

DIVISION OF POWERS: THE CONCEPTION AND PRESENT CONSTITUTIONAL PRACTICE

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SUMMARY: the article describes some problems of constitutional division of powers and shows how division of powers is exercised in Russia nowadays. The author shows all branches of powers co-existing with three main branches and analyzes the mechanisms of separation as well as of cooperation of powers. The article suggests measures to improve the checks and balances system for state authorities in the Russian Federation.

KEY WORDS: integrity of state powers, division of powers, cooperation of authorities, presidential powers, system of checks and balances.

The classical concept of division of powers appeared, as the majority of researchers believe, in the XVII century in England where the first political and legal theories were formulated. John Locke citing early research formulated some ideas: the legislative power must be exercised only through the electoral representative assembly, it is impossible for the legislative authority to enforce laws, it is necessary to establish a permanent executive authority, etc.¹

The works of Charles Louis de Montesquieu outlined the next period of this concept development. He argued that the best government would be one in which power was balanced among three groups of officials. At this time the judicial power was not defined.

There is a statement in professional literature that the founding fathers of the division of powers concept were antique philosophers Plato, Aristotle, Polibius² but V.S. Nersesyanz criticized this statement proving his point of view.³

Other theories of the origin of this concept can be found in modern literature and they are rather questionable. P.D. Barenboym writes, “important provisions for the doctrine of separation of powers are formulated in the Old Testament”.⁴ He means the constitutional division between the court, legislative and executive authorities, believing that the world's first constitution was born 3000 years ago, when Samuel, doing the will of God “explained to the people the rights and duties of kingship, and he wrote them down, and deposit it before the Lord” (1 Sam. 10, 25).

In his fundamental work “Cultural Traditions of Law” G.D.Maltsev ironically suggested not to celebrate the 3000th anniversary of the constitution but first to clarify

¹ See: Locke J. Soch. v 3 t., M., 1988. T. 3. P. 349-350.

² See: Abamashidze V.V. Uchenie o Razdelenii Gosudarstvennoi Vlasti i Ego Kritika. Tbilisi, 1972. P.4-5.

³ See: Nersesjanz V.S. Politicheskie Uchenia Drevney Grecii. M., 1979. P.166.

⁴ Barenboim P.D. 3000 Let Doktriny Razdelenia Vlastei. Sud Sjutera. M., 2003. P.10.

and to prove that Samuel's explanation of the right of kingship was constitutional and people considered it to be the constitution. "If it was a constitution, as P.D. Barenboym believes, the people had to live by its rule and it would be more famous and honored than the Torah".⁵ However, G.V. Maltsev writes that "the book written by Samuel remained completely unknown; it is not mentioned in historical documents and even in subsequent texts of the Bible".⁶

G.V. Maltsev doubts that the "problematic Hebrew constitution could include the political principle of separation of powers".⁷

"The typical model of government in ancient Israel was the authorities of the judge, the supreme ruler and the military commander vested to one person".⁸ King David, for example, was both the commander and the judge, he exercised the executive powers and he also legislated under the laws of Moses, and in addition he also was a prophet and a great psalmist.

Considering all these facts we should agree with G.V. Maltsev that it would be too daring to think that the idea of division of powers appeared in ancient Israel.

Resuming the fundamental and famous theories of division of powers suggested by John Locke and Charles Louis de Montesquieu the author can underline some basic ideas. In every democratic country three branches of powers – legislative, executive and judicial – are not only united by one state system but are also independent. The higher state authorities exercising legislative, executive and judicial powers are aimed at a certain balance of powers in the system of checks and balances. All three branches are regulated by a stable legal system and the main objective of this system is to prevent usurpation of power by one person or one group and to maintain integrity of the government and security of the state.

Kaarlo Tuori, the Vice President of the Venice Commission mentions: "in modern states the idea of democracy means that the Constitution can make the political system legal only if it follows basic principles such as democracy, division of powers and legitimacy of governance".⁹

The Constitution of the Russian Federation 1993 declared the division of powers as its basic principle and value for a democratic legal social state. However, as B.S. Ebzeev mentions, "there is no constitution in the world that exactly follows Montesquieu concept of division of powers".¹⁰

The idea of division of powers in modern countries is evolving because of different factors: forms of government, state system, political regime, historical, national and political traditions, and political practice.

⁵ Maltsev G.V. Kulturnye Tradicii Prava. Monograph/ G.V. Maltsev. – M.: NORMA: INFA-M, 2013.P. 232.

⁶ *Ibid*, P. 233.

⁷ *Ibid*, P. 233.

⁸ Salygin E.N. Teokraticheskoe Gosudarstvo. M., 1999. P.64.

⁹ Kaarlo Tuori. Voprosy Sozdania Konstitucii – Opyt Poslednih Let, New millennium constitutionalism: paradigms of reality and challenges. NJHAR. Yerevan. 2013. P. 178.

¹⁰ Ebzeev B.S. Konstitucia, Vlast i Svoboda v Rosii: Opyt Sinteticheskogo Issledovania. – M.: PROSPEKT, 2014. P.208.

The combination of these factors can influence the classical theory of division of powers (legislative, executive and judicial powers) and its realization in a certain state in a certain historical period.

For example, in Russia, according to article 11 of the Constitution the public authority is exercised by the President, the Federal Assembly, the Government, courts. Thus, there are four systems of public bodies representing four branches of power – presidential, legislative, executive and judicial.

The author has analyzed the constitutional status of state authorities in the Russian Federation, the status and role of the President, his exclusive powers to coordinate all branches of state power and has come to the conclusion that in the Russian Federation there is one more independent branch – presidential.¹¹

Many articles have recently appeared that discuss and prove the fact – in Russia there are special conditions for development of an exceptional branch of presidential power.¹²

Some authors believe that the President of Russia exercised executive power.¹³ However, B.S. Ebzeev writes, that the President plays an active coordinative role in the checks and balances system, and also coordinates the interaction between federal and regional authorities in Russia. The President is legally independent from the other three branches of powers, at the same time he/she creates the rules of law, governs, settles the disputes, sets constitutional provisions for the regional authorities and in that context he/she cannot be defined as an executive power.¹⁴ The author of this article fully agrees with this statement.

Assuming the fact that there is real presidential power in Russia we can consider article 10 of Russian Constitution to be incorrect. It says: “the state power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial power. The bodies of legislative, executive and judicial power shall be independent.” The author of the article agrees with the opinion of T.Y. Khabrieva and V.E. Chirkin that it should be mentioned that in the Constitution state power is unified and separated into branches: legislative presidential (in presidential-parliamentarian form of government), executive, judicial and controlling, all are presented by different state bodies.¹⁵

In his later work V.E. Chirkin clarified his statement: “it is not reasonable to set the strict frames for the concept of three separate branches of powers: life is going on and everything is changing. It was said long ago that there was no absolute division of powers. It cannot be realized in the state even because of the unified state power: all branches of power aim at similar goals and depend on one state policy”.¹⁶

¹¹ See: Chebotarev G.N. *Princip Razdelenia Vlastei v Gosudarstvennom Ustroistve Rossiiskoi Federacii*. Monograph. Tyumen: TYUMEN STATE UNIVERSITY. 1997. P. 134-157.

¹² See: Avakyan S.A. *Konstitucionnoe Pravo Rossii*. V 2h tomah, T. 1. M.: JURIST, 2005. P.356; Chirkin V.E. *Glava gosudarstva*. M. 2010.

¹³ See: Avdeev D.A.

¹⁴ Ebzeev B.S. *Konstitucia, Vlast i Svoboda v Rosii: Opyt Sinteticheskogo Issledovania*. – M.: PROSPEKT, 2014. P.214.

¹⁵ Khabrieva T.Ya., Chirkin V.E. *Teoria Sovremennoj Konstitucii*. – M.: NORMA, 2005. P.356.

¹⁶ See: Chirkin V.E. *Konstitucionnaya Terminologia*. Monograph/V.E.Chirkin, Institut zakonodatelstva

In fact, we can observe foreign constitutional practice and find new definitions of branches of powers: electoral branch (Nicaragua), civil branch (Venezuela), control branch (previous China Constitution of 1912, this term is followed by the present Constitution of Taiwan). Article 44 of the Saudi Arabia Constitution names the judicial authority, the executive authority and the regulatory authority.¹⁷

In the Russian Federation, as the author mentioned in his earlier works, there are branches “that cannot be described as presidential, legislative, executive, judicial.”¹⁸

As an example the author takes the Commissioner for Human Rights. According to the Federal Constitutional Law, through the Commissioner for Human Rights, the state guarantees the rights and freedoms of citizens, their observance and respect by state government, by local government and by officials. The Commissioner for Human Rights, who is appointed and dismissed by the Federal Assembly, acts in accordance with the Federal Constitutional Law (article 103 of the Constitution) and in the realization of his powers he is independent of and not accountable to any state organs or officials.¹⁹

The same example can be brought about the prosecuting authorities. The prosecutor has a special position in the system of state government. This branch of power can be defined as “prosecutor branch” because it is vested with special functions and powers.²⁰

S.A. Avakyan writes: “In Russia there are several state bodies that are not part of the three branches of powers – the Central Bank, the Chamber, the Central Election Commission. Also some special branches of powers can be distinguished – the constitutive power (adoption of the Constitution by people or by the Constitutional Assembly), public power (adoption of laws by referendum or making other important decisions only except adoption of a new Constitution); electoral power; financial and banking power.”²¹

We agree with the proposal of V.E. Chirkin to develop the concept of division of powers. He suggests to describe division of powers as a system which is unified, characterized by cooperation between branches and can be supplemented.²²

By now the most detailed formulation of the unification and division of state powers is presented in the Kazakh Constitution 1995. Part 4 of article 3 says: “The state power in the Republic of Kazakhstan is unified and executed on the basis of the Constitution and laws in accordance with the principle of its division into the

I sravnitel'nogo pravovedeniya pri Pravitel'stve Rossiiskoi Federacii. – M.: NORMA:INFA-M, 2013. P. 218.

¹⁷ *Ibid*

¹⁸ See: Chebotarev G.N. Princip Razdeleniya Vlastei v Gosudarstvennom Ustroistve Rossiiskoi Federacii. Monograph. Tyumen: TYUMEN STATE UNIVERSITY. 1997. P. 77-78.

¹⁹ Federalnyi konstitutsionnyi zakon ot 26.02.1997 №1-FKZ (v red. ot 28.12.2010) «Ob Upolnomochennom po Pravam Cheloveka v Rossiiskoi Federacii».

²⁰ See: Chebotarev G.N. *Ibid*. P. 77-78; Melnikov V.N. Prokurorskaya Vlast // Gosudarstvo i pravo. 2002. №2. P. 18.

²¹ See: Avakyan S.A. Konstitutsionnoe Pravo Rossii. V 2h tomah, T. 1. M.: JURIST, 2005. P.356.

²² See: Chirkin V.E. Konstitutsionnaya Terminologiya. Monograph/V.E.Chirkin, Institut zakonodatel'stva i sravnitel'nogo pravovedeniya pri Pravitel'stve Rossiiskoi Federacii. – M.: NORMA:INFA-M, 2013. P. 219-220.

legislative, executive and judicial branches and a system of checks and balances that provides for their interaction”.

Some authors think that new ideas for cooperation and unification of branches are very different from the Montesquieu concept of division of powers and can be characterized as a “sophomoric modernization of the classic idea”.²³

On the other hand, modern French lawyers express the opinion that Montesquieu wrote that powers should not be separated but also that they should act “as in concert”.²⁴

Many Russian authors of the last century supported the idea of integrity (unification) of the public authorities and at the same time of division of their powers – V.V. Ivanovskiy, F.F. Kokoshkin, N.I. Lazarevskiy and some other.²⁵ They didn’t think that division of state power into branches according to their functions would prevent unification of power because the nature of the state is to be united.

The present idea of cooperation between the branches of united state power can be compared with the idea of “Russian symphony of powers”. It can hardly be reconstituted nowadays. G.V. Maltsev is absolutely right when he says that “to create a symphony the ecclesiastical power and the state power must have one spirit and one faith”.²⁶

It is true that ecclesiastical and civil power could not be exercised at one and the same state but the participation of the church in state affairs is an old Russian tradition based on the principles of orthodox spirituality, unity and mutual support. This tradition will promote harmonization of the relationship between the branches of power, renaissance of the best cultural traditions and spirituality for further progressive development of Russia.

The “symphony of powers”, V.I. Fadeev thinks, is the best idea for public governance and public authority ethics. The concept of the “symphony of powers” could become the basic principle for organization of the government and also this concept could be the alternative to division of powers in which the branches tend to confront and to protect their own rights and interests”.²⁷

In January 2014 a Christmas parliamentary meeting was organized in the Federation Council and Patriarch Kirill in his speech noted that the Church is not willing to replace the authorities, but “it has the right to make a moral assessment of the bill and adopted laws. The reason is that the Church is represented primarily by Russian citizens, who have their opinion about the country and what is happening in it. People who go to Church have their own attitude and they would like to share their opinion with the authorities.” “In

²³ See: Suchilin V.N. Teoria Razdelenia Vlastei Ch.L. Montesquieu I Sovremennye Politico-Pravovye Realii / Vestnik Tyumen University. 2013, №10. P.193-194.

²⁴ See: Droit constitutionnel, 1955. P.47.

²⁵ See: Ivanovskii V.V. Uchebnik Gosudarstvennogo Prava. Kazan, 1908. P. 227-229; Kokoshkin F.F. Lekcii po Obschemu Gosudarstvennomu Pravu. Ed. 2, M., 1912. P. 221-222; Lazarevskii N.I. Russkoe Gosudarstvennoe Pravo. T.I. Konstitucionnoe Pravo.Ed. 3. SPb., 1913. P. 88-111.

²⁶ Maltsev G.V. Ibid. P.562.

²⁷ Fadeev V.I. Idei Simfonii Vlastei i Sobornosti i Razvitie Narodnogo Predstavitelstva v Rossii. Sovremennoe Obschestvo i Pravo. 32 (3), 2011, P.9.

this regard, Patriarch Kirill said, it would be useful to develop forms of systemic interaction between the Orthodox Church, other religious organizations and the government and civil society at the regional level”.²⁸

The same point of view is expressed by V. Matvienko, the Chairperson of the Federation Council. She suggested to organize the Christmas meetings annually and to make them an effective mechanism of harmonizing the relationships between the Church, the authority and the civil society.²⁹

The author has already mentioned that the principle of unification of the government and division of its powers is one of the fundamental principles of the society aiming at harmonizing political relationships. The principle prevents concentration of power in one authority or one official representative of the government and it provides for balance between the branches of power which is necessary in any democratic state and civil society.

Thus, the prime objective of the researchers and politicians is to suggest measures for strengthening all three branches of power. There is an opinion expressed in well-known legal publications that it is necessary for the Federal Assembly of Russia to exercise control over the Government, also it is reasonable to change the procedure of formation of the Federal Council to the form of direct elections of senators, to improve the judicial system and to strengthen judicial independence. President V.V. Putin mentioned the necessity to start democratic reforms of the political system in Russia.³⁰ Some measures have already been taken. For example, the procedure of formation of the Federal Council has been changed. Now the candidate for the Federal Council – the representative from regional legislative authority (Republics, Krai, Oblasts, Autonomous okrugs and Federal Cities of Moscow and St. Petersburg) – can only be a legislature member, i.e. a citizen of Russia elected to the regional legislative authorities.³¹

At the same time it is necessary for the Constitution to define the role and powers of the President and presidential bodies in the system of government in Russia. The present Constitution of Russia sets up the main functions and authorities of the President but there is an uncertainty about how the President exercises his powers, what the limits are of the President’s authorities and what constitutional guarantees there are for executive and judicial independence. The author believes, it is very important to adopt a Federal Constitutional Law “On the President of the Russian Federation” (following the pattern of the Federal Constitutional Law “On the Government of the Russian Federation”). A new Constitutional Law should regulate the procedure of implementation of presidential powers, namely, the formation of the Administration of the President, State Council, Security Council, appointment and

²⁸ Speech of His Holiness Patriarch Kirill on occasion of the first Christmas parliamentary meetings at the Federation Council, Available at: <http://www.patriarchia.ru/db/text/3544704.html>.

²⁹ Speech of V. Matvienko on the Open ceremony of the first Christmas parliamentary meetings at the Federation Council, Available at: <http://council.gov.ru/press-center/news/38817/>.

³⁰ See: Putin V.V. *Demokratia i Kachestvo Gosudarstva*. Kommersant. №20. 06.02.2012.

³¹ *Federalnyi zakon ot 03.12.2012 №229-FZ «O Poryadke Formirovania Soveta Federacii Federalnogo Sobrania Rossiiskoi Federacii»*.

dismissal of presidential representatives in the federal districts. In this law there should be rules on legal effect of directives given by the President to the Government and other state bodies.

Summing up the author can suggest some conclusions:

1. Division of powers is an effective mechanism for organization and realization of state power which depend on certain historical and political context and theoretical interpretation.
2. The state power, even if divided into separate branches, always remains unified and integrated.
3. The basic idea of division of powers is that one branch must not venture into the domain of other branches and mixed government is unacceptable.
4. The concept of division of powers suggests regulation and restraint of branches, to describe the system of checks and balances in the Constitution of a state. There has never been a typical system of checks and balances. In every country where the government's powers are divided the instruments of checks and balances are different. Also the system of checks and balances and even the form of division of powers can evolve.
5. At the present time the concept of division of powers should be completed by the cooperation and interaction of branches.
6. In the Russian Federation the Constitution establishes not three traditional branches but four branches of power – presidential, legislative, executive and judicial.
Also there are some authorities that cannot be referred to those four branches. In this realm we understand that the principle of division of powers is widening because other branches are very specific and independent.
7. The principle of division of powers established in Russia is not effectively implemented in political and legal process. The system of checks and balances should be improved. Firstly, the constitutional legislation needs some changes, then the functions of the branches should be controlled. The Constitutional Court of Russia is the body which can exercise the control function and report to the Federal Assembly of Russia.