

Constitutional freedom of speech in the context of national security

La libertad de expresión en el contexto de la seguridad nacional

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ABSTRACT

This article considers the versions of the constitutional consolidation of freedom of speech in the post-Soviet space in conjunction with the restrictive reasons for national security. Given that the latter is inherent in all the states, the authors, based on an analysis of their constitutional texts and doctrinal discussions about the divide between rights and freedoms, identified two of their principal groups. The first includes constitutions in which the freedom of speech is considered through the law and the second - where freedom of speech is considered through its guaranteeing. The article concludes that freedom is an independent, recognized as the legal ability of a person to choose the measure of his behavior, which in this case is outlined by the requirements of the norms of morality, religion, law, national security.

Keywords: constitution, freedom of speech, constitutional freedoms, law, guarantees.

RESUMEN

Este artículo considera las versiones de la consolidación constitucional de la libertad de expresión en el espacio postsoviético junto con las razones restrictivas de la seguridad nacional. Dado que este último es inherente a todos los estados, los autores, basándose en un análisis de sus textos constitucionales y discusiones doctrinales sobre la división entre derechos y libertades, identificaron dos de sus grupos principales. El primero incluye las constituciones en las que la libertad de expresión se considera a través de la ley y el segundo, donde la libertad de expresión se considera a través de su garantía. El artículo concluye que la libertad es una capacidad independiente, reconocida como la capacidad legal de una persona para elegir la medida de su comportamiento, que en este caso está delineado por los requisitos de las normas de moralidad, religión, ley, seguridad nacional.

Palabras clave: constitución, libertad de expresión, libertades constitucionales, derecho, garantías.

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1. INTRODUCTION

Legal freedoms are one of the most complex legal phenomena, taking a significant position in the system of legal restrictions [Belyaeva, Makogon, Bezugly, Prokhorova & Szpoper, 2017; Makogon, Markhgeym, Minasyan, Novikova & Yarychev, 2019] and minimizing human rights risks [Kuksin, Markhgeym, Novikova, & Tonkov, 2016; Makogon, Markhgeym, Novikova, Nikonova & Stus, 2018]. This, among other things, is connected with the fact that those determined by the legal norms of individual freedom in the doctrine are often viewed through the prism of individual rights. This supports the discussion of the divide between rights and freedoms.

Proponents of the definition of freedom as a right point out that “freedom is the same right, namely the right to perform certain actions, the right to freely dispose of oneself, one’s actions” [Strogovich, 1990, p. 224]. At the same time, freedoms act as “fundamental rights granted by the constitution” [Tiwari and Ghosh, 2014]. Based on this, it can be assumed that freedoms are similar to inalienable human rights, such as the right to: life, dignity, and personal integrity. But at the same time, “freedom of speech and expression does not give citizens the right to speak or publish without any responsibility, and the legislature can pass the laws imposing restrictions on the right to speak and to express the opinions”. Thus, the legal boundaries of freedom of speech are primarily determined for the security of the individual, society and state. A similar perception of legal rights and freedoms was also reflected at the constitutional level of some post-Soviet countries.

Others hold the position that the constitutional “freedoms are opposed to restriction”, which is their essential difference from the right - “they cannot and should not be limited by the legal framework” [Smolensky, Markheim and Tonkov, 2009]. It is “the constitutional freedoms that are defined as the constitutional provisions for the self-realization of a person, which does not require strict legal regulation” [Ignatenkova, 2006, p. 192]. The concept of freedom is an independent type of permission, consisting in the physical and spiritual moral integrity of a person and providing the subject in these areas with all the fullness of the existing possibilities for disposing of themselves and their actions, guaranteed by the prohibition of unwarranted external interference in them, including its bodies and officials [Makogon, Markhgeym, Minasyan, Novikova & Yarychev, 2019, p. 20].

Considering these positions, we cannot but agree both with the first and with the second, because freedom is an independent, recognized legal ability of a person to choose the measure of his behavior. At the same time, we believe that such an elected measure of behavior should be outlined by social norms, for example, morality, religion, law, and security. An attractive idea of absolute freedom in practice can transform into verbal permissiveness, turn into arbitrariness, cause chaos, create a threat to national security.

2. MATERIALS AND METHODS

The methodological basis of the research is formed using various general scientific methods and techniques of scientific knowledge (analysis, synthesis, deduction, induction, system-structural, formal-logical approaches). The latter includes formal legal, linguistic legal, comparative legal ones, which were used to study the constitutional texts of post-Soviet states, to reflect, regulate and articulate the freedom of speech in the constitutional texts, taking into account the provisions on the security of individuals, society and state.

3. RESULTS

The analysis of the constitutions of the post-Soviet countries - Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, Ukraine, in which the legal nature of “freedom” is laid - is of particular scientific interest. We believe it is very revealing to pay attention to the latest constitutional decisions implemented in the post-Soviet space, since these decisions were made taking into account both the community of the former state-building and the wave of sovereign expectations. Let us consider this, in particular, on the example of an obviously personally attractive and constitutionally fixed “freedom of speech”.

The primary analysis of the constitutional texts of these countries allowed us distinguishing two principal groups. The first includes constitutions in which the freedom of speech is considered through law, and the second - where freedom of speech is considered through its guaranteeing.

The first group of constitutional texts of the post-Soviet countries is represented by Azerbaijan, Armenia, Kyrgyzstan, and Uzbekistan.

Thus, the Constitution of Azerbaijan (P. 1 of Art. 47) states that “everyone has the right to freedom of thought and speech”. P. 2 establishes “a ban on forcing the promulgation of thoughts and beliefs or the rejection of thoughts

and beliefs”, P. 3 does not allow “agitation and propaganda that incite racial, national, religious and social strife and enmity”. This prohibition, in our opinion, is primarily related to ensuring national security.

The Constitution of the Republic of Armenia (Art. 42) defines the freedom of speech as the right to have one’s own opinion and freely express one’s opinion. In this constitutional provision, freedom of speech is closely associated with the right to information, freedom of the press. At the same time, the state may restrict freedom of opinion expression exclusively by law for the purposes of state security, protection of the rule of law, morality, honor and a good name.

The Constitution of Kyrgyzstan (P. 1 of Art. 31) defines that “everyone has the right to freedom of thought and opinion, while additionally securing (P. 2 of Art. 31) that “everyone has the right to freedom of expression, freedom of speech and press”. It seems that the legislator intentionally shares the freedom of thought, opinion and freedom of speech, because the latter may be understood by it in a political context, and perhaps the legislator implies that this right can be exercised only through printing. As in other constitutions, there are positive limitation in Kyrgyzstan, which are expressed in the prohibition of propaganda, discrimination, hostility and violence, which undoubtedly entails ensuring national security.

The Constitution of Uzbekistan (Art. 29) establishes the “right to freedom of thought, speech and belief”. Here, as in the Constitution of Armenia, the freedom of speech is considered in conjunction with the right to information. For reasons of state or other secrecy, the freedom of expression of thought and belief can be limited by law in order to ensure national security.

Proceeding from such constitutional consolidation, it follows that in the constitutions considered, the freedom of speech is defined as a right, and not as an independent freedom, which is additionally outlined by positive legal boundaries for ensuring national security. Thus, in certain cases, the right to freedom of speech may be restricted by law, to protect state secrets, law and order, morality, and to be protected from propaganda, discrimination, hostility, and violence.

The second group of post-Soviet countries, where the freedom of speech is enshrined through guarantees, is represented by Belarus, Georgia, Kazakhstan, Moldova, Russia, Tajikistan, and Turkmenistan.

The Constitution of the Republic of Belarus (Art. 33) defines the freedom of speech as “guaranteed free expression of opinion and belief for everyone”, and prohibits the coercion of expressing one’s beliefs. An enshrinement of the prevention of monopolization of the media is distinctive from other constitutional norms.

The Constitution of Georgia (P. 7 of Art. 17) guarantees the law of freedom of speech, while it denotes it - as a thought and its expression (P. 1 of Art. 17), which is protected by state law. However, in accordance with the law, the freedom of speech is also limited, which is necessary for a democratic society, state or public security. Moreover, everyone can freely express their thoughts through the Internet.

The Constitution of the Republic of Kazakhstan (P. 1 of Art. 20) guarantees the freedom of speech and creativity. This guaranteed freedom is associated with the free receipt of information, but does not apply to information constituting state secrets of the Republic of Kazakhstan, which in turn is aimed at protecting the national interests of the state. Propaganda or agitation threatening the security of the individual and the state is not allowed. Also, we note that freedom of speech and freedom of creativity are used in conjunction, but shared by the legislator. It seems that such a division with different subtext (political, ideological, cultural) specifies the scope of this freedom.

The Constitution of the Republic of Moldova (Art. 32) guarantees the freedom of speech not to “everyone”, but only to “every citizen” through freedom of thought, opinion, as well as freedom of public expression through word, image, or other possible means. It can be assumed that limiting the range of subjects of freedom of speech only to citizens of the state is associated with ensuring national security.

A similar consolidation is presented in the Constitution of Turkmenistan (Art. 28), the “citizens of Turkmenistan” have the right to freedom of opinion and expression”. There is also the association of freedom of speech with access to information, but only if it is not a state or other secret protected by law.

In the Constitution of the Russian Federation (Art. 29), the freedom of thought and speech is guaranteed to everyone. At the same time, for the sake of the security of the individual, society and state, “propaganda or agitation inciting social, racial, national and religious hatred and enmity or linguistic supremacy” is not allowed (P. 2 of Art. 29). In addition, it was clarified that the list of legally established information constituting a state secret outlines the boundaries of the freedom to search, transmit, receive and disseminate information (P. 4 of Art. 29). This kind of clarification fully relates to ensuring national security.

The Constitution of Tajikistan (Art. 30) guarantees the freedom of speech, press, the right to use the media to everyone. Naturally, for the purpose of national security, it is noted the protection of information relating to state secrets.

Ukraine, with its constitutional formulations that “everyone is guaranteed the right to freedom of thought and speech, free expression of his views and beliefs” (Art. 34), combined the approaches considered, defining freedom of speech as a right guaranteed by the state. Along with the freedom of speech, the right to information is established, as well as the possibility of its restriction in the interests of national security, territorial integrity or public order.

4. CONCLUSIONS

An analysis of the texts of the constitutions of the post-Soviet countries showed that all of them reinforce freedom of speech, but not permissiveness, which is primarily dictated by the security interests of the individual, society and state. At the same time, the freedom of speech is fixed in different ways in all of them. In some constitutions, the freedom of speech is enshrined as a right, in others - as guaranteed freedom. In some constitutions, the freedom of speech is granted to everyone, and in others - exclusively to citizens. The latter approach is also interpreted by us as a concern for national interests and security.

The constitutions mainly use such formulations as: freedom of opinion, free expression of opinion, freedom of speech, free expression of thoughts and views, freedom of creativity. We also note that all the analyzed constitutions are united by the contextual meaning of freedom of speech, which is expressed in ensuring the state's security. In this case, it is understood that the freedom of speech may be limited by law to protect the constitutional order, state secrets, rule of law, morality, and to protect against propaganda, discrimination, hostility and violence.

However, the main meaning of all these constitutional lexical-legal constructions is the ability of a person through the freedom of speech to contribute to the development of society and the state, without compromising their security.

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