

THE CONSTITUTIONAL EXPERIENCE OF CONSOLIDATION THE HUMAN RIGHTS FUNCTION OF THE STATE IN THE POST-SOVIET SPACE

Ivan N. Kuksin, Evgeniy E. Tonkov, Elena V. Safronova, Elvira M. Vasekina, Evgeniya I. Shabalina
Belgorod State University, Russia

ABSTRACT

Norms, legalizing the human rights function of the state are identified in this article, based on the texts analysis of the constitutions of the states-members of the Commonwealth of Independent States (CIS). The approaches of the CIS countries to the formalization of the human rights function, at the constitutional level, were established on the basis of the use of internationally recognized criteria for the human rights function of the state (the duty of the state to protect the individual, his rights and freedoms; the priority of the individual, his rights and freedoms; the guarantees of the state protection of the individual, his rights and freedoms; the guarantees of judicial protection of a person, his rights and freedoms).

Keywords: human rights function, duty, state, his rights and freedoms, his rights and freedoms, state guarantees, judicial protection

INTRODUCTION

Widening scope of the state activity, change of its orientation towards ensuring the rights and freedoms of the individual, necessitated the clarification of the functions of the modern social state [1, p. 4344-4347]. With this approach, further theoretical and constitutional-branch developments of the matter and content of state functions are possible, taking into account its modernization; clarification of priority directions of the state activity and its bodies, in the field of human rights protection; development of the constitutional system and the structure of such protection; defining of criteria for the participation of public structures in the implementation of the human rights function of the state [2, p. 110-116]. We suggest, that these and other opportunities, mediated by the distinguishing and development of the human rights function of the state, can positively affect the human rights protection in Russia and in the world.

The constituent acts of the countries, which are now the CIS members, were chosen as the focus group of the study [3, p. 6]. The scientific interest to these states is due to the fact, that their sovereign development and the formation of legal system, lie in a comparable system of political and legal coordinates. At the same time, for the period since 1991, the features of constitutional construction, including consolidation and development of the functions of the CIS states-members, were the most indicative. We chose the Russian Federation as a certain standard in this sense. This is due, inter alia, to the conclusions of the Venice Commission of the Council of Europe (Council of Europe Commission for Democracy through Law) [4, p. 579-597].

Examination of the content of the Russian Federation Constitution, carried out by the indicated commission [5], showed that the list of rights and freedoms of a person and citizen, contained in it, fully corresponds to the catalog of fundamental rights and freedoms, in accordance with international legal standards. Therefore, on the basis of the Russian constitutional reality, the consolidation of the human rights function in the CIS states-members was assessed by the presence of four components in the main law: 1) the state's duty to protect the individual, his rights and freedoms; 2) the priority of a person, his rights and freedoms; 3) the guarantees of state protection of a person, his rights and freedoms; 4) the guarantees of judicial protection of a person, his rights and freedoms.

METHODOLOGY

Modern methods of cognition, identified and developed by jurisprudence and tested by practice, were used in the work, to achieve the goal of identifying and summarizing the constitutional experience of consolidation the human rights function of the state in the post-Soviet space. Within the framework of this work, both general scientific (dialectical, system) and private methods (historical, formal-legal, structural-functional, comparative-legal) were applied.

DISCUSSION AND RESULTS

The definition of the human rights function of the state, proposed by E.E. Tonkov and M.A. Bespalova, was taken as the basis for the study. In their opinion, the human rights function of the state is the essential direction of the state activity, that appeared at a certain stage of the development of society and the state, under the influence of humanitarian axiological requirements, determined by the constitutional obligation of the state to protect the human and civil rights and freedoms. Its content is expressed in curbing the violation and restoring the violated right by means of adequate measures, taken on behalf of the state by public entities, taking into account special mechanisms and instances of liability [6, p. 30].

Further, according to the criteria, outlined in the introductory part of the work, two groups of states were distinguished (taking into account the completeness of the protection function consolidation in their constituent acts). The first group includes states, whose constitutions fragmentarily present the elements of the human rights function. The second group consists of states, whose constitutions consolidate all the above-mentioned "components" of the human rights function (see Table 1).

Table 1. The constitutional experience of consolidation of the human rights function of the state (on the example of the basic laws of the post-Soviet space in the CIS countries)

	The state's duty to protect the individual and the citizen, his rights and freedoms	The priority of a person, his rights and freedoms	The guarantees of state protection of a person, his rights and freedoms	The guarantees of judicial protection of a person, his rights and freedoms
Azerbaijan	Article 12	Article 12	Part 2 of Article 26	Part 7 of Article 71
Armenia	Article 4	-	-	Part 2 of Article 38
Belarus	Article 59	Article 2	Article 59	Articles 60, 61
Kazakhstan	-	-	-	Part 2 of Article 13, Article 76
Kyrgyzstan	Part 1 of Article 38, Part 4 of Article 15	Article 16	Part 2 of Article 15	Part 2 of Article 38
Moldova	Article 16	Part 1 of Article 4	Part 2 of Article 18	-
Tajikistan	Article 5	Article 5	-	Article 84

Turkmenistan	Article 3	Article 3	Article 7	Articles 40, 99
Uzbekistan	-	Article 13	-	Article 44
Ukraine	Article 3	Article 3	-	Articles 8, 55

Within the framework of characteristics of the first group states, the following key points were noted.

In the Constitution of Kazakhstan, the human rights function is manifested only in the norms, recognizing human rights and freedoms in general, as well as their judicial protection [7]. Thus, in the constituent instrument of this state, the human rights function is partially presented. In our opinion, the lack of provisions on the priority of a person, his rights and freedoms, duties and guarantees of the state on this matter, may adversely affect the democratic development of the state in future. Such situation can lead to unpunished violations of the rights and freedoms of the individual on the part of the state, its bodies and representatives.

Further, the constitutional experience of consolidation the human rights function of the state, through a combination of two of the declared elements, was established. As an example, here are the main laws of Armenia and Uzbekistan.

In the Constitution of the Republic of Uzbekistan [7], the human rights function of the state found itself in Article 13, which establishes the priority of a person and his inalienable rights as the one of the democracy principles. Here it is emphasized, that democratic rights and freedoms are protected by the Constitution and laws. Based on this rule, it can be assumed, that the human rights function is not addressed to the state as a whole, but to the laws.

Article 22 of the Constitution indicates, that the Republic of Uzbekistan guarantees legal protection and wardship to its citizens, both on the territory of the Republic of Uzbekistan and abroad.

Article 44 of the constituent instrument of Uzbekistan provides everyone with the right to judicial protection of his rights and freedoms, the right to appeal to the court against illegal actions of state bodies, officials, and public associations.

Thus, the interpretation of the above formulations made it possible to conclude, that in Uzbekistan only citizens of the state can appeal to the institutions of legal protection. Regarding other persons on the territory of this country, the protection of their rights and freedoms by civil society institutions, established and functioned in accordance with national legislation, is constitutionally defined.

The analysis of the Constitution of Armenia [7] showed, that the human rights function of the state was found in the norms, establishing the state's duty to protect the person, his rights and freedoms, as well as guarantees for judicial protection.

Article 4 of the Constitution indicates, that "the state shall ensure the protection of fundamental human and civil rights and freedoms in conformity with the principles and norms of international law". In spite of the fact, that in this document there is no noun "duty", the use of the word-combination "ensure the protection" made it possible to say about the corresponding duty of the state. The appeal to the principles and norms of international law, in our opinion, only emphasizes these legal relations.

The right of everyone to judicial protection of their rights and freedoms, consolidated by the Constitution and laws is only in Part 2 of Article 38 of the Constitution of Armenia.

From the point of view of interpretation the human rights function of the state, the norms of the Constitution of Armenia seem to be "weak" and insufficient, because there are no regulations on the priority of the person, his rights and freedoms; state guarantees for their protection are also not indicated.

The analysis of constitutional provisions, consolidating the human rights function, allowed us to define states, which have constitutional and legal experience of fragmentary presentation of the human rights function of the state, through three "components". For example, in Tajikistan and Ukraine there are no norms, guaranteeing state protection of individual rights and freedoms.

Article 5 of the Constitution of Tajikistan has meaningfully formulation for the priority of a person, his rights and freedoms, as well as the human rights duty of the state [7]. Article 84 establishes a provision of judicial power.

The analysis of the Constitution of Ukraine within the framework of a selected group of states, allowed to make the following conclusions.

Article 3 says: "The human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value" [7]. We consider, that this formulation is unsuccessful, because it speaks about the priority of a person in a separate social sphere. Other spheres are not taken into account. In addition, the constitutional formulation does not contain the definition of a person, his rights and freedom as a supreme value.

Then, in the same article we found phrase "human rights and freedoms and their guarantees", determining the content and direction of state activities. In our opinion, the existence of this rule allowed to make a conclusion about the priority of human rights and freedoms in the activities of the state. Article 3 also establishes the responsibility of the state to a person for its activities. It is consolidated, that the affirmation and ensuring of human rights and freedoms is the main duty of the state. In this formulation there is no word "protection", but, based on the broad interpretation of the concept "ensuring", we can assume, that the Ukrainian state, therefore, carries out the protection of a person, his rights and freedoms.

Articles 8 and 55 of the Constitution of Ukraine guarantee the judicial protection of human and civil rights and freedoms. In addition to judicial protection in national instances, there is the right of everyone to apply to international judicial institutions or to the relevant bodies of international organizations, where Ukraine is a member or participant, after using of all domestic legal remedies.

The Republic of Moldova is also included in the first group of states. In its Constitution, the human rights function is represented through three elements [7]. There is no rule on judicial guarantees for the protection of a person, his rights and freedoms.

The research interest was attracted by Part 1 of Article 4 of the Constitution of the Republic of Moldova, which proclaimed: "Constitutional provisions on human rights and freedoms shall be interpreted and enforced, in accordance with the Universal Declaration of Human Rights, other conventions and treaties to which the Republic of Moldova is a party" [8, p. 51-59]. Thus, interpreting the indicated norm, as well as the provisions of these international acts, there are grounds to say that a person, his rights and freedoms in Moldova, have priority.

Then, we characterized the constitutions of the states from the second declared research groups - Republics of Azerbaijan, Belarus, Kyrgyzstan and Turkmenistan.

So, Article 12 of the Constitution of Azerbaijan with the title "The Supreme Objective of the State" indicates, that the ensuring of human and citizen rights and freedoms is the supreme goal of the state [7]. We think, that an emphasis should be placed on the fact, that there is no word "protection" in this norm.

But, understanding the term "ensuring" in a broad sense, we can say about the constitutional consolidation of human rights function of the state. It should also be noted, that the use of the wording "the supreme objective" can be interpreted as the duty of the state in relation to a person, his rights and freedoms. It seems that, if the provision of human and citizen rights and freedoms is the highest goal of the state, then they also represent a special value and priority.

It is interesting to note, that the Constitution of Azerbaijan contains two articles with the same title - "Protection of human rights and civil liberties" (Articles 26 and 71). So, Article 26 establishes the right of everyone to protect his rights and freedoms, by the methods and means not prohibited by law, i.e. the right to self-defense. Paragraph II of this article indicates, that the state guarantees protection of rights and freedoms of everyone. Thus, there is reason to talk about constitutional guarantees for the state protection of human and civil rights and freedoms.

Article 71 of the Constitution of Azerbaijan specifies the state protection guarantees in the following formulation: "To observe and to protect rights and liberties of a human being and citizen specified in the Constitution-is responsibility of bodies of legislative, executive and legal power".

We suppose, that the presence in the Constitution of Azerbaijan of two articles with the same titles is an essential legal and technical error and should be corrected. In our opinion, it is advisable to combine the provisions of these articles in one, as they complement each other in content.

The human rights function of Azerbaijan is constitutionally manifested in Article 60 with the title "Judicial Guarantee of Rights and Freedoms".

We also should note, that only the Constitution of Azerbaijan has the titles of articles. Such a legal and technical device facilitates the perception of provisions of the law. However, mistakes, that can mislead the law enforcer, are inadmissible.

The analysis of the Constitution of Turkmenistan, on the substantive consolidation of the human rights function in it, allowed to make a conclusion, that the human rights function of the state is addressed only to citizens of this state [7].

The Constitution of Kyrgyzstan establishes the priority of individual rights in the state, as well as the corresponding guarantees in parts 2 and 4 of Articles 15 and 16 [7].

The duties of the state, all its bodies and officials to protect the rights and freedoms of citizens fully, undoubtedly and immediately, to repress violations in this area and to restore the violated position are consolidated in this constituent instrument (Part 1 of Article 38).

Thirdly, in the same norm (part 2 of Article 38), judicial protection of all rights and freedoms of citizens, consolidated by the Constitution and laws, is guaranteed.

Thus, in the Constitution of Kyrgyzstan, four components of the human rights function of the state are presented to the full extent.

In our opinion, in the Republic of Belarus, constitutional formulations, consolidated the human rights function, are the most effective. In Article 2 of the Constitution, the person, his rights, freedoms and guarantees for their realization are declared as the supreme value and the purpose of society and the state [7].

Part 2 of Article 2 of the Constitution defines the mutual responsibility of the state and citizen. We suggest, it is appropriate to specify the responsibility of state bodies, officials and other persons, executed

state functions, for actions that violate the rights and freedoms of individuals in Part 3 of Article 59 of the Constitution of Belarus.

The Constitution of Belarus also has a provision on the judicial protection of human and civil rights and freedoms (Article 60). In continuation of this provision, Article 61 consolidates the right of everyone to apply to international organizations, for the purpose of protecting their rights and freedoms, in accordance with international legal instruments, ratified by the Republic of Belarus, if all available domestic legal remedies have been used up.

The analyzed articles of the Constitution of Belarus on the subject of the research, allowed to make the conclusion about their sufficient content, in comparison with the experience of other states of the post-Soviet space.

CONCLUSIONS

1. The tendency of distinguishing of the human rights function of the state in various manifestations, in the post-Soviet space, will contribute not only to raising of the national level of human protection, its rights and freedoms, but also to integration into the international legal space.

2. Two groups are defined, according to the completeness of consolidation of the human rights function in the constituent instruments of the CIS states-members. The first group includes states, whose constitutions fragmentarily present the elements of the human rights function. The second group consists of states, whose constitutions consolidate all the declared "components" of the human rights function.

3. Different approaches to formulation of the human rights function of the state, in the constitutional norms, are not the grounds for recognizing in practice a lesser guarantee of the rights and freedoms of a person and a citizen. However, as practice has shown, the defining at the high state level of the relevant norms is not the guarantee of human rights. In this regard, we suggest, that constitutional consolidation of the human rights function of the state is not sufficient for its implementation. In the process of real performance, all eligible subjects should be involved, with the applying of appropriate liability mechanism. Otherwise, constitutional norms are the fiction and they lose their purpose in the state.

REFERENCES

- Markhgeym, M.V., Novikova, A.E., Zhornik, A.M. A Decent Living Standard as a Social Security Aspect for the Constitutional Order // The Social Sciences. 2016. Volume 11. Issue 18. Pp. 4344-4347.*
- Bespalova, M.A. The doctrine of human rights protection in the context of human rights function of the state // Scientific statements of BelsU. Series: Philosophy. Sociology of law. № 14 (85). Pp. 110-116. (In Russian).*
- Agreement on Formation of Commonwealth of Independent States (Minsk, December 8, 1991) // Information bulletin of the Council of Heads of State and the Council of Chief Authorities of the CIS "Commonwealth". 1992. № 1. P. 6. (In Russian).*
- Hoffmann-Riem, W. The Venice Commission of the European Council – Standards and Impact // EJIL. 2014. Vol. 25. №2. Pp. 579-597.*
- The Constitution of the Russian Federation. Adopted by popular vote on December 12, 1993. (Taking into account the amendments, introduced by the RF laws on amendments to the Constitution of the Russian Federation from February 5, 2014 No. 2 -FKZ) // SZ RF. 2014. № 9. P. 851. (In Russian).*
- Bespalova M.A., Tonkov, E.E. Human rights function of the state. Theory issues. Monograph. Rostov-on-Don: Rostizdat, 2012. 291 p. (in Russian).*
- <http://worldconstitutions.ru/>
- Danilenko, G.M. Implementation of the International law in CIS States: Theory and Practice // EJIL. 1999. №10. Pp. 51-59.*