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Judicial Power in the Structure of the State Mechanism and in the Separation of Powers

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Abstract: An important feature of the constitutional state, the implementation of which has become classic is the principle of separation of powers. The need for separation of powers is based on the objective of social mismatch of interests of different social groups and the patterns of their reflection in the implementation of state functions. The separation of powers involves the creation of a legal mechanism of interaction between the branches of power in a single mechanism of functioning of system of state power, their mutual influence, resolution and overcoming conflicts and contradictions, emerging in society. Law enforcement is only possible on the basis of the interpretation of the right of every judge in the framework of the implementation of justice in each individual case. Enforcement essentially involves the interpretation and clarification by the courts of law; it is right in the action and justice itself is the final interpretation of the law, the most important kind of enforcement system. The nature of the judiciary, no doubt, distinguishes it from the legislature: the courts do not create new law, not legislate but the courts, of courseare the legitimate, system defining, the final stage of law making which imparts lawmaking final form, complete the form and most importantly the meaning of the entire legislature.

Key words: Law enforcement, the judiciary system, separation of powers, the judiciary power, the interpretation of law, the legislature, society and the state

INTRODUCTION

The separation of state powers into legislative, executive and judicial powers was historically formed at the earliest stages of formation of the state and resulted in the specialization of power for different persons and institutions in which were early showed two stable trends: the concentration of power in the hands of one or a single institution; the need to share power, work and responsibility. This is the principle or theory originating from the fact that the process to ensure the normal functioning of the state, it should be relatively independent of each other authorities. These are the legislative, executive and judicial branches of government. Additionally, not just exist (co-exist) and be independent of each other but complementary and mutually influencing on each other and on the system itself (about this below).

And because the amount of work of each of the branches is determined, including the public inquiry and the needs of society (in an ideal a civil society), then the interaction of the three branches of government in mediated manner should be determined by the emerging public inquiry to address those or other problems with the request, this can be sent only to the address of one of the branches of government; the rest, according to the characteristics of the methodology of the theory of complex systemsare permanently changed, like "adjusting" a changed element of a complex system, changing, thus, themselves and, most importantly, changing the quality characteristics of the system itself.

In legal science, there are different approaches and theories that reveal the essence of the above-mentioned principle of separation of powers. The idea of separation of powers goes back to ancient times and to the Middle Ages. For the first time it is mentioned in the writings of ancient Greek philosophers Aristotle and Polybius. Further development was carried out by John Locke, in its classic form it is designed by Charles Louis Montesquieu (1689-1755) and in its modern form (1632-1704) Alexander Hamilton, James Madison and John Jay - author of "The Federalist" (Hamilton *et al*., 1993). In his research "The Spirit of Laws," published in 1748, Sh. Montesquieu wrote: "In every state there are three kinds of power: legislative power, executive power in charge of international law and the power of the executive in charge of civil law. By the first power of the sovereign or the institution creates the law. By the second power, he declares war or makes peace, sends or receives ambassadors, provides safety, prevents the invasion. Due to the third power, he punishes crime and authorizes the

collision of individuals. The latter can be called the power of the judiciary and the second just the executive power of the state.

MATERIALS AND METHHODS

Sh.L. Montesquieu developed a position on the system of checks and balances without which as noted by the philosopher, division will not be effective. He claimed: "We need a world order in which different authorities might mutually constrain each other." "Balance" between different branches of government in practice is achieved by measures, established by law. Sh.L. Montesquieu put forward the idea of a balance of powers and mutual checks and that in the bodies of public authorities should be presented all classes of society (Krasnov, 2005). "Political freedom takes place only at moderate government; it is not in the aristocracy, where all power belongs to the same nobles, norin democracy, where the people prevails. To avoid the possibility of abuse of authority, it is essential to have such order of things in which the legislative, judicial and executive powers would be divided and could mutually inhibit each other. All would be lost if these three powers would be united in the same person or institution. "In each state Sh.L. Montesquieu saw three kinds of power:

- The legislative power which make laws
- The executive, by virtue of which the Emperor declares war, concludes peace and ensure security
- The judicial power which punishes crimes and resolve cases of individuals

Thus, in the concept of separation of powers necessary for ensuring freedom and way of ensuring the unity of the government is a system of checks and balances between the different branches of it. Therefore, it can be argued that in this case the separation of powers and their unity has independent significance, its goals and methods provide that form and if necessary, change the qualitative characteristics of the system (the elements of which they are) the state (the state power system).

"If the executive branch, writes Sh.L. Montesquieu will not have the right to stop the action of the legislative assembly, the latter will be despotic as, being able to provide any power itself which is only a wish, it will destroy all other power." Add to this not only the "all other authorities" butalsothesystem itself the state (the state power system).

The legislature has the right to take part in the administration of the executive power. Mutual deterrent powers of the authorities, emphasizes Sh.L. Montesquieu could lead them to a standstill "but as for the necessary things will cause them to act, they will act in concert.

RESULTS AND DISCUSSION

In our view, it is certainly a weak point in the concept of Sh.L. Montesquieu because itdoes not take into account the harsh political realities of the state power. In addition, in the philosophical and legal system of separation of powers Sh.L. Montesquieu, in our opinion is not paid enough attention to the judiciary as the most (from all three branches) close to people, to society as an important and most accurate (compared with the legislative and executive authorities) indicator of public sentiment and public requests for addressing emerging problems that society without the intervention of the state in the face of the judicial system, can not cope. More accurate, in our opinion, it proved by G.V.F. Hegel who claimed that the autonomy and independence of the authorities will generate between them a war in which the state die or its integrity will be preserved by the victory of one of them.

It is important to note that the system, developed by Montesquieu of mutual balancing and even the opposition of the authorities did not provide the mechanism to resolve possible conflicts between the different branches of government. Do not allocating any focal point, Montesquieu considers that the authorities themselves balancing each other will be able to find a way out of the conflict between them. Thus, in contrast to Locke, who understood the separation of powers, their cooperation and close interaction, Montesquieu insists on the independence and isolation of authorities. Some authors believe that Montesquieu in his theory of separation of powers learned from contemporary European states and especially from the British constitutional monarchy, in which he saw a sample of a moderate form of government.

The judiciary as is clear from the Constitution of the Russian Federation dated 12 December 1993 (Chapter 7, "The judiciary and the prosecutor's office") is a form of state power. Thelegislative, executiveand judicial powers shall be independent. At the same time, public authorities with all its independence interact with each other and this interaction, firstly, restrain each other and secondly, by acting on one another, act systemically and the entire system (the government), qualitatively changing its structure and properties. This relationship scheme is often called a system of checks and balances, representing the only possible scheme of organization of state power in a democratic state (Okounkov and Krylov, 1996).

Hence, in your opinion, an ambivalent attitude to the authorities: the struggle for power of divided institutions against its division, fighting branches with each other, the essence of which ideally is to strengthen the system of power elements (branches of government), they confront with each other as a result of strengthening and making stable (predictable) system as a whole, on the one hand. And an inherent desire to streamline the division of powers and rid society of permanent clashes between them (the absence or reduction of collisions and the fight will only lead to dominance of any branch of government and cause unbalancing of the entire system, reducing its stability and predictability), on the other hand.

Today, every state leads to objectify in the national legislation the "checks and balances" system that would have a real practical and prevented ascending despotic power and authority of only one branch of the government. Establishment, operation and development of an independent judiciary is one of the priorities of a democratic and legal state. At the heart of such state are primarily two basic principles: the rule of law and the separation of state powers into branches (legislative, executive and judicial). A typical tendency in the development of competence of the judiciary was the legal empowerment of the judiciary to include in their jurisdiction to resolve conflict situations, arising in relations between the various authorities in violation of the interests of the Russian Federation and its subjects in the exercise of administrative control. However, this extension may not exceed the legal limits, established by the law; take the form of undue interference in the sphere of the adjacent such as the executive.

The judicial system as the scope of the organization carrier of the judiciary (judges), whose main function is to allow the social and legal conflicts in society through the implementation of justice in civil, criminal and administrative cases as well as the constitutional review of normative legal acts by means of the constitutional legal proceedings, referred by the Constitution of the Russian Federation to the interests of Russian Federation. It should be noted that the principle of the rule of law would remain unrealized until the end, if the judiciary will not take a decent position in the mechanism of state power. This, of course, says that the autonomous and independent status of the judiciary is necessary for its normal functioning and reform which is especially important at this time (Gressman, 1989).

It should be noted that although, the term "branch" was used for centuries to date in the scientific literature, there is no agreed definition of this concept. The author agrees with the definition of this concept, formulated by A.C. Avtonomova, who pointed out, "under the branches of state power meant one or more public authorities which form within a single mechanism, independent of the power system which is endowed with governmental authority to perform the functions inherent to it." The study of this definition of the branches of government authority and further studies allow us to make a number of conclusions, the use of which, in my opinion, could have an impact on the efficiency of public administration:

- The branch is a part of the unified state management mechanism, implementing a certain part of its function which is carried out over the state apparatus
- Each branch of government presupposes the existence of one or more homogeneous in their specialization of state bodies, occupying their place in the state apparatus and perform some work in public administration
- The branch of the government, its agencies have independence, autonomy, in other wordsare not subject to other branches of government and their agencies
- The branch of government has a special role in the mechanism of the function of government
- Branches of government have organizational skills without which they could not have a certain structure
- Each branch of government has specific forms, methods and procedures of its activities

In this context, it seems that in general, it is necessary to agree with the above definition, however, for example, according to Baranov (2011) branch of government is not only an organizational unit but also the institutional and functional structure.

As noted above, each branch of the government in its system not only has a certain organizational forms but also has the special role of government function. The legislative function is represented by the parliament, the executive and administrative by the government, the judiciary by the courts. It should be noted here that under the current classification of powers functions of each of them are implemented in various, not always homogeneous organizational forms. Branch of government, on the one hand, appears as the system organ or system and on the other hand as the functionof specific part of the state apparatus, materialized in the bodies of this branch of power. It can be concluded in this regard that the function is primary and the organization is secondary (Nersesyants and Chirkin,1999, Chirkin, 2001).

CONCLUSION

Thus we can conclude that the branch of government is organizational and legal transformation of certain functions of the apparatus of government.In our opinion, the introduction of the Constitution of the Russian Federation of different ways to exercise judicial power, namely through the constitutional, civil, administrative and criminal proceedings (Article 118 of the Constitution of the Russian Federation) guarantees the impossibility of the rise of the judiciary over the other branches of power and the concentration of all power in one hands. This same feature of the judiciary provides guarantees, largely, its independence. However, from the text of Article 118 of the Constitution of the Russian Federation, it follows that there is the judiciary itself and there is a subject which is given the constitutional right to carry it through the kinds of the above proceedings.

It is important to understand that the system of the judiciary in modern Russia (in particular after the next reform of the judiciary in 2014 (Law of the Russian Federation on an amendment to the Constitution of the Russian Federation dated February 5, 2014 No. 2-FCL "On the Supreme Court of the Russian Federation and the Russian Federation Prosecutor's Office") is not determined by the justice system, consisting of civil, administrative, criminal and constitutional proceedings but provides it. The structure of the judicial system is determined, first, by the nature of the applicable substantive law and secondly by the nature of social relations, regulated by the substantive law and thirdly, by the nature of the disputes, arising in these social relations (The Federal Constitutional Law on February 5, 2014 No. 3-FCL "On the Supreme Court of the Russian Federation").

The law does not apply mechanically; for its realization in life, it needs the live mediator-enforcer, who will apply it to real-life situations and events, giving the final conclusion, equated, like the law itself. That intermediary is a court. The nature of the judiciary is that justice is the most important type of enforcement. Only the court has the right to give a final conclusion such a law. In addition, the important stabilizing role of the court (which follows from the spirit and nature) we conclude that the court is making a legitimate certainty and consistency, predictability in social relations; unsystematic enforcement (including judicial) is able to destroy the law and as a result the system of state power.

It seems to the author, enforcement is only possible on the basis of the interpretation of the right of every judge in the framework of the implementation of justice in each individual case. Enforcement essentially involves the interpretation and clarification by the courts of law; it is right in the action and the justice is the final interpretation of the law, the most important kind of enforcement system. The nature of the judiciary, no doubt, distinguishes it from the legislature: the courts do not create new law, not legislate but the courts, of courseare the legitimate, system-defining final stage of law making which imparts lawmaking final form, complete the form and most importantly the meaning of the entire legislature.

There is quite overdue for the modern Russian legal reality question: isn't it time for a "more independent and more creative rol" for the courts in the Russian Federation? The apparent stalling of judicial reform, the low prestige of judges and lack of confidence in the judicial system in society, according to some researchersare pushing for the need of new reform steps: first, the recognition of judicial precedents sources of law and secondly, to the revision of the legal nature of the judicial power and recognition for courts not only law enforcement function (main enforcers today are exactly the courts) but also, to a certain extent, law-making function as, for example, the higher courts (the Constitutional Court and the Supreme Court of Russia) will "create", binding on the lower courts precedent decisions or issue binding on the lower courts judicial review which contain generalizations and variants of decisions of certain typical cases.

According to the author of the article, this position seems to be fundamentally wrong and contradictory to the nature and content of justice itself. Indeed, law enforcement, in the philosophical sense of the term is the final stage of legislation but functions to specify the right (and therefore to some extent to create "an understanding of the rule of law") have no ships. The court has the right (to perform their functions in the first place, making certainty and predictability in public order) apply legal analogy (i.e., decide on the basis of similar, regulated by law, relations). In the event that the analogy of the law in a particular situation cannot be applied, the court shall have the right to special care to apply the right analogy (i.e., decide on the basis of an existing, earlier decision in a similar case). At the same time, in our view, the analogy of law is ultra vires of the judiciary established by the Constitution of the Russian Federation. In this regard, it appears that the systematic application by the courts of law analogy is directed only at deregulation and the instability of the whole system of state power.

In addition, the blind imitation of the existing for the centuries foreign judicial systems and the principles of their work, in our opinion, will not help to improve the Russian judicial system. Forexample, in today's Russia a full copy of Anglo-Saxon legal system of case law in the

form in which it exists in the UK, of course, impossible. It is important that, on the one hand, certain failures in the judicial reform in terms of reducing the overall confidence of citizens and business to the judges, on the other hand, the need to look for new methods and ways of combating corruption in the courts, not make the system of case law serves as panacea for modern judicial Russian system.

REFERENCES

Baranov, M.L., 2011. Prospects for increasing the efficiency of state control in the federal bodies of executive power of the Russian Federation. Russia.

Chirkin, V.E., 2001. The modern state. Intl. Relat., 2001: 131-132.

Gressman, E., 1989. Separation of powers: The third circuit dimension. Seton Hall Law Rev., 1989: 492-494.

Hamilton, A., J. Madison and J. Jay, 1993. Federalist political essay. Moscow, Russia.

Krasnov, J.K., 2005. The principle of separation of powers in Russia: Theory and Practice. Russia.

Nersesyants, B.C. and V.E. Chirkin, 1999. The Problems of the General Theory of Law and State. NORMA-INFRA-M Publisher, Moscow, Pages: 576.

Okounkov, L.A. and B.S. Krylov, 1996. Commentary on the constitution of the Russian Federation. Moscow.