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Moral-legal self-regulation of freedom of conscience: culturological aspect

Морально-правова саморегуляція свободи совісті:
культурологічний аспект

Autorregulación moral y legal de la libertad de conciencia:
aspecto culturoológico

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Written by:

Irina Donnikova⁷<https://orcid.org/0000-0002-8504-1578>**Andrii Kovban**⁸<https://orcid.org/0000-0002-0272-1798>

Abstract

The purpose of the article is to analyze the possibility of combining legal and moral regulations in the implementation of the human right to freedom of conscience. The methodological basis of the study reveals the interdisciplinary of the problem. Culturological analysis of freedom of conscience is performed by using philosophical-anthropological and phenomenological approaches to identify the specifics of legal culture, the role of conscience in the moral and legal self-regulation of human. Systemic method is used for analysis freedom of conscience as a complex holistic phenomenon; historical method and comparative-legal method – for identification of the specifics of the legal regulation of freedom of conscience in historical retrospect and perspective. Scientific novelty. Freedom of conscience is revealed as a phenomenon of legal culture which involves the moral-legal self-regulation of people. As a manifestation of social self-organization the legal culture forms a tolerant communicative space, in which the actually legal regulation of freedom of conscience is supplemented by mechanism of the moral self-regulation of a person – conscience. It is substantiated that transformation of the law to a legal culture requires not only human trust in the law, but also the legal trust in a conscientious person.

Key Words: freedom of conscience, conscience, moral-legal self-regulation, legal culture, tolerance.

Анотація

Метою статті є аналіз можливості об'єднання правових і моральних норм в реалізації права людини на свободу совісті. Методологічна основа дослідження розкриває міждисциплінарний характер проблеми та представлена загальнонауковими та спеціальними методами. Культурологічний аналіз свободи совісті проводиться з використанням філософсько-антропологічного та феноменологічного підходів для виявлення специфіки правової культури, ролі совісті у морально-правовій саморегуляції людини. Системний метод використовується для аналізу свободи совісті як складного цілісного явища; історичний та порівняльно-правовий методи – для виявлення специфіки правового регулювання свободи совісті в історичній ретроспективі та перспективі.

Наукова новизна. Свобода совісті розкривається як явище правової культури, що передбачає морально-правову саморегуляцію людей. Як прояв соціальної самоорганізації правова культура формує толерантний комунікативний простір, в якому власне правове регулювання свободи совісті доповнюється механізмом моральної саморегуляції людини – совістю. Обґрунтовано, що трансформація права в правову культуру вимагає не лише довіри людини до закону, але й довіри права совісної людині.

Ключові слова: свобода совісті, совість, морально-правова саморегуляція, правова культура, толерантність.

⁷ Doctor of Philosophical Science, Associate Professor, Head of the Department of Philosophy, National University «Odessa Maritime Academy» Ukraine.

⁸ Associate Professor, PhD in Law, National University «Odessa Maritime Academy», Odessa, Ukraine.



Resumen

El propósito del artículo es explorar la posibilidad de combinar regulaciones legales y morales en la implementación del derecho humano a la libertad de conciencia. *La base metodológica del estudio* revela la interdisciplinariedad del problema. El análisis cultural de la libertad de conciencia se realiza mediante el uso de enfoques filosóficos-antropológicos y fenomenológicos para identificar los detalles de la cultura jurídica, el papel de la conciencia en la autorregulación moral y jurídica de los humanos. El método sistémico se utiliza para analizar la libertad de conciencia como un fenómeno holístico complejo; Método histórico y método legal comparativo – para la identificación de los detalles de la regulación legal de la libertad de conciencia en retrospectiva y perspectiva histórica. *Novedad científica.* La libertad de conciencia se revela como un fenómeno de cultura jurídica que implica la autorregulación moral-legal de las personas. Como manifestación de la autoorganización social, la cultura jurídica forma un espacio comunicativo tolerante, en el que la regulación legal de la libertad de conciencia se complementa con un mecanismo de autorregulación moral de una persona – la conciencia.

La libertad de conciencia se revela como un mecanismo de autorregulación moral-legal, un fenómeno de la cultura jurídica como uno de los modos de autoorganización social. La cultura jurídica forma un espacio comunicativo tolerante, en el que la regulación legal de la libertad de conciencia se complementa con un mecanismo de autorregulación moral de una persona: la conciencia. Está comprobado que la transformación de la ley a una cultura legal requiere no solo la confianza humana en la ley, sino también la confianza legal en una persona concienzuda.

Palabras clave: libertad de conciencia, conciencia, autorregulación moral-legal, cultura jurídica, tolerancia.

Introduction

In the modern world the problem of legal regulation of freedom of conscience acquires special significance. The actuality of the topic is due, first, to the growing role of the religious factor in modern socio-cultural processes, to the need to regulate the manifestations of freedom of conscience in multicultural communication; and secondly, to search for new social and legal institutions, which would contribute to the implementation and regulation of freedom of conscience, the formation of legal culture, that meets the needs of the time. Simultaneously, in scientific discourse there is a demand for interdisciplinary research on this issue, finding the ways to solve it is intensified at the intersection of law, religious studies, philosophy of culture and philosophical anthropology. As a multi-religious state, Ukraine has some theoretical experience in the study of this problem, which, we hope, can be useful to the world scientific community.

Theoretical framework

Freedom of conscience in generally meaning is a person's ability to practice religion, to practice religious cults, or to follow the atheistic ideology (Myshchak, 2019). The problem of regulation of freedom of conscience acquires special theoretical and practical significance in research in the field of law, political science and religious studies. Thus, according to Ukrainian researcher M. Babiy, "... the problematic issues of state-

confessional relations ... are one of the most thematic in contemporary Ukrainian socio-political, legal and religious discourse" (Babij, 2013). But for the most part, current studies reveal the specifics of solving a problem within a particular state, political and legal systems. In our opinion, two aspects in the study of freedom of conscience – religious and political-legal, can be united through a third, culturological. We mean the analysis of freedom of conscience as a phenomenon of legal culture, in which individual moral regulations, in particular *conscience*, are actualized.

At the same time, the problem is complicated by the fact that the concept of legal culture also remains ambiguous. As David Nelken points out, legal culture is examined in two main aspects: "culture in law" or "law in culture". He emphasizes that "in the broadest sense, the benefits of thinking about the legal culture are that they warn us about cultural differences in the understanding of law and its real role in social life" (Nelken, 2012). Emphasizing the contradiction of the concept of legal culture, D. Nelken raises the question, "whether there can be (or should be) real attempts to study the legal culture free of specific cultural or value-shaped ideas about what the legal order requires". In any case, he emphasizes, the term "culture" "enlivens" the structures of the social order (Nelken, 2012).

A similar opinion is expressed by Mark Goodale, namely, that in the anthropology of law there is a transition from law as a principle of social regulation to a legal culture, which is more likely to show increasing diversity than stages in linear cultural evolution (Goodale, 2017). The current situation in the anthropology of law is linked to the “explosion of identity” that has become a challenge to the concept of citizenship within national states. According to M. Goodale, the key question arises: is the law capable to facilitate radical social changes? (Goodale, 2017).

The same situation occurs in the anthropology of religion, which seeks to describe, classify and explain the various religious beliefs and practices of human societies and cultures without touching the issue of essence of religion and denomination. As the researchers note themselves, the limit of understanding of anthropologists is to recognize that religious worlds are “real and significant to those who construct and inhabit them” (Bowie, 2008). Simon Dein insists that “the term belief is somewhat problematic as a cross-cultural construct” and emphasizes that “it is imperative to move beyond what individuals think to look at the ways in which divergent religious practices are embodied” (Dein, 2013).

The anthropology of law and the anthropology of religion supply valuable empirical material for understanding the problem of freedom of conscience as a *human value*. We will continue the researchers' reflections and formulate the question as follows: “Will the study of legal culture lead to the identification of invariant, common to different cultures and states mechanisms of self-regulation of freedom of conscience?”. To find the answer, it should be noted that the concept of legal culture should integrate both aspects of research – “culture in law” and “law in culture”, the emergence of which was made possible thanks to the use of a social approach to law. But if we consider the law as a cultural phenomenon (that is, to understand legal culture from the standpoint of “law in culture”), it must be recognized that the “revitalization” of social structures occurs through the person as a carrier and creator of culture and as a creatures, capable to self-organization of one's own life (Donnikova, 2011). In this case, we follow the tradition of Ukrainian philosophical, cultural and philosophical-anthropological thought, which connected moral problems with individual human being in culture (Krymskyj, Malakhov). Cultural analysis of the legal regulation of freedom of conscience makes it possible to focus

not only on freedom (in its socio-legal meaning), but also on the conscience as one of the specific individual moral regulations of human existence. If we define a conscience as «a faculty of moral reasoning» it can be argued that “freedom of action is restricted when one is forced to do something that contravenes some deliverance of his conscience” (Swan, Vallier, 2012). Therefore, violation of conscience occurs, when “some coercive interference with an agent” compels person to contravene one or more of his core moral duties (Swan, Vallier, 2012). We can also agree with Michael J. Perry that recognized internationally human right to freedom of conscience is the right to live one's life in accordance with the liberations of one's conscience (Perry, 2014).

Really, conscience is an inalienable companion of personal freedom, because it determines a person's value choice on the basis of self-regulation, and therefore releases person from direct interference with the law. Let's reiterate Mark Goodale's point, that the main discussions in the anthropology of law concern the problem. But the main point of the discussion is to rethink the law as a mode through which society reproduces itself and which is criticized in terms of always-contested “vital motifs of cultural identity” (Goodale, 2017).

Thus, the analysis of the regulation of freedom of conscience requires a theoretical generalization of ideas of the anthropology of law and anthropology of religion, as well as the use of theoretical principles of philosophical anthropology and philosophy of culture to clarify the role of the person in the legal self-regulation. The purpose of the article is to explore the possibility of combining legal and moral regulations in the implementation of the human right to freedom of conscience, to identify the specifics of legal culture in the context of the problem of self-regulation of freedom of conscience.

Methodology

The methodological basis of the article reveals the interdisciplinary of the problem and is presented by general scientific and special methods. The systemic method is used for analysis freedom of conscience as a complex holistic phenomenon; historical method and comparative legal method – for identification of the specifics of the legal regulation of freedom of conscience in historical retrospect and perspective. Culturological analysis of freedom of conscience is performed by

using philosophical-anthropological and phenomenological approaches to identify the specifics of legal culture, the role of conscience in the moral-legal self-regulation of human.

Results and discussion

As already mentioned, the concept of «freedom of conscience» is used in both theoretical and practical meaning as a legal category, related to the formation and development of the state, society and religion, their attitude to different orientations of worldviews. The content of the concept has evolved from religious tolerance, social recognition of the human right to free choice between different religions and confessions, to the right to freedom of conscience, that is, the right of the individual to free choice of the worldviews, as it's desired by one's own conscience. According to M. Babiy, freedom of conscience, on the one hand, appears as a kind of social, individual reaction to the contradictions and disagreements that arose in the systems "state – religion", "church-believers, intellectual deviants", "confession-confession"; as a response to an inhumane, repressive attitude towards individuals depending on their worldview orientations (Babiy, 1994). On the other hand, freedom of conscience is an important principle, observance of which reduces the possibility of aggravation of contradictions, escalating them into conflicts, guaranteeing their solution in a non-violent way. At the same time, it should be noted that in the constitutions of many foreign countries different terms are used, which provide for the right to freedom of religion, conscience and freedom of religious considerations and worldview. Thus, the right to freedom of thoughts, conscience and religion is enshrined in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights. In Ukraine, unlike other countries, an attempt has been made at the constitutional level to introduce a new term that characterizes human rights in the religious sphere – "freedom of worldview and religion". However, according to the Ukrainian researchers E. Martyniuk and O. Nikitchenko (Martynjuk, Nykytchenko, 2009), the same synonymous series are used in legal acts (international and Ukrainian), that is, the same thing: freedom of thought, conscience, religion, belief and worldview. The authors emphasize that in the Ukrainian constitutional-legal field, the concept of conscience is absorbed by the concept of "freedom of worldview" (Article 35 of the Constitution of Ukraine states that "everyone has the right to freedom of worldview and religion"), although it is contained in the Law

of Ukraine "On Freedom of Conscience and religious organizations" (April 23, 1991). Therefore, a problematic situation arises that needs clarification: are these concepts really identical if each of them "has its own autonomy, self-determination and intrinsic value" (Martyniuk, 2009)? The problem is that freedom of conscience is mostly represented and explored in the context of the state's relations with religious organizations, although it is declared as an individual's right. Exactly in the practical plane legal norms come into collision with the difficult reality of human relations, ethical contradictions and conflicts, which unfold relatively autonomously relatively the legal field and may be exacerbated by tactless, abusive behavior or utterances of other views.

We agree with the anxiety of Ukrainian researchers that the broad interpretation of the concept of freedom of worldview has led to the disappearance of the concept of "conscience" from a large quantity of scientific materials. Although, the concept of "conscience" has to do with human morality and morality as a whole, the world of values and appraisals, therefore, the concept of "freedom of conscience" implicitly contains a moral meaning. It also means that understanding the freedom of conscience of an individual or community may not coincide with the political and legal interpretation of this concept. In everyday life the moral level of a person often does not go beyond elementary ethics, which involves the reward for good deeds or retribution for evil. Justice, which is interpreted in this way, has a certain positive meaning, because one understands that one must pay for everything. But its negative meaning, which it disclaims, renders meaningless any diligence that does not cause an adequate reward (Gromov, 2014). That is why the regulatory role of conscience becomes important in the observance of the legal principle of justice. Legal norms avoid elementary ethics and appeal to the conscious acceptance of otherness without any benefit or reward. Therefore, the requirements of law and morality coincide.

The Ukrainian researcher L. Yarmol (Yarmol, 2006) states that freedom of religion implies the following possibilities: to have religion or belief; to accept religion or belief (both internal and external aspects, that is why it is a component of both freedom of recognition of belief and religious freedom); to change one's religion or beliefs (a person's ability may also have both internal and external aspects); to profess one's religion or beliefs (a person's ability relates to the internal and external sphere of the individual – to

adhere to any religion, belief; openly admit, follow some doctrine, certain views, beliefs); obtain religious and (or) secular education; abstaining from some actions that are incompatible with religious or other beliefs of a person (Yarmol, 2006). The ground for respect for the freedom of conscience of each person is not their objective correctness (then the courts would have to decide the veracity of the declared worldview and become something of a new inquisition). In today's democratic society, freedom of conscience is a true area of autonomy of the individual's conscience, unless it may be a danger to the legitimate interests of others. The autonomy of freedom of conscience and the other people's interests is a contradiction which actualizes the problem of harmonization of worldview priorities and preferences. In the culturological analysis we will mark it as a problem of tolerance. If the political and legal content of the concept of "freedom of conscience" reveals the right of a person to freely form his or her own worldview and to act freely in accordance with it, it is also reasonable to take into account the diversity of worldviews and the necessity for their harmonization. It is not only about the right of everyone to freedom of conscience, but also the duty to tolerate different views that define the legal culture. Therefore, the questions arise, firstly, is it possible to restrict freedom of conscience (which is inevitable when the law interferes), and secondly, are law remedies enough to regulate human relations in the sphere of religion and worldview?

Formation of national models of legal regulation of freedom of conscience is not a copy of successful models, but provides the use of the best world experience of each country, which should be organically combined with local traditions, mentality, forms of tolerance and religious tolerance, features of legal and political cultures. The main tool for creating an effective model of regulation of freedom of conscience is an open dialogue of all stakeholders, equality and the dissemination of knowledge (Kovban, Kohut, 2019). But at the same time we emphasize – a dialogue that unfolds in search of knowledge "of how human societies have organized relations, including conflicts, in ways that fundamentally challenge the human chauvinist dogmas" (Goodale, 2017). Mark Goodale poses a question about the legal ecology, which requires, in our opinion, a certain legal ontology, in which social existence goes beyond social and state institutions, has "a kind of reality beyond the human" (Goodale, 2017), and deontology, which determines a person's relationship with reality beyond its own boundaries. Taking into account

the legal environment, tolerance is a way of relating to the whole world in which "humans occupy profoundly interdependent positions with nonhuman animals, cosmological forces, and the land" (Goodale, 2017). This tendency is consistent with international legal community's attention to preventive measures rather than compensatory measures. International law scholars argue that implementing pre-emptive actions and commitments issue through «conflict avoidance» cooperation system (Annabi, Jalali, 2018). And what is of the personal legal practices of freedom of conscience? In the context of legal ecology, moral and legal self-regulation of human becomes even more important. If the main purpose of law – to prevent conflicts, including the sphere of religion, it is hardly possible without voluntary human choice. So the issue of creating conditions for tolerant interaction and the implementation of the principles of non-conflict communication in people's lives should be raised not only in the context of the legal culture, but the culture in general – as a way of self-organization of human life.

In a broader ontological context, the regulatory boundaries of law which are established by a moral person are particularly clear. The law is not capable of forcing a person to truly respect another person – only to be respectful to him, and these are different things. The first has to do with the free will of every person, the second with its ability to rationally and reasonably manage its own will. As a result, tolerance practices are actualized as forms of cultural practices (including legal ones) that are based on the free will of a person and combine human freedom, conscience and morality. With this in mind, tolerance practices should be considered as forms of cultural or moral-legal practices that unite freedom, conscience and morality. They draw attention of scholars from different fields of knowledge, which highlight their importance and ambiguity. In particular, according to political theorist Wendy Brown (2006), tolerance, which is aimed at reducing conflict, at the same time, contains disapproval, dislike, and sometimes justification for violence. According to him, the position of moral autonomy of the individual, which is placed in the center of tolerance, gives grounds for criticism in the distinction between tolerance and intolerance. In civil society, tolerance acquires the status of a particularly valuable social norm, as it ensures a constant harmony between confessions, political groups, other social associations, obliges them to respect and understand different cultures, civilizations and nations.

Modern practices of tolerance should be seen as a search process of non-conflicting existence, which preserves the personal cultural and moral autonomy of people (Donnikova, 2018). On the one hand, the development of culture is accompanied by the expansion of the space of human freedom and moral autonomy, on the other, the growing dependence of people on intercultural connections and relations. Therefore, the readiness of a person to meet not only with another one, but also with an unknown person, becomes as much his existential characteristic as the willingness to accept someone another and unknown (Donnikova, 2018). And it is only in interpersonal communication that a legal culture is born, in which legal norms become effective through self-regulation of human, and take part in the practice of human life.

The starting point for thinking about tolerance as a condition for freedom of conscience is recognizing differences between people – bearers of different cultures, which actualize the appeal to the moral grounds of intercultural communication, the adoption of the “value of difference”. The inequality of “I” and “You” addresses the problem of duty and responsibility of the «ethical subject» (Levinas, 1999). Collision with Other is at the same time a responsibility for him, regardless of how the Other treats me: for me he is the one for whom I am responsible (Levinas, 1999). But the important question arises (both for culture in general and for legal culture in particular), why and how can we be tolerant (moral, conscientious)? What are the goals (if so formulated) of tolerant interactions – to achieve the combination of values, cultures and religions (accept differences) or to maintain their autonomous coexistence; to adhere to a zero tolerance in demonstrations of anti-human acts or to avoid violence in any case? According to the Ukrainian philosopher V. Malakhov, the requirement to be tolerant is rooted “in the value space of culture – in human beliefs, preferences, customs that are consciously upheld” – in everything that gives rise to cultural incompatibility (Malakhov, 2013). Kyle Swan and Kevin Vallier point at three accounts of the significance of conscience, including deeply held principles and important personal life projects, «individual ideals» (include the ideals of the major world religions) (Swan, Vallier, 2012).

Rooted in individual life, cultural values do not come to the same thing and at the same time imply a certain level of the rational, spiritual life of the person who has chosen them. A realistic

position in the situation of cultural diversity is the recognition of the *right to the incompatibility* of value attitudes, which enables any human community to freely cultivate its own values and traditions in their authentic form (Malakhov, 2013). The right to the incompatibility creates a requirement for moral self-regulation – if I want to be free, I must be tolerant. From these positions, obviously, it is necessary to fill the concept of legal culture with certain content and to comprehend the regulatory mechanisms of freedom of conscience.

Law is the first necessary term for regulation of tolerant relations at the level of society and human communities that interact in a common socio-political space. But tolerant (as well as intolerant) relationships demonstrate themselves primarily in interpersonal interactions, which are not always amenable to legal regulation but grow into powerful creative or destructive collective effects. “Instilling” of a tolerant attitude should be considered as a socialization of personality, in which law and morality operate side-by-side, and the social norm becomes a fixed method of regulating human and community behavior.

The Ukrainian philosopher S. Krymsky wrote:

A tolerant figure acts under the control of self-criticism, which comes down to a willingness to admit one's possible mistake or wrongness. He assumes in himself a part of the evil against which he fights, and a part of the good for which he stands, in his opponent; such a rotation on itself and on the valuable and ironic opponent forms a formula of tolerance. Thus, tolerance is revealed as a moral phenomenon that is a component of the spiritual and ethical composition of civic consciousness (Krymskyj, 2013).

The idea of tolerance concerned with the idea of pluralism of thoughts, points of view and worldviews. This reveals the cultural diversity of mankind and the uniqueness of each person. So, the regulation of any demonstration of human freedom is impossible only through legal, formally determined methods. The delicate, “subtle” world of human relations will always remain more complicated than the content of legal rules and laws. That’s probably why the international community is offered not rigid regulations but declarations (for example, the Declaration on the Elimination of All Forms of Intolerance and Discrimination on the basis of UN Religion or Beliefs (1981) and the UNESCO Declaration of Principles of Tolerance (1995). First of all, they define the range of human values

where the law should apply and where its limits are defined. Researchers emphasize that modern law comes from the communicative nature of a person and human existence, that is, that rights do not exist outside communication, and therefore beyond legal obligations and moral and legal responsibility (Poliakov, 2012). The multicultural context obliges to take into account the multidimensionality of a human, the variety of his social and cultural statuses and ways of self-determination. The law considers a person first and foremost as a citizen, and it should be remembered that he or she is also a cultural being and therefore has the rights as a member of the cultural community. As M. Walzer rightly remarked, in tolerance and protection we feel the need both as citizens of the state and as members of groups – as well as individuals, strangers and both (Yarmol, 2006).

Therefore, the issue of legal regulation of freedom of conscience is not solved solely by protecting or restricting rights and freedoms. Legal culture is both a communicative space of human existence, and a way of social self-organization, and confines which give the opportunity for self-realization of human through free and creative self-regulation and self-organization. In general, as E. Martyniuk and O. Nikitchenko point out, “conscience cannot be restricted by legal ways, and of course, if it is given freedom under the law, then it cannot be restricted at all without violating the relevant legal acts... Not conscience is limited, but immorality” (Martynjuk, 2009).

The legal culture should be the counteraction to the immorality. This means that to ensure the freedom of conscience is not enough legal regulation from the state, because this is a paradox: the legal requirements rise above the requirements of conscience. When it comes to affirmation the uniqueness and authenticity of every person, his/her rights to demonstration his/her own individuality and protection of identity, then arise the limits of the law – it should, defending human’s freedom of conscience, rely on human’s conscience, using a human rights-free space. The issue of legal regulation of freedom of conscience is shifted into the space of consensus seeking by non-violent ways through human moral self-regulation. Thus, it is a question of «trust» of the law in a conscientious person in his/her frees self-determination of religious and worldview priorities.

Conclusions

The analysis of the problem of regulating of freedom of conscience requires a culturological approach that combines legal, religious and philosophical-anthropological aspects. In the analysis of freedom of conscience as a complex phenomenon of legal culture, the emphasis is shifted from the concept of freedom to the concept of conscience as a mechanism of human self-regulation. The legal culture as one of the mode of social self-organization forms a tolerant communicative space, in which the legal regulation of freedom of conscience is supplemented by the moral self-regulation of a person. In the context of the legal culture, the forms and means of exercising the freedom of conscience by everyone create the conditions for tolerant (non-conflict) relations in multicultural communication through the coordination of individual religious and ideological preferences that is for the exercise of the freedom of conscience for others.

Thus, we define freedom of conscience as a phenomenon of legal culture, which involves the moral-legal self-regulation of people. It is substantiated that the moral-legal self-regulation of freedom of conscience requires taking into account the various religious values and practices, socio-cultural statuses of a person, and thus the legal “trust” in a conscientious person in his/her free self-determination of worldview priorities. The transformation of the law to a legal culture requires not only human trust in the law, but also the legal trust in a conscientious person.

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