
The Concept of the Triad of Branches of State Power and Issues of its Modernisation

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Abstract:

The article analyzes approaches to forming and modernizing of Kazakh administrative and political elites. The theory of power separation is deeply studied in light of possible changes of the Constitution of the Republic of Kazakhstan, the authors make essential suggestions in order to improve the current system of legal authorities.

Key Words: *Constitutional Council, Prosecutor's Office, President, Central Election Commission, government, authorities*

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A. Establishment and Development of the Theory of Separation of Powers

The essence and functions of the state and its individual agencies (including prosecution agencies) are defined together with other factors and systems of the state, with its institutionalization, as the state is a social and legal-political formation being the main institution belonging to the legal sphere. And as we know, “an important theoretic ‘background’ of studying of problems of institutionalization of power is a classic theory of separation of powers”⁴.

1. Origins of the Theory in Ancient Times

It should be noted that this theory did not appear overnight, its origin can be traced to legal and political thought of European antiquity. Thus, ancient Greek thinker Polybius described a mechanism of state structure in Ancient Rome, where the power was divided between century and the Curiatii comitias, the Senate, consuls, praetors and others. Talking about these agencies and officials, Polybius suggested that the aim of this division was to set “the state into the position of uniform fluctuations and balance, like a ship sailing against the wind”⁵.

Polybius also suggested that the idea of allocation of state functions was well implemented in Ancient Rome: consulate represents the monarchy, activity of senate is influenced by the presence of *aristocracy*, and the assemblies present democracy. Polybius' ideas “on circulation of forms of government and on mixed government were widely used for different projects of ‘ideal’ states, including the theory of power separation”⁶.

Aristotle back in Ancient times singled out power institutions similar to modern legislative, executive and judicial branches of power: “The state is a complex thing presenting a unity of plurality, consisting of specific different dissimilar parts. Firstly, there is a legislative body (people’s assembly), the function of which is performed with participation of all freemen. The second element is administrative, or governmental, which is represented by magistracy, having its powers. And thirdly, there are judicial authorities which execute justice”⁷.

These ideas of Aristotle based on separation of functions of state agencies anticipated, according to scientist R.R. Salimnyazeva, the ideas of philosophers of the new age as to separation of powers within the system of “checks and balances”⁸.

⁴ Matukhin A. *The State within the Sphere of Right*. // Almaty, 2000, p.391.

⁵ Polybius. *The Histories in 40 Volumes*. V. I-III. Moscow, 1890-1899, p.289; Marchenko M.N. *Problems of the Theory of the State and the Law*. // Moscow, 2006, p.291.

⁶ *Philosophic Dictionary / aut.-comp.* S. Ya. Podoprigora, A. S. Podoprigora. — Edition 2 — Rostov-on-Don: Feniks, 2013, p. 331.

⁷ Aristotle. *The Athenian Constitution/ Aristotle*. — Moscow: Mysl', 1997, p. 414.

⁸ Salimnyazova R.R. *Independence of Judicial Power as a Guarantee of a State of Law*. // Kazan, 2007, p. 8.

However, according to V.S. Nersesyants, Aristotle “did not aim to analyse the nature of their interaction, the methods and forms of regulation of their relations, oppositions, balancing their relations etc., which would be important for the doctrine of power separation”⁹.

Even though we agree with critics of V.S. Nersesyants, we think that Aristotle’s achievement, who back in ancient times separated unified government power and singled out corresponding state authorities, served as a basis for establishment of integral concept of state power.

2. *Development of the Concept in Modern Age*

This concept became especially relevant before and during the Civil War in England in the 17th century and during the French Revolution of the second half of the 18th century. Particularly respected thought leader of 17th-century England was John Locke. His name is associated with development of this concept.

However, it should be taken into account that some researchers think that this is not a finalized theoretic concept, but a “doctrine of hierarchy of powers within a state created through social contract”¹⁰, where “the legislative power, if necessary, should be supreme, and all the other powers represented by some members of society flow from it and subordinate to it”¹¹.

Regardless of certain level of truth for above-mentioned position, it is worth to be noted that John Locke, however he came close to the theory of social contract, was the first one to develop the theory of constitutional parliamentary monarchy based on the idea of separation of power functions between the legislator, executor of law and subjects of external relations (federal power).

Significant development of the theory of power separation was launched by the works of outstanding French thinker Charles Montesquieu. In his works “Persian Letters”, “Considerations on the Causes of the Greatness of the Romans and their Decline”¹², “On the Spirit of the Laws”¹³ the doctrine of power separation gets formulation corresponding to modern understanding of this phenomenon.

⁹Nersesyants V.S. *Political Doctrines of Ancient Greece* // V.S. Nersesyants. – Moscow: Nauka, 1979, p. 188.

¹⁰Azarkin N.M. *Montesquieu's Doctrine on Separation of Powers*. // *Pravovedenie*. 1982, No. 1, p. 56.

¹¹John Locke. *Two Treatises of Government*. In 3 volumes. V.3. Moscow, 1988, p. 350-351.

¹²Montesquieu Ch. *Persian Letters. Considerations on the Causes of the Greatness of the Romans and their Decline* // Moscow: “Kanon-Press-C”, “Kuchkovo Pole”, 2002.

¹³Montesquieu Ch. *On the Spirit of the Laws*. // Montesquieu Charles-Louis. *Chosen Works* / Gen. edit. and proslusion by M.P. Baskin. —Moscow: Goslitizdat, 1955.

As it is correctly mentioned in Kazakhstan juridical literature, not every society generates and implements the concept of power separation. Then, when do power separation ideas arise? What situation triggers the separation into branches?

Answering those questions, it is worth to mention that Montesquieu's ideas presented that level of development of social and political processes in France when quite large amount of citizens began to actively participate in discussions of intrastate social problems, when the foundation was starts for development and implementation of principles of diversity in politics and ideology. It is exactly in that moment when "intellectual strata of society actively search for ways and methods to create reliable guarantees of rights and freedoms for nationals or citizens, undertake efforts on protection of them from possible usurpation of all the state power both by individuals and government authorities"¹⁴.

Montesquieu, being the mouthpiece of revolutionary and progressive ideas of French society, created a concept of a need for independent functioning of government institutions: "there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression"¹⁵.

It should be pointed out that some European states in times of Montesquieu actually realised the principle of independent functioning of separate bodies of governmental power. However, regardless of that, the meaning of Montesquieu's concept lies in the fact that he for the first time associated this principle with problems of democratic essence of governmental power and arbitrary treatment of people by the government. Also, he correctly notices that only formal, for show, separation of power is not enough in order to eliminate tyranny, if the power belongs in fact to a small social group or a class dominating the society: "At Venice the legislative power is in the council, the executive in the *pregadi*, and the judiciary in the *quarantia*. But the mischief is that these different tribunals are composed of magistrates all belonging to the same body; which constitutes almost one and the same power"¹⁶.

Analysing and mentioning importance of the principle of power separation, Montesquieu underlines also the importance of checks and balances system within administration of government. Talking about main origins of governance,

¹⁴See Marchenko M.N. *Issues of Theory of State and Law*. // Moscow, 2006. P. 292

¹⁵Montesquieu Ch. *On the Spirit of the Laws*. http://new.philos.msu.ru/uploads/media/SHarl_Lui_Monteske_O_DUKHE_ZAKONOV.pdf, p. 60.

¹⁶ Montesquieu Ch. *On the Spirit of the Laws*. // Montesquieu Charles-Louis. *Chosen Works* / Gen. edit. and prolusion by M.P. Baskin. – Moscow: Goslitizdat, 1955. P. 291.

Montesquieu notes: “The Legislative Assembly consists of two parts which mutually restrain each other by the right of cancellation granted to them; at this both of them are bound with executive power, which in its turn is bound with legislative power. It should seem that these three powers are to reach the state of dormancy and quiescency. However, necessary stream of events shall make them act, and they would act in unison”¹⁷.

B. The Essence of Theory of Power Separation

Thus, the main essence of studies theory and necessity of its implementation lies in mutually agreed interaction of all government bodies, nominally referable by the nature of their functions to the group of state institutions nominally separated into an individual branch of power, preventing usurpation and monopolisation of power through their legal separation.

1. Need for Reframing of Approaches to Three-Link Structure

Acknowledging great contribution of Modern Age thinkers into development of ideas on state structure, however based on conceptual principles of theory of power separation there is a need to reframe approaches to three-link structure of government power, as modern development of state authorities requires modernisation of studied concept. It is associated with the fact that classic theory of power separation was formulated 2-3 centuries ago, but development of the society led to complication of administration of government, establishment of new functions of the state – which in its turn led to establishment of the system of new state bodies. New interpretation of the doctrine on three branches of power took place in the beginning of 20th century, when prominent Chinese revolutionist Sun Yat-sen except from legislative, executive and judicial powers pointed out also existence of control and examining powers¹⁸. This issue is also brought up in the works of S.N. Sheverdyayev, according to whom “during last two centuries the scope of responsibilities of the state has greatly increased, and several states established new centres of influence based on specific nature of state construction. This was the way the ideas about forth – elected – power appeared in countries of Latin America, about examining and control powers – in Taiwan. In Russian constitutional and legal discussion independent types of power are presidential, control (implemented by activity of the Auditing Chamber), financial (performed by the Central Bank), supervisory (performed by the Prosecutor’s Office) etc.”¹⁹.

¹⁷ Montesquieu Ch. On the Spirit of the Laws, http://new.philos.msu.ru/uploads/media/SHarl_Lui_Monteske_O_DUKHE_ZAKONOV.pdf C. 61.

¹⁸ Sun Yat-sen. Program of Construction of the State, Chosen Works. Moscow, 1964, p. 435.

¹⁹ Sheverdyayev S.N. The Theory of Separation of Powers within the Context of Historic Conditions and Difficulty of Cultivation of its Meaning on Russian Grounds, In the book: Modern Problems of Organisation of Public Power. Moscow: “Yustitsinform”, 2014, p.25.

Professor S.A. Avakian goes further talking about actual operation of organisational, people's, presidential, prosecutorial, financial and banking, control powers²⁰.

Establishment of new branches of power is also discussed by Kazakhstan scholars. Thus, E.B. Abdrasulov, talking about agencies of developing control and supervision powers, mentions the Constitutional Council of the Republic of Kazakhstan, the Prosecutor's Office of the Republic of Kazakhstan and the Human-Rights Ombudsman under the President of the Republic of Kazakhstan²¹.

Together with scientific doctrine, the Constitution of many countries already acknowledges operation of such types of power as elected and control together with traditional three branches²².

2. *Origins of the Issues on Classification of Power Branches*

Why do researchers today bring up a problem of classification of government power? Why do they criticize traditional triad of power? These are not trifling questions, as our reality, legislative regulation and theories are often in contradiction to each other. Thus, according to para. 4 Article 3 of the Constitution of the Republic of Kazakhstan "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 legislative, executive and judicial branches with a system of checks and balances regulating their interaction"²³. Then, what branch of power do the Constitutional Council of the Republic of Kazakhstan, the Prosecutor's Office, the President of the Republic of Kazakhstan, the Central Election Commission and other government bodies belong to?

In order to avoid these inconsistencies, juridical literature often uses the phrase "does not belong to any branch of power". Thus, G. Sapargaliev stresses that "the Prosecutor's Office of the Republic of Kazakhstan does not belong to any branch of state power according to current Constitution and the legislation based on it", being a "specific system of government bodies independent on other authorities"²⁴.

²⁰Avakian S.A. Constitutional and Legal Problems of the Model of Power Organisation in Russian Federation // In the book: Modern Problems of Organisation of Public Power. Moscow: "Yustitsinform", 2014, p.59.

²¹Abdrasulov E.B. The Role and Meaning of the Bodies of Constitutional Control within the System of Power Division. // A collection of works of the Republic Scientific Conference organised by L.N. Gumilyov Eurasian National University: "Legal and Juridical Reform in the Republic of Kazakhstan: History and Modern Period". – Astana, 2005, p.45-46.

²²Panov A.B. The Role of Judicial Power within its Interaction with Other Branches of Power, http://www.panov.in/Otvety/Zapisi/2011/12/25_Rol_sudebnoj_vlasti_pri_vzaimodejstvii_s_drugimi_vetvami_vlasti.html

²³The Constitution of the Republic of Kazakhstan, http://online.zakon.kz/Document/?doc_id=1005029

²⁴Sapargaliev G.S. Constitutional Law of the Republic of Kazakhstan. Academic Course. // Almaty, 2006, p. 169.

However, as it was correctly mentioned in juridical literature, popular “wording ‘does not belong to any branch of power’ puts a certain state body or an official out of the system of state bodies, which is absolutely illogical”²⁵. Indeed, if we do not refer the Prosecutor’s Office to any of classic branches of power, but do not discuss establishment of a new branch to house the prosecution agencies, then it falls out of the system of government power.

Conclusions

For these reasons modern scientific doctrine should diverge from classic separation of unified state power into three branches and acknowledge that the value of the doctrine formed in times of Montesquieu lies not in establishment of a certain model of power triad, but in the essence which stipulated important principles of inadmissibility of mergence of functions of state authorities leading to usurpation, tyranny, dictatorship or other negative consequences. The theory of power separation should be in the first place regarded as a general concept for operation of state power in modern world, as a directing principle of government action “upon establishment of the structure of authorities and determination of scope of their competence”²⁶, and not as a necessity to implement a three-branch model when it does not fit into modern reality of state authorities structure. This approach eliminates all the inconsistencies, and the legislator upon acceptance of a scientific doctrine has an opportunity to change the Constitution of the Republic of Kazakhstan in the way that it not only states quantity of branches of power, but stipulates the principle of separation and the system of checks and balances.

References:

- Abdrasulov E.B. (2005), “The Role and Meaning of the Bodies of Constitutional Control within the System of Power Division”, A collection of works of the Republic Scientific Conference organised by L.N. Gumilyov Eurasian National University: “Legal and Juridical Reform in the Republic of Kazakhstan: History and Modern Period”. – Astana,
- Aristotle (1997), “The Athenian Constitution / Aristotle”, Moscow: Mysl’, 1997.

²⁵Abdrasulov E.B. The Role and Meaning of the Bodies of Constitutional Control within the System of Power Division. // A collection of works of the Republic Scientific Conference organised by L.N. Gumilyov Eurasian National University: “Legal and Juridical Reform in the Republic of Kazakhstan: History and Modern Period”. – Astana, 2005, p. 46.

²⁶Sazhina V.V. Separation of Powers: Historic Doctrine and Constitutional Practice // The Fundamental Law of Belarusian State and Society (to the 20th anniversary of adoption): materials of international research and practice conference. – Minsk: Pravo I Ekonomika, 2014, p. 261.

- Avakian S.A. (2014), "Constitutional and Legal Problems of the Model of Power Organisation in Russian Federation", In the book: *Modern Problems of Organisation of Public Power*. Moscow: "Yustitsinform".
- Azarkin N.M. (1982), "Montesquieu's Doctrine on Separation of Powers", *Pravovedenie*, No. 1, p. 56.
- Locke J. (1988), "Two Treatises of Government", In 3 volumes. V.3. Moscow.
- Marchenko M.N. (2006), "Issues of Theory of State and Law", Moscow.
- Matukhin A. (2000), "The State within the Sphere of Right", Almaty, 2000.
- Montesquieu Ch. *On the Spirit of the Laws*. // Montesquieu Charles-Louis. *Chosen Works / Gen. edit. and prulusion by M.P. Baskin*. – Moscow: Goslitizdat, 1955. http://new.philos.msu.ru/uploads/media/SHarl_Lui_Monteske_O_DUKHE_ZAKONO_V.pdf
- Montesquieu Ch. *Persian Letters* (2002), "Considerations on the Causes of the Greatness of the Romans and their Decline", Moscow: "Kanon-Press-C", "Kuchkovo Pole".
- Nersesyans V.S. (1979), "Political Doctrines of Ancient Greece", V.S. Nersesyans. – Moscow: Nauka.
- Panov A.B., "The Role of Judicial Power within its Interaction with Other Branches of Power", http://www.panov.in/Otvety/Zapisi/2011/12/25_Rol_sudebnoj_vlasti_pri_vzaimodejstvii_s_drugimi_vetvami_vlasti.html
- Philosophic Dictionary / aut.-comp. S. Ya. Podoprigora, A. S. Podoprigora*. — Edition 2 — Rostov-on-Don: Feniks, 2013.
- Polybius, "The Histories in 40 Volumes", V. I-III. Moscow, 1890-1899.
- Salimnyazova R.R. (2007), "Independence of Judicial Power as a Guarantee of a State of Law", Kazan.
- Sapargaliev G.S. (2006), "Constitutional Law of the Republic of Kazakhstan", Academic Course, Almaty.
- Sazhina V.V. (2014), "Separation of Powers: Historic Doctrine and Constitutional Practice", *The Fundamental Law of Belarusian State and Society (to the 20th anniversary of adoption): materials of international research and practice conference*. – Minsk: Pravo I Ekonomika.
- Sheverdyayev S.N. (2014), "The Theory of Separation of Powers within the Context of Historic Conditions and Difficulty of Cultivation of its Meaning on Russian Grounds", In the book: *Modern Problems of Organisation of Public Power*. Moscow: "Yustitsinform".
- Sun Yat-sen (1964), "Program of Construction of the State", *Chosen Works*. Moscow.
- The Constitution of the Republic of Kazakhstan. http://online.zakon.kz/Document/?doc_id=1005029