UDC 342

CONSTITUTIONAL AND LEGAL BALANCE BETWEEN THE INTERESTS OF THE INDIVIDUAL AND THE STATE IN THE INFORMATION SPHERE: USING TELEGRAM MESSENGER AS AN EXAMPLE

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In this article, the interests of the individual and the state are considered through the prism of such a basic concept as «constitutional and legal balance of interests». Using an illustrative example with the messenger Telegram, the author tries to illustrate how often paradoxically atypical situations arise from the collision of the interests of the individual and the state, how they can be solved in practice.

At the present stage of legal science and practice development, very little attention paid by legal scholars was devoted to the issues of limiting the individual's interests. Since there is a noticeable lack of integrated knowledge on this topic in the scientific sphere in Belarus, it is very useful to conduct the study.

The Constitution of Belarus formed the basis for the individual's interests (rights, freedoms) limitation, which is quite reasonable, because differing «from other normative acts, the Constitution is the fundamental law.» [1, p. 62]. Its structural component is not accidental. It is quite interesting that Section Two is named «The Individual, Society and the State». The order of these words is not chaotic. The Constitution proclaims that the interests of the individual come first, and only then comes the state, which makes the individual's interests priority the corner-stone. So why does the contemporary practice show a completely different, contrary picture, and why is the observance of the concerned priority more an idealized exception than a realistic rule? In this regard, the essence of this statement is revealed in the lines of the following work: and so it should be, // but it is not actually – // prescribed by centuries of change: // all that we have so long wanted, // did not find so many generational changes. It seems that next generations, much to their regret, can meet their age in a similar epopee.

It is quite symbolic that the preamble is located at the beginning of the Constitution. It contains everything that the nation tried to tell us at the time of its adoption. Not without purpose the people of the past generation have indicated in it their desire to assert the rights and freedoms of every citizen and have entrusted the state to execute this task. It is no coincidence that the state is responsible to the citizen for creating conditions for the free and honourable development of the individual, who is responsible to the state for the unquestioning fulfillment of the Constitution. Nevertheless, both the state and each of its citizens must always follow this condition and implement the bilateral agreement. Of course, the state is obliged to create appropriate conditions for the citizen, but only if the latter followed the law. And the state can expect the citizen to fulfill the constitutional responsibilities only if the state has created all the conditions necessary for that. The above-mentioned condition should be regarded as a rule of limiting the interests of the individual and the state.

It is particularly interesting that the terms «citizen» and «everyone» found in the text of the fundamental law are used both in the singular and in the plural, but the term "personality" is always used only in the singular. There is no doubt that this peculiarity was used to demonstrate the special nature of the relationship between the individual and the state, i.e. individualized relationship nature. Their bilateral responsibility towards each other comes exactly from that. It turns out that in all cases without exception, the approach to each citizen should always be individual because all people are unique in their own way and are the supreme value of the state. This statement must be formulated as another rule of limiting the interests of the individual and the state.

The structure of the investigated norms in the 1st part of article 23 of the Constitution is of great interest. Thus, the situation is the following: its structuring is based on the principle of constitutional benefits distribution according to their value. Therefore, the order of the benefits should not be considered as accidental.

It could be clearly seen that the list under consideration is headed by the state interests and a formulation lobbying the individual's interests is only at the end of the list. Here you can see not the title of chapter II of the Constitution – «The Individual, Society and the State», but the diametrically opposite phrase, which is in the form of «The State, Society and the Individual». It may tell us that the individual's interests placing

in the «center of the World» is only a declared by the Constitution rule. In its turn, the state decides how to apply it. I. I. Pliakhimovitch noticed that «the constitutional right of the leading States reaches a state, when the usual principles cannot be accepted without reservations» [2, p. 6]. We agree that foundations formulated by «days of yore» should not be useful today.

It should be noted that the norm of article 23 of the Belarusian Constitution is one of the few norms that have direct effect and are the subjects to direct application. Therefore, the practical significance of how its content will be interpreted is very great, because the fate of a person can depend on it.

The principles for the individual's interests limitation are confirmed in article 23 of the Constitution of Belarus. The bounds of its implementation are established by the articles 24-27, 34, 63, etc. Speaking of restrictive norms, S.A. Gorshkova noted that the standards are being introduced «to establish a balance between the rights of individual citizens and the interests of society and the state as a whole» [3, p. 83-84]. It should be noted that, according to the rule written in part 1 of article 23 of the fundamental law, limiting the individual's interests is permissible only in exceptional cases, constituting an exhaustive list. It is allowed to limit the individual's interests only in the case provided by «law, in the interests of national security, public order, protection of morality, public health, rights and freedoms of other persons» [4]. It means that there are no reasons except the one mentioned above that can be regarded as lawful. In this way A. N. Pugachev writes: the limitation of the interests of the individual should be regarded as «exceptional measures provided by law and only to the extent which is necessary» [5, p. 221]. We agree that the individual's interests limitation should be exceptional in all cases. It means that there are no other options for solving the problems of society and (or) the state, i.e. the ways not to limit the constitutional interests of the individual should not be present. In addition, without limiting the individual's interests, there would be much more negative consequences not only for the state and society, but also for the individual that makes it up. Exceptionality is achieved through the so-called presumption of greater harm. Probably that is why the courts, adjudging somebody to die, enunciate this catchy phrase: «in the name of the Republic of Belarus he is sentenced to the exceptional measure of punishment». Thus, the state illustrates that there are no other ways to keep the foundations of the Belarusian statehood unshakable.

So what was in the Union that we have not yet abandoned? V. D. Selemenev, V. I. Shimolin, studying the history of post-war life of Germans on the territory of former Soviet Union, noted that the information about repressed German agents were withheld to such an extent that any laws about the declassification were of no importance due to the limitation period expiration [6, p. 21]. To the deepest regret, in the modern realities it is necessary to state the fact that the survivals of the Soviet past about this hidden policy of the state in respect of the individual's rights and freedoms, escaped the collapse of the Soviet society and entrenched firmly in the minds of many politicians of the countries of the former Soviet Union. It is sad to realize that such States still exist. Not showing even a scanty share of the desire to preserve the individual's rights and freedoms, they simply neglect such a great value of the entire history of mankind, limiting it in the earned rights and freedoms. The so-called nature of exclusivity is not familiar to them, it simply does not exist, and the restriction of personality in its interests is a normal phenomenon. L. Y. Grudtsyna notes, neither the legislative nor the executive, nor the judicial power of such States simply feel limited by human rights [7, p. 36], in view of it the interests of the individual are relegated to the background, creating «vacant» places for the state. In the same way, P. P. Baranov suggests that the States «have to get rid of stereotypes, that every person is a subject – a dependent and obedient contractor» [8, p. 115], that was imposed by the dictatorship of former «kings».

Returning to the issue of exceptionality, it is important to clear the nature of the limitations taken. Let us recall, that A. N. Pugachev marked the high importance of the exceptional nature when choosing the measures aimed at limiting the individual's interests. More recently, we talked about such a fundamental principle of the relationship between the individual and the state as individualization. Associating it with exceptionalism, it is quite simple to explain what specific limitations should be applied to a particular individual. Having thoroughly analyzed the essence of such phenomena, it is arguable that measures aimed at limiting the interests of the individual must comply with:

– its legal status, which realizes the principle of individualization;
– the maximal protection of the state interests with the minimal infringement of the individual.

The category of the bounds of interests limiting comes from the second point. It is not necessary to prove that everything has its limits. In legal practice, the question of determining the bounds of the individual's

interests limiting is much talked of. The fact is that the limiting puts a «final point» in the process of invasion of the individual's constitutional rights and freedoms. Consequently, they are of particular importance. Playing a restrictive role, the bounds of the individual's interests limiting draw a parallel between legal and illegal infringement of the rights and freedoms. Therefore, the following factors should prevail in determining the limitation bounds:

- duration (most often lasting character);
- measures (means of influence);
- objectives (protection of national security, etc.).

In the case if the individual's interests limitation was not carried out in accordance with part 1 of article 23 of the Basic Law, the so-called legal provisions shall be applied. According to its part 3 of Art. 59, exactly the state organs, officials or other persons who the execution of the state functions was entrusted to, shall be responsible for the actions breaking the rights and freedoms of the person. N. I. Matuzov says, that a person has to «build his/her behavior in accordance with the requirements of the Basic Law, adhere to the common interest, do his/her duty, respect the rights» [9, p. 44] of other people, because otherwise he or she will have to be accountable for his/her actions. However, it applies not only to the individual, but also to the state. Scientist B. S. Ebzeyev claims [10, p. 60] that in this case the term «responsibility» used in the preamble of the Basic Law is the basis of the constitutional system. The fact is that it determines the foundation of the relationship between the people and the state, the latter of which must always provide the protection of the individual, his life and health, property and rights.

The above mentioned aspects should always be taken into consideration when limiting of the individual's interests. However, the legal practice makes the picture half-turned. In this regard we will consider one interesting and paradoxical example.

We will examine the conflict of interests between: Telegram messenger for public usage on one side, and the Russian Federation, that wants it to provide access to information about users, on the other side. Telegram does not pay much attention to the requirement of the Russian state. In an attempt to maintain its composure, Telegram, in fact, categorically refuses to comply with Russian legislation. Of course, Russia does not like it, and therefore, it tries to ban the messenger services on its territory. As an alternative, there were other options. One of them was to give the government access to the security system of Telegram. The latter is not satisfied with this proposal, so the state began to apply different sanctions. And it would be all right except for one thing: most citizens evaluated all the advantages of the online platform and did not want to lose the opportunity to use it. It is quite clear that for Russia such a surprise was unwanted, because it was confronting not simply with a messenger, but with society that was dissatisfied with state policy. They all need one thing - to keep the opportunity to use Telegram. The Russian Federation, in this case, was between its desire (interest) to gain access to the Telegram, ensuring national security, and quite a negative public opinion about it, more and more willing to keep the opportunity to use the messenger (interest).

Thus, we see how the interests of two sides are opposed: the individual and the state. Within the limits of Russian legislation, Telegram must provide for the FSS information required to decode electronic communications. In turn, this obligation should be implemented in the protection of the provisions enshrined in the Constitution of the Russian Federation, which represents the right to confidentiality of correspondence. Moreover, it is necessary to solve this problem in such a way that the interests of not only the state but also the individual were satisfied. Experience has shown that in April 2018, such a consensus was not reached – the state was still able to force the messenger to provide the necessary information and therefore protected only its own interests. Was it really supposed to be like that? Obviously not. If the messenger and the state reached a compromise, it could be possible to elaborate mechanisms that could disclose information about a threat to national security. Moreover, it would be selective provision of information. At the same time it would be possible to keep the privacy of correspondence of a larger number of users with the interests of their personal life. One option is to disclose the message, only if they contain such terms as «attack», «bomb», «explosion», etc. Furthermore, court should lead the establishment of special procedure for reclamation of information. In this case law enforcement agencies will have to provide the organizer of the messenger information about events or actions that pose a threat to the national security of the state, including all what it is expressed in, how decoding can help prevent the existing threat.

It should be noted that previously there were no such stories. The only thing that comes to mind is the case of the FBI against «Apple», which deals with the iPhone unlocking after the terrorist attack

in San Bernardino. Anyway, a court judgment that would assess the so-called balance of interests of the individual and the state was not made. The case «Russia against Telegram» becomes the first global story of its kind: it is a precedent, and its consequences are very important for the Russian Federation and for other countries that made up the former Union, including the Republic of Belarus. After all, the Belarusian state always follows the example of its «big brother». Placing priorities in the direction of the state interests, there will be more cases of the wrong law enforcement practices, which will be followed by the states. Therefore, «not tomorrow», but today we have to move away from it. Not without reason, the European Court of Human Rights is increasingly interested in issues related to the Internet and legal regulation of the network.

Let's try to analyze this situation from the point of view of the above-described rules of the individual's interests limiting. Let's start with asking ourselves a very reasonable question: is this case exceptional? A controversial question. Nevertheless – N. S. Bondar explains [11, P. 134] –when the limiting the interests of the individual, the state may choose the principle of the special significance of its interest, but, unlike the individual, it is intended to ensure the foundations of both as a condition of their natural existence, guaranteeing the satisfaction of the interests of the individual in its single and concentrated expression. The studied example shows a slightly different picture, where the interests of the individual and society were not satisfied. Thus, only the interests of the state were protected. It means that the principle of balance was also not respected. I. N. Malynych says, that every legal relationship is stable when «its legal content – mutual rights and obligations of subjects – is balanced» [12, p. 98], which, to the deepest regret, in this example, is not observed. Did the individual and the state have a so-called individualized relationship? It stands to mention that there was no such relationship nature, as there was no «communication» between the state and the individual, which would allow to find options that prevent unjustified infringement of the rights and freedoms of the individual. V. N. Vlaznev suggests that after all, public administration should be «not as an instrument of dictator» [13, p. 125]. As an unequal partner, it puts the person in a dependent position, realizing the presumption of greater harm for the common good. There are no limiting bounds here. In terms of the concept of national security, the state structures «forge chains», not constraining themselves with the bounds of interests limiting of this person. The state chooses the measures, not always corresponding to the needs and the state is not responsible for that to the society or to each individual comprising it.

Thus, the study showed that the constitutional and legal balance between the interests of the individual and the state on the example of Telegram messenger was not objectively established. It illustrated very clearly what trends in the law enforcement practice are outlined by many countries of the former Soviet Union. Yet, the states need more than one year to go away from it.

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