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Constitutional Justice in a System of Separation of Powers

The author examines the separate problems of assessing the place and the role of the judicial system as a whole and constitutional justice, in particular, within the system of separation of powers, whilst accounting for the modern juridical nature of various governmental bodies' powers, as well as their functions.

Key words: governmental power, separation of powers, judicial bodies, judicial independence, functions of governmental bodies, constitutional principles, constitutional justice

The entrenchment of the principle of implementation of governmental power on the basis of a system of separation of legislative, executive and judicial powers, as outlined in article 10 of the Russian Federation Constitution, signalled Russia's return to fundamental constitutional-legal values. Meanwhile, it is obvious that the principle of separation of powers — as a fundamental principle of a rule-of-law state — has its own historical origins, rooted in an entirely different political and legal reality. Therefore, the contemporary analysis of the structural-functional characteristics of governmental authorities inevitably leads to the conclusion that we need to modernise our understanding of the concept of separation of powers.

At different stages, the course of societal development inevitably generates a distinct scientific understanding of the specific features related to the structuring and functioning of governmental authorities. Contemporary classical theory of the concept of "separation of powers" is interesting only as a "constructive casing", which allows us to outline the fundamental principles of building a system of governmental power. For historical reasons, the theory itself cannot be accepted in its literal interpretation, with centuries having passed since its initial formulation by Montesquieu.[1]

The power function is the primary aspect of the structure of power. The formulation of the power function must precede the creation of the power structure (body), which is designed to implement the given function, and not the other way around. Unfortunately, the reality of state building reveals many examples when the creation of a governmental body (for instance, for a particular individual) precedes the modeling of its functions, sometimes objectively not corroborated by public needs.

The preservation of the principle of separation of powers in modern constitutionalism mainly derives from the differences inherent in juridical mandates. As such, the idea of a

[1] *Montesquieu C.L.* Selected Works. Ed. M.P. Baskin. Moscow, 1955.

representative mandate, obtained from a direct sovereignty bearer, is rigidly connected to the system of legislative power. The administrative mandate predetermines the nature of executive power, as an agent charged with the implementation of governmental functions, as assigned by legislative power. Finally, the legal nature of judicial power is predetermined by the idea of the jurisdictional mandate, obtained either directly from the bearer of sovereignty or obtained by a court (judge) as a result of interaction between the two other systems of governmental power (representative and executive).

The modern — "post-classical" — understanding of the constitutional principle of the separation of powers is expected to assume as its basis the system of checks and balances. In an exclusive sense of providing the principles underlying the rule-of-law state, the latter means a more intensive interpenetration of norm-setting, norm-implementing, and norm-stabilising functions of legislative, executive and judicial power.

The public designation and the inherent legal nature of parliament derive primarily from representation (the representative mandate of legislative power). As such, this governmental authority cannot be isolated from the system of legal enforcement either in relation to the organisation of its own work or in relation to the opportunities for adopting individual legal acts, directed at other participants of the political-juridical process — for instance, the cadre decisions of the State Duma (the approval of the appointment by the President of the Russian Federation of the Chairman of the Government, solving the issue of confidence in government, the appointment and dismissal of the Chairman of the Central Bank, the Chairman of the Accounts Chamber and half of its auditors, as well as the Human Rights Commissioner) and the Federation Council (the appointment of judges to the Constitutional, Supreme and Supreme Arbitration Courts, the appointment and dismissal of the Prosecutor General, the deputy Chairman of the Accounts Chamber and half the auditors).

The parliament also functions as a body that resolves public conflicts and, as such, can be classified as a subject of constitutional juridical activity (for example, the State Duma can bring charges against the President for his impeachment and the Federation Council can impeach the President). The implementation of such activity by the representational body is only possible through specific parliamentary means, which reflect the representative nature of the mandate of this body of governmental power. It should further be noted that the latter function of the representative body of power is not a primary one and is more of auxiliary nature.

The availability of the norm-creating (but not the law making) competency of the bodies of executive power is obvious; though this competency is not carried out only within the rigid juridical-technical formula of "implementing the law", but also within the scope of the more flexible formula of "on the basis of the law" (or "in accordance with the law"). In carrying out its main social designation, that of providing professional administration of public processes (administrative mandates), executive power cannot achieve this goal without the norm-creating function that regulates these processes. However, the specific character of normative regulation is obvious in the executive system with a significant number of legal regulations being operative in their nature. These specified regulations underpin the implementation of the principles and general norms passed by the body representing the nation.

At the same time, it is impossible to deny the executive authorities' involvement in the mechanisms of legal dispute resolution, especially in the administrative sphere and in the

sphere of administrative legal relationships. As such, the list of the federal and regional bodies of executive powers, which are authorised to consider cases related to administrative offences, is directly entrenched in article 22.1 of the Code of Administrative Offences of the Russian Federation. Of course, the execution of the latter function by the executive power (the bureaucracy) takes place through specific administrative means, which are not related to judicial procedures and which carry a subsidiary character in terms of the titular direction of the activity of the bureaucratic system — positive social administration.

Finally, judicial power, whose main social design is to provide balance in a developing public system, obtains its goal by means of resolving legal disputes through the mechanism of legal procedure (juridical mandate). As such, the main function — court activity — comprises the resolution of a particular legal dispute. However, the work of judicial power does not stop there. At a certain level of its development, the function of norm regulation arises. It comprises the evaluation of the legality of a regulatory act. In the process of norm control the norm-creating function emerges as part of the function of the court, which can operationally and professionally resolve a public dispute by authentically filling the legislative gap.

The acceptance of the necessity and consistency of judicial norm creation, at least applied to constitutional justice, represents a very important guarantee against a situation, in which ineffective implementation or non-implementation of norm-creating regulations by other "branches" of governmental power can threaten the implementation of the governmental function providing public consolidation. The acceptance of the judicial norm as a formal source of law significantly enriches the national legal system through additional juridical opportunities of positive regulation of social relations. Additionally, this route offers more dynamic and professional opportunities, compared to the traditional regulatory process. It is assumed that a positive resolution of this problem in general Russian theory and practice will lead to new opportunities in scientific knowledge.

It must be noted that such questions do not arise in some countries of the post-Soviet space, despite the fact that these legal systems are directly related to the continental family. For instance, the Constitution of the Republic of Kazakhstan (article 4) declares that the law in effect includes not only the Constitution itself, as along with laws, regulatory legal acts, and international agreements related to it, but also the normative declarations of the Constitutional Council and the Supreme Court of the Republic.[2]

We must not deny the significant meaning of the resolutions passed by the plenums of the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation. In a number of cases, the consideration of the texts established by such resolutions provides room for thought regarding the relationship between judicial interpretation of the juridical norm and the norm-creating process. As an example, consider resolution N 57of the plenum of the Supreme Arbitration Court of the Russian Federation, dated 23 July 2009, "On some procedural questions of the practice of processing cases, which deal with the non-execution or ineffective execution of contractual obligations".[3]

Frequently, the boundary between the normative and the interpretational components of court decisions is a blurred one. It can be argued that judicial acts, which are the result of the generalisation of judicial practice and are simultaneously tasked with setting out the

[2] The official website of the President of the Republic of Kazakhstan: http://www.akorda.kz/.

[3] Vestnik VAS RF. 2009. N 9.

vector for further development of such practice, possess a mixed legal nature. They can be said to be of a normative-interpretative nature. And yet, legal science has not developed a clear set of criteria for separating law enforcing (judicial) interpretations, which lead to filling in gaps in legal regulation on the basis of principles of analogy of law, and law enforcing (judicial) norm creation, which leads to the creation of judicial norms.

This problem had little relevance within the context of a closed legal system and the absence of an institution of constitutional norm control (Russia before 1991) because the questions of the normative nature of judicial acts would arise only in relation to the resolutions of the plenums of the Supreme Court. In the context of active processes of globalisation, coupled with the convergence of legal families and the emergence of constitutional justice, the necessity for solving questions set out by juridical practice increased significantly.

In this context, it is relevant to mention institutions of civil and appeal procedural law, such as judicial recourse to ensure the protections of rights, freedoms and legal interests of indefinite numbers of people (articles 45 and 46 of the Civil Procedural Code of the Russian Federation) and the examination of cases related to the contestation (or admission of voidance) of normative legal acts (judicial activity in the sphere of norm control) (chapter 24 of the Civil Procedural Code of the Russian Federation, chapter 23 of the Arbitration Procedural Code of the Russian Federation).

Clearly, the resulting outcomes of the courts' law enforcement activity in the abovementioned procedural institutions substantially differ from the courts' juridical decisions in the general and appeal jurisdiction, which are arrived at by considering regular legal disputes. Judicial decisions, which are made within the context of the abovementioned procedural institutions, possess the qualities of standardisation, in the precedent setting sense, through the depersonalisation of the direction of its action.

It is essential to emphasise the value of the gradual, but steadfast, penetration into Russian legal culture of the acceptance of the normative elements of the decisions of the Constitutional Court of the Russian Federation, the consideration of the number of legal positions related to the formulation of general and appeals juridical practice inherent in them, and the inclusion of direct references to the relevant acts of the Constitutional Court of the Russian Federation into texts of court decisions as a means of their establishment.

The executive function is also extended to judicial power. At the same time, it is not the chief function in terms of the legal nature of judicial power. It comprises internal and external aspects. The internal aspect of the legal-executive function of the court adds up to the adoption of respective legal acts that concern the organisation of its work as a body of governmental power. The external aspect concerns the inclusion of judicial bodies into the system of checks and balances, which is a direct component of a system of "separation of powers".

As such, each system of governmental power (legislative, executive and judicial), separated from a perspective of their differing social designations (mandates), possesses the respective set of functions, which can be implemented in a norm-formulating, norm-executing, or juridical form. Each of these systems of governmental power promulgates compulsory norms of behaviour, is an important component of the administrative process (in a broader sense) and, finally, is involved in the removal of public contradictions by means of resolving juridical disputes. At the same time, each branch of governmental power employs a specific set of legal mechanisms, inherent only to it, for carrying out the respective func-

tions, and it is this given specificity that determines the special features of the legal nature of each system of governmental power.

Thus, the presence of "atypical" functions in different systems of governmental power requires the adoption of a titular function that corresponds to the mandate of the governmental body (law making, law application, judicature) alongside the subsidiary functions, which each body must implement in direct relation to the implementation of titular functions. As such, a court is not entitled to undertake norm-creating activity outside of the context of its juridical functions. For instance, in resolving a constitutional-legal dispute and, at the same time, disqualifying a norm that leads to a gap in legal regulation, the Constitutional Court must resolve the issue of overcoming (compensating for) this gap through setting up of an order of implementation of its decision through the assignment of responsibilities to another body of governmental power (legislative, executive) to implement corresponding regulation in a certain period, while also introducing temporary regulation using the formula "until such time as...". Consequently, the overcoming of (compensation for) the legal gap takes place as part of judicial norms (in this context, it is different from a judicial precedent). The elimination of the gap is carried out by legislative or executive power, depending on the norm that is disqualified by the outcome of constitutional legal proceedings.

In discussing judicial norm creation, we are generally discussing the emerging, distinctive system of reciprocal discretionary restraint between the legislator and the courts, since the norm-creating function of either facilitates the obvious improvement of the professional activity of the other. In receiving an unequivocal, norm-setting signal from the Constitutional Court, the federal assembly has the opportunity to eliminate defects. The vector of legislative modernisation gets its roots from the norm of the court resolution, which carries the constitutional-legal sense of that real-life situation, that interlacement of pubic relationships, the regulation of which is found to be unsound in the final decision of the Constitutional Court

However, this logic must be complete. This takes into account a very important condition, which according to part 4 of article 70 of the federal constitutional law "On the Constitutional Court of the Russian Federation", whereby the Constitutional Court adopts a resolution that creates a normative legal act that does not correspond or does not fully correspond with the Constitution and the content of this decision results in the necessity of eliminating the emerging gap in legal regulation, then the Constitution must be applied until a corresponding new legal act is adopted.

It is obvious that constitutional-legal principles, whether textually reproduced in the Constitution or given effect by means of the constitutional lawmaking procedure ("the spirit of the Constitution"), prescribed into the foundation of the non-constitutionality of the disqualified legislative norm, are the result of the direct application of the Constitution. It is these principles, per se, that create the framework of the new system of legal regulation, applicable to the corresponding area of public relationships. In this instance, the legislator is not within his right to carry out norm creation outside the context of or in contradiction to the context of the new constitutional legal sense of the disputed normative situation.

When the Constitutional Court, in formulating its decision, employs the technical-juridical algorithm to eliminate the legal gap using the principle: "up to the moment of the legislative adoption of a corresponding act, the following norm conditions must be employed...", we are witnessing the creation of a judicial norm that ensures the direct action

of the Constitution, the necessity of which ensues directly from the legislative directions of part 1 of article 15 of the Constitution of the Russian Federation and part 4 of article 79 of the Federal constitutional law "On the Constitutional Court of the Russian Federation".[4] On the one hand, such a judicial norm fills in the juridical gap, which is inevitably created as a result of a disqualification of a legal norm during the constitutional process, and, consequently, ensures the continuity of legal regulation of a corresponding group of social relationships and the stability of the functioning of the public system in the corresponding sector. On the other hand, such judicial normative prescription legally limits the discretion of the legislative power during the course of implementing legal regulation of the lawmaking process.[5]

That said, in some cases, the Constitutional Court sets out the judicial norm in a concrete form, contained in the operative part of the resolution[6], while, in others, the resolution of the Constitutional Court contains a prescription for the legislator to use the content of the legal position, outlined in the preamble part of the resolution that highlights the legal necessity of directly applying the Constitution with the corresponding constitutionally significant values (for instance, the non-admission of disproportionate limits to the rights of citizens for individual undertaking of pre-electoral propaganda against all candidates at a personal expense[7]; the non-admission of disproportionate limits of property rights of citizen-debtors and creditors as business entities of real estate,[8] etc.)

Legal science must pay closer attention to the issue of judicial norm disqualification and related issues of conception, typology, characterisation of legal consequences of "negative (nullifying)" norm creation.

It should be noted that the decisions of the Constitutional Court can accept the norm under question as unconstitutional; however, they can also deem it "conditionally consti-

[4] Federal constitutional law N 1-FKZ, dated 21.07.1994 (amended on 28.12.2010.), "On the Constitutional Court of the Russian Federation (effective from 09.02.2011), SZ RF, 25.07.1994, N 3, statute 1447.

[5] See, for instance, Constitutional Court of the Russian Federation resolution N 3-P, dated 15 January 1998; SZ RF. 1998. N 4, statute 532, dated 16 June 1998, N 19-P; SZ RF. N 25. 1998, statute 3004, dated 23 December 1999, N 18-P; SZ RF. 2000. N 3, statute 353, dated 18 February 2000, N 3-P; SZ RF. 2000. N 9, statute 1066, dated 27 June 2000. N 11-P; SZ RF. 2000. N 27, statute 2882, dated 27 April 2001, N 7-P; SZ RF. 2001. N 23, statute 2409, dated 14 March 2002, N 6-P; SZ RF. 2002. N 12, statute 1178, dated 2 April 2002, N 7-P; SZ RF. 2002. N 14, statute 1374, 12 April 2002, N 9-P; SZ RF. 2002. N 16, statute 1601, dated 10 April 2003, N 5-P; SZ RF. 2003. N 17, statute 1656, dated 15 March 2005, N 3-P; SZ RF. 2005. N 13, statute 1209, dated 11 May 2005, N 5-P; SZ RF. 2005. N 22, statute 2194, dated 14 July 2005, N 9-P; SZ RF. 2005. N 30 (part II), statute 3200, dated July November 2005, N 10-P; SZ RF. 2005. N 47, statute 4968, dated 22 March 2007, N 4-P; SZ RF. 2007. N 14, statute 1742, dated 24 May 2007, N 7-P; SZ RF. 2007. N 23, statute 2829, dated 10 July 2007, N 9-P; SZ RF. 2007. N 29, statute 3744, dated 12 July 2007, N 10-P; SZ RF. 2007. N 30, statute 3988, dated 23 December 2009, N 20-P; SZ RF. 2010. N 1, statute 128, dated 21 January 2010, N 1-P; SZ RF. 2010. N 6, statute 699, dated 26 February 2010, N 4-P; SZ RF. 2010. N 11, statute 1255, dated 2 March 2010, N 5-P; SZ RF. 2010. N 11, statute 1256, dated 21 April 2010, N 10-P; SZ RF. 2010. N 19, statute 2357, dated 28 May 2010, N 12-P' SZ RF. 2011. N 6, statute 897, dated 2 June 2011, N 11-P; SZ RF. 2011. N 24, statute 3526, dated 22 November 2011, N 25-P; SZ RF. 2011. N 49 (part 5), statute 7333, dated 6 December 2011, N 27-P; SZ RF. 2011. N 5, statute 7552 and others.

[6] See, for instance, the Constitutional Court of the Russian Federation resolution N 18-P, dated 23 December 1999; SZ RF. 2000. N 3, statute 353.

[7] The Constitutional Court of the Russian Federation resolution N 10-P, dated 14 November 2005, SZ RF. 2005. N 47, statute 4968.

[8] The Constitutional Court of the Russian Federation resolution N 10-P, dated 12 July 2007, SZ RF. 2007. N 30, statute 3988.

tutional". In other words, the norm can be retained within the legal system only because it allows for the existence of a constitutional-legal meaning described by the Constitutional Court of the Russian Federation (under the condition of its use in this strict sense).

Therefore, in the first instance, when the norm is completely disqualified, the Constitutional Court's decision, with the aim of ensuring the principle of the stable functioning of the legal system, must contain measures directed at overcoming the emerging legal gap. These should include directions for when the decision comes into power, as well as the timeline, deadlines and specific features of its implementation that need to be published in accordance with item 12, part 1 of article 75 of the Federal constitutional law "On the Constitutional Court of the Russian Federation"; must give corresponding assignments (prescriptions) to governmental bodies, which are part of the norm-creating process, regarding the adoption of the normative acts that help fill the regulatory gap within specific timeframes; must establish temporary regulation of public relationships ahead of filling the legal gap, in the instance that the principle of analogy of law cannot be applied (for instance, if a normative disqualification occurred in the sphere of regulation of imperative administrative, criminal and other relationships). The last option, in essence, gives meaning to the known postulate of the direct application of the Constitution until such time that a new normative act is adopted in the instance of a disqualification of a given norm (part 4, article 79 of the Federal constitutional law "On the Constitutional Court of the Russian Federation").

In the other instance — when the norm is recognized as "conditionally constitutional", in other words, it meets the constitutional criteria only within the bounds of its contents, as set out by the Constitutional Court, whereby the norm is recognised only in the sense corresponding to the Constitution (so, this can also be described as a partial or semantic disqualification of the norm) — the formal gap in legal regulation is absent. In this situation, it is the regulatory practice that is disqualified, as it diverges from the original constitutional sense of the norm and its retention implies the acknowledgement of the use of unconstitutional regulation, which, of course, is inadmissible.

The gap, as such, is considered filled by the Constitutional Court's decision, which contains the new and only possible interpretation of the norm in future regulatory activity. This comprises a new normative-judicial text.

However, the absence of a regulatory gap in a semantic disqualification of a norm does not imply that there is no need for corresponding governmental activity to be adjusted, in order to ensure that the partly disqualified normative material (formally and textually retained in the normative act) corresponds with its new constitutional-legal sense.

Therefore, in this instance, it becomes necessary to employ the mechanism of parliamentary norm creation, among other things, due to the inclusion of the Russian legal system in the continental legal family. A constitutional-judicial decision, comprising a distinctly expressed normative component, initiates legislative activity, which eventually leads to the amelioration of a norm defect that was identified by the Constitutional Court.

Discussion regarding the place and the role of judicial power in the system of separation of powers is not possible outside the context where judicial power is characterised by its independence and autonomy, which are ensured by the corresponding system of legal guarantees for judges (the chamber) to reach decisions on individual cases.

When examining the interactions of judicial power with other "branches" of governmental power, judicial power is frequently perceived as a control mechanism over executive

power. Areas of such control are distinguished by a separation of types of judicial process in the Constitution of the Russian Federation. "The Russian Federation employs a branched control mechanism of judicial power over executive power, which is executed through constitutional, civil, administrative and criminal legal procedure. This allows for identification of judicial control over bodies of executive power in the following areas: constitutional control, control over courts of general jurisdiction, control of arbitration courts".[9]

Of further interest is the examination of the system of constitutional principles, which determines the elements of activity of judicial power. These include "objective fundamental origins that reflect its nature as an autonomous branch of power, ideational foundations of its organisation and activity, directly entrenched in constitutional or normative acts or emerging from their contents, and the legal nature of judicial power itself".[10]

Constitutional principles should be examined as "juridical" values of constitutional importance. Of specific importance is the emphasis on principles that are not included directly in the text of the Constitution. As such, the latter can be considered an exclusive domain of the Constitutional Court as a body of constitutional norm control: a) it isolates a specific legal principle, which emerges from the nature of public relations that are under analysis ("spirit of the Constitution"); b) it formulates this principle, introducing it into the regulatory systems; c) it formulates a judicial norm on the basis of the given principle. In essence, in this instance, we are talking about the analytical stages of constitutional norm creation.

Modern approaches to constitutional regulatory government in the Russian Federation dictate a number of new principles, which are related not only to the work and organisation of power itself, but also to relationships with other bodies, organisation and systems of power, its resource provision, the status of its providers, its functions and the status of acts that are adopted by the bodies of judicial power, etc. This approach has come about as a result of objective factors of Russian legal activity and the demands of legal development when building a rule-of-law state. At the source of the formation of both the complexity of the functioning principles (the number and the system of functioning principles), as well as their content, lies the autonomy of judicial power.

The entire complex of principles, which the modern field of constitutional law treats as related to the foundation of organisation and activity of judicial power, should be connected to the category of autonomy, which is ensured, first of all, by the prohibition of external interference and, secondly, by the establishment of a foundation of non-interference and provision of autonomy internally. As such, all fundamental sources can be divided into principles that determine the external autonomy of judicial power or the ideas of autonomy of the court in the system of "separation of powers" in Russian statehood and principles that set out the internal (inter-system) autonomy, which include principles related to the judge's status and the principle of legal procedure as a basis for the provision of its autonomy in the process of implementing justice.

Meanwhile, the system-forming principle of autonomy of judicial power will serve as the primary principle and will be applied to both groups of principles.[11]

[9] *Goncharov V.V.* The Relationship Between Executive and Judicial Power in the Russian Federation. Rossiiskii sudya. 2008. N 4.

[10] Ibid.

[11] Ibid.

The normative foundation of judicial autonomy, the independence of judges, as well as the system of their legal guarantees, were formulated with the adoption of the Constitution of the Russian Federation through the Federal constitutional law, dated 31 December 1996, "On the judicial system in the Russian Federation", as well as through the Russian Federation law, dated 26 June 1992, "On the status of judges in the Russian Federation". The abovementioned acts not only legislatively consolidated the meaning of "independence of judges", but also of "independent legal procedure", "independence of the courts", "independence of judicial power" and "autonomy of courts", "autonomy of judicial power".

The concept of "independence", in contrast to "autonomy", can be used by the legislator only in relation to the direct implementation of legal procedure, the regulation of procedural practice by the courts and the judges, and their actions and decisions in relation to deciding particular cases. The "independence" category is narrower than autonomy, with independence being an element of autonomy. Autonomy is the basic, system-forming category. The concepts of "autonomy" and "independence" can only be examined as interdependent concepts. The autonomy of judicial power is a necessary condition of the independence of legal procedure and those charged with executing it. And, conversely, without secure guarantees of independence for judges and with respect to legal procedure, autonomy is not possible in judicial power.[12]

In concluding this article, it must be stated that there is a need for more flexible approaches to the characterisation of the principles of separation of powers, with the accent on the idea of checks and balance and the corresponding constitutional-legal constructs. There should also be a consideration of an approach that departs from the existing division of the system of power into legislative, executive and judicial powers due to the impossibility of "including" other "atypical" bodies of governmental power in the parameters of one of the traditional "branches".

[12] *Terekhin V.A.* Provision of Independence to the Courts — Prioritisation of the Judicial-Legal Policy. Rossiiskaiia Yustitsiia. 2009. N 10.