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The concept of freedom of conscience and its constitutional and legal basis

This article discusses new approaches to issues of freedom of conscience, its legal basis and various constitutional and legal aspects. Author considers the current condition of freedom of conscience, and position of religion in Kazakhstan, based on a large factual material. The author made an analysis of the legal acts, regulating the activities of religious organizations in the Republic of Kazakhstan.

Key words: freedom of conscience, interfaith relations, religious association, freedom of religion, secular state.

New approaches to issues of freedom of conscience, its conceptual apparatus, the main features and elements of the legal basis and the content, various constitutional and legal aspects have appeared over the past twenty years. These issues are reflected in varying degrees in the works of contemporary Russian legal scholars: S.A.Avakyan [1], M.V.Baglai [2], A.I.Barmenkov [3], S.A.Buryanov [4], V.V.Klochkov [5], M.G.Kirichenko [6], V.A.Kuroedov [7], A.S.Lovinyukov [8], F.M.Rudinsky [9] and others.

Great scientific value and practical interest are studies and publications on this theme of a number of well-known Kazakh scientists. These are the works of Artemiev A.I. [10], G.K.Bilyalova [11], E.K.Kubeev [12], R.A.Podoprighora [13], A.N.Sagindykova [14], G.S.Sapargaliev [15], J.F.Trofimov [16].

Methodological approaches in addressing modern problems of human rights, including freedom of conscience, are marked in the works of the President of the Republic of Kazakhstan N.A.Nazarbayev. In the basic works of the head of state is contained a number of fundamental ideas and positions on interfaith relations, human rights, freedom of conscience, freedom of religion and religious associations, on the development of Kazakhstan as a secular state. Fundamentally important place is given to the development of democracy and human rights.

In our country has been accumulated rich and varied experience of realization of freedom of conscience, legal guarantees faithful implementation of legislation on freedom of religion. However, under the new conditions it's required further development of the legal freedom of conscience. Freedom of conscience — one of the most important human and civil rights, enshrined in the international instruments and legislation of many countries. In international acts and legal standards are usually given such wording: «Freedom of thought, conscience and religion.» The concept of this freedom is defined in the international legal acts on human rights. In The Universal Declaration of Human Rights (Art. 18), in the International Covenant on Civil and Political Rights (Art. 18), this right is proclaimed it as the right to freedom of thought, conscience and religion. Similar provisions are contained in the European Convention on Human Rights (Art. 9), the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5), the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (art. 1) and in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE (Art. 9.4).

In a number of regional and international acts this right is worded differently. Thus, in the American Declaration of the Rights and Duties of Man it is spoken about the right to religious freedom and religious practices, and in the American Convention on Human Rights about freedom of conscience and religion. African Charter on Human and Peoples' Rights guarantees freedom of conscience and the free practice of religion. The broadest definition is given in the Final Act of the Conference on Security and Cooperation in Europe and the Concluding Document of the Vienna meeting of representatives of States — the participants of OSCE, which uses the term «freedom of thought, conscience, religion and belief.»

The content of freedom of thought, conscience and religion is revealed in the article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights. It includes the following freedoms: a) adopt a religion or belief of his choice; b) to have a religion or belief; c) to change religion or belief; d) manifest religion or belief, either alone or in community, public or private, in teaching, practice, worship; d) to worship or to perform religious rites and ritual; e) ensure the religious and moral education of their children, parents or legal guardians in accordance with their beliefs. Similar el-

ements are included in the content of freedom of thought, conscience and religion, and in other international instruments listed above [10, pages 12–13].

Article 22 of the Constitution of the Republic of Kazakhstan provides: «Everyone has the right to freedom of conscience» [17].

Freedom of conscience is a difficult multifaceted concept, which has the legal and ethical aspects. Definition of the concept of freedom of conscience as ethical categories must comply with at least the following requirements: it must include the objective conditions of freedom of conscience and moral responsibility of the person for their activities (the subjective factor of freedom of conscience), correspond to the historical nature and are subject to significant impact.

Constitution of the Republic of Kazakhstan proclaims the right to freedom of conscience — guaranteed opportunity to profess any faith or not to profess any religion. Freedom of conscience is manifested in an action in accordance with their beliefs to implement the cult rites administered to promote values of faith or distributing anti-religious views by all legal means to obtain training and education in the clerical schools, etc. The right to freedom of conscience, according to the Constitution of the Republic of Kazakhstan shall not specify or limit universal human and civil rights and responsibilities before the state [17]. Therefore, freedom of conscience is first and foremost the legal status of citizens.

The right of citizens of our country to freedom of thought, or confession of any religion is based on the Constitution of the Republic of Kazakhstan [17], the Civil Code of the Republic of Kazakhstan [18], the Law of the Republic of Kazakhstan «On Religious Activity and Religious Associations [19] Law of the Republic of Kazakhstan» On non-profit organizations «[20], and other legislative acts of the Republic, as well as international instruments on the rights and freedoms of man and citizen, recognized by the Republic of Kazakhstan. This follows directly from Sec. 1, Art. 4 of the Constitution of the Republic of Kazakhstan: «The current law in the Republic of Kazakhstan are the norms of the Constitution, relevant laws, other regulations, international agreements and other obligations of the Republic of Kazakhstan [17]. It is important to note that according to para. 3 of Art. 4 of the Constitution of the Republic of Kazakhstan «international treaties ratified by the Republic shall have priority over its laws and are directly applicable when the international treaty that its application requires the promulgation of a law» [17].

The right to freedom of opinion stems directly from Sec. 1, Art. 5 of the Constitution of the Republic of Kazakhstan: «In the Republic of Kazakhstan shall recognize ideological and political diversity» and Sec. 1, Art. 22 — «Everyone has the right to freedom of conscience» [17]. Legal basis of freedom of conscience implies a certain relation of the state to its citizens according to their atheistic and religious views. This is the ratio of the relevant legal provisions. In legal terms, freedom of conscience is regarded as a legal institution, ie as a set of legal rules governing social relations that arise in the implementation of this freedom.

During the implementation of the legal norms, which constituent institution of freedom of conscience, arise and terminate certain legal relations in which the participants are endowed with subjective rights and legal responsibilities. With regard to the subjective rights (i.e rights belonging to a particular person), also used the term «freedom of conscience» (for example, you can say, «my right of freedom of conscience»). Thus, freedom of conscience in the legal sense, may be regarded as objective right (Liberty of Conscience Institute) and as a subjective right (the right to freedom of conscience).

It should be noted that the concept of freedom of conscience is an ambiguous concept, which has a number of aspects, shades, meanings and the elements. Thus, A.S.Lovinyukov highlights in the notion of freedom of conscience 10 interconnected structural elements: 1) the right to practice any religion; 2) the right to perform religious rites; 3) the right to change one's religion; 4) the right not to profess any religion; 5) the right to promote religion; 6) the right to conduct atheistic propaganda; 7) the right to charity; 8) The right to religious education; 9) cultural and educational religious activities; 10) equality before the law for all citizens, regardless of their attitude to religion [8; 26].

Institute of freedom of conscience is a totality of legal norms fixing the right of every citizen to profess any religion or no religion, the right to worship and the right of atheist propaganda, as well as establishing a system of special safeguards actually enforce these rights

Among these provisions should be distinguished constitutional law, administrative law, criminal law and family law, and the special role are played by the constitutional norms, because they have the highest legal force and they identified the most essential features of the Institute of freedom of conscience. This is and the meaning of «freedom of conscience».

Several studies separated the concept of «freedom of conscience» from the concept of «freedom of religion». First, in their opinion, it is reduced to the right to be a believer or an atheist. The second — to the right

of citizens to choose any religion, to create religious communities and so on. At the heart of the constitutional concept of freedom of conscience in Kazakhstan are laid provisions on relation of the state to religion and the church, on freedom of conscience. According to the theoretical and legal aspect this concept is based on the jurisprudence developed by the doctrine of subjective rights of citizens.

Subjective right is a kind, a measure of possible behavior of a competent person. In addition, there is always a subjective right entitled to something for an object that represents a certain value in the material, political and other respects.

The right to freedom of conscience is one of the subjective rights which is enshrined and guaranteed. The meaning and significance of the subjective right is to provide every citizen with the use of one of the most important spiritual values - freedom of conscience. The right to freedom of conscience has an important place in the structure of the legal status of a citizen. First of all, we note, that it is one of the basic constitutional rights. Constitutional rights are a kind of subjective rights of citizens. In contrast to the subjective rights, which are enshrined in the current legislation, the rights fixed in the Constitution, provide the opportunity to use the most valuable social benefits, determining the root of the human condition. They reflect the most essential, basic communication and the relationship between society and the individual, and realized high commonality and a large stability. These rights are permanent and are not settled by repeated implementation. They still feature in that they mediate relations and communications of citizens not to each other, or with individual state agencies, and the state as a whole. These features of the constitutional rights apply to the subjective right of freedom of conscience.

The constitutional freedom of conscience is the personal fundamental right of a citizen. An important feature of personal rule is that they:

a) guarantee individual freedom, ie, unimpeded select different behaviors of the citizen in the field of moral relations, life and private life, if this behavior is not contrary to the rule of law and the principles of universal morality;

b) individuate the identity of the citizen, contribute to the manifestation of the best spiritual interests, abilities, aptitudes and individual characteristics;

c) determine the most significant aspects of the situation of the person in relation to law and order.

In the personal rights individual interest, the scope of moral-home, private life are object to constitutional protection; citizen as a person stands at the forefront here. In addition, personal constitutional rights embodies in admissibility of unlawful use of violence against the person.

This provision has great importance for the understanding of the constitutional freedom of conscience, which acts as an important aspect of personal liberty of the citizen. The implementation of freedom of conscience is connected with all the constitutional rights and duties. Any constitutional freedom, including freedom of conscience, is ultimately aimed at ensuring the well-known material or spiritual benefits. Furthermore, it presents certain options, i.e. suggests an alternative to the well-known and, therefore, must consist of at least three rules to ensure: a) a measure of possible behavior in a certain direction; b) a measure of possible behavior in the opposite direction; c) selecting between these two rights.

Unlike other personal rights the constitutional freedom of conscience is not a single subjective right, and the set — more precisely, a system of subjective rights, and each of them has the legal aspects, consists of specific powers. The content of this constitutional freedom is not got a unique solution in science.

Legal institution of freedom of conscience is structurally very complex, consists of a large number of subjective rights, mainly administrative, specifying constitutional norms. Analysis of the constitutional law on freedom of conscience allows you to select the basic rights: 1) to confess any religion or no religion; 2) religious worship. Each of them has its own forms of implementation. The right to practice any religion or no religion realized by citizens for life, constantly. The right to religious worship is carried out periodically and is often associated with the emergence of state-legal, administrative, legal, and other, industry, legal relations.

The right to confess any religion or no religion provides unavailability undue coercion of the conscience of man, eliminates illegal interference in the scope of his spiritual life, provides a free choice. It is the most essential aspect of freedom of conscience as a social good [6; 34].

The right to practice any religion is ensured equality of all religions before the law and the lack of privileges granted to any one of the religious confessions in the Republic of Kazakhstan. The right implies the possibility to change the faith, to join another religious confession, the citizen can be a member of only one religious-cult association.

If we consider a single right to profess any religion or no religion in terms of its structure, it is possible to distinguish ordinary powers. Firstly, the right to affirmative action, that is, to use the social benefits associated with the possibility of choosing between religion and atheism and the absence of unlawful coercion of the conscience of man. Secondly, the right — petition addressed to all citizens around the state bodies, officials, public organizations and individuals and assumes a legal obligation to respect that right, not to hinder its implementation. Third, the law — a claim that is the ability to appeal the illegal actions of subjects of public relations to the relevant authorities.

Under the law of worship it is meant the right of citizens without disturbing public order and the rights of others, individually or together with co-religionists freely perform religious rites and ceremonies. This right, as an integral part of public-legal institution of freedom of conscience, and has its own structure — a significant number of branch subjective rights. But overall this is one of the most important rights fixed constitutional norm and implemented in the form of authority.

Entitlement, the right of use is that believers are given the opportunity to perform religious rites and ceremonies. Right — the requirement assumes all others respect this right — not to interfere with the rites, if they do not go beyond the legal limit, and the right — a claim — the possibility of protection through petitions, complaints to the relevant public authorities

Free practice of devotions is ensured as long as it does not violate public order; does not infringe on the rights of citizens; does not harm the health of the population. Features of legal guarantees of constitutional freedom of conscience, primarily related to the complete secularization of law and legal relations in society. Religion has no effect on the capacity and capability, ie, on the extent of political, labor, property, housing, family and other rights of citizens. The system of legal guarantees of freedom of conscience consists of state-legal, administrative — legal, criminal law and civil law guarantees. Unlike other personal constitutional rights, a special role in this case (in addition to state-legal) play an administrative and legal guarantees.

State-legal guarantees are, first, the constitutional norms on freedom of conscience; second, the activities of public authorities, aimed at the implementation of these standards, create the appropriate conditions.

Administrative law, criminal law, civil law guarantees are the conditions and means of ensuring the protection of freedom of conscience, provided the relevant branches of law (for example, criminal and administrative responsibility for violation of legislation on religious cults).

Freedom of conscience is an important spiritual benefit, a significant socio-political value, an element of personal freedom. Its implementation is an essential aspect of the development of democracy, secularism in Kazakhstan. Different approaches to the definition of freedom of conscience, its main features and elements, which are discussed in this section, are not limited only to the legal aspects. As Buryanov noted, the right of everyone to freedom of conscience is a legal dimension of freedom of ideological choice (including its religious form, as one of many possible, as well as the change has already made the choice), the backbone in the system of human rights. Without the realization of this right other human rights lose much of the actual content, while remaining declaration. Implementing the right to freedom of conscience, man realizes himself, makes sense and defines their place in life [4; 24].

Freedom of conscience has two aspects. One is the freedom of moral and ethical views of human (i.e., what constitutes good and evil, virtue or villainy, good or bad deed, honest or dishonest behavior, etc.). Hence, by the way, common notions of decency and conscience rights. There is a certain ideal standard, which can be weighed against each individual. Another aspect of freedom of conscience is precisely the inner (spiritual) ability of the person to choose a similar ideal and worship him. Freedom of religion is the ability to believe in the existence of such an ideal, not as someone from the others, and in the form of an unusual (divine) being not only the most honest, just, humane, but also think about the moral purity of each of us, helping us to choose the true path, the holding of the bad things, adjusts to help your neighbor. As such beings belong to all the best qualities — it brings, and even identifies freedom of religion with freedom of conscience [1; 9].

The implementation of freedom of conscience requires legal guarantees. The legal basis for the realization of freedom of conscience stands Constitution. The Constitution of the Republic of Kazakhstan defines the status of religious freedom and legal safeguards. Constitutionally — legal status of religious freedom its embodiment got in the sections II «Man and the Citizen» of the Basic Law of Kazakhstan, Article 22 states: «1. Everyone has the right to freedom of conscience. 2. The right to freedom of conscience must not specify or limit universal human and civil rights and responsibilities before the state» [17].

In Kazakhstan society the democratic elements were formed that make up the content of the principle of freedom of conscience. The proclamation of the 1995 Constitution of the Republic of Kazakhstan as secular

state (Article 1) refers to the fact that in the country there is no official state religion, and none of the beliefs are not recognized as binding or preferred. State is equally tolerant to Islam and Orthodoxy, to other faiths [12; 148].

In accordance with the Constitution of the Republic of Kazakhstan religions, their laws and dogmas, religious associations, operating in Kazakhstan, have no right to influence the policy of the state, on the political system, the activities of state bodies and their officials. Secularism of Kazakhstan ensured the separation of religious associations from the state. It also means that public authorities should not allow illegal interference in the affairs of religious communities and religious groups to impose on the functions of state bodies. In addition, the state should not fund religious organizations.

Further, the secular nature of Kazakhstan is expressed in that is not allowed political parties based on religion. It says on the avoidance of political parties based on religion. This does not imply the idea that form political parties based on religion is not prohibited. Although this provision is not contained in the Constitution, it goes without saying. The fact is that if the party's activity on religious grounds is prohibited, and it is impossible to create such parties. Such parties are not subject to registration in the state bodies. And not registered parties are not legitimate.

Recognizing the illegal activities of political parties based on religion, the Constitution of the Republic of Kazakhstan has consistently argued the secular character of the state. After all, political parties are to conduct political work to implement policy. Since the state is separated from religion, religious groups should not interfere in state policy, in the affairs of state. This should be interpreted as restricting the rights of religious dogma that nothing to do with politics do not have, and should serve only meet the religious needs of the faithful. Citizens, regardless of the religion practiced, enjoy political rights. Both believers and clergy can be elected to public authorities as citizens, not as representatives of the respective denominations.

The establishment and activity of religious organizations whose goals and activities, aimed at overthrowing the constitutional order, violation of the integrity of the Republic, undermining the security of the state, inciting religious hatred are forbidden. Separation of religion and state means that it is impossible to teach religious dogmas in public schools. With this principle it is incompatible involvement of religious organizations and their representatives in any activity of any public body, government agency, such as the consecration opened public institutions (schools, libraries, clubs, etc.), businesses, their products, and so on., as well as placing them in those or other signs of religious symbols.

Genuine democratic character of relations between the state and religious organizations, the fullness of the implementation of freedom of conscience in Kazakhstan are particularly evident in terms of independent Kazakhstan. In the country all relations between the state and religion are governed by the laws and the Constitution. At the same time, every citizen has the right to freedom of conscience, the implementation of which must not specify or limit its universal human and civil rights and responsibilities before the state. Question of faith or atheism — is a private matter of everyone.

In modern Kazakhstan there is a multi-religious society. After gaining its independence, the Republic, in fact, is a revival of religion, increases the number of believers. The state has created all the conditions to meet the needs of their religious believers. In our country in peace and harmony with Muslims live followers of Orthodoxy, Catholicism, Protestantism, Judaism, Buddhism and other religions. In our country there is the largest number of religious buildings in the Central Asian region. And we are on an equal footing as mosques and churches and temples, synagogues, houses of worship and other religious buildings belonging to the widest range of denominations.

Respect of Kazakh people to other faiths, tolerance and mutual understanding have become a consolidating and unifying factor, the main condition for sustainable development of the state and to ensure social stability in our country.

In Kazakhstan there are no conflicts and confrontation between people on the basis of religion. Develop constructive forms of relationships between state and religious associations, as well as between different religions.

As shown by the results of a series conducted in 2013, opinion polls, about 90 % of citizens assess the religious situation in the country as well. State policy in the sphere of inter-religious relations support 86 % of the citizens.

In our opinion, these figures indicate the effectiveness of state action in the field of religion, which contribute to the stabilization of the religious situation in the country and are widely supported in society. However, today we must understand that the maintenance of interfaith harmony requires not one-off and ongoing efforts by both the state and the civil society, especially religious communities themselves [21].

In conclusion, we note that many facts indicate that in the sovereign Kazakhstan relations of religious organizations and the state are constantly evolving.

It is expanding dialogue and contacts of believers and non-believers for genuine democratic development of Kazakhstan. Under the influence of the democratic process and relevant to all problems, including the problem of the future of Kazakhstan, believers and unbelievers can not find understanding. And this process is irreversible.

In Kazakhstan the main principle is the separation of religious associations from the state in all its manifestations. At the same time, the republic by declaring itself a secular state, does not dismissive of guaranteeing the implementation of freedom of conscience [11; 155]. Constitutional and legislative regulation of the implementation of this law citizens conforms to generally accepted norms of international law on freedom of conscience and religion. Considering the current stage of development of Kazakhstan in the context of this problem, we emphasize that it is accompanied by complex processes in the spiritual life of the community, a large increase in religious communities as traditionally practiced religions and non-traditional. The state should enforce religious laws. At the same time it is necessary to study trends in religious movements, comprehensive work to neutralize the negative phenomena in the religious environment. Freedoms, including freedom of conscience, must have legal guarantees.

The main conclusion of this article is that the state provides the objective conditions for freedom of conscience. Manifestation of genuine freedom of conscience does not depend on the number of its carriers, it appears meaningful action oriented people, humanity as a whole. Freedom of conscience in the legal sense, we consider as objective right (Freedom of Conscience Institute) and as a subjective right (the right to freedom of conscience). An important element of freedom of conscience is the principle of the equality of believers and non-believers, without which it is virtually impossible. Freedom of Conscience Institute is a totality of law recognizing the right of every citizen to profess any religion or no religion. It should be noted that the constitutional freedom of conscience — the fundamental right of private citizens. Unlike other personal rights of constitutional freedom of conscience — not a subjective right, but a set of subjective rights, and each of them has the legal aspects, consists of specific powers.

Thus, the concept of freedom of conscience can be formulated as: freedom of conscience — a constitutional legal norms of the secular state, which regulates a set of subjective rights and provides an opportunity to practice any religion or no religion.

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И.Е.Ысқақова

Ар-ождан бостандығының түсінігі және оның конституциялық-құқықтық негіздері

Мақалада ар-ождан бостандығына қатысты конституциялық-құқықтық аспектілер мен құқықтық негіздемелер кеңінен қарастырылған. Автор фактілік жағдайларға сүйене отырып, ар-ождан бостандығы жағдайын, Қазақстандағы діни ахуалды зерделеген. Сонымен қатар Қазақстан Республикасының діни бірлестіктердің қызметін құқықтық реттеуге қатысты нормативтік-құқықтық актілерді жан-жақты талдаған.

И.Е.Искакова

Понятие свободы совести и ее конституционно-правовые основы

В статье рассмотрены новые подходы к вопросам свободы совести, ее правовым основаниям и различным конституционно-правовым аспектам. Автор на основе большого фактического материала рассматривает современное состояние свободы совести и положение религии в Казахстане. Сделан анализ нормативно-правовых актов, регулирующих деятельность религиозных объединений в Республике Казахстан.

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