whenever the religious minister claims his capacity, so that he may proceed to a certain act (Manoledakis, *Threats*, p. 212).
- c) *"Provokes or incites the citizens towards being hostile"*. The capacity of the religious minister exerts a particular pressure in the conscience of the crowd of faithful due to his special role in the community of

⁹ When the religious minister performs his act, while performing his priestly duties (Gafos, p. 176).

faith. If the religious minister also combines special capacities or potentials, this may make his influence more dangerous. Whichever mean he can use to provoke or incite the citizens (the faithful in particular) towards being hostile, constitutes the element of objective grounds for the crime. The term "hostility" signifies the creation of hate or any form of hostility not exclusively religious hostility (Kontaxis, *Penal Code*, p. 1680). The provocation of religious intolerance does not constitute an exclusive way for committing the crime. It could provoke, for example, animosity against a person or persons or team or group of people with a specific for example racial, ethnic or political orientation. The provocation or stimulation should occur in a way that the disruption of common peace is being threatened. Provocation is conceptually distinguished by stimulation. Provocation is direct and has immediate reaction whereas stimulation is the hidden and treacherous pursue of the aim (Troianos, 'Lectures' [1984], p. 395). It could be deduced that the provocative or stimulated act of the religious minister turns into hostility. It has been ruled, in the unique decision, by the Supreme Court 1489/1997, which has examined the application of the article 196 of Penal Code, that a religious minister (priest of a parish) incited the church goers towards hostility against the Metropolitan.

- d) "*Against state power or other citizens*". By state power we mean state authority with a wider sense of the term and under all its facets that is, the legislative, executive and judicial power. The clause "against other citizens" indicates that the hostility which was caused by the religious minister could be directed against a person or group of people. The motives may not be religious but for example, political, racial and ethnic. There are contemporary examples of religious ministers of the Church and other religions, in Greek territory, to turn their religious community against a group of people.

The crime is committed with willful misconduct, in other words the capacity of the religious minister is known and that with his capacity

he provokes or incites the citizens towards hostility, against state power or against other persons and the will to perform this act (the knowledge and will that the act of the religious minister is capable of inciting the citizens towards hostility). The prospective deception suffices whereas the crime committed through negligence is not punished. Also, it is considered to be *a fait accompli*, when there was provocation or stimulation, without requiring the provocation of hostility. It is sufficient for the typesetting of the crime to know that the way and the means were used objectively in order to achieve the previous result of provocation or stimulation. The attempt cannot be included in article 196 of Penal Code (Kontaxis, Penal Code, p. 1681). The intention to incite citizens towards hostility is evidence, as well as the objective attainment of this goal, without requiring the realization of the goal and is punishable with a prison sentence for up to three years.

Conclusion

The jurisprudence has not dealt with article 196 of Penal Code on “ecclesiastical office abuse” or more accurately, as we have substantiated in our analysis, “ecclesiastical or religious office abuse”, in a thorough way. There is only one case study reference, made in Supreme Court 1489/1997 (Poinika, *Chronika* 48/1998, pp. 492-493) where a priest was sentenced due to the fact that he incited the congregation to have feelings of hostility towards a Metropolitan. In reality, it is common in Greek territory to commit the aforementioned act, either by highly-ranked religious ministers of the dominant Church with regard to state power or human groups, but also by religious ministers of other religious denominations. Nevertheless, an ex-officio implementation is not initiated by prosecution authorities for committing crimes in public places by means of the press or the mass media in general. The protection and prevention through exercising and implementing article 196 of Penal Code will foster the safeguard of social peace, whose equilibrium is at risk and thus is in danger, especially during the last decade where Greece is experiencing hard times and a period of deep migration crisis.

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