Sergei Sergevnin

Separation of Powers and Constitutional Justice: Problems of Place and Role

Summary
The study discusses various problems arising in relation to the assessment of the place and role of the judicial system as a whole and constitutional justice, in particular, in the context of the separation of powers, and the juridical nature of the powers assigned to certain governmental bodies.

The detachment of governmental powers in the course of separating the legislature, the executive and the judicial branch in accordance with Article 10 of the Constitution of the Russian Federation marked Russia's return to the fundamental constitutional and legislative values. It is, nevertheless, also obvious that the principle of the separation of powers – as a fundamental principle of the rule of law – has its historical origins rooted in a completely different political and legal system. Therefore, the contemporary analysis of the structural and functional characteristics of governmental authorities inevitably leads to the conclusion that we need to update our understanding of the concept concerning the separation of powers.

In various periods, social development inevitably results in distinct scientific interpretations of the specific features related to the structuring and functioning of governmental authorities. The classical *trias politica* concept is only interesting as a

Sergei Sergevnin, Adviser to the Constitutional Court of the Russian Federation, Doctor of Jurisprudence, Professor, Head of the Theory of Law and Government History at the North-West Institute of Management of the Russian Presidential Academy of National Economy and Public Administration.

"constructive framework" for the fundamental principles of a system for governmental powers. For historical reasons, the theory cannot be accepted in its literal interpretation, with centuries having passed since its initial formulation by Montesquieu.[1]

The functions of the branches make the primary consideration underlying the power structure. Function must be developed before setting up the structure (body), as the latter is designed to implement the given function, and not the other way around. Unfortunately, in practice governmental bodies are set up in numerous cases before their functions are determined (for instance, for a particular individual), at times they are not even not corroborated by public needs.

Retention of the principle of the separation of powers in modern constitutionalism mainly derives from the differences inherent in judicial mandates. The idea of a representative mandate, obtained from a direct person who has sovereignty, is rigidly linked to the legislative branch. The administrative mandate predetermines the nature of the executive branch as an agent charged with the implementation of governmental functions. Finally, the legal nature of the judiciary is predetermined by the idea of the judicial mandate, obtained either directly from the person of sovereignty or indirectly through a court (judge) as a result of interaction between the two other systems of governmental power (representative and executive).

The modern – or "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, the principles underlying the rule of law include a highly intensive interpenetration of the norm setting, implementing and stabilizing functions of the legislative, executive and judiciary branches.

The public authorisation and the inherent legal nature of parliament derive primarily from representation (the representative mandate of the legislative). This executive authority cannot be isolated from legal enforcement in terms of either the organization of its work or to the opportunities of adopting individual statutory acts affecting the other participants of the political and juridical processes – see, for instance, the cadre decisions of the State Duma (approval of the appointment of the Chairman of the Government by the President of the Russian Federation, which solves the problem of confidence in government, the appointment and relief of the Chairman of the Central Bank, the Chairman of the Audit Office and half of its auditors, as well as the Human Rights Commissioner) and of the Federal Council (the appointment of judges to the Constitutional and Supreme Courts, the appointment and relief of the Prosecutor General, the deputy Chairman of the Audit Office and half the auditors).

Parliament also functions as a body that resolves public conflicts and, as such, it can be classified as a subject of constitutional judiciary activity (for example, the State Duma can bring charges against the President for his impeachment and the Federation Council can impeach the President). The representative body can perform such activity only through specific parliamentary means, and this reflects the representative nature of the mandate of this body of governmental powers. It should further be noted that the latter function of the representative body is not a primary one, it is rather auxiliary in nature.

The norm-setting (but not the legislation) competence of the executive bodies stands to reason; although it is not only enforced within the rigid juridical and 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 order to fulfil its main social assignment, i. e. that of providing professional administration of public processes (administrative mandate), the executive branch cannot achieve this goal without the norm-setting function that regulates these processes. However, the specific character of normative regulation is manifest in the executive system through a significant number of statutory regulations which underpin the implementation of the principles and general norms adopted by the body representing the nation.

At the same time, the executive authorities' involvement in the mechanisms of legal dispute decision is undeniable, especially in the administrative sector and in administrative legal relationships. The list of executive federal and regional bodies authorized to consider cases related to infringements is directly specified in Article 22.1 of the Russian Federation's Act on Infringements.

Of course, the implementation of the latter function (bureaucracy) takes place through specific administrative means 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 role is to ensure balance in a developing public system, obtains its goal by means of resolving legal disputes through the mechanism of legal procedure (judicial mandate). The main function – court activity – comprises the decision of a particular legal dispute.

However, the work of the judicial branch is not confined to this. At a certain level of its development, the function of norm regulation is also required and comprises the assessment of the legitimacy of a regulatory act. In the process of ex post constitutional control, the norm-setting function emerges as part of the function, 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-setting, at least applied to constitutional justice, represents a very important guarantee against a situation, in which ineffective implementation or non-implementation of norm-setting regulations by other "branches" of governmental powers 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 decision of this problem in general Russian theory and practice will lead to new opportunities in scientific knowledge.

It must be noted that no such questions arise in some countries of the former Soviet area, despite the fact that their legal systems are directly related to the continental family.

For instance, the Constitution of the Republic of Kazakhstan (Article 4) provides that the law in effect does not only include the Constitution, 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 decisions passed by 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 decisions gives room to thought regarding the relationship between judicial interpretation of the juridical norm and the norm-setting process. As an example, consider decision No. 57 of 23 July 2009 of the Supreme Arbitration Court of the Russian Federation "On certain procedural questions concerning the practice of judging cases which deal with the non-execution or ineffective execution of contractual obligations".[3]

Frequently, the boundary between the normative and the interpretative components of court decisions is blurred. It can be argued that judicial acts, which result from the generalization of judicial practice and are simultaneously tasked with setting out the vector for further development of such practice, which has a mixed legal nature, which can be termed as normative-interpretative. And yet, legal science has not developed a clear set of criteria for separating law enforcement (judicial) interpretations, and this results in filling in gaps in legal regulation by analogy of law, and law enforcement (judicial) norm setting, 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 ex post constitutional control (Russia before 1991), because the normative nature of judicial acts would arise only in relation to the decisions of the Supreme Court. In the context of the active processes of globalization, coupled with the convergence of the various families of legal systems 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 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 ex post constitutional 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 outcomes of the courts' law enforcement practice in the above mentioned 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 standardization, in the precedent setting sense, through the depersonalization of the direction of its action.

It is essential to emphasize the value of the gradual, but steadfast, penetration into Russian legal culture of the acceptance of the normative elements of the deci-

sions 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 organization of its work as a body of governmental powers. 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".

Each system of the various branches of governmental powers (legislative, executive and judicial), separated from a perspective of their different social mandates, has its respective set of functions, which can be implemented in a norm-formulating, norm-executing or juridical form. Each of these systems of governmental powers establishes 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 powers uses a specific set of legal mechanisms specific to it, during the implementation of the respective functions and it is this inherent specificity that determines the special features of the legal nature of each system of governmental powers.

Thus, the presence of "atypical" functions in the various systems of governmental powers requires the adoption of a function that corresponds to the mandate of a governmental body (legislative, enforcement and judicature) alongside the subsidiary functions, which each body must implement in direct relation to the implementation of titular functions.

A court is not entitled to undertake norm-setting activity outside of the context of its judicial 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 powers (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) this 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-setting, we are discussing the emerging, distinctive system of reciprocal discretionary restraint between the legislator and the courts in general, since the norm-setting 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 modernization gets its roots from the norm of the court decision, 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 decision 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 legislation 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-setting 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 legislation process.

That said, in some cases, the Constitutional Court sets out the judicial norm in a concrete form, contained in the operative part of the decision,[5] while, in others, the decision 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 decision

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;[6] the non-admission of disproportionate limits of property rights of citizen-debtors and creditors as business entities of real estate[7] etc.).

Legal science must pay closer attention to the issue of judicial norm disqualification and related issues of conception, typology, characterization of legal consequences of "negative (nullifying)" norm-setting. 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 constitutional". 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-setting 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, asset out by the Constitutional Court, whereby the norm is recognized 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 ac-

tivity. 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-setting, 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 characterized 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 powers, 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".[8]

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 organization and activity, directly entrenched in constitutional or normative acts or emerging from their contents, and the legal nature of judicial power itself.

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 ex post constitutional 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-setting.

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 organization of power itself, but also to relationships with other bodies, organization

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 organization 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.[9]

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.[10]

In concluding this Article, it must be stated that there is a need for more flexible approaches to the characterization 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 powers in the parameters of one of the traditional "branches".

Notes

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

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

3 Vestnik VAS RF. No. 9., 2009.

4 Federal constitutional law No. 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, No. 3., statute 1447.

5 See, for instance, the Constitutional Court of the Russian Federation decision No. 18-P, dated 23 December 1999; SZ RF. 2000. No. 3., statute 353.

6 The Constitutional Court of the Russian Federation decision No.10-P, dated 14 November 2005, SZ RF. 2005. No. 47., statute 4968.

7 The Constitutional Court of the Russian Federation decision No.10-P, dated 12 July 2007, SZ RF. 2007. No. 30., statute 3988.

8 V. V. Goncharov: *Relationship between Executive and Judicial Power in the Russian Federation*. Rossiiskii sudya, 2008/4.

9 Ibid.

10 V. A. Terekhin: *Provision of Independence to the Courts. Prioritisation of the Judicial-Legal Policy*. Rossiiskaiia Yustitsiia, 2009/10.