

JUDICIAL POWER IN THE SYSTEM OF SEPARATION OF POWERS IN RUSSIA AND FOREIGN COUNTRIES: PAST, PRESENT AND FUTURE

Antonova N.A., Tumanova L.V., Chentsov N.V.
Tver State University, Tver, Zhelyabova str., 33, Russian Federation

ABSTRACT

The paper discusses the problems of determining the place of the judicial power in modern conditions, analyzes the available points of view on its interaction with the legislative and executive branches of power in Russia and foreign countries. The authors disclose the essence of the judicial power through the forms of its manifestation and reveal the features of its implementation depending on the legal and judicial systems of a state, and analyze the evolution of jurisdictional powers. Particular attention is paid to the analysis of the activities of constitutional control bodies. Based on the study conducted, the authors determine the general and distinctive features of the implementation of the judiciary in Russia and foreign countries in the context of the development of judicial authorities.

Keywords: judicial power; Constitutional Court; legal proceedings

INTRODUCTION

The principle which is firmly entrenched in the system of state construction in most countries is the principle of separation of powers. Constitutions of various states define it as a fundamental idea embodied to some extent in the interaction of central authorities. Turning to the peculiarities of action of this principle under current conditions is related to the fact that strictly typical forms of interaction between the "three authorities" have long been unavailable; their mutual relations are filled with new powers and means of influencing each other. The subject of our study is the place of the judiciary in the changing balance of various branches of power. Trends in recent years indicate that the judiciary has long "outgrown" its original powers to implement only justice. The task is to consider the evolution of the theory that discusses separation of powers from the moment of its inception to the present day, as well as a picture of the changes in the functions of the judiciary against such a development.

FORMATION OF THE SEPARATION OF POWERS PRINCIPLE

Analysis of various sources makes it possible to state that the forerunner of the emergence of theoretical developments on the issue of the separation of powers was the formation of the separation of powers institution, which began to emerge from ancient times. Its foundations were already observed in the Roman and Athenian republics where power was built differently from earlier times.

For example, in Greece, such political institutions that held each other back were: the National Assembly which in effect fulfilled the role of a legislative body; Council of 500 and two collegiums of strategists and archons exercising executive power. The judicial power was exercised by the court of Heliaia which at the same time could interpret the laws. The highest body authorized to control all of the above-mentioned bodies was the people's assembly which was held every month.

The sources testify to the first case evidenced in a document on separation of powers: the laws developed in [Sparta](#) under Lycurgus dating back to the [8th century BC](#). According to these acts, the state system lasted more than eight centuries¹.

¹Boldyreva R.S. Separation of powers. Theoretical and legal aspects: thesis for a Candidate Degree in Law Sciences: 12.00.01. - M., 1998. - 164 p.

The idea underlying the current principle of separation of powers was laid down in the [constitution of the Roman Republic](#), according to which the administration in [ancient Rome](#) was divided into three main forces: the [consuls](#), the [senate](#) and the [comitia](#). We see again three parts of one central authority, each of which is organized and can restrain the other two. At the same time, the supreme body in ancient Rome was the Senate, which has the right to interpret laws. It also had the right to veto decisions of the people's assembly. In the Senate's competence there were also some powers allowing it to influence the judiciary: it had the right to appoint judicial boards and issue orders for the investigation. An important state body in the state under consideration was a people's assembly. It had control powers that extended to all executives (except dictators). The assembly adopted laws, and in fact formed a government authority (namely, it elected special collegiums that carry out executive power according to modern terms). There was also a special judicial body in Rome, namely eight praetors. Their election was carried out by the Senate.

In the Middle Ages, the situation changed and only the church organization could to confront the monarch's power in those conditions. This was due to the fact that a monarch, being a divine governor, and taking any decision, had to pay attention to the interests of the church. In addition, we should not forget about the role of church norms in regulating the relationship between people. Church works were the source of law (and in Muslim countries it is a source of law to this day). In other words, at a certain time of history, the influence of church organizations on state development was very great.

Representative institutions emerged later in Western countries (England and France) in conditions of estate-representative monarchies also limited the sovereignty of the monarch. Although at first the main purpose of those representative institutions was to take control of only the disposal of finances, a full-fledged parliament grew up from this right later.

And the actual constitutional enshrinement was received by the theory of separation of powers, developed by the time, in the United States in the Constitution adopted in 1787.

Theoretical studies on the issues of separation of powers have been conducted for centuries. Contributors to the development of the theory were thinkers of different countries and eras. Among them is the thinker [Marsilius of Padua](#) (XIV century). In his famous treatise "Defender of the World" (Defensor pacis), he expressed the idea of the need to divide power into legislative and executive². His contribution to the development of the theory was introduced by the British politician J. Lilburn³ who opposed the omnipotence of parliament. He sharply criticized the idea of uniting both legislative and executive functions in one body.

But most often the theory of separation of powers is associated with two thinkers who, nevertheless, looked at the implementation of this theory in different ways. So, talking about the separation of powers, John Locke had in mind the division of it into legislative and executive, while the judiciary was regarded him as an element of the executive power⁴. Ch. L. Montesquieu spoke quite differently. He allowed only that option of separation of powers which provided for the independence of the judiciary, delineating it from the other two⁵. The position of Charles L. Montesquieu is explained by the fact that, being an experienced practitioner of state-legal activity, he understood the problems of inefficient functioning of state bodies. And it was he who carried out the most thorough development of this principle. In his fundamental work "On the Spirit of Laws" (1748) Ch. L. Montesquieu presented the results of an in-depth study of the

² History of political and legal doctrines: A textbook for the universities / Under the general editorship of Academician of RAS, Doctor of Law, Professor V.S. Nersesyants. - 4th edition, revised and enlarged - M.: Norma, 2004. P. 128.

³ Lilburn J. Pamphlets. M., 1937.

⁴ Locke. J. Selected philosophical works. M., 1960. V.2.

⁵ Montesquieu Ch.L. Selected works. M.. 1955. Pp. 290-291.

political and legal norms of several states stating that "freedom is possible under any form of government if the state is governed by a right guaranteed from violations of law through the separation of powers into legislative, executive and judicial powers, which are mutually restraining each other"⁶. Apparently, the aim of his theory was to create the security of citizens against arbitrariness and abuse of power, ensuring political freedoms.

In this connection, one cannot agree with the statement that the founders of the theory concerning separation of powers assigned the court always an independent role⁷.

We see that the founders of the theory in question had opposing views on the place of the judiciary in the system of separation of powers.

It should not be forgotten that the theory of separation of powers is closely connected with the notion of a law-based state, and at present the separation of powers is one of the signs of a law-based state.

The essence of the theory of separation of powers developed by Ch. Montesquieu is as follows. First of all, the author of the theory put forward three types of power: legislative, executive and judicial, which should be implemented by different state bodies. Each system of bodies carries out this or that function of the state. In addition, the system of checks and balances must become an element of the organization of state power on the basis of its division so that the authorities control each other's actions. Montesquieu considered this system of checks and balances as a combination of the measures of influence of each authority on the other two (they included certain measures of responsibility of the authorities, and the right of veto as an opportunity to resist the absolute power of the parliament). But, it should be noted that in the statements of Montesquieu there is no idea of the balance of power, which is often said today. He gave the legislature a predominant role. The executive power was viewed by this thinker as a kind of power that was limited in its nature. Moreover, the judiciary was considered by them generally as a half-power.

Subsequently, the theory of separation of powers has made next steps forward. His contribution to the development of the theory was introduced by J.-J. Rousseau. Objecting to Montesquieu, Rousseau defended the unity of power and believed that all power should belong to the people, it cannot be divided, alienating from the people, while the form of the exercise of this power should be the people's assemblies⁸. It is necessary to take into account the historical moment (the revolutionary processes taking place in France) when Rousseau's theoretical developments were carried out. History itself contributed to the active development of new views on building a machinery called state power.

The US Constitution of 1787, embodying the idea of the separation of powers, begins with the words: "We, the people of the United States..." This emphasizes that the only source of power is precisely the people. And the main leitmotif of the entire US Constitution is the organization of state power based on its division between the three bodies (Congress, President and Supreme Court). Also the system of checks and balances has found the reflection in this document. The Constitution has enshrined not only the status of the main bodies of the state, but also the measures of their impact on each other. The President has received the right of veto, Congress - the right of impeachment against the head of state, etc.

The establishment of a separation of powers system in the US Constitution and the establishment of a system of "checks and balances" directly resulted from the works of Charles Montesquieu and John Locke⁹.

⁶ N.M. Azarkin "Montesquieu". Moscow. "Yuridicheskaya literatura". 1988.

⁷ V.M. Lebedev. Judicial power in modern Russia. Problems of formation and development. SPb., 2001. P.30.

⁸ Chirkin V.E. Constitutional Law: Russia and Foreign Experience. - M.: Publishing house "Zerkalo", 1998. P. 245.

⁹ See: M.C.J.Vile. Constitutionalism and the Separation of Powers. Oxford University Press, 1967.pp.64-67

Thus, despite the fact that today's situation is characterized by a more diverse manifestation of the mechanism of "checks and balances," the basic principles and institutions through which public authorities should interact for the purpose of optimal management were laid already in the works of Montesquieu. As V.E. Chirkin points out: "Over time, the concept of separation of powers has however been subject to modifications. The provisions also began to appear in constitutions that departed from the original rigid scheme. And even within the United States itself, several decades after the adoption of the constitution, an institution for judicial constitutional control arose, not foreseen by it: the courts began to verify the constitutionality of the laws adopted by the "independent branch", the parliament, which from the standpoint of Anglo-Saxon law had the upper hand... This was the first breach in the rigid approach to the concept of separation of powers"¹⁰.

THE NATURE OF A JUDICIAL POWER

The existence of the judicial power, along with the legislative and executive, is a sign of a democratic state. The main purpose of the judicial power is the protection of members of society from any arbitrariness, both from the will of other citizens, and from the arbitrariness of the state itself, its bodies and officials.

The judicial power as a legal category has several meanings. First, the judicial power is the activity of the judiciary in the exercise of the powers conferred on them. Secondly, the judicial power is often understood as the totality of the law courts, the judiciary system. In the context of the separation of powers principle, the judicial power can be viewed as a form of state activity aimed at resolving certain conflicts that are subordinate to it. Accordingly, as any kind of activity carried out in a state, it (the judicial power) is characterized as by common signs peculiar to any kind of state power, and by its special ones, among which a certain place is occupied by those that allow it to influence the legislative and executive power.

It is customary to distinguish two forms of implementation of the judicial power: *justice* - that is, the activity of a court for reviewing and resolving civil, criminal cases, as well as cases arising from administrative offenses; and also *judicial control* which is exercised by the judicial power in two forms: judicial constitutional control (constitutional justice) and judicial administrative control (administrative justice).

JUDICIAL POWER IN THE SYSTEM OF SEPARATION OF THE US AUTHORITIES

The first embodied example of separation of powers (the US Constitution) has ensured the independence and isolation of the judicial power in the United States by providing it "to one Supreme Court and such lower courts as the Congress may establish from time to time", backed up with a practically life-long term for the judges of the Supreme and lower courts (Section I of Article III). Under the US Constitution, the bodies of state power have powers for mutual control and deterrence which are called upon to ensure the responsible performance of their functions. At the same time, the founders of those constitutional provisions sought that the authorities function without interfering with each other and strive to create an effective state mechanism.

The constitutional mechanism of "checks and balances" has provided the executive and legislative branches of government with the means to restrain the judicial power through the selection and appointment of federal judges, and through the determination of the scope of jurisdiction of federal courts. The US Constitution does not mention the influence of the judicial power itself on the legislative and executive powers (incidentally, it does not contain also a number of other institutions enshrined in modern constitutional acts). But later the Supreme Court of the USA, since 1803, apart from the powers indicated in the Basic Law appropriated to itself the right of constitutional control, i.e. the right to decide on the conformity of the Constitution with acts of Congress, the President and the state authorities.

¹⁰ Chirkin V.E. Constitutional Law: Russia and Foreign Experience. - M.: Publishing house "Zerkalo", 1998. P. 245.

It follows from the analysis of the implementation of constitutional supervision in the United States conducted by William Burnham that the existence of such supervision is due to two reasons. First, the Constitution is a law and must therefore be respected, and the constitutional clause on the supremacy of federal law makes the Constitution the supreme law of the country. Secondly, the judges forming the judicial branch of power, and being endowed in accordance with Article III by the "judicial power of the United States" have the right in cases submitted for their consideration to assert what is a right¹¹.

By interpreting constitutional norms, judges of the Supreme Court, like other courts exercising such control in the United States, determine the future of legal acts. And so, the judicial power acquired a deterrent tool in relation to the executive and legislative branches of power.

It should be noted that the activity of the Supreme Court in recognition of certain Acts of Congress as unconstitutional, constantly grows. Thus, the analysts of this activity of the Supreme Court cite the following figures: for the period from 1789 to 1864, the Supreme Court made only two decisions on the recognition of laws as unconstitutional, from 1864 to 1963 (that is, in 99 years, almost a century) already 74 such decisions, and from 1953 to 1998 (in just 46 years) there were made 76 such decisions¹².

Although there was a decision in the history of the US Supreme Court, that is difficult to call progressive. In 1857 this body decided that Congress does not have the power to put an end to slavery (the case of *DredScottv.Sandford*)¹³.

The ratio of lawmaking activity of the Congress and the Supreme Court deserves a separate review in the aspect of the problem on the balance of power authorities. Legislation largely depends on judicial interpretations, with the help of which it is integrated into the legal systems of the states and federation. Judicial interpretation of laws often becomes a link between the common and statutory law, because by means of interpretational doctrines, the constructions and concepts created in the case law but not provided in a legal language itself, are introduced into the practice of applying legislation. Applying the law, the judges are bound not only by its text, but also by the precedents and legal doctrines that were established in the decisions of higher courts.

In addition, the Supreme Court creates the right, not only through precedents, but also by enacting regulatory legal acts. Since 1934 the US Congress delegated a number of legislative powers to the Supreme Court through special laws. Including, these are powers in comparison of the rules relating to arrangement of work itself of federal courts; the procedure for receiving and examining cases on the first and the appellate courts, judicial research of evidences, etc. Such acts are adopted as follows. Such rules being developed at the conference of judges chaired by the Chief Justice of the United States are sent to Congress. Within 90 days, Congress (for the rules on evidence, the term is twice longer) takes one of the decisions: rejects the rules or agrees with them, and then they become the law, and other acts of the normative character that have been in effect cease to exist, accordingly.

Thus, the Supreme Court can adapt and modify the operation of laws in accordance with the norms of "higher law", the Constitution. Due solely to the "creative interpretation of the purposes and principles of the Constitution", the Supreme Court influences the course and character of American political life as a whole. This purpose is served also by the doctrine of "political issues", according to which the courts must deal with disputes arising in connection with problems which decision is assigned to the competence of

¹¹ Bernham U. Legal system of the USA. 3rd edition. M.: "Novaya Yusticiya", 2006. P. 59.

¹² Daniel A. Farber, William N. Eskridge, Jr., Philip. P. Frickey. Constitutional Law: Themes for the Constitution's Third Century. 2 ed., West, 1998.p. 7-28.

¹³ Bernham U. Legal system of the USA. 3rd edition. M.: "Novaya Yusticiya", 2006. P. 61

the "political" branches of power (i.e., the congress and the President) and for which the courts themselves do not possess Jurisdiction¹⁴.

JUDICIAL POWER IN THE SYSTEM OF SEPARATION OF THE AUTHORITIES IN RUSSIA

In the Russian Federation, the Constitutional Court of the Russian Federation and constitutional (statutory) courts of the constituent entities of the Russian Federation exercise constitutional justice. Within the framework of administrative justice, the court controls the legality of acts and actions of executive authorities and their officials.

Do the judicial authorities claim a special position in the system of state power, provided that the separation of powers is not absolute and, therefore, there is a situation when some branch of power must still come to the forefront and assume the supreme position? According to Article 125 of the Constitution of the Russian Federation and the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation can recognize acts of the legislative and executive branches of power as unconstitutional. Courts of general jurisdiction and arbitration courts verify the legality of acts of the legislative and executive branches of government. This indicates a certain superiority of the judicial power over other branches of government. But each branch of government has its own competence, its own sphere of activity, its own range of issues and tasks that are carried out independently.

In the course of realization of its basic functions, the judicial power ensures the *rule of law* both in the consideration of certain disputes and in relation to the state. This allows it to make such *powers* which neither the legislative nor the executive powers have: (to deprive a person of freedom and even life for the commission of a crime, dissolve the political party, force a state body to cancel its decision and compensate a person for damage caused by illegal actions of officials).

But this power is to some extent rather weak compared to others, since it does not rely on direct support of voters, like legislative power, although in some countries judges of lower courts, people's assessors, can be elected by citizens. It does not have the mechanisms of using force, as the executive power. The strength of this power is rooted in the unswerving execution of the law, in respect of a judicial decision, and its indisputability.

Because of this, the place of the judiciary in the system of separation of powers is seen in different ways. There are opinions that the judiciary should act in the system of separation of powers as a guarantor of their existing equilibrium. Sometimes the judiciary within the system of separation of powers is seen as a sort of arbiter, as an institution acting as an intermediary between the legislative and executive authorities. There is also an opinion that the judiciary is called upon to "adapt the continuously increasing state structure to the constitutional requirements of the separation of powers, each of which must fulfill its own unique functions"¹⁵. In our opinion, the judiciary performs all these three tasks simultaneously. Of course, this can be said when we speak, first of all, of a constitutional court or other body exercising constitutional control. But even all these functions can manifest simultaneously in the activities of courts of general ju-

¹⁴ Egorov S.A. Constitutionalism in the United States: political and legal aspects // Cited from the book "Reader on Constitutional Law". Volume III: Constitutional regulation of territorial organization of power // compiled by: Doctor of Law, Professor N.A. Bogdanova, Candidate of Juridical Science, Junior Researcher D.G. Shustrov. SPb.: Publishing House "Alef-Press", 2014. P. 953.

¹⁵ E. Burdina. The Judiciary in the Russian Federation: Textbook. Saransk: Mordovian book publishing house. 2006. P. 47.

jurisdiction. Unless, when a court of general jurisdiction makes a decision about illegality of this or that act of the executive authority, does it not support the parity of legislative and executive power?

But still the most important guarantors of the principle of separation of powers in the judicial system, and a democratic constitutional state are the constitutional courts. Theodore Mauntz generally insisted that constitutional courts are real courts, and constitutional jurisdiction is a genuine jurisdiction¹⁶. In the process of exercising their powers to review laws and other normative acts, these specialized courts "restrain" the attempts of the legislative and executive branches of power to monopolize power, keep them within the limits of constitutionally established powers, which is a condition for preventing (or neutralization) arbitrariness in power and, ultimately, the supreme guarantee of the fundamental rights and freedoms of man and citizen¹⁷.

K.M. Sarsenov reasonably believes that, in contrast to the courts of general jurisdiction endowed with the function of judicial constitutional control (according to the American model), the specialized constitutional courts are more consistent in carrying out their mission as guarantors of "separation of powers". J.I. Hovsepyan notes that if the courts of general jurisdiction can under certain circumstances "curtail" the practice (scope) of the functions of constitutional litigation performed by them, and focus on traditional types of activity, criminal and civil proceedings, it is unacceptable for constitutional courts, since constitutional court proceedings are the only activity for them. To refuse this activity is tantamount to self-abolishment of these bodies.¹⁸

According to T.I. Makhlayeva, the judicial power can be exercised only on the basis of its interaction with other branches of state power, what determines the whole meaning and purpose of the separation of powers as a legal phenomenon and concept¹⁹. It is worth noting that none of the branches of power have the right to interfere in the activities of another branch of government, but at the same time, as D. Fetishcheva notes, "without constant interaction, the system of state bodies will not be able to function as a single whole"²⁰.

Being a form of state power, the judicial power makes up a whole with the legislative and executive powers, indeed. However, there is a constant and regular interaction between them; mutual relations are built in different cases and for different reasons, but with a single goal, the construction of a law-based state. And, as V.M. Savitsky notes in the context of the system of checks and balances, the judicial power is characterized not so much by justice, but by a legal opportunity to exert an active influence on the decisions and actions of the legislative and executive authorities, "balancing" them²¹.

The separation of powers lies at the basis of state power in the Russian Federation under Article 10 of the RF Constitution. The place of the judicial power in the system of public authorities of the Russian Federation is determined to the decisive degree by the provision on the separation of powers enshrined in Articles 10 and 11 of the Constitution of the Russian Federation. The judicial power is recognized as an inde-

¹⁶ Mauntz T. German state law // Cited from the book "Reader on Constitutional Law". Volume III: Constitutional regulation of the territorial organization of power // compiled by: Doctor of Law, Professor N.A. Bogdanova, Candidate of Juridical Science, Junior Researcher D.G. Shustrov. SPb.: Publishing House "Alef-Press", 2014. P. 905.

¹⁷ See: O. Hovsepyan. Tendencies towards the centralization of state power and the prospects for the separation of powers in Russia at the beginning of the 21st century / Academic notes of the Faculty of Law / St. Petersburg State University of Economics and Finance. - 2005. - Issue 4. - P.42.

¹⁸ See Ibid.

¹⁹ T. I. Makhlaeva. Judicial power in the system of separation of powers. - M.: AEFPP. 2003. P. 30.

²⁰ Fetishcheva D.V. Judicial power in the modern state: comparative legal research (history, theory and practice): Monograph. M.: Nauchnaya kniga. 2007. P. 51.

²¹ V.M. Savitsky. Organization of the judicial powery in the Russian Federation. M., 1997. P. 29.

pendent branch of power. Judges are recognized as independent and subject only to the Constitution of the Russian Federation and the law. In their activities for the administration of justice, they are not accountable to anyone. At the same time, the judicial power in Russia not only exercises justice, but takes a special place. So, it is the judiciary that has the power to resolve disagreements between the state authorities of the subjects of the Federation, if the conciliation procedures implemented by the President have not achieved the desired result (Articles 80 and 85 of the Constitution of the Russian Federation). In other words, we are talking about the concerted action of all branches of power in this case.

It should be noted that the principle of separation of powers, laid down in the Constitution in 1993, came to its realization in the form in which it exists now not immediately. It played a positive role in building Russian statehood, in the formation of constitutionalism. And the judicial power (primarily, represented by the Constitutional Court of the Russian Federation) was not at the last place here.

The influence of the activity of the Constitutional Court on the process of lawmaking became indisputable. Under the influence of its decisions, the subject of legislative regulation is more strictly defined, the correct relationship between different legal acts is established, and gaps in legislation are quickly removed.

And here again it is appropriate to recall Theodor Mauntz who said that the constitutional jurisdiction sometimes tempts and pushes a legislator to shift to a judge the decision of delicate issues entrusted to the legislator himself or to the government²².

This statement cannot be accepted without a critical analysis. After all, the separation of powers actually involves the separation of issues, including "delicate" ones between different branches of power. Moreover, the very procedure for resolving even the most difficult problems seems more expedient in many cases, if only because of such a fundamental principle of justice as publicity and the ability to appeal the decision in the same open procedure to several courts. Naturally, there is nothing like this in other branches of power. Speaking about the importance of the judicial power, it is necessary to emphasize administrative proceedings. The administrative proceedings enshrined in the 1993 Constitution, received an independent status only in 2015 with the adoption of the Code of Administrative Procedure of the Russian Federation. We should agree with the opinion of Yu. N. Starilov that this Code has a great influence both on improving the quality of the judicial power itself and on strengthening the rule of law in the sphere of public administration²³. The establishment of judicial control over the actions of the executive power was first proclaimed in the 1977 Constitution of the USSR. Since it was not a law of direct action, it took another ten years to have a law regulating the procedure for appealing against the actions of officials and authorities. Then, initially based only on the powers of the prosecutor's office, it became possible to appeal against legal acts. On the one hand, the civil procedural legislation "was in no hurry" with the regulation of these new categories of cases which differed significantly in their legal nature from ordinary civil cases, but also "did not let go" this type of judicial protection into "independent navigation" even after the constitutional consolidation of the administrative legal proceedings. Today it is difficult to overestimate the importance of administrative justice in ensuring the proper formation and functioning of not only the legislative and executive, but the judicial power itself. By the number of cases, administrative legal proceedings in Russia are difficult to compare with the activities of administrative courts of any European state. Thus, R.O. Opalev cited data according to which only in 2015 4.5 million administrative cases were considered. And,

²² T. Mauntz. See above. P. 907.

²³ Starilov, Yu.N., The Modern Model of the Russian Administrative Court Procedure: Constitutional-Legal Establishment, Administrative Procedural Legislation, Judicial Practice / Actual issues of the development of administrative court proceedings. Materials of the scientific and practical conference on October 26-27, 2016. Tver, 2016, p.23.

for example, in Spain, such cases are less than three hundred a year, and in other countries even less²⁴. Of course, such a comparative analysis can also testify that we still have more problems requiring judicial review, but we must take into account that not all decisions recognize the actions of officials as illegal or the normative legal acts that are not acting. The very possibility of judicial control is important. Particular attention should be paid to the subject of regulation of the Administrative Procedure Code. All cases subject to review in accordance with the procedure provided by this Code are divided into two types: cases on protection of violated or challenged rights, freedoms and legitimate interests, and cases which are related to the implementation of mandatory judicial control of rights and freedoms (article 1, Administrative Procedure Code of RF). Consequently, the judicial power is called upon not only to eliminate possible violations in the actions of the legislative and executive branches, but also to ensure the prevention of such violations. The Administrative Procedure Code constantly evolves. As the judicial practice is formed, certain gaps and the need to include new categories of cases are identified. In the context of this study, it is possible to highlight the emergence of such a category of cases as "challenging acts containing explanations of legislation and possessing normative properties". The need for judicial challenge of such acts is due to the fact that often the executive branch changes the meaning of legal norms under the guise of interpretation. The establishment of judicial control over such acts can effectively eliminate not only violations, but also the threat of violation of rights. But in order to make this protection even more effective, it is necessary to solve at the legislative level the problem of compensation for harm caused by illegal actions of the authorities or the adoption of a non-legal normative act directly in the same administrative process. When considering cases on protection of the electoral rights, the judiciary largely influences the formation of legislative and executive authorities. In most cases, it is the judiciary that confirms or refutes the results of the voting, and also ensures the elimination of those candidates who violate the rules established by the electoral law. The cases of challenging the decisions and actions of public authorities cover all spheres of public administration, including the performance of judicial acts themselves. It is also important to note that in case of transfer of certain state functions to any non-state bodies and organizations, their decisions and actions are subject to judicial control in the same manner. Administrative proceedings provide some control over the judicial power itself. This primarily concerns the formation of the judiciary establishment. According to the rules of administrative proceedings, the decision of the Examination Commissions on admission of the qualification examination to the position of a judge may be appealed. There has been no such appeal so far, but this opportunity is an additional guarantee of the independence and impartiality of the judges. Judicial decisions may be appealed against the decisions of the Qualification boards of judges related to giving recommendations to the position of a judge. In accordance with the Law "On the Status of Judges in the Russian Federation", only qualification boards have the right to give such a recommendation. The boards themselves are, in fact, public formations, but they fulfill the most important state function ensuring the appointment to judges of candidates who meet the requirements of the law. The independence and impartiality of judges is also guaranteed by the judicial procedure for appealing the disciplinary penalties imposed on a judge. The law provides for three possible disciplinary sanctions: a notice, warning and early termination of powers. Termination of powers is an exceptional measure, therefore for its appeal the Disciplinary Court was originally created in the structure of the Supreme Court of the Russian Federation, and since March 2014 the Disciplinary College of the Supreme Court has been functioning. It should be noted that the Disciplinary College can be appealed as by a judge whom the qualification college has been deprived of authority, as well as by the Chairman of the Supreme Court, in the event of the college's refusal to apply such disciplinary punishment to the judge. Such an order contributes to the people's confidence in the bodies of the judicial power. Other disciplinary penalties may be appealed by a judge to the relevant court of a constituent entity of the Russian Federation or to the Supreme Court if the decision is taken by the Higher Qualification College of Judges of the Russian Federation. Judicial prac-

²⁴ Opalev R.O. On the issue of possible trends in improving legislation in the field of justice on administrative cases. // Actual issues of the development of administrative court proceedings. Materials of the scientific and practical conference on October 26-27, 2016. Tver, 2016, p.98.

tice shows that when considering such cases in courts, the principles of competitiveness, transparency, independence and objective truth are fully observed. Let's pay attention to the fact that the empowerment of judges and the deprivation of their powers differ in order. When appointing to the post, the Qualification Boards only recommend, and they cease their powers independently without agreement with those who made the final decision on appointment to the position of a judge. Whereas for the legislative and executive branches, the procedure for appointing and withdrawing powers is almost identical. If elected by a vote, then the response is decided by voting. Speaking about justice in the structure of the judicial power, we should pay attention to the consideration in administrative proceedings of cases of awarding compensation for violation of the right to legal proceedings within a reasonable time.

The principle of separation of powers not only distributes the functions of state power among the three branches, but also establishes their independence and mutual balancing. In this system, the courts are bound by the legislative and executive powers to apply laws and other normative legal acts, but the judicial power has the opportunity to recognize unconstitutional laws, decrees of the President of the Russian Federation and resolutions of the Government of the Russian Federation, i. e. their actual cancellation. The judicial power is completely independent in issuing judgments and sentences, but their execution is the responsibility of the executive power. The possibility of judicial appeals by citizens as of actions (inaction) of officials and executive bodies allows the judicial power to resist the illegal actions of those authorities. The functions and powers of the judiciary, thus, serve as a kind of counterbalance to the other two branches of power, and form a unified state power in combination with them.

The principle of separation of powers as a principle of building a state mechanism exists also so that mutual control and balance of powers does not lead to the assignment of powers of the judiciary to any other authority. But the judicial power should not deal directly with norm-setting, thus substituting legislative bodies, and interfere with the prerogatives of the executive power. However, this characteristic of the separation of powers principle needs to be clarified. So, judicial practice, certainly, influences a direction of legislative activity, and also corrects many mistakes of enforcement authorities; Moreover, by interpreting the law in its application, courts reveal the true content of legal norms, often different from the original objectives.

Speaking about the activities of the judicial power and its place in the state mechanism, it is worth paying attention to the fact that in Russia this power operates on two levels (however, as in other federal states). Article 10 of the Constitution of the Russian Federation establishes the principle of separation of powers as a principle of state power, which operates both at the federal and regional levels. It would seem that the subjects of the Russian Federation have the right to independently form their own bodies of judicial power, just as they form legislative and executive bodies. However, the nature of the judicial power, unlike the other two, is such that it can function only if there is a specific vertical of the judicial power from the bottom up. Moreover, not all the constituent entities of the Federation (regions, territories) have generally formed statutory courts which by their designation are bodies of constitutional control.

In recent years, there has been a significant democratization of the judicial power. In various years, the Federal Constitutional Law "On the Judicial System of the Russian Federation", federal laws on enforcement proceedings, on bailiffs, on the Judicial Department under the Supreme Court of the Russian Federation, "On Justices of the Peace in the Russian Federation", "On Financing the Courts of the Russian Federation", "On People's Assessors of Federal Courts of General Jurisdiction in the Russian Federation", the Federal Constitutional Law "On Military Courts of the Russian Federation", the Criminal Procedural Code, the Civil Procedure Code and the Arbitration Procedure Code, the Code of Administrative Court Procedure, the Federal Constitutional Law on the Supreme Court of the Russian Federation, the Federal Law on the Judicial Community in the Russian Federation, the Status of Judges in the Russian Federation, and others were adopted. Judicial reform at its completion should ensure the implementation of unified

constitutional principles of justice and the status of judges, raise the prestige of the judicial power, and guarantee its independence and high professionalism.

The process of legislative optimization which ensures the functioning of the judicial power continues. The State Duma proposed a draft Concept of a Uniform civil procedural code. In addition, a significant number of changes have been made to all procedural laws recently on the initiative of the Supreme Court of the Russian Federation. Of particular importance is the development of informatization of the judiciary. All these laws and changes to them are based on the fundamental principles enshrined in Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms of 1950²⁵ and the legal positions of the European Court of Human Rights. Thus, the independence of the judicial power is ensured by the procedure for appointing a judge, the term of office, guarantees of personal inviolability and external attributes of the judicial power. All federal judges in the Russian Federation are appointed to the office without the limitation of the term of office. We must say that our country did not come to this immediately, and it took a lot of arguments to exclude a specific three-year "probation period" for newly appointed judges. This problem seems unresolved with respect to the justices of the peace, which in most of the constituent entities of the Russian Federation are appointed for the first time for three years, and then for five years, although the Federal Law allows for the first time to appoint for five years, and then for ten. There are also certain doubts with the appointment of justices of the peace, since the bodies of constituent entities of the Russian Federation are appointed the justices, and in fact candidates for deputies of legislative bodies are brought to administrative responsibility by justices of the peace. Independence and impartiality of judges is directly connected with another major problem of any authority, the problem of combating corruption and such a component of it as a "conflict of interests". Those restrictions which are now set for judges with a view to prevent a possible conflict of interests seem excessive. After all, there were always not only dynasties of workers in our country, and also dynasties of lawyers, where the majority of family members in several generations engaged in legal activities. Now, if one of the family members is a judge, others are no longer lawyers or prosecutors within this territory. Certain changes in this situation have begun. At the last congress of judges in December 2016, Article 9 of the Code of Judicial Ethics has been substantively changed. Probably, other "related situations" will be mitigated gradually, naturally without detriment to independence and impartiality. Such strict requirements as when appointing judges are not applied in other branches of power, that is due to the special significance of the judicial branch for the proper functioning of the authorities as a whole.

CONCLUSIONS

As already noted, the Constitutional Court plays a special role in realizing the principle of separation of powers. The Constitution assigns to it the functions of the highest judicial body exercising control over constitutionality. The Constitutional Court is obliged to check the laws and competence of state bodies from the standpoint of the separation of powers established by the Constitution of the Russian Federation. Proceeding from this, the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" provides for the power of the Constitutional Court to review normative legal acts and international treaties, as well as to resolve disputes over competence directly from the point of view of separating the state power into the legislative, executive and judicial powers, established by the Constitution (paragraphs 4 and 5, Part I, Article 86; Part I, Article 94).

The Constitutional Court of the Russian Federation acting in the conditions of separation of powers and entitled to interpret the norms of the Constitution gave its doctrinal interpretation of the principle of separation of powers. This interpretation also applies to the fact that the system of checks and balances is a prerequisite for the operation of the principle under consideration, ensuring the independent exercise of all branches of government (Decree of January 18, 1996 on the Verification of the Altai Territory Charter

²⁵ Consolidated legislation of the Russian Federation. 1998, No. 20, article 2143.

(Basic Law)), and that the holder of sovereignty is the multinational people of the Russian Federation, therefore confrontation between the branches of power cannot be tolerated (Decree dd. 11 December 1998 on the case on the interpretation of Part 4, Article 111 of the Constitution on the authority of the President to submit to the State Duma for approval the candidacy of the Chairman of the Government). The Constitutional Court also spoke about the need to balance the branches of power and prevent the concentration of functions of various branches of government in one body (Decree dd. May 29, 1998 on the verification of the Law of the Republic of Komi on public service), and that the principle of separation of powers is enshrined in the Constitution of the Russian Federation as one of the foundations of the constitutional system for the Russian Federation as a whole, i.e. not only for the federal level, but also for the organization of state power in its subjects (Resolution of January 18, 1996 on the Verification of the Charter (Basic Law) of the Altai Territory).

The Constitutional Court also touched on the issue of applying federal relations pattern between the executive and legislative authorities at the level of the constituent entities of the Federation (Resolution dd. January 18, 1996), from which the Court has developed legal positions relating to the interaction of legislative and executive state power bodies of the constituent entities of the Russian Federation, which emphasize the need to reconcile the powers with the nature of these bodies, to practise moderation in the exercise of these powers and not to violate the principle of independence of authorities.

In general, the activity of the Constitutional Court in Russia, as well as in any other state where such a body functions, is aimed at ensuring the stability of the Constitution, constitutional provisions and principles. But by exercising interpretation of certain provisions of the Constitution in certain historical situations, the body of constitutional control helps to adapt it to a changing reality. Then, the constitutional text gets a new reading and functions as a "living" Basic Law of the state and society. In addition, the legal positions of the Constitutional Court are also subject to clarification, which is required in new historical conditions. This was repeatedly mentioned by the Chairman of the Constitutional Court of the Russian Federation²⁶.

In the event that the Constitutional Court interprets some provisions related to the implementation of the principle of separation of powers, it is important that these legal positions are adequately perceived by the authorities, what in turn would allow the functioning of the state organization within the framework of constitutional requirements. This is an obligatory condition for the operation of the principle under consideration.

SUMMARY.

Thus, this study revealed specific features of the judicial power in conditions of separation of powers, the correlation of Russian and foreign experience in the development of constitutional and judicial standards. Definition of problems in the interaction between the judiciary and other branches of power in the Russian Federation and foreign countries indicates the need for continuing scientific research on this topic.

CONFLICT OF INTEREST

The authors confirm that the presented data do not contain a conflict of interest

REFERENCES

- Azarkin N.M. "Montesquieu", Moscow: "Yuridicheskaya literatura". 1988.
Bernham U. Legal system of the USA. 3rd edition. M.: "Novaya Yusticiya", 2006.
Boldyreva R.S. Separation of powers. Theoretical and legal aspects: thesis for a Candidate Degree in Law Sciences: 12.00.01. - M., 1998.

²⁶ See: <http://www.ksrf.ru/> (accessed date June 7, 2017)

- Burdina E.V. The Judiciary in the Russian Federation: A Textbook. Saransk: Mordovian book publishing house. 2006.
- Daniel A. Farber, William N. Eskridge, Jr., Philip. P. Frickey. Constitutional Law: Themes for the Constitution's Third Century. 2 ed., West, 1998.
- Egorov S.A. Constitutionalism in the United States: political and legal aspects // Reader on Constitutional Law. Volume III: Constitutional regulation of the territorial organization of power // compiled by: Doctor of Law, Professor N.A. Bogdanova, Candidate of Juridical Science, Junior Researcher D.G. Shustrov. SPb.: Publishing House "Alef-Press", 2014.
- History of Political and Legal Studies: A Textbook for Universities / Under the general editorship of Academician of RAS, Doctor of Law, Professor V.S. Nersesyants. - 4th edition, revised and enlarged - M.: Norma, 2004.
- Lebedev V.M. Judicial power in modern Russia. Problems of formation and development. SPb., 2001.
- Lilburn J. Pamphlets. M., 1937.
- Locke. J. Selected philosophical works. M., 1960. V.2.
- Mauntz T. State Law of Germany // Reader on Constitutional Law. Volume III: Constitutional regulation of the territorial organization of power // compiled by: Doctor of Law, Professor N.A. Bogdanova, Candidate of Juridical Science, Junior Researcher D.G. Shustrov. SPb.: Publishing House "Alef-Press", 2014.
- Makhlaeva T.I. Judicial power in the system of separation of powers. - Moscow: AEF. 2003.
- Montesquieu Ch.L. Selected works. M. 1955.
- M.C.J.Vile. Constitutionalism and the Separation of Powers. Oxford University Press, 1967.
- Ovsepyan Zh.I. Tendencies towards the centralization of state power and the prospects for the separation of powers in Russia at the beginning of the 21st century / Academic notes of the Faculty of Law / St. Petersburg State University of Economics and Finance. - 2005. - Issue 4.
- Opalev R.O. To the question of possible tendencies in the improvement of legislation in the field of justice in the administrative fields.// Actual issues of development of administrative legal proceedings. Materials of the scientific-practical conference dd. October 26-27, 2016. Tver, 2016.
- Savitsky V.M. Organization of the judicial power in the Russian Federation. M., 1997.
- Starilov Yu.N. The modern model of the Russian administrative legal proceedings: the constitutional-legal establishment, the administrative procedural legislation, the judicial practice // Actual questions of development of administrative legal proceedings. Materials of the scientific and practical conference on October 26-27, 2016. Tver, 2016.
- Fetishcheva D.V. Judicial power in the modern state: comparative legal research (history, theory and practice): Monograph. M.: Nauchnaya kniga. 2007.
- Chirkin V.E. Constitutional Law: Russia and Foreign Experience. - M.: Publishing house "Zerkalo", 1998.