

## JUSTICE IN THE CONTEMPORARY WORLD

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*The article reveals the essential characteristics of justice as a specific type of state activity and identifies the main signs of justice that distinguish it from other types of state activity as well as from other types of judicial activity. The article also analyzes the categories of “justice” and “judicial power” and defines the essence of judicial control in the context of its relationship with justice. As a result of the study, the authors come to the conclusion that the most important and promising approach is to consider justice to be one of the characteristics organically inherent in the judiciary or as a related phenomenon. In this sense, justice is defined as state activity within the framework of which the judicial power is exercised. The judiciary is, accordingly, the essential expression of the functional purpose and competent certainty of justice. Turning to the issue of the signs of justice, the authors touch upon the problem of its wide and narrow understanding arising in connection with the increasing role of mediation, conciliation and arbitration as alternative forms of resolving legal conflicts, as well as in connection with vesting certain state bodies with jurisdictional powers. They come to the conclusion that, unlike in a number of foreign countries, justice in Russia can be administered only by state courts. The study of the subject area of justice related to the situation of legal conflict is also of considerable interest. In this context, the analysis of the concept of “legal conflict” and the proposed differentiation of such conflicts into types with the subsequent study of each of them is quite justified. Having studied justice as a category, which makes it possible to reveal the content and legal essence of this type of state activity, the authors define this concept in one universal definition.*

**Keywords:** justice; judicial authority; legal conflict; fairness; jurisdiction; judicial control.



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## Introduction

The main goal of legal and judicial reforms in Russia and abroad is to create an effective state. In such a state an important role is undoubtedly played by justice designed to ensure the sustainability of the judiciary and the adequate needs of society with a focus on the individual person, with his or her rights and freedoms, and democracy, the separation of powers and parliamentarism are recognized as basic political values.

Unfortunately, evaluating the results of the implementation of the constitutional ideas, principles and norms underpinning the contemporary model of justice in Russia, we have to state that only a virtual illusion of its effectiveness and full-fledged provision of human rights and freedoms has been formed so far. In fact, we are far from meeting the set goals – the gap between the ideal of justice and its practical implementation is very tangible. It seems that the more the judicial power and the judicial system are reformed, the more public complaints and societal distrust they cause. Numerous negative statements about justice in the mass media sometimes use the most unexpected combinations of the notion, such as “rusted justice” and “tariff for justice.”

However, this situation is not unique to Russia. Some foreign countries are also concerned about the current state of justice.

For example, the United States recognizes the inability of its system of justice to preserve the social fabric that binds the nation together. The state has invested



enormous amounts of human and monetary capital in building the system of justice in the country. However, there is great doubt that this system can achieve the desired results, namely a reduced crime rate and an increased respect for the law.<sup>1</sup> As a result, every element of the U.S. justice system is questioned: from how it is organized to the techniques used to prevent crime, to the very philosophy upon which it is based.

Therefore, when considering the prospects for the development and further implementation of judicial reform by the Russian state, it is exceedingly important to explain the idea of the usefulness, reasonableness and practical importance of special scientific studies devoted to the analysis of theoretical problems of justice, as this is an essential generator of not only constitutional legal ideology and culture, but also individual, social, professional constitutional ideology. This subject matter has great research potential and allows moving closer to the ideal national model of “good justice” which will function in a constitutional mode ensuring real protection of the foundations of the constitutional system and human and civil rights and freedoms.

Moreover, the concept of “good justice” for citizens may differ from the concept of “good justice” for the judges themselves and for court staff. Thus, according to a survey conducted by Swiss researchers among judicial governors and judges of Switzerland, the indicators of “good justice” for judges are: (1) speed of justice; (2) focus on the interests of citizens; (3) openness; (4) independence from any external influence and political pressure; (5) transparency; (6) humanism; (7) proximity to people; and (8) individual approach.

For judicial governors, however, the criteria of humanity and humanism are not so significant. According to them, indicators of “good justice” are: (1) fairness; (2) accountability of justice to society; and (3) reliability.<sup>2</sup>

In any case, the model of “good justice” should reflect not only the legal and social reality, but also the historically established understanding of this legal phenomenon formed under the influence of objective factors of the national state and legal development, as well as traditions determining the mentality of the population of a country, their attitudes towards the law, the state and public institutions. At the same time, the principles of justice, based on three fundamental concepts, remain unchanged: do not offend anyone, give a person his due and do not take away from a person what belongs to him.<sup>3</sup>

However, coming to such a conclusion is not enough to form a correct understanding of justice. It is necessary to take into account that this concept is multidimensional and theoretically inexhaustible. The versatility of this legal category

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<sup>1</sup> Barbara Jordan, *Justice*, 5 Texas Journal of Women and the Law 175 (1996).

<sup>2</sup> Yves Emery & Lorenzo Gennaro De Santis, *What Kind of Justice Today? Expectations of “Good Justice”, Convergences and Divergences Between Managerial and Judicial Actors and How They Fit Within Management-Oriented Values*, 6(1) International Journal for Court Administration 63, 68–70 (2014).

<sup>3</sup> Dorr Kuizema, *Justice*, 12 Central Law Journal 208 (2012).



is reflected in the various characteristics of justice. For example, there is conciliatory justice and restorative justice which, as is well known, go far beyond the bounds of judicial power and legal proceedings although they remain under the control of the court. Some concepts, having nothing to do with the implementation of state power, or rather its judicial branch, are sometimes associated with the definition of “justice.” We can cite as an example preventative (preventive) justice carried out by a notary, or alternative justice carried out by arbitration courts.

However, the concept of “justice” in a strictly legal meaning is different – it is considered to be a legal phenomenon that is a complex system having specific goals and objectives, functions, forms of their implementation, structure and regulation that correspond to a certain stage of a society’s development. And the more developed a society is, the more complicated the mechanism of the implementation of justice is, the more multidimensional this concept becomes. In this connection it seems natural that with the development of society and its state institutions there will appear a more complex judicial system, structure of the judiciary and procedural rules the courts are guided by. And the judiciary, consisting of people directly administering justice, will be different – it will be better.

### **1. Justice as a Multidimensional and Meaningful Category**

As one eminent jurist put it, justice is the main interest of man on earth. In foreign legal doctrine justice is often defined as something incidental to other ends of our existence that implies justness, right and adjusted relations of man.<sup>4</sup>

In Russia, the formation of scientific views of justice in its modern sense was greatly influenced by the adoption in 1991 of the Concept of Judicial Reform designed to create a powerful and independent judiciary based on the constitutional principle of separation of powers, and then in 1993 by the Constitution of the Russian Federation which proclaimed the idea of forming a legal state and declared justice as one of the most important means of protecting the rights and freedoms of man and citizen. This gave rise to the fruitful theoretical work of representatives of legal science motivating them to define new approaches to the tasks and content of justice. In recent years, significant steps in this direction have been made both in terms of the general theory of law, and in terms of special legal sciences, first of all, constitutional law, criminal procedural law and civil procedural law.

Nevertheless, the general concept of justice is still debatable. Despite the active use of the term “justice” in Russian regulatory legal acts, there is no definition of the term in the acts. For example, Article 118 of the Constitution of the Russian Federation contains only one short formula:

Justice in the Russian Federation shall be administered only by court.

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<sup>4</sup> Dorr Kuizema, *Justice*, 12 Central Law Journal 208 (2012).



However, in order to understand the legal meaning of the term, it is necessary to analyze a whole series of constitutional norms that reinforce the basic principles of judicial organization and legal proceedings. It should be noted that this approach to the definition of justice is characteristic not only of the Constitution of Russia. It is found in the constitutions of many foreign states which neither mention nor regulate justice issues, but contain rules relating to the organization of the court system, the procedure for appointing or electing judges, legal proceedings and particular procedural rights of an individual. Thus, in the German Constitution of 1949 there is a special section called "Justice" (*Rechtsprechung*) (Sec. IX). However, the concept of justice itself is not defined and is not actually used there, and the focus is on the judiciary (*rechtsprechende*), which refers to the court system consisting of the Federal Constitutional Court, federal courts, land courts (Arts. 92–94) and specialized courts in the field of general, administrative, financial, labor and social justice (Art. 95). The section also deals with guarantees of impartial and proper administration of justice and mentions such of them as the independence of judges and their subordination only to the law (Art. 97). It also reveals the main elements of justice in the context of the principles of justice and the general concepts of the procedure. In particular, the articles of this section contain provisions on the prohibition of the death penalty (Art. 102), the inadmissibility of double punishment for the same act (Art. 103), the necessity of restricting freedom only on the basis of law and the maximum periods of pre-charge detention (Art. 104). The section proclaims the equality of all German residents before the law and provides their right to judicial protection, including against the arbitrary exercise of state authority, the right to be heard in court and the presumption of innocence.

Unlike the Constitution of Germany, the constitutions of many other European countries do not single out the issues of justice in a special section, rather they have a section on judicial authority. For example, Section VI of the Constitution of Spain of 1978<sup>5</sup> is called "Judicial Power" and is devoted to justice and judicial power. It stipulates that the people are the bearer of justice, and the judicial power is exercised on behalf of the King (part 1 of Art. 117). It also establishes that judges are independent, irremovable, accountable and subject only to the law (part 2 of Art. 117). The further depiction of the judiciary is given from the point of view of the descriptive characteristics of the main principles of the judiciary, the governing body of the judiciary (General Council of the Judiciary) and the order of its formation, the legal status of the Supreme Court as the highest court, the relationship of the prosecutor's office with the judicial authorities and the requirements with respect to the judges.

Section VIII "The Judicial Power" (*l'a utorité judiciaire*) of the Constitution of France of 1958 does not mention justice at all and the main focus is on state support of this activity, the judiciary, which is proclaimed as a guardian of personal freedom (Art. 66).

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<sup>5</sup> Constitution of Spain (1978) (Jan. 16, 2019), available at [http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist\\_Normas/Norm/const\\_espa\\_texto\\_ingles\\_0.pdf](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf).



According to Article 64 of the French Constitution, the President of the Republic is the guarantor of the independence of the judiciary and heads the highest judicial authority (the Supreme Council of Magistracy), which includes the Minister of Justice (as his deputy) and nine members from among eminent scholars in the field of law (chosen by the President), one representative from the offices of the Senate and the National Assembly, as well as from the Council of State of France (Art. 65). In general, only three articles of the French Constitution are devoted to the judiciary.

Not much more attention is paid to these issues in the Norwegian Constitution of 1814.<sup>6</sup> Section D “On Judicial Power” (*dømmendemakt*) includes five articles. This section starts with a reference to a specialized judicial body called the State Court (Impeachment Court), which deals exclusively with cases initiated by the Odelsting (one of the departments of the legislative body Storting) against members of the State Council, the Supreme Court or the Storting for committing crimes during the performance of their official duties (Art. 86). Subsequent articles of this section define the basis of the legal status of the Supreme Court of Norway as the highest court. The most important provisions on justice in the context of legal proceedings are included in Section E “General Regulations” of the Constitution of Norway. The section contains the rule that no one can be convicted otherwise than by law or punished otherwise than by a court; torture during interrogation can never take place (para. 96).

As we see, in the Basic Laws of France and Norway there are actually no norms defining the general principles of legal proceedings, the structure and activities of courts, the legal status of judges and the relationship of the court and other state bodies.

In comparison with the constitutions of the states mentioned above, the Constitution of Turkey of 1982<sup>7</sup> differs positively owing to the fact that it contains the most informative Section 3 “Judicial Power” (*yargı*). Among the fundamental factors of justice it specifies the independence of the courts, the material security of judges, professionalism, trial publicity and the validity of court decisions. And yet the vast majority of the rules in this section are devoted to the judicial structure. It regulates in detail the status of the higher courts and, above all, the Constitutional Court, its structure, functions and powers (Arts. 146–153). As for the other issues of justice, in particular, the rules of the court activities and judicial proceedings, they are not reflected in the Turkish Constitution and are regulated by special laws.

The Constitution of China of 1982 is of particular interest from the point of view of the legal regulation of justice. China rejects the principle of separation of powers, and all the power in the state belongs to the parliament elected by the people on the basis of democratic principles. For all that, however, Article 126 of the Chinese Constitution stipulates that the people’s courts shall administer justice independently, without

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<sup>6</sup> Kongeriket Norges Grunnlov (Jan. 16, 2019), available at <http://grunnloven.lovdata.no>.

<sup>7</sup> Türkiye Cumhuriyeti Anayasası (Jan. 16, 2019), available at <http://www.anayasa.gen.tr/1982ay.htm>.



interference by administrative bodies, public organizations or individuals. This is the only article of the Constitution that mentions justice. In the other articles of the Constitution devoted to the structure and activities of the people's courts, nothing is said about justice or the judiciary, and these terms are not used. However, neither this nor any other section of the Chinese Constitution contains norms that would determine the procedural principles of justice. The only exception is the principle of open justice provided for in Article 125 of the Constitution.

The U.S. Constitution of 1787<sup>8</sup> demonstrates a different approach to the issues of justice. It does not have a special section on justice and/or the judiciary. However, it does have rules relating to the characteristics of justice. Thus, Section 2 of Article 3 of the Constitution defines the subject area of justice which includes all cases based on law and equity. The same article provides guarantees for the impartial and correct administration of justice including the irrevocability of judges and their material security. A significant part of the U.S. Constitution is devoted to the rules of the basic principles of legal proceedings, such as: (1) trial of all crimes by jury; (2) the possibility of jury trial in civil cases when the amount sought is greater than \$20; (3) the inadmissibility of double punishment for the same offense; (4) the right not to testify against oneself; and (5) the inadmissibility of imprisonment without due process.

Thus, in the constitutions of countries both of the Romano-Germanic and of the Anglo-Saxon legal systems justice is viewed as something obvious and not entailing a separate constitutional regulation.

Nevertheless, the absence of a legislative definition of justice in the constitution and regulatory legal acts of Russia and other countries is compensated for by a huge amount of formulations of this concept in scientific studies.

At the same time, the main approaches to the concept of justice formed in Russian legal doctrine differ significantly from the understanding of this legal category in other countries. In foreign legal systems, the concept of "justice" is usually considered from two aspects: social and legal. It is believed that social justice refers to the distribution of benefits and burdens in society by social institutions. Legal justice, however, concerns the creation of legal norms and their enforcement through sanctions that include the compensation of injury or the imposition of punishment.<sup>9</sup> But in this latter sense justice is not seen as retribution for evil, nor as punishment, but as the subordination of the conduct of the individual or the practice of his life to the principles of law. For example, D. Kuizema notes that justice is something that is universally recognized and must be administered in the life circumstances in which a person has to live.<sup>10</sup> U.J. Pak also points out that from the perspective of the right, justice must be considered to be taking the correct action.

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<sup>8</sup> Constitution of the United States (Jan. 16, 2019), available at <http://constitutionus.com>.

<sup>9</sup> Gray Cavender, *Justice, Sanctioning and the Justice Model*, 22(2) *Criminology* 203 (1984).

<sup>10</sup> Kuizema 2012.



Here, justice is accompanied by the duty to obey the general rules or procedures guiding our actions.<sup>11</sup>

It is emphasized that if justice is to be done among men, the right rules for just relations must be found and administered. Therefore, the concept of justice is most often associated with the concept of justness. These concepts are even considered to be identical. Moreover, we encounter the statement that justice is law and law is justice. In this sense, scholars associate the concepts of “law” and “justice” with the activities of the courts. For example, R. Pound in 1912 drew attention to the fact that courts and law exist to administer justice.<sup>12</sup> Obviously, in this case they are talking about legal justice.

At the same time, it is recognized that the term “justice” is associated not just with the law. It may also refer to various forms or manifestations of justice (for example, economic justice, moral justice, political justice, etc.). Thus, justice itself in the broad sense of the word can be thought of apart from the activities of courts.<sup>13</sup> Justice in its encompassing sense is sometimes also translated as “righteousness,” while “law” frequently retains a more strictly legal or forensic sense.

Hence, in foreign legal doctrine the concept of justice is interpreted quite broadly and correlates with such concepts as law and justice but is not identified with court activities. Moreover, the activity approach to the characterization of justice is not used here at all. Therefore, there is a gap between the theory of justice and the judicial institution. This gap could be overcome by the concept of judicial justice that fits the judicial institution.

There is a different interpretation of the concept of justice in Russian jurisprudence. A review of the domestic legal literature of the last decade allows us to identify five main approaches to the concept of justice.

Firstly, justice is defined as one of the forms of public administration in its broad sense, which is “governance of a society carried out by the state as a whole through all three branches of government.”

Secondly, from the standpoint of “legism,” justice is viewed as an independent, objectively necessary type of state activity.

Thirdly, justice is analyzed in the context of judicial law which presupposes the integration of judicial activities regulated by criminal, civil and other branches of procedural law in one concept of “justice.”

Fourthly, justice is studied in the context of its relationship with the judiciary.

And finally, justice is treated as one of the types of services provided by the state.

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<sup>11</sup> Un Jong Pak, *Judicial Justice: From Procedural Justice to Communicative Justice*, 16(1) Journal of Korean Law 147, 150 (2016).

<sup>12</sup> Roscoe Pound, *Social Justice and Legal Justice*, 75(20) Central Law Journal 455 (1912).

<sup>13</sup> Lourens M. du Plessis, *Conceptualising “Law” and “Justice” (1): “Law”, “Justice” and “Legal Justice” (Theoretical Reflections)*, 2 Stellenbosch Law Review 279 (1992).



Undoubtedly, each of these approaches brings a certain amount of clarity to the issue of the essence of justice and emphasizes certain aspects of this phenomenon. At the same time, the most important and promising approach is to consider justice to be one of the characteristics inherent in the judiciary or to be a related phenomenon.

Research on the judiciary within the framework of the theory of law, constitutional law, criminal procedural law and civil procedural law had a significant influence on the formation of scientific thought in this field in Russia. The range of opinions and definitions of justice in them is quite wide and diverse. Thus, recognizing justice and the judiciary as close but not identical concepts, many researchers assume that justice is a function of the judiciary, and the latter is based on the idea of resolving social contradictions and achieving social compromise based on law.

There is also an opinion that justice is a form of realization of the judicial power. In particular, according to one point of view, the only function of the judiciary as a branch of state power is judicial protection of the rights and freedoms of a person and a citizen, and justice is a form of realization of judicial authority.

Another point of view states that justice should be viewed rather not as a form, but as the legal content of the judiciary.

Some scholars believe that in its substantive purpose the judiciary is a specific form of state activity institutionalized as a justice system. Thus, the concepts of "justice" and "judicial authority" can be considered to be equivalent.

It is obvious that an adequate interpretation of justice in relation to the judiciary is hampered by an insufficient level of theoretical elaboration and the relative novelty of the very concept of "judicial authority," which first appeared only in the Declaration of 12 June 1990 "On State Sovereignty of the RSFSR," as well as by the lack of clarity as to what should be understood by its functions and forms of implementation.

Without going into a detailed study of this issue, we would like to cite a successful (in our opinion) definition of the functions of the judiciary formulated by S. Zagainova. She proposes to understand the main activities of judicial bodies as the functions of the judiciary:

This is the range of activities, the duties that the state assigns to this power.<sup>14</sup>

Reasoning in this way, Zagainova argues for the viewpoint that justice is the main function of the judiciary, and she gives a thorough critical assessment of the position of those scholars who put judicial control beyond the bounds of justice, regarding it as an independent function of the judiciary. It is interesting to mention that Zagainova expresses the idea of justice as an external function of the judiciary together with its intra-system function – the administration of justice.

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<sup>14</sup> Загайнова С.К. Судебные акты в механизме реализации судебной власти в гражданском и арбитражном процессе [Svetlana K. Zagainova, *Judicial Acts in the Mechanism of Implementation of Judicial Power in Civil and Arbitration Proceedings*] 34 (Moscow: Wolters Kluwer, 2008).



One may agree or disagree with the classification of the functions of the judiciary proposed in this research, but one thing, in our opinion, is indisputable: justice is its most important function, and through this function the judiciary implements its mission in society. Thus, the judicial power is exercised through justice and is the essential expression of its functional purpose and competent certainty.

As for one more issue, touched upon by Zagainova and connected with the relationship between justice and the other functions of the judiciary, as well as with considering judicial control to be one of them, the answer is not so obvious. In contemporary Russian legal doctrine two diametrically opposed approaches to this issue have been formed. Some scholars believe that the function of the administration of justice is “the dominant one, but not the only function of the judiciary,” and put judicial control beyond the bounds of justice. Others believe that the judicial power is exercised only through the administration of justice and that all the activities of the court, carried out in accordance with the legal procedure established by law, are nothing more than justice which includes judicial control. However, all the authors who have studied both general theoretical and specific issues of regulation or practical implementation of judicial control unanimously distinguish the following three types: constitutional or judicial constitutional control; judicial control over the legality of actions (inaction) of public authorities exercised by courts of general jurisdiction and arbitration courts; and judicial control exercised at the pre-trial stages of criminal proceedings in the manner prescribed by the Code of Criminal Procedure of the Russian Federation, including cases of judicial authorization of preventive measures or other measures of criminal procedural coercion, as well as investigative actions restricting constitutional rights and freedoms of citizens. In addition, within the framework of the contemporary model of legal regulation, some authors single out preliminary judicial control exercised by courts of general jurisdiction in administrative proceedings in cases of judicial authorization of administrative measures aiming at the restriction of the rights, freedoms and legitimate interests of individuals.<sup>15</sup>

At the same time, the opinions of scholars differ when it comes to the essence of universally recognized types of judicial control in relation to justice. For example, some scholars, when speaking of the activities of the court in criminal proceedings, claim that if such an activity is connected with a dispute or a conflict, then it is a question of justice. But if there is no conflict, and there is only court activity to render the decisions of the investigating authorities or the prosecutor valid through delivering an appropriate court judgment, then this type of judicial activity does not apply to justice.

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<sup>15</sup> Зеленцов А.Б. Судебное санкционирование как институт административно-процессуального права // Административное право и процесс. 2017. № 3. С. 57–63 [Alexander B. Zelentsov, *Judicial Authorization as an Institute of Administrative Procedure Law*, 3 Administrative Law and Procedure 57 (2017)].



One more viewpoint is also worth mentioning. Analyzing the problems of judicial control at the pre-trial stages of criminal proceedings, Zagainova considers it to be only an element of justice. This position is based on the fact that in this situation the judge does not resolve the case as a whole. There are other approaches to the point: some authors call judicial control a special kind of justice, others an integral part of justice, and a number of scholars consider it to be a form of justice or one of the tasks of justice.

Many administrative law scholars dealing with the issues of administrative justice adhere to the same position. In their research, judicial control exercised in the course of administrative proceedings of administrative cases is often defined as administrative justice,<sup>16</sup> which means that it is identified with it.

In modern Russian literature there is another proposition according to which justice is a function of the judiciary and judicial control is its authority, a type or a form of realization.

At the same time, it is obvious that separation of judicial control from justice and attributing it to an independent function of the judiciary or to a special form of its implementation is, in no way, justified. The artificial opposition of these legal phenomena is devoid of both theoretical and legal grounds. At the same time it would be incorrect to speak of the identity of these concepts, as well as to assert that judicial control is one of the tasks of justice or a form of its implementation, as some authors believe.

As we see it, justice absorbs judicial control, which is included in its content and is its particular manifestation. For example, constitutional control exercised by the Constitutional Court of the Russian Federation and constitutional (statutory) courts of the constituent entities of the Russian Federation, as well as judicial control over the legality of actions (inaction) and decisions of public authorities, exercised by courts of general jurisdiction and arbitration courts, are the contents of constitutional and administrative justice, respectively, which are implemented in the form of constitutional and administrative proceedings.

The same meaning inherent in the concept of "justice" in the context of its relationship with judicial control is applicable to criminal proceedings. Thus, we are convinced that the court, when considering cases related to the exercise of judicial control, implements exclusively the function of administering justice, but does not engage in any other procedural activity in which an independent function of the judiciary, distinct from justice, is manifested.

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<sup>16</sup> See Зеленцов А.Б. Административное правосудие: проблема теоретического определения понятия // Вестник Российского университета дружбы народов. Серия: Юридические науки. 2002. № 2. С. 36–44 [Alexander B. Zelentsov, *Administrative Justice: the Problem of the Theoretical Definition of the Concept*, 2 Bulletin of the Peoples' Friendship University of Russia. Series: Legal Sciences 36 (2002)].



## 2. Essential Characteristics of Justice as a Type of State Activity

Analysis of the issue of the relationship of justice with the judiciary and judicial control highlights only a few facets of this legal phenomenon. Therefore, adherents of various scientific concepts gradually come to the idea of the need for a common understanding of justice, revealing it, on the one hand, as a function of the judiciary and, on the other hand, as a type of state activity in which the judicial power is actually implemented.

In general, the study of justice as a type of state activity has a solid tradition in domestic jurisprudence. This approach to the understanding of justice was formed in pre-revolutionary Russia and was most characteristic of the Soviet period. Nowadays, the definition of justice through the activities of the courts is also widespread in the legal literature. At the same time, we can clearly see two trends in the writings of modern scientists.

The first trend is widely represented in the textbooks on the structure and activities of law enforcement agencies and presumes that justice is understood as a type of law enforcement activity of the court in order to ensure legality. The second trend is to consider justice as a type of court enforcement.

It is necessary to emphasize that the discussion of this topic reflects the specifics of the Russian concept of justice. Foreign legal doctrine did not attempt to consider this concept from the perspective of court activities, nor did it raise the question of whether such activities are law enforcement. And this is not surprising. According to the general opinion of foreign scholars, the court is not a law enforcement body, and law enforcement is carried out by the police.

As for Russian researchers, the decision as to whether justice belongs to law enforcement activity depends on the meaning which certain authors put in the concept of its functions.

At present, it is firmly established that the functions of justice are derived from the functions of the state and law, and their content is based on the functions of law and is determined by the purpose (tasks) of the judiciary. The functions of justice are considered to be the main directions of its activity, a set of procedural and organizational duties to be performed by special subjects, carriers of the judiciary, to perform the tasks assigned to them and to achieve their goals.

Thus, the functions of justice do not coincide with its goals. The differences between them were very clearly showed by researcher A. Tsikhotsky who wrote that the goals of justice characterize the requirements for the court's activities, and the function is only its social role determined by the existence of law, legislation and the law enforcement function of the state.<sup>17</sup> In other words, the category "goal" answers

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<sup>17</sup> Цихоцкий А.В. Теоретические проблемы эффективности правосудия по гражданским делам [Anatoly V. Tsikhotsky, *Theoretical Problems of the Effectiveness of Justice in Civil Cases*] 62 (Novosibirsk: Nauka, 1997).



the question of what the judicial activity is aimed at, and the category “function” the question of the extent to which it is carried out.

The ultimate goal of justice is quite broad – it is the protection of the rights and freedoms of a person and a citizen. This goal of justice corresponds to the human rights function of the state, which is traditionally distinguished together with its law enforcement function. Therefore, if we correlate the goal of justice with this function, we can conclude that justice performs a crucial function – human rights function – which is based on the law enforcement activity of the court aimed at protecting and restoring violated rights. And this is where justice differs from law enforcement, which is based on the protection of law and order.

Thus, the human rights activities of the court are not identical to the special law enforcement function, which is associated with the identification and elimination of offenses. Moreover, under the current regulation in Russia, the assignment of the court to law enforcement agencies does not comply with the law, by virtue of which these bodies are an integral part of the executive branch. That is why we cannot obviously recognize the definition of justice as a type of law enforcement activity of the state as an admissible one. The peculiarity of the activities carried out by the court is so great that it does not fit into the traditional concept of a law enforcement function, which the court performs only indirectly. A different approach would contradict the modern concept of the judiciary as a tool not only for punishing offenses, but also for protecting and restoring human rights, including those violated by the state itself, its bodies and officials.

The latter statement leads to the definition of justice as a variety of law enforcement activities of the court, as a result of which the conflict of certain legal relationships is resolved, which, in its turn, results in a regulatory impact on the existing legal order, protection or restoration of the right and, ultimately, implementation of constitutional provisions on human rights and freedoms.

Such a statement, as a matter of principle, is true. But it still needs one clarification. Justice, by its nature, is not just law enforcement, but jurisdictional activity. It should be mentioned that jurisdiction (from the Latin *jurisdictio* – legal proceedings, court hearing) is traditionally understood as the authority of judges and courts only, involving the trial and resolution of cases within their competence and the enforcement of decisions taken, since the literal translation of *jurisdictio* means “legal speaking,” the act of “proclaiming the right by an authority empowered to judge.” Therefore, throughout the world, jurisdiction is traditionally identified with the administration of justice. However, in modern domestic doctrine jurisdiction is interpreted more widely than justice and refers to any activity of the state and non-state bodies in the application of the law. In this respect, the idea expressed by one of the researchers is quite significant. Professor S. Alekseev claims that justice is the highest jurisdictional activity carried out by the courts, and they are the only authorities in the state empowered by law “to judge the law” in relation to a particular



legal matter, that is, to determine the legality or illegality of facts and make legally final decisions on them.<sup>18</sup> The statement of another Russian researcher, D. Tumanov, who called justice the king of law enforcement, is worth mentioning as well.<sup>19</sup>

Thus, speaking of this concept in its most general sense, we can note that justice is the law-enforcement, jurisdictional litigation activity of the court that restores and protects violated legal interests and rights. Is it possible, however, to consider that this definition reflects all the essential characteristics of justice? Obviously, it is not, because it does not disclose the scope and content of this concept.

As a matter of fact, we have already touched upon the issue of the content of justice when we talked about judicial control in the context of its relationship with justice and the judiciary.

This, however, does not cover the essence of the problem. As the analysis of the legal literature shows, the viewpoints of scientists are polarized. Some consider justice to be all the court activities carried out in accordance with the procedure established by law. Others believe that when considering certain categories of cases (for example, civil cases in summary proceedings, without a court hearing), the court exercises not justice, but a certain judicial function similar to notary activity, or a judicial management (administrative) function. It should still be recognized that nowadays more and more scientists exclude the possibility of attributing some court proceedings to the mechanism of administration of justice, and other court proceedings only to the ordinary procedural activities of the court, believing that it undermines the very essence of the judiciary.

This, in our opinion, is an answer to the first of the above questions – the question of the content of justice which, in its most general form, should be recognized as the consideration by the court of all cases requiring resolution on the basis of the criteria of legality and fairness.

The answer to the second question – regarding the scope of the concept of justice – is connected with the clarification of the issue of which kind of court activity constitutes justice itself, at what procedural moment it begins and when it ends.

Despite the fact that this issue has attracted the attention of many researchers for a long time, different authors have different views on it. In particular, a number of scholars continue to identify justice with the court activity on consideration and resolution of cases only in the first instance and believe that the function of justice is not carried out at subsequent stages of the proceedings. Some researchers believe that justice, in the proper sense of the word, covers a relatively narrow sphere of

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<sup>18</sup> Алексеев С.С. Собрание сочинений в 10 томах. Т. 8: Учебники и учебные пособия [Sergey S. Alekseev, *Collection of Works in 10 Volumes. Vol. 8: Textbooks and Tutorials*] 223 (Moscow: Statut, 2010).

<sup>19</sup> Туманов Д.А. Еще раз о том, является ли судебный приказ актом правосудия, или Размышления о сущности правосудия // Законы России: опыт, анализ, практика. 2012. № 9. С. 16 [Dmitry A. Tumanov, *Once Again on Whether the Court Order Is an Act of Justice or Reflection on the Essence of Justice*, 6 Laws of Russia 13, 16 (2016)].



the exercise of the court power, and that it is adjudication in which this power is implemented; as for making so-called intermediate decisions, it does not match the functions of justice. There is also an opinion that justice covers the whole process of consideration of a case in court. In addition, some researchers believe that justice coincides with legal proceedings.

Logical analysis of the above ideas does not indicate their impeccability. In our opinion, it would be equally incorrect both to expand the scope of the concept of justice identifying it with legal proceedings and to restrict it only to making judicial decisions. Such definitions are unlikely to provide the necessary clarity.

We believe that nowadays there is hardly any need to prove that the concepts of “justice” and “judicial proceedings” are not equivalent. Justice is narrower than legal proceedings, because the latter includes – in addition to the activities of the court to resolve, for example, a criminal case – pre-trial proceedings, that is, the actions of the bodies of inquiry, preliminary investigation and prosecutors.

The exhaustive argument of this opinion was given by one of the researchers of this issue, A. Tsikhotsky, who devoted a number of provisions of his monograph to it. Analyzing the correlation of the above categories, he reasonably proceeded from the need to differentiate them according to the subject criterion, pointing out that the subject of justice is the court, but the subjects of the proceedings, in addition to the court, are other participants.<sup>20</sup> On this basis Tsikhotsky concluded that justice, being the supporting structure of legal proceedings, can be carried out only through the actions of the participants of the latter, although justice itself does not cover these actions.

Completely sharing the above position, we would like to emphasize that it, to a certain extent, determines the object of study. The study of the issues of legal proceedings will require an analysis of the actions of each of its participants, whereas the study of the issues of justice will make us focus on the activities of the court, touching upon the activities of the participants in the judicial proceedings only in terms of their impact on the administration of justice.

Objecting to the opinion of those scholars who identify justice with legal proceedings, we, nevertheless, cannot agree that the activities on the administration of justice are limited only to the delivery of judicial acts resolving the case on the merits. It seems that the most correct and precise definition of the scope of this concept was given by the Russian scholars who proposed to attribute to justice everything that is resolved and considered by the judicial authorities on the basis of the rules on jurisdiction established by law. The cited opinion is of fundamental importance because it provides a clear understanding of the fact that the judicial power is exercised only through the administration of justice, and, in this sense, the

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<sup>20</sup> Цихоцкий А.В. Теоретические проблемы эффективности правосудия по гражданским делам: дис. ... докт. юрид. наук [Anatoly V. Tsikhotsky, *Theoretical Problems of the Effectiveness of Justice in Civil Cases: Doctor in Law Dissertation*] 155 (Moscow, 2007).



court itself cannot do anything else. The other functions of the judiciary are auxiliary, and the judicial power is not directly implemented through them. In other words, the concept of justice should cover all judicial activity on the application of the norms of substantive and procedural law.

The concept of “administering justice” is, consequently, broader than the concept of “resolving a case on the merits.” Some researchers pointed to this fact as far back as the 1960s, claiming that administering justice is a court activity which includes a whole range of legal procedures for the establishment and study of the actual circumstances of the case during the court trial, legal qualification of these circumstances and making legal conclusions arising from these procedures. This point of view seems very convincing and remains relevant today. At the same time, it is impossible to agree with this viewpoint, that only in the administrative hearing the court administers justice and that, in this connection, such actions of the judge as the termination of the proceedings at the stage of preparing the case for trial are not justice. However, as we see it, such activity of a judge is nothing else but justice. If a judge examines and evaluates, even preliminarily, the evidence, finds out and establishes the facts, applies the law and makes a binding decision, then, no matter at what stage of the proceedings all these legal actions are performed and expressed in judicial acts, the judge exercises specific elements of justice.

We can make a number of general conclusions based on the foregoing:

1. Justice is not identical with the judiciary. Justice, in terms of its purpose, is a state activity within the framework of which the judiciary is exercised. The judiciary is, accordingly, the essential expression of the functional purpose and competent certainty of justice.

2. The court, unlike other state bodies, is not an ordinary law enforcement body, but a special human rights body. The main function of justice, therefore, is the function of human rights protection.

3. Justice now covers a wide variety of legal conflicts that require resolution on the basis of such criteria as legality and fairness, and administrative offenses are among them. The basis of the control activities of the court in constitutional and criminal proceedings, as well as in proceedings arising from public relations, and in proceedings on administrative offenses, is also a legal conflict which requires attributing this activity of the court to justice.

The court, therefore, always acts as an organ of justice, regardless of the category of cases it resolves.

### **3. The Concept and Signs of Justice**

Considering justice to be a category that allows revealing the scope, content and legal essence of this type of state activity, however, it is necessary to emphasize the objective complexity of defining this concept in one universal definition.



In this regard, it is advisable to use a different approach, focusing, first of all, on the signs of justice allowing to distinguish it, on the one hand, from other types of state activity and, on the other hand, from other activities of the court.

### **3.1. The Legal Content of the Feature “Administration of Justice Only by a Court”**

Only a court can be a subject of justice in the Russian Federation, and not just any court, but only a state court (para. 1 of Art. 118 of the Constitution of the Russian Federation). This means that no other state bodies or non-state organizations have the right to administer justice. The judiciary has a monopoly on this type of activity. Thereby, a constitutional ban on any redistribution of the powers of the judiciary is established.

It should be noted that a similar approach is characteristic of the legislation of many foreign countries. For example, the Constitution of Spain of 1978, which was drafted in politically unstable conditions and was aimed to form an open and democratic regime, including the judicial system,<sup>21</sup> stipulates that the exercise of judicial power at all stages of the administration of justice falls exclusively within the competence of judges and the courts (part 3 of Art. 117). Moreover, by virtue of part 6 of Article 117 of the Constitution, the creation of emergency courts is prohibited.

A similar rule exists in the Constitution of Germany of 1949, which establishes that emergency courts are not allowed and no one can be removed from the jurisdiction of the lawful judge (Art. 101). The Constitution of Belgium of 1997<sup>22</sup> also stipulates no emergency commissions or courts can be established under any name (Art. 146).

However, in some foreign countries the administration of justice by quasi-judicial and other institutions that are not part of the judicial system of the country is permitted. Such rules exist, for example, in the constitutions of the Netherlands, Portugal and Ecuador.

Chapter VI “Administration of Justice” of the Constitution of the Netherlands of 1983<sup>23</sup> stipulates that the prerogative of resolving disputes arising on matters not regulated by civil law may be transferred, by an Act of Parliament, to quasi-judicial or other institutions that are not part of the judicial system. The procedure for the consideration of such cases and the execution of decisions made on such cases is established by the Act of Parliament (part 2 of Art. 112).

The Constitution of Ecuador of 2008<sup>24</sup> also stipulates that the authorities of indigenous peoples administer justice, applying their own rules and procedures to

<sup>21</sup> Joaquín T. Villarroya, *Breve historia del constitucionalismo español* [Brief History of Spanish Constitutionalism] 45 (Madrid: Centro de Estudios Constitucionales, 1997).

<sup>22</sup> Constitution de la Belgique (Jan. 16, 2019), available at [http://www.dekamer.be/kvvcr/pdf\\_sections/publications/constitution/GrondwetFR](http://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetFR).

<sup>23</sup> Constitution of the Kingdom of the Netherlands (Jan. 16, 2019), available at <https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>.

<sup>24</sup> Constitución del Ecuador (Jan. 16, 2019), available at <https://www.wipo.int/edocs/lexdocs/laws/es/ec/ec030es.pdf>.



resolve conflicts in the community according to their own customs or customary law (Art. 191).

In general, many states in South Africa are characterized by the presence of so-called “autonomous justice systems” or “unofficial (informal) systems of justice.” These systems of justice are often autonomous of the South African formal legal system in the sense that they are independent.<sup>25</sup> For example, in many urban African locations there are informal courts set up by Community Councilors and Ward Committees. They are a kind of appendages to the formal legal system in two ways. First, they are responsible for documenting new residents, issuing residence permits, making sure that rentals and utilities are fully paid up, and for sorting out housing and residential difficulties, including neighborhood disputes. An example of such an unofficial court is the *lekgotla*. If a sanction imposed by a *lekgotla* is not implemented by a wrongdoer, the authority of the Administration Board and the South African police can be invoked to enforce the sanction.

Second, these systems of justice are appendages to the formal legal system in the sense that their activities are limited by South African formal law. If their actions exceed these limits, they can be brought before Magistrates’ Courts and fined for exceeding their authority.

There are other similar systems of justice in the townships, for example, *makgotla* (which is the plural form of *lekgotla*) dealing with tribal or “homeland” representatives. According to J. Hund, these courts have many non-legal functions.<sup>26</sup> They educate, acquaint people with the requirements of the formal legal system, integrate and organize public opinion, and so on. Hund points out that the courts often settle disputes by adjustment and development of indigenous law. With respect to the procedures followed, the essence of fairness, as it is construed by Western legal systems, is adhered to. For example, the *audi alteram partem* rule is scrupulously followed. Also, these courts do not adhere to a strict formalism in arriving at their decisions. These systems of justice are appendages to the formal legal system only in the sense that they operate on the basis of many South African formal legal definitions and use these to define urban rights and duties.

When speaking of Russian legislation, it is important to emphasize that, while allowing the administration of justice exclusively by the state court, it considers the administration of justice not to be merely a collegial activity of a special subject. The legislator rejected collegiality as an absolute principle of justice in favor of expanding the sole consideration of the case. As a result of this, justice is increasingly exercised by representatives of the state authorities – by the judges – individually, and that, in principle, corresponds to a new understanding of the organization of legal proceedings.

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<sup>25</sup> John Hund, *Formal Justice and Township Justice*, 13(2) *Philosophical Papers* 50 (1984).

<sup>26</sup> *Id.* at 175.



### **3.2. Subject Area of Justice**

The subject area of justice is characterized by the fact that, firstly, it is within the sphere of the application of the law, and, secondly, it is not limited to the specialized field of public relations and is related to the situation of legal conflict, which may be based on various categories of public relations. In fact, any conflict that has a legal nature may be within the area of justice. This characteristic of justice most clearly manifests itself in comparison with government administration, the hallmark of which is a clearly defined restriction of the sphere of public life to which the activities of its organs apply, including those that exercise jurisdictional powers and decide on the application of measures of administrative responsibility.

It is necessary to elaborate on the concept of legal conflict. Unfortunately, the concept of legal conflict, the theoretical foundations of which were laid in the domestic doctrine in the 1990s, has not yet received a final conceptualization. There are still various approaches to the definition of this concept in the scientific literature. However, all the existing interpretations in general agree on the idea that a legal conflict is always a certain confrontation of subjects of law in connection with the application, violation or interpretation of legal norms.

One of the most successful definitions of legal conflict was given by V. Kudryavtsev, who proposed to consider a legal conflict

any conflict in which a dispute is somehow connected with the legal relations of the parties (their legally significant actions and conditions), and, therefore, the subjects, or the motivation of their behavior, or the object of the conflict have legal characteristics, and the conflict itself has legal consequences.<sup>27</sup>

A legal conflict, thus, may be based on a different understanding (interpretation), non-compliance with or violation of absolutely any rule of law: authorizing, binding or prohibiting.

The concept of "legal conflict," used to characterize the subject area of justice, must be distinguished from the categories of "legal dispute" and "offense," which are not always differentiated in modern legal literature. For example, some authors refer to relations arising from the fact of the offense as legal conflict or legal dispute, and these concepts are treated as equivalent. Other authors limit the understanding of the conflict in the legal sphere exclusively to offenses, or define the offense through the concept of "conflict," or consider the conflict to be an exclusively wrongful act. There is also an opinion that the offense is not a legal conflict, as it precedes the conflict.

In this context, the viewpoint of one of the leading experts in the field of legal conflicts A. Zelentsov is clear and convincing. He proved in detail the idea based

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<sup>27</sup> Юридическая конфликтология [Legal Conflictology] 15 (V.N. Kudryavtsev (ed.), Moscow: Institute of the State and Law of the Russian Academy of Sciences, 1995).



on the fact that a legal dispute and an offense are independent forms of legal conflict. Legal conflict, according to Zelentsov, is a generic concept, the content of which includes both a dispute on law and an offense. He defines a dispute on law as a legal conflict, the subjects of which are the parties to the disputed substantive law relationship, and which arises as a result of non-compliance with the rules established by legal norms, violation of the subjective rights of one party by the other party and their lack of intent to restore the rights voluntarily.<sup>28</sup> According to the scientist, a dispute on the law differs from an offense by the presence of a special legal procedure for its resolution, and an offense differs from the dispute by its wrongfulness.

It is obvious that legal conflicts resolved by the court are diverse and inexhaustible. Therefore, any classification will inevitably be, to some extent, sketchy. All of them, however, can be conditionally combined into three groups: civil law conflicts, criminal law conflicts and administrative law conflicts. Moreover, in reality, such conflicts arise both in connection with a substantive law relationship and in connection with a procedural law relationship, the subdivision of which has the most general character. Thus, substantive conflicts include:

- offenses (criminal and administrative), in the resolution of which the court establishes the presence or absence of an unlawful act, the guilt of the person brought to justice or, on the contrary, the person's innocence, and determines the legal consequences for this person in the form of sentencing or exemption from liability;

- civil law or public law disputes, in the resolution of which the court recognizes or rejects the existence of certain legal relations between the parties, determining the legal consequences that should arise for the civil or administrative plaintiff and defendant; or establishes the presence or absence of a legally significant event or fact, thereby creating for a person, appealing to the court, the legally necessary prerequisites for the realization of that person's personal or property rights, or refusing to create such prerequisites due to the lack of proper grounds; or provides jurisdictional verification of regulatory legal acts of state authorities and other state bodies and organizations endowed with rule-making powers, or the legality of administrative decisions and actions (inaction) of administrative bodies; or carries out judicial authorization, making a decision on the use of coercion or on the performance of certain investigative or administrative actions.

Procedural conflicts arise when the conflicting interests of individual subjects of the proceedings collide. Such conflicts become legal conflicts due to the fact that there is an objective need for their procedural resolution. A typical example of such a conflict can be the verification of lower court decisions by a higher court and their subsequent cancellation or modification. This group of conflicts also includes all

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<sup>28</sup> Зеленцов А.Б. Теоретические основы правового спора: дис. ... докт. юрид. наук [Alexander B. Zelentsov, *Theoretical Foundations of a Legal Dispute: Doctor in Law Dissertation*] 52 (Moscow, 2005).



situations where an interim procedural decision, taken by a court on a certain case, can cause the violation of the constitutional rights and freedoms of participants of the process, creating an obstacle to further progress of the case. It is characteristic that in this instance only the will of the subject of the violated right brings the specific conflict into the sphere of justice, and the legislator establishes only the general right to appeal the decision. But, to tell the truth, there are situations when such decisions give rise to a conflict, the possibility and procedure for the resolution of which is not provided for by law. Such non-standard situations, in our opinion, should also be included within the scope of the subject area of justice because it is the court that is empowered to resolve all legal conflicts, and the court cannot refuse to ensure judicial protection even in circumstances where the legislator does not establish a procedure for the consideration of certain cases, for example, if there is a gap in procedural law.

The above views containing a description of the subject area of justice are sufficiently substantiated by legislation and allow us to conclude that justice covers all categories of cases arising from social contradictions and subject to judicial resolution.

### **3.3. The Arbitration Nature of Justice**

Justice is arbitration in nature. Therefore, the court as a conflict-resolving intermediary must be neutral with respect to its parties. This feature is most pronounced in the special jurisdictional procedural activity of the court, the essence of which is that the court is not entitled to consider and resolve legal conflicts on its own initiative. It is especially important to emphasize this, taking into account the fact that, comparatively recently, the courts were entitled to initiate cases within their jurisdiction in the field of constitutional and criminal justice.

The boundaries of the activities of the court in each specific process are defined in a number of regulations that establish the principles of equality and competitiveness of the parties. These principles, which are so characteristic for the adjudication of private law disputes, have finally found application in the consideration of disputes arising from public law relations, criminal, administrative and tort cases.

Another aspect of the arbitration nature of justice lies in its situational character, which means that the court does not have any permanent continuous field of activity. This feature of justice is especially evident in comparison with the state administration, including that part of it which covers the jurisdictional activities of administrative bodies on the application of measures of administrative responsibility. When revealing the signs of state administration, a number of scholars indicate that it is carried out continuously, constantly and systematically,<sup>29</sup> whereas justice is exercised only on filing a procedural act to the judicial authority for the resolution of a legal conflict.

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<sup>29</sup> Бахрах Д.Н., Россинский Б.В., Старилов Ю.Н. Административное право: учебник [Demyan N. Bakhrahk et al., *Administrative Law: Textbook*] 33 (Moscow: Norma, 2004).



### **3.4. Procedural Form of Administration of Justice**

Justice is exercised in a special procedural form which determines the stages of legal proceedings, the sequence of procedural actions carried out within the stages and the procedural functions of the participants in the process. In general, these common features of procedural form are characteristic of all legal proceedings – constitutional, civil, criminal and administrative.

Nevertheless, in the light of the main trends in the reform of procedural legislation, the assertion retaining its relevance for a long period and stipulating that it is the procedural form of justice that distinguishes it from the activities of any other state bodies may be questioned.

Currently, it is impossible to overestimate the importance of this feature of justice, since in modern legal science the procedural form is identified not only with the activities of the courts but also with the activities of any state bodies, provided that it consists of a set of homogeneous procedures regulated by law and aimed at achieving a certain substantive result.

This conclusion corresponds to the main trends in the development of procedural legislation towards its proceduralization. The presence of procedural form, therefore, is an important but not the main sign of justice. We believe that the essence of justice cannot be limited only to procedural form. The presence of the procedural form allows classifying the court as a law enforcement body, but it does not distinguish one law enforcement body from another.

It is especially important to emphasize this, since the procedural form is a form of implementation not only of the court activity for the consideration and resolution of legal conflicts, but also of the jurisdictional activities of other state bodies which are not part of the system of judicial authority, but which use quasi-judicial procedures, that is, almost judicial procedures, maximally close to them.

Therefore, in order to determine the qualitative nature of jurisdictional bodies, it is necessary to identify, in particular, the distinctive features of each of the procedural forms.

### **3.5. Justice and Justness: Aspects of Interaction**

Justice is exercised in such methods and ways that are designed to ensure that cases are considered by independent and impartial judges in accordance with established jurisdiction, as well as to ensure that fair and legitimate judgments are made. It is judges who occupy a central place in the judicial organization and have the greatest influence on other groups of subjects.<sup>30</sup> Considering in more detail the content of this aspect, one cannot ignore the issue of the relationship between justice and justness.

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<sup>30</sup> Teresa A. Sullivan, *The Persistence of Local Legal Culture: Twenty Years of Experience from the Federal Bankruptcy Courts*, 17(3) *Harvard Journal of Law & Public Policy* 801 (1994).



Justness is a phenomenon of the social and moral sphere, inevitably peculiar to it and characterizing the attitude of a person to social values. It cannot be expressed through its one-dimensional description. This fact predetermines the existence in the domestic legal doctrine of a number of definitions claiming to provide an adequate interpretation of the essence and content of justness.

An understanding of what justness is depends on many factors: the current political situation, the political regime and social values, among others.<sup>31</sup>

Historical experience shows that different nations at different periods of their development had their own ideas of what is fair and what is not. Moreover, these ideas were not always the same.

Thus, in the period of primitive law (and later the first Roman laws), when justice was the means of preserving peace, everything that served to prevent private vengeance and private war was regarded as an instrument of justness.<sup>32</sup> The second stage in the development of the legal theory of justness dates back to the time of Plato and Aristotle, when it was understood as a means of harmonious maintenance of the existing social order. In the Middle Ages, a new concept of justness as a means of ensuring maximum individual self-assertion emerged. This conception was purely individualistic. It sought by means of law to prevent all interference with individual self-development and self-assertion so far as this may be done consistently with a reciprocal self-development and self-assertion on the part of others. It conceives that the function of the state and of the law is to make it possible for the individual to act. This concept culminated in the late 18<sup>th</sup> century and was reflected in the French Declaration of Human Rights and the U.S. Bill of Rights. As a result, justness came to be understood as a device for securing the maximum of individual self-assertion in 19<sup>th</sup>-century legal thought.

During the 19<sup>th</sup> century, the theme of justness dominated the works of H. Spencer, a prominent theorist of liberalism. Initially, his concept of justness was primarily regulatory in nature. He formulated the legal idea of justness in a well-known phrase:

The liberty of each limited only by the like liberties of all.<sup>33</sup>

Hence the demand – to adopt a law on equal freedom and to recognize it as the law on which the right system of justness should be based.<sup>34</sup> In the 20<sup>th</sup> century, J. Rawls, the founder of the famous liberal theory of justness, continued to develop the ideas of

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<sup>31</sup> Louis E. Wolcher, *The Meaning of Justice in the World Today*, 67(4) National Lawyers Guild Review 228, 230–232 (2011).

<sup>32</sup> Pound 1912.

<sup>33</sup> Herbert Spencer, Stanford Encyclopedia of Philosophy (Jan. 16, 2019), available at <http://plato.stanford.edu/entries/spencer/>.

<sup>34</sup> Jonathan H. Turner, *Herbert Spencer: A Renewed Appreciation* (Beverly Hills, CA: Sage Publications, 1985).



Spencer. He distinguished two main principles of justness: (1) everyone should have equal rights with respect to the most extensive scheme of equal fundamental freedoms compatible with similar schemes of freedoms for others; and (2) social and economic inequalities must be arranged in such a way that: (a) they can reasonably be expected to benefit all, and (b) access to positions and posts should be open to all.<sup>35</sup> In modern foreign doctrine it is considered that Rawls's concept of justness is the most promising one. It also emphasizes that justness has a formal nature. Formal justice presupposes the principle of the equality of the parties, as well as the elimination of unjustified inequality. What was considered true and fair in one case should be recognized similarly in all other cases. Only in this way can fair justice be ensured.

At the same time, some foreign scholars, such as C. Carr, believe that the notion of formal justness as a virtue embodying loyalty to government, obedience to the system, impartiality and so on, is only a philosophical illusion that disappears when one tries to understand this concept and get to its essence. Carr notes that philosophical and political sciences know little about justness, but, nevertheless, they continue to interpret it. From Carr's point of view, it is easier to understand what justness is if you start from its opposite concept – injustice.<sup>36</sup>

In Russian law, the concept of justness also causes ambiguous interpretation. Domestic lawyers define justness in the field of law as: a principle of legal liability, a principle of law, a practical criterion of law enforcement, a goal of the entire lawmaking and law enforcement process.

The concept of justness has been most thoroughly analyzed in a recent work by L. Voskobitova, who considers justness to be a qualitative characteristic of the mechanism of the implementation of judicial authority.<sup>37</sup> By fair trial she understands the observance of a set of procedural rules that are necessary for the protection of human rights in resolving a dispute about civil rights of a citizen or during the examination of the charges against the citizen, and which ensure due process in the consideration and resolution of criminal cases by the court, as well as in the exercise of judicial review.

In general, all Russian scholars link justice with justness. However, the question of the relationship between these legal categories is decided differently by different scientists. The study of the scientific literature makes it possible to distinguish three main approaches to the interpretation of this relationship.

The first approach identifies justice with justness. It is emphasized that justness in the field of justice is an integral part of social justice. It is the goal, principle driving force of court procedure. Many foreign researchers adhere to the same opinion. For

<sup>35</sup> Sebastiano Maffettone, *Rawls: An Introduction* (Cambridge: Polity Press, 2010).

<sup>36</sup> Craig L. Carr, *The Concept of Formal Justice*, 39(3) *Philosophical Studies* 211 (1981).

<sup>37</sup> *Воскобитова Л.А. Механизм реализации судебной власти посредством уголовного судопроизводства: автореф. дис. ... докт. юрид. наук* [Lydia A Voskobitova, *The Mechanism for the Implementation of the Judiciary Through Criminal Proceedings: Doctor in Law Dissertation Abstract*] 15 (Moscow, 2004).



example, in foreign dictionaries, justice is quite often defined as the quality of being just, impartial or fair; as a principle or ideal that helps resolve matters rightly; as justness in the way that people are treated; as the establishment or determination of rights according to the rules of law or equity; or as the fair and proper application of laws in compliance with natural law, according to which everyone should be treated equally and impartially.<sup>38</sup>

At the same time, it would be possible to cite many examples where completely legitimate and well-founded judicial decisions are in contradiction with the requirements of morality which give us an idea of justice and injustice. In case of a contradiction between the norms of morality and law, the court, without any doubt, should give preference to the latter. Consistent implementation of the idea that justice is a synonym for justness can objectively lead to the opposition of law and morality and the resolution of cases on the basis of the requirements of morality, but contrary to the law, and ultimately to the identification of law not with law, but with justness.

In the course of this discussion the following statement is quite convincing: justice is primarily an activity and, therefore, it is not entirely logical to regard the activity itself as justness. Justness, after all, is an evaluative and, to some extent, an extra-legal category.

And finally, from the point of view of the etymology of the term, justice still means legal proceedings based not on justness, but on law.

The second approach treats justness as a constitutional or a constitutional-legal principle of the administration of justice. This approach, in principle, is correct if we consider justice to be a set of principles related to the implementation of fundamental human rights and freedoms at the present time. In this sense, justness acquires the value of a legal principle to the extent that it is embodied in the legal mode of regulation.

In international legal acts, justness is also considered to be one of the principles of justice. For example, in Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties (adopted on 5 September 2001 at the 762<sup>nd</sup> meeting of the Ministers' Deputies) it is defined, in a broad sense, as a principle relating to the idea of justice. Recommendation REC(2001)9 also stipulates that the resolving of disputes should be done according to equitable principles and not just according to strict legal rules. However, in a narrower sense, justness is proposed to mean an amendment to written law, when the use of the latter will cause obviously disproportionate consequences. It is also stressed that the concept of justness can be used to fill gaps in the legislation and regulations in specific cases which they do not cover.<sup>39</sup>

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<sup>38</sup> Merriam-Webster's Dictionary (Jan. 16, 2019), available at <http://www.businessdictionary.com/definition/social-justice.html>.

<sup>39</sup> Рекомендация Комитета Министров Совета Европы REC(2001)9 государствам-членам об альтернативах судебному разбирательству между административными органами и частными сторонами, принятые 5 сентября 2001 г. // Вопросы государственного и муниципального управления. 2008. № 3.



Representatives of the third approach call justness the goal of justice. According to them, this viewpoint is axiomatic and does not need to be proved.

At the same time, such a statement seems too categorical. It is obvious that the authors who propose to distinguish the concepts of justness and justice understood by citizens as the ultimate “consumers of judicial services” and by law enforcers are right. The value of justice for a citizen is expressed in the protection of the rights and freedoms guaranteed by the state. Therefore, in the public legal conscience justice is really associated with the category of justness. For the law enforcer, however, the terms “justice” and “justness” are not always identical; justness should be taken into account by the law, it is an element of the authority and legitimacy of the judicial power, and it is traditionally perceived as a principle of law.

Following this logic, we can consider justness to be the goal of justice only to the extent that it contributes to the most complete protection of the violated right. As one researcher, Professor D. Fursov of Russian State University of Justice, figuratively noted, the pursuit of the restoration of justness at every step of the court activity would be inappropriate, since it can distract from clarifying the merits of the case, and it is not objectively fundamental for its participants.<sup>40</sup>

Thus, justness and justice cannot be considered to be legal phenomena coinciding in whole or in part. Justness is, rather, an internal property of justice that contributes to its perception as a social and legal value. Justness is a direct reflection of people’s actions towards each other.

The perception of justness prevailing in the practice of the European Court of Human Rights can be a valuable addition to what has already been said. The Court understands justness as the result of the implementation of standards of justice<sup>41</sup> and as a provision of procedural justness of all court procedures (the judgments of the European Court of Human Rights of 24 February 1997 in the case *De Haes and Gussels v. Belgium*; of 23 June 1993 in the case *Ruiz-Mateos v. Spain*; of 19 March 1997 in the case *Hornsby v. Greece*).<sup>42</sup>

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C. 114 [Recommendation REC(2001)9 of the Committee of Ministers of the Council of Europe to member states on alternatives to litigation between administrative authorities and private parties adopted on 5 September 2001, 3 Issues of State and Municipal Government 106, 114 (2008)].

<sup>40</sup> Фурсов Д.А. Справедливость как фундаментальная ценность арбитражного и гражданского процесса // Российский ежегодник гражданского и арбитражного процесса. 2005. № 4. С. 58 [Dmitry A. Fursov, *Justice as Fundamental Value of Arbitration and Civil Proceedings*, 4 Russian Yearbook of Civil and Arbitration Proceedings 50, 58 (2005)].

<sup>41</sup> Mauro Cappelletti & Vincenzo Vigoriti, *Fundamental Guarantees of the Litigants in Civil Procedure: Italy in Fundamental Guarantees of the Parties in Civil Litigation: Studies in National, International and Comparative Law* 514 (M. Cappelletti & D. Tallon (eds.), New York: Oceana Publications, 1973).

<sup>42</sup> See Donna Gomien et al., *Law and Practice of the European Convention on Human Rights and the European Social Charter* 201 (Strasbourg: Council of Europe Publishing, 1998); Michele De Salvia, *La convenzione europea dei diritti dell'uomo* [The European Convention on Human Rights] 275 (Napoli: Editoriale scientifica, 2001).



### **3.6. Binding Force of Court Decisions**

Justice is exercised within the framework of state power and ensures the universally binding force of judicial decisions, the execution of which involves the suppression of the will (freedom) or material deprivation of one of the parties by using, in some cases, the power and strength of the state.

The universality of the binding force of a judicial decision is one of its most important properties and is expressed in the following:

- the court decision, which resolved the issue of specific rights and duties, should be binding not only for the subjects of the substantive legal relationship in which such a decision was made, but also for all other persons who may be affected, in one or another way, by the court decision;
- no one has the right to challenge the legality of a court decision and to cast doubt on it, until it has been revised in accordance with the procedure established by law;
- non-judicial bodies with jurisdictional powers are not entitled to overrule court decisions; in addition, they cannot consider and resolve legal conflicts that have already been the subject of court consideration;
- legal facts and legal relations established by a court decision, which has entered into force, are binding on non-judicial bodies with jurisdictional powers and other courts that hear cases involving the same subjects.

The implementation of court decisions by measures of state coercion is very specific, since the court, applying punishment to the criminal or to the person in respect of whom the proceedings in the case of an administrative offense are being conducted, cannot implement, by its own means and resources, any of the coercive measures that it proclaims in its judicial acts. Nor can the court independently ensure the restoration of a right that it declares violated, including its compulsory protection. In both cases, the resources, efforts and actions of the executive branch (the institution of bailiffs, etc.) are necessary.

Thus, the court, on the one hand, is empowered to apply coercion ranging from the authoritative recognition of a legal fact or ascertaining the infringement of the right to the application of punishment. On the other hand, it has very limited possibilities of real impact on the offender or another person who has violated the law, since the fulfillment of the court order is primarily within the scope of the executive branch.

As a result of the above study of the concept and signs of justice, at least two important conclusions can be formulated.

1. Justice is a type of law enforcement jurisdictional activity which has a number of specific features distinguishing it from the law-enforcement activities of other public authorities and state bodies, as well as from other activities of the courts.

2. In modern conditions the concept of justice cannot be determined on the basis of its procedural peculiarities, since the procedures themselves have changed



significantly, and the presence of a procedural form no longer distinguishes the court from other law enforcement agencies.

### Conclusion

The objective changes in the activities of the court that have taken place since the beginning of the modern judicial reform in Russia require a significant change in the understanding of justice. There is no doubt that the most important and promising approach is to consider justice to be one of the characteristics organically inherent in the judiciary or as a related phenomenon. In this sense, justice is defined as state activity, within the framework of which the judicial power is exercised. The judiciary is, accordingly, the essential expression of the functional purpose and competent certainty of justice.

At the same time, the clarification of the issue of the relationship between justice and the judiciary characterizes only a few facets of this legal phenomenon. Therefore, adherents of various scientific concepts gradually come to the idea of the need for a common understanding of justice and its features, revealing it, on the one hand, as a function of the judiciary and, on the other hand, as a type of state activity, within the framework of which judicial power is actually implemented.

In this regard, the main thing, as we see it, is the need for a clear understanding of what justice really is, as a type of state activity, and what characteristic features it possesses.

The use of the integrative analysis of the concept of "justice," as well as consideration of its axiological immanent essence, provide, in our opinion, sufficient grounds for defining this legal category as a special type of state activity carried out by courts and judges by consideration and resolution in a special procedural form of legal conflicts, assigned to their jurisdiction, and by making binding decisions, ensured by measures of state coercion, in order to restore and protect violated legal interests and rights.

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