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On legal and factual grounds of relevance of confessional cemeteries and religious sites of common cemeteries to real estate property objects for religious purposes *

SUMMARY: 1. Introduction: formulation of the Problem – 2. The genesis of the legal status of religious cemeteries – 3. The meaning of confessional cemeteries and religious sites of common cemeteries, attached in different religions – 4. The nature of confessional cemeteries from the perspective of the right – 5. The issue of confessional graves in the Russian Federation legislation – 6. The theme of religious burials in the judicial practice of the courts of the Russian Federation – 7. Conclusions.

1 - Introduction: formulation of the Problem

According to V.A. Zakharenko, the issues on functioning of the burial places include the problem of the land use as well, as connected with the establishment and operation of cemeteries¹.

The question of the return of churches (previously deprived in Soviet times) by the secular state² to religious organizations is extremely difficult, not only because of the clearly excessive politicization, but due to the objective complexity of it from a legal point of view.

Quite an extensive law enforcement practice by the Federal Law from 30.11.2010 № 327-FZ (as amended on 23.06.2014) «On the transfer of property for religious purposes under state or municipal property to religious organizations»³ has been accumulated by today (for almost 6 years). However, both reference these issue public authorities and in fact

* Article peer reviewed.

¹ V.A. ZAKHARENKO, *Cemeteries: complex issues of land use and exploitation*, in *Journal of the Moscow Patriarchate*, 2012, № 8, pp. 92–93, p. 92.

² I.V. PONKIN, *Commentary on some articles of the Federal Law «On Freedom of Conscience and on Religious Associations»*, Moscow, Institute of relations between the State and religious denominations and Law, 2007.

³ Federal Law of 30.11.2010 № 327-FZ «On the transfer of property for religious purposes under state or municipal property to religious organizations» (<http://www.garant.ru>).



religious organizations are faced with many intractable or insoluble problems in the implementation of legal opportunities provided by the specified Federal Law.

However, both reference the subject public authorities and the religious organizations are faced with many difficult or intractable problems in the implementation of the legal possibilities offered by the said Federal Law.

One of such difficult issues is the question of the grounds and conditions for inclusion of confessional cemeteries and religious sites of common cemeteries to real property objects for religious purposes.

According to R.V. Tupikin, it is reasonably to attribute to the number of real property for religious purposes

«confessional (religious) cemeteries, religious sites of common cemeteries, religious buildings on such cemeteries or parts of cemeteries; burial place of venerated religious or using special high believers' respect personalities»⁴,

but the reasons for this validity are not given by the specified author in his fundamental research.

Meanwhile, the issue is far more than of academic interest. Today the current practice of transfer of property for religious purposes which is in state or municipal property to religious organizations has almost no examples of the transfer of confessional cemeteries and religious sites of common cemeteries to religious organizations, except in cases where the places of burials are on the territory of a single composite property complex being transferred (having been transferred) to the religious organization⁵.

2 - The genesis of the legal status of religious cemeteries

Strictly speaking, the so-called secularization of cemeteries began relatively recently. In France, for example – in the 1870-1880's. French Law of 14.11.1881 canceled the religious nature (religious affiliation) of cemeteries, forbade to establish the division of municipal cemeteries into areas depending on religious affiliation, to create or increase religious cemeteries;

⁴ R.V. TUPIKIN, *Civil-law and contractual regulation of property relations of religious organizations in foreign states*, Moscow, Institute of relations between the State and religious denominations and Law, 2016, p. 17.

⁵ I.V. PONKIN, *The modern Secular State: constructive secularity. Constitutional-legal research*, Moscow, Institute of relations between the State and religious denominations and Law, 2006, p. 236.



a general rule of burial in the municipal cemetery was established, common to all⁶. Although even the repressive against the faithful French Law of 1905 «On the separation of churches and state» did not impose a ban on Christian symbols on cemeteries⁷.

Today it is almost impossible to come across cemeteries where certain gravestone constructions have no any religious symbolism, except for separately located war graves of the Soviet period.

However, according to some media reports, recently in one of the cities in Sweden there was opened the first «neutral» cemetery, where it is prohibited to conduct any religious observance and to place any religious symbols on the gravestones. But it is exotic.

3 - The meaning of confessional cemeteries and religious sites of common cemeteries, attached in different religions

According to the document «On the Christian burial of the dead», approved by the decision of the Holy Synod of the Russian Orthodox Church on 05.05.2015⁸, «the Proper burial of bodies of the deceased Christians from the very beginning of the Church is one of the important aspects of its life».

It should be noted that the special relation to such burial sites is present not only in Orthodox Christianity but in other religions as well.

As pointed out by K.M. Andreyev,

«a number of internal rules of religious organizations contain prohibitions on unauthorized access to certain iconic places and objects, as well as to the ceremonies of a funeral and burial, including burial in denominational cemeteries»⁹.

So, in Judaism, – says this author, –

«the burial of the dead in Judaism is produced according to strict rules in designated cemeteries where the burial of Gentiles is forbidden. The presence at the funeral of a Gentile and the opening of graves are prohibited and is a specific religious secret»¹⁰.

⁶ I.V. PONKIN, *The modern Secular State*, cit., p. 265.

⁷ I.V. PONKIN, *The modern Secular State*, cit., p. 238.

⁸ The document «On the Christian burial of the dead», Approved by the decision of the Holy Synod of the Russian Orthodox Church from 05.05.2015 (Journal № 30) (<http://www.patriarchia.ru/db/text/4067729.html>).

⁹ K.M. ANDREYEV, *The concept and features of religious mysteries in the framework of constitutional freedom of religion*, Moscow, Jurisprudence, 2015, p. 51.

¹⁰ K.M. ANDREYEV, *The concept and features of religious mysteries in the framework of*



According to K.M. Andreyev, in Islam, a Muslim must be buried in a Muslim cemetery,

«tombs never open. Their contents, including a visual display, is a religious mystery. The reburial is possible in exceptional cases, if they were not executed by the established religious rules, if a believer is buried in the cemetery of members of another religion or in ritually unclean land, in case of danger of assault upon the corpse and the destruction of the grave»¹¹.

4 - The nature of confessional cemeteries from the perspective of the right

A confessional cemetery has many aspects of its significance and its role played in the religious life of the people.

By P.V. Fedorov,

«the phenomenon of the necropolis is recognized primarily because of the ability of the cemetery to "accumulate" time in itself, and create quite a specific situation of the chronotope ... a Cemetery is not a void, a place of "sleep and rest". The peculiar passage of time here is part of the dynamics of memorial culture: memory, based on faith and feeling, is competing with oblivion, struggling with depersonalization. This dynamic, visible even to a passerby and especially... explorer, is very useful for penetration into the essence of the culture. The cemetery represents a means of "saving" memory... The cemetery is a space of signs...The phenomenon of the cemetery is inextricably linked to mental representations of it, or images»¹².

Quite a lot about the significance of gravestone constructions for the culture has been written by V.F. Gladyshev¹³.

K.M. Andreyev justifies its author's concept of a particular kind of religious mystery:

constitutional freedom of religion, Moscow, Jurisprudence, 2015, p. 43.

¹¹ **K.M. ANDREYEV**, *The concept and features of religious mysteries in the framework of constitutional freedom of religion*, Moscow, Jurisprudence, 2015, pp. 44–45.

¹² **P.V. FEDOROV**, *Cemetery as a multi-valued social and cultural phenomenon: a common approach to the study (by the example of the Kola Peninsula)*, Kola North Necropolis: research, conservation, communication, Collection of scientific articles, Murmansk State Humanities University, Murmansk, 2013, pp. 17–26, pp. 17, 18, 23.

¹³ **V.F. GLADYSHEV**, *Over the Styx: Perm epitaph*, Perm, 2000. **V.F. GLADYSHEV**, *Perm Antique Mirror: A History of Perm in the mirror of the necropolis*, Perm, 2001; **V.F. GLADYSHEV**, *Perm Necropolis: memory signs in memorial plastic*, Perm, Aster, 2005.



«religious mystery arising from special religious ritual of the burial and care of burial places in some denominations, including the prohibition to attend the funeral and take part in the funeral rites of the uninitiated persons, religious requirement to bury on special confessional cemeteries and the prohibition of access to the tombs of the uninitiated persons»¹⁴.

According to our concept, relevance of confessional cemeteries and religious sites of common cemeteries to real property objects for religious purposes is determined by the following circumstances:

- the nature and the original purpose of religious (confessional) cemeteries and religious sites of common cemeteries, which is reflected in the target of such places to create a homogeneous religious and cultural memory space and in their conjugation with religious mystery (in one of its forms, according to the classification by K.M. Andreyev);
- the imperative of the protection of human dignity of the deceased – in recognition of his post-mortem will (expressed in his lifetime or presuming, based on the fact that they express his identity or giving preferential treatment to a particular religion) regarding his following a certain religious tradition, including the part of the burial after his death;
- immanent conjugation of religious (confessional) cemeteries and religious sites of common cemeteries with religious respect for the implementation of acts (and even reverence) and conduct of religious ceremonies (religious worship);
- the presence of the iconic constructions of religious significance on religious (confessional) cemeteries and religious sites of common cemeteries.

5 - The issue of confessional graves in the Russian Federation legislation

According to paragraph 2 of Article 16 of the Federal Law «On Freedom of Conscience and on Religious Associations»¹⁵ worships and other religious rites and ceremonies can freely be committed in cemeteries and crematoria, in places of pilgrimage (which may include burials of religiously respected or revered by the faithful individuals), as well as «on the land owned by religious organizations on the right of ownership or granted to them or on

¹⁴ **K.M. ANDREYEV**, *The concept and features of religious mysteries in the framework of constitutional freedom of religion*, Moscow, Jurisprudence, 2015, pp. 56–57.

¹⁵ Federal Law of 26.09.1997 № 125-FZ «On Freedom of Conscience and on Religious Associations» (<http://www.garant.ru>).



any other property right» (if it is a single complex property object for religious purposes, it may also include separate burials).

According to paragraph 2 of Article 15 of the Federal Law dated 12.01.1996 № 8-FZ (ed. 07.03.2016) «On the burial and funeral business»¹⁶, burial places can be (in the statutes) confessional. The decision on establishment of such burial sites, as stated by the second section of paragraph 2, Article 17 of the said Federal Law, is «adopted by the executive authorities of the Russian Federation or local government, on the territory of which they are created». This legal norm creates some difficulties in the creation of new religious burial places, even on the land plots that are in the religious organization property and included in the single composite property complexes for religious purposes. Although subparagraph 3 of paragraph 1 of this Article 15 determines that the proposals for the establishment of burial sites are made by "mass religious associations whose constitutions provide for the exercise of religious rites in cemeteries, to create faith-cemeteries".

According to paragraph 2 of Article 18 of the Federal Law «About burial and funeral business», «on public cemeteries, the burial may be based on religious ... customs and traditions». Relevant for the theme of this material Article 19 «Confessional cemeteries» of the Federal law «About burial and funeral business» establishes that confessional cemeteries are designed for the burial of the dead of the same faith. Confessional cemeteries can be administered by local authorities. The order of the activities of confessional cemeteries is determined by the local authorities in coordination with the relevant religious communities. The activities of confessional cemeteries on the territories of rural settlements can be carried out by citizens themselves.

Under paragraphs 9.10, 9.11 and 9.12 of the Document «MDK 11-01.2002. Recommendations on the order of funerals and the maintenance of cemeteries in the Russian Federation» recommended by the Protocol of Gosstroy of the Russian Federation of 25.12.2001 № 01-NS-22/1¹⁷,

«confessional cemeteries or sections of cemeteries should be designed with the requirements and traditions of religious organizations and denominations. Religious sections of cemeteries should be separated

¹⁶ Federal Law of 12.01.1996 № 8-FZ «On the burial and funeral business» (<http://www.garant.ru>).

¹⁷ MDK 11-01.2002. Recommendations on the order of funeral and cemetery maintenance in the Russian Federation, The Recommended Protocol of the RF State Construction Committee of 25.12.2001 № 01-NA-22/1, Moscow, State Construction Committee of Russia, "DIAS"; SUE LAC 2002.



by the zone of moral protection with a minimum width of 20 m. The area of the zone can be used for greenery planting and landscaping with the use of small architectural forms. It is recommended to provide religious cemeteries or areas with places of worship or buildings for rituals of farewell and remembrance. Placement of several constructions or buildings on the common area of ritual zone should be guided by the regulations on fire safety". Paragraph 12.42 of the above-mentioned document specifies that "in the structure of buildings-cemeteries there can be embedded, attached or free-standing religious buildings. While settling the religious buildings of various faiths, it is recommended to place them in different areas, courtyards or parts of the building-cemetery».

Paragraph 10.6 of the mentioned document states:

«On all types of cemeteries, except confessional ones, ... regardless of ownership, to bury the remains after cremation (ashes) there should be provided special sites for burial of funeral urns with ashes and for burials without urns».

A lot of reference subject research regulations are accepted and valid at the regional (subjects of Federation) and municipal levels. For example, we specify the Law of Moscow dated 04.06.1997 № 11 (ed. by 07.05.2014) «About burial and funeral business in the city of Moscow»¹⁸ and the Decision of the Executive Committee of the municipality of Kazan from 16.02.2015 № 693 «About approval of the procedure of activities of confessional cemeteries in the city of Kazan» (in edition of 23.09.2015).

Thus, in our country the legal status of confessional cemeteries and religious sites of common cemeteries (using the language of these acts – faith-based cemeteries or sections of cemeteries; we find this language not entirely successful, continuing to use the taken «confessional») is regulated by the law. Another issue is the quality of this regulation.

It is significant that neither the Federal Law from 30.11.2010 № 327-FZ (ed. on 23.06.2014) «On the transfer of property for religious purposes under state or municipal property to religious organizations»¹⁹, nor the Resolution of the Government of the Russian Federation from 26.04.2011 № 325 (as amended on 21.03.2012) «On the list of the documents proving the right of religious organizations to receive property for religious purposes

¹⁸ Law of Moscow of 04.06.1997 № 11 «On the burial and funeral business in Moscow» (<http://www.garant.ru>).

¹⁹ Federal Law of 30.11.2010 № 327-FZ «On the transfer of property for religious purposes under state or municipal property to religious organizations» (<http://www.garant.ru>).



under state or municipal ownership, and order of their issue»²⁰ do not contain directions on possibility of transfer of land with burials to religious organizations. Although in the «monastery, temple and (or) other cult complexes», attributable to the property for religious purposes (within the meaning of paragraph 1 of Article 2 of the Federal law dated 30.11.2010 № 327-FZ) the possibility of existence of such land plots (with burials), by default, I suppose, is presupposed (or, at least, allowed).

6 - The theme of religious burials in the judicial practice of the courts of the Russian Federation

There is a very small amount of such a practice. Some reference examples will be given below.

So, in one case, a religious organization named Armenian Apostolic Church Cemetery presented their claims for recognition of their ownership of the complex of Church buildings: the building of almshouse, the priest's house, the outbuilding in the courtyard of the Church and the Armenian cemetery, arguing that the claimed constructions form a single property complex of religious significance and are the object of cultural heritage of regional significance, a monument of history and culture²¹. The Armenian cemetery is included in a property complex of religious purpose and, in accordance with paragraph 1 of article 2 of the Federal Law dated 30.11.2010 № 327-FZ, and is pertained to the property for religious purposes. For this study it is important to identify the initial reason for the construction of the specified property complex as objects of religious significance.

If the cemetery existed any earlier than other religious facilities included in the property complex, this fact is the proof of our concept on the relevance of confessional cemeteries and religious sites of common cemeteries to real property objects of religious significance on the basis of specific (above-mentioned) characteristics. If the cemetery arose later, the relevance – on the basis of the presence of constructions of iconic religious

²⁰ Russian Federation Government Resolution dated 26.04.2011 № 325 "On the list of documents justifying the right of religious organizations to obtain property for religious purposes under state or municipal ownership, and the order of issuing" (<http://www.garant.ru>).

²¹ Decree of the Federal Arbitration Court of the North Caucasian Military District (cassation instance) from 21.12.2006 on case № A53-2825, 2006-C4-11 (http://kad.arbitr.ru/PdfDocument/3886993d-bcac-40a2-a6d8-06e1b95fb338/A53-2825-2006_20061221_Postanovlenie%20kassacionnoj%20instancii.pdf).



purposes on religious (confessional) cemeteries and religious sites of common cemeteries.

In the lawsuit of a local religious organisation the Orthodox parish of St. Sergius and Herman of Valaam to the administration of the city of Volgograd it was stated that «since 1993, we began construction of the temple and outbuildings on the territory of cemetery of Krasnoarmeyskiy district of Volgograd»²². Thus, the need for construction of the object of religious significance on the territory of the cemetery was justified by the need to perform religious ordinances. In our case this is the funeral service of the deceased and other funeral services.

The decision of the Arbitration court of the Kostroma region reflected the historical data that

«the Church was built at the expense of members of the Tokmachevs family. Some representatives of this family were buried in the churchyard of this Church ... the Church is enclosed by a stone wall, inside there is a parish cemetery»²³.

In this case, the arrangement of the confessional cemetery was discernible from the very fact of construction of the object for religious purposes – of the Orthodox Church.

7 - Conclusions

As K.B. Yerofeev writes,

«the process of creation (or revival) of confessional cemeteries is complicated, due to our recent atheistic past, the loss of many traditions and customs of our people. It is a necessary process contributing to the establishment of principles of faith, love, and growth of spirituality»²⁴.

And this revival is directly related to the question on the legislative securing of recognition of the legal possibility of classifying religious cemeteries and religious sites of common cemeteries as real property objects of religious significance – in order to remove existing problems of transfer

²² The decision of the Arbitration Court of the Volgograd region from 26.08.2008 on case № A12-10846 / 08-C52 (http://kad.arbitr.ru/PdfDocument/eca48da3-11c9-40e6-89d9-d8560968ad9b/A12-10846-2008_20080826_Reshenija%20i%20postanovlenija.pdf).

²³ The decision of the Arbitration Court of Kostroma region of 11.10.2013 in case № A31-7342/2013 (http://kad.arbitr.ru/PdfDocument/aa6ee881-6f02-4c9c-9511-1e16b5fafb6b/A31-7342-2013_20131011_Reshenija%20i%20postanovlenija.pdf).

²⁴ **K.B. YEROFEEV**, *Faith, Parish cemetery*, 2012, № 3, pp. 9–17, p. 17.



of such objects to relevant religious organizations under Federal Law from 30.11.2010 № 327-FZ (as amended on 23.06.2014) «On the transfer of property for religious purposes under state or municipal property to religious organizations».