

## THE MECHANISM OF CHECKS AND BALANCES AS A METHOD OF CONSTITUTIONAL CONFLICTS SOLVING: COMPARATIVE LAW ISSUES

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The subject. The paper is devoted to legal analysis of category “checks and balances” in the scope of constitutional legal coercion.

The purpose of the paper is to confirm or disprove hypothesis that mechanism of checks and balances is a method of prevention and resolution of constitutional conflicts.

The methodology of the study includes comparative legal method as well as general scientific methods (analysis, synthesis, description) and particular academic legal methods (formal-legal method, interpretation of legal acts).

The main results and scope of their application. While the Russian legal tradition focused on the search for optimal “checks” and “balances” as well as defended the theoretical model of formalism in this matter, the English legal tradition, on the contrary, focused on finding the optimal functional balance of all branches of government. The system of checks and balances serves the purpose of resolving constitutional and legal conflicts, when it is based on a functional approach rather than a formal one. The factors of “checks and balances” mechanism are:

- formation of the three branches of government in different ways;
- comparability of powers of the Supreme authorities belonging to various branches of the powers with discrepancy of terms of their powers;
- authorities of every branch of government must have “counterbalance” – the powers of compensatory, substituting type – besides it’s traditional powers. The executive and legislative authorities have “quasi-judicial” powers, the executive authorities have “quasi-legislative” powers often.
- authorities of every branch of government must have “checks” – possibility to participate in the mechanism of constitutional and legal coercion in relation to another branch of the power.

The executive branch can prevent a constitutional conflict generated by a gap or defect of laws through delegated law-making. The executive branch receives “quasi-legislative” powers with delegated law-making. It allows this authorities not only to respond promptly to changing public relations, but also to fill legislative gaps in a timely manner. This “counter-balance” is aimed at preventing constitutional and legal conflicts.

Conclusions. The mechanism of checks and balances, which is based on the principle of separation of powers, is the primary way to prevent constitutional and legal conflicts, and also serves the purpose of resolving conflicts that have already arisen. The main manifestations of this function are the presence of compensatory and substitutive powers of various branches of government and the possibility of one branch of government to participate in the mechanism of constitutional and legal coercion in relation to another branch of government.

### 1. Introduction

The traditional concept of “checks and balances” has repeatedly become the subject of research throughout the development of the domestic science of constitutional law. As noted by Yu.A. Tikhomirov, the presence of checks and balances is a necessary mechanism for the “legal resolution of conflicts between authorities” [1, p. 205]. At the same time, the system of checks and balances is a manifestation of the phenomenon of separation of powers, which consists in creating a state system that allows minimizing possible mistakes in management, a one-sided approach to the issues being resolved. [2, p. 92; 3, p. 204]. To a greater extent, this mechanism is valid only for constitutional law.

In the classical understanding of the term “checks and balances”, we will not find it in administrative, criminal, municipal law, since these branches of law do not regulate legal relations, the object of which is the separation of powers. In this connection, a legitimate question arises: why in these areas of law we are talking about legal coercion in resolving anomalies in law, while in the constitutional law a “special” mechanism of checks and balances is used? How does the mechanism of checks and

balances relate to constitutional law enforcement? To answer this question, it is enough to present the mechanism of checks and balances in constitutional law in the form of scales with "three equal shoulders" corresponding to the three branches of state power, then legal coercion is a force of attraction that, depending on the weight of each shoulder, balances the overall structure of constitutionalism. In this example, legal coercion is literally focused on leverage checks and balances.

At the same time, if the system of checks and balances were a common set of heterogeneous measures of constitutional law enforcement, it would be difficult to explain how this mechanism originated much earlier in raising the issue of sanctions of constitutional norms and in various legal systems. It is obvious that, being one of the foundations of the constitutional system of modern democratic states, the system of checks and balances represents a certain mechanism for resolving the key contradictions of various branches of government, but in each state this mechanism has its own "sound".

## **2. Development of scientific views on the principle of separation of powers as the basis of mechanism checks and balances.**

First of all, let us turn to the doctrine of French and American constitutional law - the founders of the principle of separation of power as the basis for the organization of state power.

Already Sh. Montesquieu, objecting to the practice of the indivisibility of state power during the days of feudal absolutism, essentially proposed to classify all state bodies into three branches: legislative, executive and judicial power. The concept of separation of powers formulated by him formed the basis of the theory and practice of constitutionalism already at the initial stage of their formation [4, p. 56].

This principle, in particular, was the basis of the US Constitution of 1787. Despite the fact that this principle is not directly mentioned in the text of its article, it is reflected in the definition of the constitutional and legal status of the highest bodies of the United States. In this connection, the principle of separation of powers was naturally studied by American scientists.

In particular, as pointed out by David Carillo and Danny Chu, researchers at Berkeley University, the principle of separation of powers is the basic philosophy of the American state system, since it establishes a system of checks and balances to protect each branch of government from abuses of other branches [5, p. 657]. The separation of powers and checks and balances, even more than the Bill of Rights, is the main defense of individual liberty in the United States.

In American literature, there are two theoretical models of resolving conflicts between three branches of government: formalism and functionalism. Formalism assumes that the legislative, executive, or judicial powers are easily identifiable. In other words, each state act can be classified as legislative, executive or judicial. The Supreme Court of the United States in a number of decisions applies this theoretical model.

Functionalism, on the contrary, proceeds from the need to maintain an optimal balance of power between the branches of government. Instead of relying on a clear separation of powers, functionalism prohibits "too much" from appropriating any branch of government. In some decisions of the Supreme Court of the United States, reference can be made to the analysis of the separation of powers in terms of the functional approach.

Today, as Richard Benvel points out, the separation of powers is increasingly seen precisely as a system of checks and balances necessary for optimal government. In the United States, as in several other presidential systems, strict separation of powers is often a fundamental constitutional principle. At the same time, in Great Britain and other common law countries, the theory of separation of powers was much less well known, since in Great Britain most institutions developed in order to achieve a balance between the monarch (and more recently the government) and parliament. In this connection, this system in the UK is more like a balance of power than a formal separation. [6, p. 1].

Notable in this regard is the displacement of aspects of legal regulation in the principle of separation of powers: while the Russian legal tradition focused on the search for optimal "checks" and "balances", consistently defending the theoretical model of formalism in this matter, the English legal tradition, by contrast, focused on finding the optimal functional balance of all branches of government.

In practice, many countries do not seek a strict separation of powers, but choose a compromise where some functions are divided between state institutions. For example, in the UK, the powers of parliament, government, and courts are closely intertwined. In fact, the executive and the legislative

branches of government are seen as a "close union", which Walter Badggot called "the effective secret of the English Constitution" [7, p. 67-68].

It seems that the system of checks and balances then serves the purpose of resolving constitutional legal conflicts when it relies on a functional approach rather than a formal one. Since the achievement of an optimal balance as a way of resolving constitutional conflicts between branches of government is not promoted by their isolation of independent existence, but by the presence of "points of contact" between branches of government.

It is no coincidence that in many of the basic laws of various countries, adopted after the 1990s, the separation of powers was directly enshrined in constitutional norms. [8, p. 113]. As noted by B.S. Krylov, in the constitutions of all countries, even those in which the separation of powers is theoretically not recognized (Great Britain and some countries of the British Commonwealth), it actually exists [9].

### **3. The role of the system of checks and balances within the constitutional conflicts: the Russian experience.**

In the course of constitutional and legal development, according to V.E. Chirkin, the principle of separation of powers has undergone significant modifications:

- first, in judicial practice, and then in constitutions, the thesis about the system of checks and balances was formulated (checks and balances) of the branches of power - one must restrain the other, not allowing it to rise unnecessarily;
- secondly, there was a provision not only about the balance, but also about the interaction of the branches of government;
- thirdly, it turned out that some special state bodies, institutions (for example, the prosecutor's office, constitutional control bodies, the state bank) do not fit into this triad or the relations between them are different than the original concept envisaged; the head of state also has a different position than the original authors of the concept of separation of powers saw it;
- fourth, in constitutions there were references to new branches of government (electoral, civil, organizational power, etc.) [10, p. 121-122].

Consider the first of those proposed by Professor V.E. Chirkin modifications of the principle of separation of powers: a system of checks and balances - on the example of the Russian constitutional order.

In addition to constitutional scholars, the system of checks and balances was also investigated by legal theorists. In particular, Matuzov N.I., Malko A.V. determine the system of checks and balances as a set of legal restrictions established by the Constitution and laws in relation to a specific state authority: legislative, executive, judicial [11, p. 164]. This mechanism is necessary especially for Russian constitutional law, since, as rightly noted by B.S. Krylov, an analysis of existing constitutions and charters of constituent entities of the Federation shows that sometimes the independence of the legislative and executive branches of government, as it were, goes beyond only mutual checks and balances and turns into a means of pressure from one branch of government to another. In this case, most often this pressure comes from the executive branch. However, the vast majority of constitutions and charters of the subjects of the Federation establish and maintain business relations between the executive and legislative bodies [9].

A feature of the practical implementation of the principle of separation of powers is the presence of a mechanism of checks and balances, by which it is necessary to understand the constitutional-specific competence relationships between government bodies in the context of the principle of separation of powers [8, p. 116]. The factors of checks and balances are:

- the formation of the three branches of government in various ways;
- commensurability, but inconsistencies in the terms of office of the supreme bodies of state power belonging to different branches of government;
- the presence on each lever of interaction "counterweight" - powers of a compensatory, substitute type: for example, the executive and legislative authorities have "quasi-judicial" powers, the executive power - "quasi-legislative", etc.;
- the presence of branches of power on each lever of interaction, respectively, "checks" - the possibility of participation in the mechanism of constitutional and legal coercion of one branch of power, to another, the right of veto.

According to A.A. Zdorovtsevs and K.A. Zueva, relying on the philological interpretation of the categories, "restraint" is a deterrence from any action; those. such authority due to which the authority cannot carry out certain actions. In turn, "counterweight" is what counteracts, opposes; those. such authority, (response to action, decision), which the authority has the right to implement (implement) in cases specified by law. From this it follows logically that some powers are checks, others are counterbalances [12, p. 1182].

Let us give a number of examples illustrating the presence in the Russian legal system of checks and balances aimed at resolving constitutional and legal conflicts, but not directly related to measures of constitutional and legal coercion.

So, to prevent a constitutional conflict, generated by a space, or a conflict of laws, the executive branch may be authorized by way of delegated lawmaking. Delegated lawmaking (Eng. Delegated law) - regulations issued by the government under the authority of parliament that actually possess the force of law, by way of assignment (delegation) by the parliament to the government of certain legislative powers. Such delegation is in its essence the transfer of the right to pass laws to a state body (in particular, the government), which, in accordance with its own competence, does not have such rights [13, p. 131]. The phenomenon of delegated lawmaking is known and the Russian practice of constitutional construction and is recognized as a constitutional convention of the Russian Federation. So, for example, the acts of the Government of the Russian Federation, adopted pursuant to the delegated authority of the parliament, can be checked in the procedure of the constitutional legal proceedings, since This authority is entrusted by the federal legislator to the Government of the Russian Federation due to the fact that some matter did not receive substantive regulation in the law. Such acts of the Government of the Russian Federation can be checked for their constitutionality, in order to establish whether they are not invading the limits of legislative regulation. [14, p. 1108].

As examples of the beneficial effects of delegation processes on the economy and social and political life, in particular, the American experience of massive delegation of legislative power from congress to executive power headed by President F. Roosevelt in the 1930s, during the "great depression", as well as a similar experience of the US 70s. (presidency of R. Nixon) and partly the 80s. (presidency of R. Reagan) [15].

Under delegated lawmaking, the executive authority receives "quasi-legislative" powers, which allows it not only to respond quickly to changing social legal relations, but also to fill in legislative gaps in a timely manner. In this connection, this "counterweight" is aimed at the prevention of constitutional and legal conflicts.

Further, certain "quasi-judicial" powers belong in the system of checks and balances of the legislative branch. This illustrates quite vividly the mechanism of impeachment of the President of the Russian Federation. According to Part 1 of Article 93 of the Constitution of the Russian Federation, the President of the Russian Federation may be removed from office by the Council of the Federation only on the basis of an accusation of treason or another serious crime, confirmed by the conclusion of the Supreme Court of the Russian Federation on the presence of signs of crime and the conclusion of the Constitutional Court of the Russian Federation on compliance with the established procedure for bringing the charge. In this case, the charge must be substantiated. Thus, the highest legislative body of the country should in fact qualify what was done by the President of the Russian Federation as treason or other serious crime.

Classic examples of checks and balances can be found in the legislative process of the Russian Federation:

- President's veto. If the President of the Russian Federation rejects it (restraint) within fourteen days from the moment of receipt of the federal law, then the State Duma and the Council of the Federation consider this law again in accordance with the procedure established by the Constitution of the Russian Federation. If, when reconsidered, the federal law will be approved in the previously adopted wording by a majority of at least two-thirds of the total number of members of the Federation Council and deputies of the State Duma, it must be signed by the President of the Russian Federation within seven days and promulgated;

- bills introducing or canceling taxes, exemption from paying them, issuing government loans, changing the financial obligations of the state, other bills providing for expenses covered by the federal budget can be introduced only with the conclusion of the Government of the Russian Federation (counterweight) (part 3 Article 104 of the Constitution of the Russian Federation);

- the right of legislative initiative belongs to the President of the Russian Federation, the Council of the Federation, members of the Council of the Federation, deputies of the State Duma, the Government of the Russian Federation, legislative (representative) bodies of the constituent entities of the Russian Federation. The right of legislative initiative shall also belong to the Constitutional Court of the Russian Federation and the Supreme Court of the Russian Federation on issues within their competence (Part 1 of Article 104 of the Constitution of the Russian Federation).

The mechanism similar to the President's veto is provided for in Article 7 of the US Constitution of 1787. According to information posted on the official website of the US Congress, the first veto was applied by President George Washington on April 5, 1792, and the first successful overcoming of the veto by the Congress happened on March 3, 1845 (President John Tyler's veto). At the same time, in the entire history of the US presidency, a total of 1,508 vetoes were introduced (an average of 6.7 vetoes per year) (excluding the so-called "pocket veto" - pocket veto, which cannot be overcome), and 111 of them were overcome. The fact that only 7.3% of bills, which was vetoed by the President of the United States, was able to finally take the US Congress, clearly demonstrates the effectiveness of the manifestations of checks and balances (veto).

Russian enforcement reality does not give such a vivid picture of the realization of the right of veto. According to information posted on the official website of the State Duma as of November 2017, from 2 to 7, the convocation of the State Duma of 1996. Russian President used his right of veto 61 times. The statistics of overcoming the veto are quite conditional, since the legislative process takes into account the indicator of the number of re-adopted laws (first adopted before this period and rejected (or returned to the State Duma without consideration) by the Federation Council or President of the Russian Federation, which thus comprises a number of received laws both during President veto overcoming procedure and laws returned Federation Council Federal Assembly. Over the past period from 1996 to 2017, this figure was 27 laws.

#### **4. Conclusions.**

It is necessary to conclude that the mechanism of checks and balances, "encrypted" in the principle of separation of powers, is the primary way of preventing constitutional and legal conflicts, and also serves the purpose of resolving them in such forms as the authority of various branches of state power compensatory, substitute type and the ability of one branch of government to participate in the mechanism of constitutional legal coercion in relation to another branch of government.

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