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The problem of legal status of judicial theological expertise

The article is devoted to the problem of the judicial theological expertise. At present theological expertise is not included in the departmental list of state judicial expertise and there is no methodology of carrying it out. Qualification requirementsfor an expert, his statusand a certification procedure have not been determined yet. The article considers such expert's activities as theological expertise and expert investigation carried out on request of law enforcement bodies or the court. The objectives of the judicial theological investigation or expertise are presented in the article. The problem of putting correctly the questions for an expert to answer,requirements for the methods of carrying out theological examination and expertise are also considered in the article. The author notes that it is difficult to resort to the scientific principles while carrying out theological expertise because an expert's subjective opinion may have an impact on the conclusion. The article underlines the necessity of legal investigation of the problems connected with judicial theological expertise in order to make it real legal instrument to protect freedom of conscience and freedom of religion. Judicial expertise must become a legal force to prevent illegal actions of religious associations.

Проблема правового статуса судебной религиоведческой экспертизы

Статья посвящена проблемам судебной религиоведческой экспертизы. Отмечается, что на настоящий момент религиоведческая экспертиза не значится в ведомственном перечне государственных судебных экспертиз и не имеет строго разработанной методики. Статус эксперта-религиоведа не определен, нет процедуры сертифицирования, не сформулированы квалификационные требования. В статье дается характеристика таких видов деятельности, выполняемых религиоведами по запросу правоохранительных органов или по постановлению суда, как производство экспертиз и экспертных исследований. Излагаются общие задачи судебной религиоведческой экспертизы и ставится проблема корректности вопросов, которые выносятся на рассмотрение эксперта. В общей постановке

рассматриваются требования к методике проведения религиоведческих исследований и экспертиз. Отмечается, что на практике следовать принципам научности при проведении религиоведческой экспертизы достаточно сложно, и на выводы экспертов зачастую влияют их субъективные взгляды и убеждения. Делается акцент на необходимости юридически проработать вопросы судебной религиоведческой экспертизы, чтобы она являлась действенным правовым инструментом защиты права на свободу совести и свободу вероисповедания, и, в то же время, способствовала законному пресечению противоправных действий религиозных объединений.

Ключевые слова: *религиоведческая экспертиза, свобода совести, свобода вероисповедания.*

Keywords: *theological expertise, freedom of conscience, freedom of religion.*

The Russian Federation is a multi-confessional state that is why the law enforcement bodies and judicial organs have to solve complicated problems,connected with vigorous activity of various religious associations. On the one hand, the Constitution of the RF guarantees the right to freedom of conscienceand freedom of religion to its citizens;consequently, the state must provide legal protection of religious associations.On the other hand,maintenance of law and order and national security is consideredone of the most important tasks of the state, religious sphere being also included. Officials of the law enforcement and judicial bodies have no special knowledge in the sphere of religion, thereforetheological investigation is resorted to when cases, connected with activities of religious associations are considered.

One should distinguish between the state theological expertise and the state judicial theological expertise. In this article, we have not considered in detail the state theological expertise, but have touched upon some of its features:

1). State theological expertiseis carried out when a state registration body doubts a religious character of the association, which has submitted the documents for registration; or the actual goals of the association do not correspond to the goals presented in the documents.

2). State theological expertise is carried out by the state body powered to it by the Order of Ministry of Justice of the Russian Federation, by the Council on the theological investigation. Its conclusions are binding on relevant state bodies.

3). State expertiseis characterized by the strict procedure.However, this feature is peculiar for this type of investigation to a lesser extent than the first two.

This article is mostly devoted to the judicial theological expertisebecause it has not been well developed in the legal doctrine of the RF.

The definition of the judicial theological expertise is stated in the Russian Federal Forensic Examination Act No. 73 of May 31, 2001 «On the state judicial and expert activities of the RF»:

«Judicial expertise is a procedural step consisting of investigations and expert's conclusions in response to the questions raised by the court, judge, agency of inquiry, interrogating officer, and investigator. It requires special knowledge in specific area of science, technology, art or trade». A written conclusion prepared by an expert upon the results of investigation is accepted by the court as an important evidence in the case proceedings

Theological expertise is a «type of judicial investigation based on such principles as the right to freedom of conscience and religion and other rights and freedoms of a citizen in accordance with common principles and norms of international law, the Constitution of the Russian Federation, and rights of the religious associations».

Theological expertise of religious activities is a procedural action therefore, it is necessary to determine the professional qualification of an expert on religious issues. Questions to be solved by an expert should be formulated clearly and the investigation procedure should be determined. An expert is responsible for the results of the expertise.

Unfortunately, the above-mentioned requirements are often ignored. Unlike other types of judicial examinations (linguistic. medical, psychiatric etc.),an expertise of religious activities does not rest on any specially determined technology. More than that, expertise of religious activities is not included in the departmental list of state judicial expertise carried out for procedural purposes.

The status of an expert on religious issues has not been determined yet, the certification procedure has not been worked out, and the qualification requirements have not been formulated.

As a rule, the University professors, who specialize in such subject as «Religious study», carry out judicial expertise. However, as it has been mentioned in the article «To the Question of the Methods of Theological Expertise» religious activities are very diverse and a religious scholar whois considered to be a specialist in one religion may know nothing about other religious movements and may fail to give a professional conclusion on their activities. The lawfulness of such expertise is debatable.And in fact, judicial decisions are made, state coercive measures are applied on the basis of the expertise (ban on the religious association activities, and recognition of their information materials as extremist ones etc.) That is why the court must show maximum responsibility when appointing theological expertise. Besides, the law enforcement bodies and courts have to make decisions on peculiar issues related to faith and beliefs of people. Persons engaged in expertise may also have their own beliefs and their conclusions on the same problem may differ radically.

In April2011, the Khabarovsk Territorial court considered the case of one of the churches of Christians of Evangelical Faith in Khabarovsk. The expert by

prosecution and the expert for the defense presented their conclusions on the church activities and influence on the minds of its adherents. The conclusions turned out to be diametrically opposite. The expertise presented by the prosecution office contained the conclusion that the activities of the church were aimed at programming human conscience. Experts for the defense saw the early Christian tradition in the doctrine and religious practice of the church. At the first hearing the court ordered a liquidation of the church, taking into consideration the conclusions made by the experts by prosecution. It took 18 months, two hearings (much time, much money, nerves of its leaders and adherents) to dismiss the prosecutor's claim. The conclusions of independent expertise of religious activities and psychological expertise, appointed during the third trial, practically coincided with the conclusions made by the experts for defense during the first trial. The expert by prosecution was sure to rely on his own religious beliefs.

Clear criteria of religious association's evaluation and official technologies of expertise have not been developed in Russia yet. That is why expert's approach may be subjective.

Besides, the majority of experts engaged in the investigation exercise the negative attitude to the new (the so-called «non-traditional») religious associations. The chief editor of the journal «The Religion and Law» A.V. Pchelintsev says that expertise of religious activities must not violate freedom of religion and freedom of conscience. However, the practice shows that theological expertise very often becomes an instrument of persecution of the non-Orthodox religious associations. Thus, it is necessary to work out a legal basis for the theological expertise.

The problem of differentiation of two terms – «theological expertise» and «theological investigation» is also raised in the article. Touching upon the problem of the need to work out the legal basis for theological expertise it should be noted that judges and prosecutors do not always understand the difference between these two terms. Uncertainty of use of these terms may create difficulties during the trial in the court.

In September 17, 2013, the court in Novorossiysk recognized the translation and interpretation of Holy Quran ideas into the Russian language as an extremist book. The experts' conclusion formed the basis for the prosecutor's opinion. When questioned, the experts explained that they had done an examination rather than expertise, and their investigation was philosophical in nature, they expressed their subjective opinion.

In our opinion, there may be three types of expert work connected with religious activities by the court statement:

1). «Consulting work» is given when there is no need to carry out a serious analyses and the conclusion is clear for the law enforcement officials who have sent the request. For example, to find out whether the pictures and statements in the Internet insulted the religious feelings.

A curious case occurred in the private practice of the author of the article. An «expert's opinion» was prepared on the prosecutor's request, concerning the e-

mail letter sent to the procurator's office and signed by a false name. The letter contained quotations from the Old Testament and demanded prohibiting spreading of the book. The expert's opinion was necessary to send the letter to the archive.

2). «Theological investigation» is carried out to decide whether it is necessary to institute proceedings on the fact of spreading religious literature. It requires serious work. An expert is to answer the questions concerning the information contained in the materials presented for the investigation.

3). «Carrying out theological expertise» is a complex investigation, requiring much time. It is carried out by the statement of the court or by an authorized body and aimed at examining not only the literature of the religious association but its activities too. Such documents as a Charter of the religious association (if itis officially registered), the nature of its dogma, cult and non-cult activities, intrapersonal relations in the association etc. are seriously analyzed. It might be necessary to attend church services, to observe rituals and ceremonies, to communicate with the adherents of the religious association. In this case, an expert must apply to the court or to the prosecutor for the permission for such activity.

This type of work is characterizedby deeper and more serious analyses than in the above-mentioned activities. Complex linguistic, psychological, psychiatric, sociological expertise is also carried out and an expert's task is to solve only such questions, which pertain to his competence. An expert's conclusion issued in competence with all procedural rules is accepted by the court as procedural document having legal force. An expert's responsibility is great as the court makes the judgment based on its conclusion. That is why an expert is required to sign a statement that it was warned about the responsibility for giving knowingly false expert's conclusion (Paragraph 5 of the Article 204 of the Code of Criminal Procedure of RF).

The objectives of expertise:

- to determine the type of religion which the religious association under investigation belongs to;
- to study the doctrine and the cult of the religious association;
- to find out whether the literature spread by the religious association contains statements aimed at the opposing some people to the others on the religious grounds, at the incitement to religious hatred and hostility;
- to find out whether there are destructive elements in the cult and proselytizing practice in the religious association.

However, in each case the questions vary, depending on the materials presented for investigation. It should be noted that very often questions for an expert to answer are formulated by the court or other authorized body without previous consultations with an expert. The lawyers as a rule are not competent in the sphere of religion and the questions they formulate for experts are sometimes difficult or even impossible to answer.

The expertise of religious activities done by O.D. Molchanov on the Samara district court request in 2008 is a vivid example of it. Practically all the questions

for the expert to answer were beyond the scope of his competence. The following question was put for the expert to answer: «Are there any facts (in the investigated materials) distorting the doctrine of the Islamic organizations which are not forbidden on the territory of Russia, and if the doctrine is really distorted, what kind of distortion is it and what is it aimed at»?

The expert could not cope with the task because the answer to this question required knowledge of *all* creeds of *all* Islamic organizations throughout *all* the territory of Russia.

To answer the question whether the materials under the investigation are extremist in nature, it is not necessary to formulate it in such a manner, involving general theological problems.

Here is another example of incorrectly set issue. The material for investigation was a letter written by the community members to the city head with the protest against the activities of a local religious association. The expert had to answer the following questions:

«Are there any features of a totalitarian sect in the activities of the church?»

«Do the provisions of the religious publications of this church contain evidence proving its belonging to a totalitarian sect?»

«Are these provisions scientifically reasonable and proved?»

It is impossible for the expert to make a conclusion because the term «a totalitarian sect» is neither scientific nor legal. There is a list of specific features of «a totalitarian sect» in the Internet and in special literature. However, the scientists specializing in modern religious movementssay that the associations with such features do not exist in reality.

The Decree of the Plenum of the Supreme Court of the Russian Federation on the judical practice on criminal cases for extremist crimes from June 28, 2011 No 11 states that it is not allowed to put legal questions above the scope of expert's competence and connected with assessment of actions, when expertise in cases involving extremist offenses is appointed. Solution of such problems relates only to the jurisdiction of the court. If the questions put to an expert are considered by him incorrect, he must submit a written application to the court and ask for the questions to be reformulated. After 30 days the expert must refuse investigation (in a written form) if the questions have not been corrected. In some cases, the law enforcement officials doubt the religious nature of some associations and the questions areformulated in the following way:

«Is Scientology a religion from the point of view of criteria adopted by the modern Russian religious-study»?

«Are there any religious rituals in Scientology»?

«Is auditing a religious ritual»?

It should be noted that in a number of European countries Scientology is not recognizes as religion. However, in Spain, Sweden, Australia it is recognized. In Russia, some scientists consider Scientology Quasi-religion; others refer it to the mystical direction of the New Age movement. There are scientists who regard

Scientology as a transnational commercial organization. The question being still open, expert' conclusion will not be free from his subjective opinion.

To make expertise an expert must have the following materials at his disposal:

- constituent documents and the charter of a religious association; constituent assembly minutes, a certificate of established sample of registration of a religious association and an extract from the state register of Legal Entities on State registration of a religious association;
- information on the basic religious tenets;
- information on the rituals and other actions practiced by a religious association;
- forms and methods of religious association activities;
- documents reflecting the structure and management of a religious association;
- decisions of the governmental and executive bodies;
- literature, audio-visual materials, produced and spread by a religious association;
- records of investigative actions, containing the information necessary for an expert to carry out expertise and make a conclusion, e.g. records of investigative inspection of buildings and other facilities belonging to a religious association and constructed for religious services, religious meetings;
- interrogation protocols of witnesses, victims, the accused, the suspected aimed at getting information on the contents of religious services and other religious rituals and ceremonies;
- other legal documents

If the documents submitted to an expert do not contain enough information for expertise, an expert may apply to the court or the procurator and ask for the necessarymaterials.

As a rule, an expert gets only some fragments – brochures, leaflets,websites which are taken out of the context. To liquidate a religious association and to ban its activities it is necessary to consider its activity as a whole and in detail. Insufficient material for expertise is fraught with inadequate conclusions and unlawful actions of judges and law enforcement bodies.

An expert makes a conclusion in a written form. It has a status of the procedural document andcontains a detailed description of the expertise, answersto the questions put by the court. A written conclusion prepared by an expert upon the results of investigation is accepted by the court as one of the evidence. The court's refusal to accept the conclusion as a valid proof must be motivated in the adjudication.

If the expert's conclusions are incomplete and lack clarity, the court may appoint additional or re-expertise, Additional expertise is appointed when some points are not clear or new materials have been obtained. In this case, the expertise is entrustedto the same expert. If the court disagree with the conclusionsand

consider them unfounded it may appoint re-expertise, another expert being engaged. For example, additional expertise of the brochure «Good News from God», produced by a religious association «JehovahWitnesses» was appointed because the court was not satisfied with linguistic and psychological expertise.

To carry out an expertise of religious association activities it is necessary to follow special methodology, which is a set of practices to stage a research process, devices, procedures, and operations.

General requirements for the investigation process:

1. Methods and tools must be lawful. The experts should adhere to the constitutional norms of a secular state (the decisions are made on behalf of the state) and to comply with citizens' right to freedom of conscience and freedom of religion. The methods of expertise must not infringe on the citizens' rights and freedoms and must not suppose inequality and restriction. It is the court that decides whether there is violation of the law.
2. Methods and tools must be religiously neutral. An expert is supposed to be impartial, i.e. he must examine the documents objectively, not considering the problem from the point of view of any religion. An expert must not doubt the verityof the documents presented for expertise. It is unacceptable for an expert to be guided by prejudices and stereotypes of the mass consciousness.
3. Method and tools must be ethical. They must not humiliate religious feelings and contradict public morality.An expert must avoid conflict situations. He should be tolerant when communicating with leaders of religious associations. (Such contacts are made only with the consent of the court or the procurator).
4. The process of obtaining information must comply with the norms of the procedural law. Methods contradicting law are unacceptable (e.g. shadowing chase, wiretapping, penetration into electronic accounts protected by a password). An expert's conclusions shall strictly comply with the procedural form.
5. Methods of investigation must be effective. They must promote the information for clear answers and conclusions. While choosing methods an expert takes into consideration the peculiarities of the object under investigation, materials accessible for the examination, the nature of the questions to answer.
6. To choose methods and tools of expertise it is necessary to adhere to the scientific principles. In E.S. Yelbokyan's opinion, theological expertise may be relevant only if it is based on general scientific principles. An expert must adhere to such principles as verifiability, falsifiability, objectivity, rationality, orderliness, verity, consistency, variability of the parts, inter-subjectivity, axiological neutrality.

We cannot but agree with it, especially with regard to the principle of verifiability. Unverifiable conclusions cannot be considered scientific from the point of view of science; in legal contemplation,it cannot be a procedural document if it is impossible to verify the conclusion. However, it is necessary to note a number of problems an expert faces while carrying out expertise.

Tocarry out the investigation successfully an expert is supposed to know the essence of religion, symbolic meaning of religious rituals and the meaning of religious terms. It is not easy sometimes to make scientific conclusions concerning historical events because the approaches to them are different. Expert's conclusions are not only theoretical, they are legally oriented and a legal decision is taken on their basis.

Reliability of the results of the expertise and the possibility of verification depend on the information sources. The information sources must be reliable, accessible, and scientifically authoritative. Authenticity of texts, symbols, pictures under investigation usually undergo the process of verification.However, it is very difficult to check the conclusions. It has been mentioned above that the conclusions may be quite different and it is the court that decides.

Having analyzed the problems connected with the theological judicial expertise we have come to the conclusion that it is necessary to consider this problem from the legal point of view, that is, to work out qualification requirements for experts in the sphere of religion. Only in this case the expertise may really become one of the legal documents guaranteeing citizens' rights to freedom of conscience and freedom of religion. At the same time, it will suppress illegal actions of some religious associations.

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