National Research University
Higher School of Economics

Aleksandr N. Shmelyov

JUDICIAL NULLIFICATION OF REGULATORY LEGAL ACT

EXTENDED ABSTRACT OF DISSERTATION
submitted for the degree of Candidate of Science in Law

Scientific Supervisor
Morshchakova Tamara Georgievna
Doctor of the Science in Law, Professor,
Honored Lawyer of the RSFSR,
Honored Scientist of the Russia

Moscow - 2018

The thesis has been prepared at the Department of Judicial Power
of the Faculty of Law of the Federal State Autonomous Educational Institution
for Higher Education National Research University 'Higher School of Economics'

The text of the thesis is available on the website of the Higher School
of Economics: https://www.hse.ru/sci/diss/221068554

12.00.11 – Judicial activity, prosecutorial activity,
human rights and law enforcement activities

Academic Secretary
Dissertation Council on Law
Doctor of Law, assistant professor Iryna Alexandrovna Emelkina

Research Rationale

The rule of law in Russia is a necessary and no-alternative goal of the legal development in country. At the same time, this goal cannot be achieved if there is a lack of legal mechanisms that limit the power within the established system of checks and balances. In the legal framework set by the Federal Constitutional Act, it is the justice that supervises the lawmaking activity of state authorities of all levels and local self-government authorities.

Through the "search" of law based on the highest legal principles and standards, the Russian courts are meant to verify the provisions of regulatory legal acts that are an objectified expression of an imperious command to check the presence of a legal content in these acts. Accordingly, judicial regulatory control is an instrument for enforcement of human and civil rights and freedoms, the stability of law and order protecting them, and, at the same time, a guarantee of the legal and political development of the state in a natural and legal manner.

The Federal Constitution indicates the duty of the court to exercise a supervisory function for the "legality of the law" during the legal proceedings of any case, since this directly arises from the provisions of Article 120. And this is the implication of the structure of a legal and democratic state, since the implementation of the nullification of the illegal law occurs through the use of various instruments in all types of legal proceedings.

At the same time, the legal institute of the nullification of a regulatory legal act has an intersectoral nature, since there is a rather complex system of instruments for the nullification of regulatory legal acts (provided for by or not forbidden by law) carried out by authorities constituting other branches and levels of state power, along with judicial nullification in the Russian Federation.

Based on the universality of judicial control, the centrality of judicial nullification in relation to these non-judicial (parliamentary and administrative) procedures is evident.

The problems associated with intersectoral systemic interaction of the nullification instruments, the consequences of nullification for the legal system and the nullified norm, and the procedure for overcoming these consequences in order to establish a "legal balance" are debatable in science and practice of law enforcement. At the same time, judicial nullification as a complex of instruments presented in all types of legal proceedings requires clarification in order to make them more effective and to ensure their control function for the procedures of nullification carried out by representative and executive authorities.

Development of the nullification institute in the law is conceptually and practically complicated by the fact that the regulatory legal act is an ambiguous

phenomenon as an object of nullification in the Russian legal system. Weak conceptual framework at the legislative level of issues related to the establishment of a legislation system, as well as the powers of state authorities as well as other authorities and organizations which are imposed by law to execute the public functions on adoption of statutory regulation, has the effect of producing its various forms, both provided for by and not provided for by law, but actually applied. Under these conditions, the power decisions, expressed in regulatory terms, are often taken in violation of, or bypassing lawmaking procedures and the "filters" included in them to control the legal content of the acts. As a result, unofficial forms of regulatory acts (departmental letters, explanations and instructions, methodological recommendations and manuals) may "modify" the law, or either deprecate the meanings of legal regulation laid down by the legislator when the law is adopted. Determination of the proper role of such acts in the system of legal regulation and provision of their timely nullification also require scientific analysis.

Mentioned key tasks determine the relevance of the problem field under consideration and predetermine the necessity to develop measures to overcome destructive tendencies, which ultimately endanger human and civil rights and freedoms in Russia.

Extent of previous investigation of the research

In the domestic legal doctrine, certain issues of the nullification of the regulatory legal act, including the problematics of the legal nature of the nullification object, the instruments of regulatory control in the sectoral legislation, and the legal consequences of nullification are reviewed in works of S.S Alekseev, I.V. Antonov, O.A. Bek, O.V. Brezhnev, A.E. Vitevsky, N.V. Vitruk, G.A. Gadzhiev, A.A. Gusev, O.S. Ershov, G.A. Yesakov, G.A. Zhilin, V.A. Zhuykov, V.V. Zaitsev, Ye.K. Zamotayeva, V.D. Zorkin, V.A. Kirsanov, I.R. Medvedev, P.N. Meshcheryakov, M.A. Mityukov, I.G. Moiseyeva, T.G. Morshchakova, S.V. Narutto, V.V. Nevinsky, V.B. Nemtseva, S.V. Nikitin, M.S. Nosenko, S.A. Pashin, A.I. Fedin, V.A. Filanovsky, T.Ya. Khabrieva, N.I. Yaroshenko, V.N. Yatsenko and others.

It is necessary to mention separately the works of S.A. Pashin and G.A. Yesakov, devoted to the nullification of the law in the jury, since this legal phenomenon was hardly developed in the domestic legal science.

Meanwhile, up to now, there were no interdisciplinary and intersectoral research conducted on the institute of nullification of the regulatory legal act have not been carried out, including: 1) comprehensive analysis of the legal nature of nullification, its causes and consequences; 2) research of sectoral instruments of

judicial nullification and instruments of nullification carried out by legislative (representative) and executive authorities; 3) analysis of the significance of judicial nullification as a fundamental sub-institute of nullification; 4) research of the nullification objects in the Russian legal system; 5) understanding the influence of the facts of nullification on the political and legal development of society and the state.

Theoretical basis of the research was the works of scientists in the following fields of legal knowledge: the theory of state and law, the state and law of Russia and foreign countries, constitutional law, administrative and administrative procedural law, civil and arbitration procedural law, criminal law and criminal procedural law, and other legal sciences: M.B. Azarova, L.P. Anufrieva, K.V. Aranovsky, A.I. Bastrykin, K.A. Bekyasheva, S.A. Benyaminova, T.V. Berezhnaya, O.V. Bogatova, A.L. Burkov, A.B. Vengerov, L.Ye. Vladimirov, M. Jousse-Ivanina, G.A. Yesakov, V.D. Zorkin, O.M. Zuev, D.A. Kerimov, A.A. Klishas, S.D. Knyazeva, A.I. Kovler, N.M. Korkunov, I.V. Kotelevskaya, Ye.V. Kudryavtseva, V.P. Malakhov, A.V. Malko, M.N. Marchenko, N.I. Matuzov, P.N. Meshcheryakov, I.V. Mikhailovsky, T.G. Morshchakova, V.V. Nevinsky, V.B. Nemtseva, S.Ye. Nesmeyanova, S.V. Nikitin, S.A. Pashin, L.A. Prokudina, T.N. Radko, N.Ya. Razumovich, M.M. Rassolov, S.M. Rustamov, Ye.V. Ryabtseva, S.L. Sergevnin, Yu.A. Tikhomirov, V.V. Ustinov, A.B. Khramtsov, V.A. Cherepanov, G.F. Shershenevich and others.

Methodological basis of the research was based on general scientific and special methods of cognition, including dialectical, logical, system and structural, formal and legal, logical and legal, historical, comparative, and sociological methods, method of analysis and synthesis, method of complex analysis, method of interpreting the rules of law, method of making legal decisions.

Empirical basis of the research was the decisions of the Constitutional Court of the Russian Federation; decisions of the Plenum of the Supreme Court of the Russian Federation, decisions of the Plenum of the Supreme Arbitration Court of the Russian Federation, decrees of the Supreme Court of the Russian Federation, materials of self-collected empirical (statistical and sociological) data.

Object and subject of research.

The *Subject of the research* is legal relations arising in connection with the implementation of judicial regulatory control for the legal content of regulatory legal acts, mediating the withdrawal of non-legal material from the legislation system, as well as modification in practice of its interpretation and application in case where its

defectiveness was identified. At the same time, this research object is analyzed in its conditionality as a whole by legal relations developing at the intersectoral level in connection with the regulation and functioning of the institutions of parliamentary, administrative and judicial nullification.

Accordingly, the *Object of the research* is the normative consolidation of the instruments of regulatory control in all types of legal proceedings, by virtue of the direct indication of the law (in constitutional, administrative and civil types of legal proceedings), and also instruments in historically developed practice (in criminal proceedings). Proceeding from the task of analyzing the entire interdisciplinary institute of nullification, whole object of the research is the entire set of nullification instruments that are accepted by the legislator and law enforcement practice, and take place in the Russian legal system.

The purpose and objectives of dissertation research.

The purpose of the dissertation research is the theoretical substantiation of the fundamental significance of the sub-institute and the mechanisms of judicial nullification represented in all types of legal proceedings, in the structure of the intersectoral legal institute of the nullification of the normative legal act, its deep correspondence to the principles of the rule of law and the fundamental foundations of democracy; development of applied proposals for improving the mechanisms of judicial, parliamentary and administrative nullification in the modern legal system of the Russian Federation.

Objectives of the research:

1) Study of the distinction between the concepts of "source of law" and "form of law" in order to determine the object of nullification and the reasons (grounds) for its implementation;

2) Identification of the properties of the regulatory legal act recognized as such in the legal doctrine, in federal and regional legislation, in the jurisprudence of superior courts, in the legislation of the countries of the near abroad having similar legal traditions with Russia, and on the basis of their system analysis to delineate the regulatory legal act (nullification object) from other acts having regulatory properties;

3) Analysis of the legislation system of the Russian Federation for its compliance with the principle of legal certainty, as well as the activities of subjects of lawmaking from the point of view of their powers to issue regulatory legal acts affecting the human and civil rights, freedoms and duties;

4) Identification of the grounds (criteria) for verifying acts during implementation of nullification through its various instruments;

5) Delineation of the instruments of judicial regulatory control applied in relation to the forms of law (regulatory legal acts) and other forms of law other than

regulatory legal acts, established by legislation but affecting the definition of rights, rights, freedoms and duties of subjects of legal relations ("interpretative acts");

6) Analysis of the interconnection of sub-institutions of the intersectoral institute of nullification;

7) Supplementation of the conceptual apparatus in the considered field of legal knowledge with a system of definitions with refined content;

8) Development of proposals on improving the nullification instruments, as well as on the necessary filling of the gaps in the current legislation in the field under consideration.

Scientific novelty of thesis research.

This is the first time when an attempt was made to substantiate the independence of an integrated intersectional legal institution, which includes interconnected instruments (sub-institutions) of parliamentary, administrative and judicial nullification (judicial nullification has a central role in this institution), on the basis of interdisciplinary approach (approach applied not only in the field of law) and intersectoral legal approach.

Through system analysis, the thesis demonstrates deformation of the system of national legislation, which is expressed in an independent definition or expansion by some public authorities, as well as authorities and organizations imposed by law to exercise public functions, of their own powers in the field of quasi-regulatory determination of the limits of human and civil rights, freedoms and duties. In addition, attention is drawn to the fact that deformation is an obvious consequence of the strengthening in the practice of issuing by public authorities the "interpretative acts" containing explanations of legislation and often deprecating the objectives of legal regulation that the legislator relied upon when it was adopted.

Necessity for the development of an intersectoral legal institute of nullification, which ensures reorganization of the legal system from regulatory legal acts with deformed legal nature and is one of the key elements of the system of checks and balances in the rule of law state, is substantiated.

With a view of developing instruments of judicial regulatory control and strengthening their interrelation with other instruments of nullification, ensuring the stability of constitutional elements of "checks and balances" in the system of state power, strengthening federal relations, creating a consistent system of statutory regulation and preventing public authorities and other lawmaking subjects from creating arbitrary determination of their terms of reference for quasi-regulatory regulation affecting rights, freedoms and duties of humans and and their associations, the author suggests adopting federal regulatory legal acts at the law level: on the general principles of the organization of the legislation system of the Russian

Federation and the legislation system of the territorial subjects of the Federation. Also draft amendments to the Constitution of the Russian Federation, a set of federal constitutional laws and federal laws aimed at the practical implementation of theoretical proposals presented in the research on improving judicial regulatory control instruments have been prepared.

Theoretical significance of the research is determined by the fact that the author developed the theoretical concept of the institute of nullification of the regulatory legal act, substantiated its intersectoral nature, developed proposals for the development of the conceptual apparatus and gave the author's classification of the components of the legal institute of nullification, which is performed for the first time in the domestic legal science.

Breadth of the scope of the thesis research, where nature of the regulatory legal act is considered, along with the problematics of regulatory control, development of the legislation system in the Russian Federation and other features of the legal system objectively determining the development of the nullification institute, based on the theory and history of the state and law of Russia and foreign countries, administrative and constitutional law, has provided the possibility of substantiating a set of theoretical proposals, specifying and complementing scientific ideas in the field under consideration.

Comparison of the doctrinal positions of legal experts on the subject of research with legislative and law enforcement practice made it possible to identify a set of problems that are problematic for the legal system and revealed in connection with the consequences of the nullification of a regulatory legal act in various types of legal proceedings, which has not been previously considered in works dedicated to judicial regulatory control.

Practical significance of the research. Conclusions, suggestions and recommendations prepared during the research can be applied in the lawmaking and law enforcement practice of the Russian Federation, including not only judicial, but also law enforcement activities on implementation of the supervisory functions of the public prosecutor's office and departmental control by the Ministry of Justice.

At the same time, results of the thesis research can be applied in higher education programs, in professional development programs; for the preparation of curricula on the theory of state and law, domestic and foreign constitutional law, civil and arbitration procedural law, administrative procedural law, and criminal procedural law; when developing specialized courses and study guide on the topic; in research activities during further development of the institute of the nullification of a regulatory legal act, and in related fields of jurisprudence.

The main issues to be considered during thesis defense.

1. Nullification is an interdisciplinary scientific concept. At the same time, in the field of law, essence of the phenomenon of nullification consists in the termination of the legal norm (cancellation of the norm or refusal to apply it) or the aggregation of legal norms objectified and fixed in various forms of law: in a regulatory legal act (the level of law and by-law) in the law enforcement (individual) act.

2. Phenomenon of the nullification of a regulatory legal act is revealed in the legal system as a result of various instruments. At the same time, the powers to implement the nullification, its proper subjects, procedures (instruments), and the consequences of nullification differ depending on a number of factors, including: the form of law where the nullified norm is fixed; the sector profile of legal regulation; the presence or absence of substantive and (or) procedural law indicating the proper procedure for the implementation of nullification in these norms.

3. The following additions to the system of concepts of legal science on problems of nullification of a regulatory legal act are proposed:

Nullification of a regulatory legal act is the fact of the termination of the validity of a regulatory legal act (or its separate provisions) by a competent authority through cancellation, recognition as invalid or suspension (abstract nullification), or carried out by refusing to apply it to legal relations associated with the subject of its regulation (casual nullification).

Legal institute of the nullification of a regulatory legal act is an interdisciplinary legal institution that includes a complex of parliamentary, administrative and judicial legal instruments (procedures) provided for by law or not forbidden by law, ensuring the termination of a regulatory legal act (or its separate provisions).

Judicial nullification of a regulatory legal act is a sub-institution of the interdisciplinary institute for the nullification of a regulatory legal act, which includes a set of procedures for judicial control over the legal content of a regulatory legal act, and is fundamental in relation to other sub-institutions of nullification (parliamentary and administrative).

Nullification effect in the judicial system (in justice) is judicial nullification of a regulatory legal act (or its separate provisions), repeated throughout the country, or in its part within the framework of an individual regulatory control, and fixing the shortcomings of legal regulation.

Nullification of the law in a court of jury is an act of refusal by the jury to convict the defendant of an offence, in proper procedural order, despite the fact that the criminal act was actually committed by the defendant; this refusal is based on suppositional legal and moral impulses.

Nullification effect in jury trial is the nullification of the law taking into account the crimes with similar nature, repeated throughout the country, or in its part, in the courts where jury is involved.

4. Classification of the legal institute of nullification of a regulatory legal act is offered according to the following criteria:

1) ***sub-institutions of parliamentary, administrative and judicial nullification*** are distinguished for subjects authorized to take a decision on nullification.

In turn, judicial nullification is delineated by sector profile: it is exercised in constitutional law; civil procedural and arbitration procedural law; administrative procedural law; criminal and criminal procedural law;

2) by nature of the instruments of regulatory control in the current legislation, as well as the effect on stability of the legal system, such types as ***ordinary*** **and** ***extraordinary nullification*** are delineated;

3) depending on the legal possibilities of the subsequent multiplication of the decision on nullification with respect to similar legal relationships, separation of the nullification into two forms ***(abstract, casual)*** is substantiated;

4) by nature and extent of the consequences of the implementation of the nullification act (exclusion/preservation of the act (norm) in the legislation system), the following nullification is delineated:

a) ***De jure et de facto***[1] is "classical nullification" (loss of legal force by legal norm);

b) ***Non de jure sed de facto derogat***[2] is "shortened (deferred) nullification": recognition of the legal norm (regulatory legal act) as invalid;

c) ***Non de jure sed de facto derogat in causa***[3] ***- "individual" or "beacon" nullification*** is a nullification meaning de facto refusal to apply the legal norm (regulatory legal act) in an individual case (*ad hoc*), without losing legal force by the norm or recognition of the norm as invalid.

5. Nullification is one of the elements of power limiting and self-limiting, and therefore represents a political and legal phenomenon. This legal institution acts as an effective instrument to ensure counteraction to the natural (constitutive) aspiration of any authority to extend power. Nature of the nullification of regulatory legal acts in Russia derives from the functions of controlling over the legal content of legislation, implemented in the system of separation of powers.

6. Nullification procedures and, accordingly, nullification of the regulatory legal act serve for the following:

a) ensuring the legal content of the statutory regulation;

---

[1] De jure et de facto (Latin) is de jure and de facto (legally and actually).

[2] Non de jure sed de facto derogat (Latin) is not a legal cancellation, but actual cancellation.

[3] Non de jure sed de facto derogat in causa (Latin) is not a legal cancellation, but actual cancellation in the case (trial).

b) overcoming the conflicts that exist between public authorities that provide statutory regulation, and preventing occurrence of such conflicts;

c) exclusion of conflicting (collision) legal regulation in the legislation system;

d) reduction (in the future) the field of disputes over the content of legal norms.

7. Nullification of regulatory legal acts is carried out by means of a number of nullification procedures (nullification processes) provided for by law or not forbidden by law.

8. The basis of judicial nullification arises from the provision of Article 120 of the Constitution of Russia and consists in the duty of the court to verify the applicable right to its compliance with general legal principles, which follows from the idea of the rule of law.

9. The fundamental role of judicial nullification in the intersectoral institute of the nullification of regulatory legal acts is determined by the universality of the judicial nullification processes that result from the control functions of the judicial authorities and their exclusive powers in the final resolution of legal disputes.

10. For the purposes of the conducted research, and in view of the absence of the generally accepted distinction between the concepts of "source of law" and "form of law" in the Russian legal science, the author of the thesis proposed to recognize as the *sources of law* the lawmaking factors, which include: (1) legal traditions of the society; (2) universally recognized human values (the universality of which does not depend on national or ethnic customs and traditions); (3) views on the role of a person within the framework of state and public order; (4) emerging (actual) social relations; (5) representations on social justice and the common good; (6) prevailing professional and everyday sense of justice in society; (7) dominant systems of religious views (or secular views), etc. Accordingly, the concept of *"form of law"* is defined as a source of determination (objectification) of legal norms.

Thus, the nullification object is the legal norms, determined in regulatory legal acts that are recognized in Russia as official forms of law, as well as in actually applied acts of a quasi-regulatory nature. At the same time, sources of law (lawmaking factors) are the criteria for verification of regulatory legal acts in the nullification instruments[4].

11. Current regulatory regulation, adopted by the Government of the Russian Federation and the Ministry of Justice of Russia in the late 90s of XX century, contained a sufficient set of measures (necessary instruments) to prevent the issue bye-laws with a deformed legal nature (including violation of the procedure for adoption or in forms not provided for by legislation) by federal public authorities. Mentioned regulation and court practice formed before the adoption of the decision No. 6-P dated March 31, 2015 by the Constitutional Court of the Russian Federation

[4]Except for the extraordinary instruments of administrative nullification.

met the tasks of improving the instruments ensuring the counteraction to arbitrary lawmaking of public authorities and overcoming the unsystematic and contradictory nature of the current legislation.

However, in general, the goal to overcome the destructive processes in this field, which consist in spreading the practice of adopting acts with violation of procedure, issuing acts of recommendatory nature without indicating their recommendatory nature, and in the independent determination by a number of authorities of regulatory power affecting the rights, freedoms and duties of citizens, has not been achieved. Legislative policy and lawmaking practices developed over the past two decades, as well as the decision of the Constitutional Court of the Russian Federation No. 6-P dated March 31, 2015 on recognition as nullification objects of acts containing explanations of legislation and having regulatory features, and subsequent reform of the procedural legislation in that terms led to the actual reorganization of the system of the country's legislation and a reduction in the significance of the law adopted in the detailed parliamentary procedure.

12. In the absence of a single regulatory act on the legislation system and the disunity of the norms on procedure for the adoption, registration and publication of regulatory legal acts, there is an independent expansion by some public authorities of their own competence for statutory regulation. Such state of affairs was ascertained in the AJC of the Russian Federation: regulatory legal acts of the General Prosecutor's Office of the Russian Federation, the Judicial Department at the Supreme Court of the Russian Federation, the Investigative Committee of the Russian Federation, the Bank of Russia, etc., were referred to the objects of judicial control and nullification. However, in some cases, special laws on these public authorities do not contain corespondent norms authorizing them to exercise regulatory power affecting the rights, freedoms and duties of citizens.

This may result in further aspiration of the federal public authorities to independently expand their competence in the field of lawmaking activities, which in turn will lead to an increase in cases of violation of the rights and legitimate interests of citizens and their associations. Accordingly, this expands the objective necessity to improve the nullification procedures.

13. Proceeding from the goal of restricting the lawmaking that is not permitted by the legislator, in the work it is proposed to adopt federal regulatory legal acts at the level of the law on general principles of organization of the legislation systems of the Russian Federation, legislation of the territorial subject of the Russian Federation and regulatory acts of local self-government authorities.

14. In order to strengthen federative relations and create conditions for the progressive development of legal and political systems, it is proposed to foresee the interconnection of procedures of the sub-institution of parliamentary nullification at

the level of the territorial subject of the Russian Federation and judicial nullification with regard to the federal regulatory legal act nullified at the regional level: to amend the legislation in terms of establishing the order of suspension in cases provided by law, of validity in the territory of a territorial subject of the Russian Federation of the provisions of the federal regulatory legal act and the introduction of the correlating public authorities of the territorial subject of the Russian Federation to send to the competent court a request for compliance of the federal law, by-law regulatory legal act or their separate provisions under dispute, with the Constitution of the Russian Federation, federal law, treaty on the delimitation of jurisdiction and powers.

15. In order to ensure the stability of the constitutional legal regime, clarification is suggested for the procedure for the implementation by the President of the Russian Federation of the instrument for the nullification of acts of the Government of Russia stipulated by the federal constitution and the introduction of additional instruments for judicial and parliamentary control over such a decision in the form of correlative procedures for parliamentary and judicial nullification. Drafts of corresponding amendments to the Constitution of the Russian Federation have been developed.

16. Proceeding from the necessity to provide adequate guarantees for the delimitation of power between the Federation and the territorial subjects of the Federation, a regulation is proposed in the legislation of the nullification procedure for suspending the act of the highest official of the territorial subject of the Federation by the President of Russia, including his obligation to appeal to the competent court for the purposes of judicial regulatory control over the act suspended by him in the administrative order.

17. In order to resolve the problem situation that arose after the Constitutional Court of the Russian Federation has actually recognized the presumption of the legality of acts containing explanations of legislation and having quasi-regulatory features, it is proposed to provide a simplified instrument for verification of the interpretative act for its compliance with regulatory legal acts of a higher level.

18. In order to improve the instruments of judicial nullification, the following measures are proposed:

- supplement the list of administrative cases assigned to the jurisdiction of the Supreme Court of the Russian Federation, cases of challenging regulatory legal acts of authorities and organizations that are imposed by the federal law to execute public functions; the list of administrative cases assigned to the jurisdiction of court of the level of the territorial subject of the Russian Federation; challenges on disputing the statutes of municipalities and regulatory legal acts adopted by the population directly (on a local referendum (meeting of the citizens));

- unify the provisions of the AJC of the Russian Federation and the APC of the Russian Federation in determining the procedure for overcoming the legal irregularity in legal relations that may arise in connection with the court's recognition of a regulatory legal act that is ineffective fully or in part, while adopting the model contained in the APC of the Russian Federation;

- in order to improve the judicial control over the legal content of acts containing explanations of legislation and having regulatory features, a model is proposed where the court, at the stage of initiation of proceedings for challenging act containing explanations of legislation and having regulatory features, should independently consider the issue of compliance of disputable act with the criteria that allow recognize it as such act, this determines further way of claim: proceedings or refusal to initiate trial, if the act has an advisory nature[5];

- supplement the grounds for reviewing court decisions on new and newly discovered circumstances in civil (arbitration) and administrative proceedings, including in their list "recognition of the law applied in an individual case by a constitutional (statutory) court of a territorial subject of the Russian Federation as inconsistent with the constitution (statute) of a territorial subject of the Russian Federation in connection with the adoption of a decision by which the applicant has applied to a constitutional (statutory) court of a territorial subject of the Russian Federation".

19. In order to legitimize the nullification of the law in the jury trial, additions are proposed to the Criminal Procedure Code of the Russian Federation on the clarification in the parting word of the presiding judge on the binding verdict of the jury for the presiding judge and the types of decisions that judge must make on the basis of the verdict returned by the jury (including the obligation to render an acquittal in the case when the jury return a negative answer to at least one of the three main questions that taken up to them in a mandatory manner).

20. In order to ensure the normative unity of explanations in judicial practice with the letter and spirit of the law, and the correspondence of such explanations to the Constitution of Russia, it is proposed to include decisions of the Plenum of the Supreme Court of the Russian Federation in the list of objects of constitutional control exercised by the Constitutional Court of the Russian Federation.

[5]At the same time, actions of public authorities and local self-government authorities, as well as their officials, based on legal positions set forth in acts of advisory nature, may be challenged in the manner provided for challenging decisions, actions (inaction) of public authorities and officials (Section 22 of the AJC of the Russian Federation and Section 24 of the APC of the Russian Federation). A draft of the corresponding amendments is proposed.

Summary of the study by chapters.

The first chapter **"Normative legal act as an object of contestation in the nullification procedures"** contains, as its basic premise, evaluation of the doctrinal positions of the legal theory concerning **distinctions between the concepts of "form of law" and "source of law" – within the paradigm of theoretical and practical aspects of contestability of normative legal act,** inter alia, we demonstrate practical significance of the aforementioned concepts for our study.

Meanwhile, the author postulates, that normative legal act is one of the forms of consolidation (objectification) of legal norms, i.e. is a form of law, which, in its turn, has different lawmaking factors as its sources. Development of the doctrinal viewpoints on distinctions between the concepts of "form of law" and "source of law" is practically relevant for the improvement of means of control over legal provisions and their limits.

On the basis of the aforesaid, we show, that identification of properties of the normative legal act together with sources of law (lawmaking factors), taken as basis for adoption of the acts, has a deep significance for adoption of judicial and non-judicial nullification procedures and their legislative improvement.

Next, we analyze **modern trends of the development of legislative system in the Russian Federation and their impact on making normative control effective; we single out normative legal acts, procedures for contestation of which is provided by the acting procedural legislation, together with normative legal and quasinormative acts, contestation of which either has features that lack legal regulation or is not formally provisioned by the law.**

The study acknowledges that legislative system in the Russian Federation is off-balance due to the: (1) existence of a vast scope of forms of law (official and unofficial), through which state and municipal authorities or other bodies, on which the law confers performance of the public functions, exercise normative or quasinormative regulation; (2) policies of the state agencies, who unilaterally define their powers to issue such acts that affect rights, liberties and duties of the citizens; (3) acknowledgement by the Constitutional Court of the Russian Federation of the admissibility of contestation of the acts, containing interpretation of laws and possessing normative qualities (resolution No 6-P dated March, 2015) while resolution on this case does not instruct the federal legislator to adopt criteria for permissibility of such norm-making.

The author considers, that under the aforementioned conditions, the system of control over norm-making activities of the executive branch, having its framework in the acts of the President of the Russian Federation, Government and Ministry of Justice on enactment and registration of the sublegal acts, has proven to be unable to prevent public authorities from unduly loose interpretation of laws and attempts to

correct them, circumventing ordinary parliamentary and administrative procedures. This allows us to conclude, that it is necessary to develop mechanisms of judicial nullification of normative legal acts and, respectively, supports relevance of the study's topic in order to implement principles of the rule of law in Russia.

The second chapter **"Nullification of normative legal act as an inter-branch legal institute"** deals with the essence and origins of the inter-branch institute of nullification together with the sub-institutes of parliamentary, administrative and judicial nullification distinguished inside this institute.

Justifying the use of the Latin term "nullification[6]" in the professional vocabulary of the modern Russian language to denote actions aimed at removing some element from the system in the natural, technical and humanity sciences, the authors also shows interdisciplinary (universal) nature of nullification.

We show that, in the absence of comprehensive studies on the legal institute of nullification in the Russian legal science, its certain aspects have been examined in the legal doctrine of international public law, constitutional law, procedural law[7], which also proves inter-branch legal nature of the nullification of normative legal acts.

Furthermore, legal phenomenon of the nullification of normative legal act manifests itself in the legal system as result of different nullification mechanisms, and the powers to perform nullification, relevant subjects, procedures and consequences of nullification differ according to a variety of factors. Such factors may include form of law, containing a norm undergoing nullification; branch of legal regulation and significance of specific relevant procedures of nullification, conditioned by it.

Objects of nullification are forms of law legally acknowledged in the Russian Federation – normative legal acts (certain provisions of the normative legal acts) and other acts applied in practice, including acts, containing interpretation of laws and possessing normative properties.

We demonstrate complex structure of the nullification of normative legal act, emerging as a result of the combination of a number of juridical facts: juridical fact of an empowered subject exercising activity to implement nullification procedure and juridical fact of reaching a decision to declare a legal norm invalid (decision on its nullity or on prohibition of its application, i.e. on declaring it inoperative). We also show, that consequences of nullification may consist of changes in the law enforcement practice or possible application of the law-making authority itself for the corrections of legal regulations of social relations in view of the legal positions (opinions), which emerged during the nullification procedure implementation.

---

[6] Nullification from lat. "*nullus*" – "none" and "*facere*" – "to make".

[7] I.e., civil procedural law, including its arbitration form, administrative procedural law, criminal law and procedure.

We also propose an author's classification of the legal institute of the normative legal act nullification. In particular, inside parliamentary, administrative and judicial nullification we distinguish nullification mechanisms of ordinary and extraordinary types, being separate sub-institutes of nullification.

Analysis of the ***ordinary parliamentary nullification mechanisms*** demonstrates existence of the specific features of their legal nature, which has to be taken into account to ensure their improvement. Namely, nullification within the framework of legislative (lawmaking) process, besides such inherent for all nullification procedures basis as lawmaking factors, also takes into account political factor; and in the nullification procedures, as set in previously effective treaties between the federal center and subjects of the Federation on the demarcation of competences and powers, issue of the relevant subjects to initiate nullification mechanism has not been addressed.

Having said that, based on the essence of ***extraordinary parliamentary nullification*** it is difficult not to conclude on its intrinsic legal nature, based on the parliamentary control function and fundamental principles of the supremacy of law and popular sovereignty.

Meanwhile, resulting from the adoption by the subject of Federation of an act on nullification of the norms of federal legislation, procedure of extraordinary parliamentary nullification demonstrates stable interrelation between parliamentary and judicial sub-institutes of nullification – as having essential significance, as have been shown on the example of nullification, performed in 1995 by the State Duma of Stavropol Krai and its subsequent override by the Stavropol legislators through the appeal to the Constitutional Court of the Russian Federation. Due to the current absence of an appropriate legal mechanism to overcome political and legal crisis emerging from such nullification, the author proposes his own model of legal framework for such mechanism of nullification.

Discussion of the ***sub-institute of administrative nullification*** is preceded in the study by analysis of the founding act of RSFSR and USSR, affirming traditional for Russia, since the establishment of the republican form of government, investment of the executive branch with the powers to annul normative legal acts. Modern legislative system of the Russian Federation, containing a vast institute of administrative nullification, follows tradition that emerged in the Soviet period, which is corroborated by the analyzed ordinary and extraordinary mechanisms of administrative nullification.

Based on the nature of certain powers of the President of the Russian Federation on performing administrative nullification of legal acts of the Government of Russia, we argue necessity to reform procedures of exercising such powers in order to delineate them and to ensure mutual control between the branches of power.

The most important tendency of the development of nullification institute is defined by the acknowledgement in the aforementioned resolution of the Constitutional Court of the Russian Federation No 6-P dated March 31, 2015 of the acts, containing interpretation of laws and possessing normative qualities, as an object of nullification, and subsequent reforms of the procedural legislation in this respect. The author points out that a legal position, chosen by the Constitutional Court of the Russian Federation, has led to the final acknowledgement of the "agency legislation" in the Russian Federation, in spite of the often contradicting and (or) illegal positions on the effective legislation contained in them. Practically, resolution has introduced presumption of legality of such acts and, corresponding, binding nature of their implementation by the subjects of legal relations unless such acts are contested under the established procedure.

Examination of the ***sub-institute of judicial nullification*** is preceded by the examination of periodization of the normative control development using the historiographical approach, based, among other things, on the cardinal changes of political and legal regimes in Russia.

Mechanisms of judicial nullifications are graded according to the branches of law. We underscore their ordinary nature in all types of judicial proceedings, excluding one extraordinary procedure in the criminal proceeding – nullification of law in the jury trial.

Procedures of judicial nullification are distinguished according to the consequences of their performance (declaration) for the annulled norm itself.

The author concludes that judicial nullification of the normative legal act is a crucial sub-institute of nullification from the point of view of implementation of the rule-of-law principles, including effective protection and restoration of rights, liberties and legal interests of the subjects of legal relations. At the same time, judicial procedure of nullification by bearing witness, on the one hand, to the law-making process resulting in promulgation of defective norms, leading to the infringement upon the given rights, attests, on the other hand, to the efficiency of the legal system's means to rectify itself.

We postulate, that nature of the nullification of normative legal acts is conditioned upon the functions of control over the contents of legislation, its legal matter, its translation (development) of the provisions of the Constitution of the Russian Federation as a social contract and international conventional acts on the human rights and liberties protection, ratified by Russia.

The author points out that examination of parliamentary, administrative and judicial normative control as an inter-branch legal institute stems from the unity of law enforcement goals of nullification, stability of constitutional regime, legal and political stability, which are supported exactly by monitoring of the norms of

effective legislation on accordance with the universally accepted by the democratic society legal principles and goals of legal development.

Meanwhile, the author emphasizes that legal principles and goals of legal development in the democratic society do not represent exhaustive set of tools, used by the subject of nullification procedure to monitor the norms. Full set of tools consists of all sources of law (law-making factors[8]) in the national legal system, generating objectification of law in the forms of normative legal acts. Correspondingly, nullification of normative legal act is based on suprapositive legal, moral, ethical and political foundations. Distortion of the form of law and emergence of the deformed forms of law (normative legal act) in the legislative system, in their turn, may serve as an impulse for nullification.

The third chapter of the thesis – **"Judiciary nullification of normative legal act" deals with the analysis of its general and particular features in different types of judicial proceedings.**

Jurisdictional activities of the Constitutional Court of the Russian Federation and constitutional (statutory) courts of subjects of the Russian Federation as a mechanism of the nullification of normative legal acts of the higher level, are examined as having crucial significance in relation to the parliamentary and administrative nullification, procedures and legal consequences of which can be reviewed under general judicial procedures.

As law enforcement activities of the whole judicial system fall into the purview of the constitutional justice, decisions of the federal and regional constitutional (statutory) courts in the procedure of normative control should, by definition, establish law-enforcement practices and corrections to the legislative policies.

The study systematizes a number of crucial legal positions of the Constitutional Court of the Russian Federation, defining features of the sub-institute of judicial nullification, including the following (1) that contestation of normative legal acts is included within the normative matter of the constitutional right to judicial protection; (2) that "classical" nullification (*"de jure et de facto"*) is performed in the

[8] On the debating point of the theory of law on distinguishing between the concepts of "source" and "form" of law, the author has chosen an approach, according to which lawmaking factors (sources of law) include: (1) legal traditions of the society; (2) universally accepted human values (universality of which does not depend on national or ethnic customs and traditions); (3) views on the place of a person in the framework of state and public institutions; (4) emerging (factual) social relations; (5) ideas of social justice and common good; (6) professional and common legal consciousness, dominating in the society; (7) dominating systems of religious or secular views etc. See proposition No 10, submitted for the defense.

We presume that mentioned in the non-exhaustive list above lawmaking factors, objectified from the vast sphere of natural, humanity and social ontological bases of the existence of human and society, form fundamental natural principles of law, i.e. its sources. Consequently, such sources acquire universally accepted nature and find their expression in the international conventional and national constitutional acts or acquire acceptance even without being reduced to the written legal acts. As a prototype of law and universally accepted measure of justice, they act as a set of tools to monitor derivative legal norms, regulating social relations.

constitutional justice, distinguishing this mechanism from other types of judicial nullification; (3) that removal of laws from the legal system on the grounds of their unconstitutionality is not permissible under procedures of regular courts and courts of arbitration.

The author emphasizes specific feature of the application of tools to monitor norm in the constitutional proceedings: previously reached legal positions of the Constitutional Court of the Russian Federation and positions of ECHR on interpretation of conventional acts are applied in their dynamics.

We identify a tendency in development of nullification in constitutional proceedings for the Constitutional Court to proclaim norms themselves unconstitutional less frequently, and to more often disqualify unconstitutional understanding of the matter of norms, either existing in the law-enforcement practices, or potentially possible in the future.

Analysis of the legal framework for the activities of constitutional (statutory) courts in subjects of the Federation confirms lack of alignment between nullification mechanisms applied by them, e.g., concerning legal consequences of nullification for the disqualified norm (whether it is excluded from or remains in the legislative system).

Concerning procedures of regional constitutional (statutory) courts, issues of prejudice of their decisions also lack regulation: grounds for the retrial due to the new facts, according to the effective procedural legislation, do not include legal act, applied in the particular case, being proclaimed to contravene constitution (statute) of a subject of the Federation by the decision sought after by the applicant from the constitutional (statutory) court.

Issues of jurisdiction of the disputes on conformity of normative legal acts of a subject of the Federation with constitution (statute) of a subject of the Federation in case if a region does not have a constitutional (statutory) court also lack solution, as also does a connected issue of the consequences of nullification with regard to the procedure of removal of the deformed act or their certain provisions from the legislative system (“*de jure et de facto*” or “*non de jure sed de facto derogare*”).

To overcome these gaps we propose drafts to amend effective federal normative legal acts.

To analyze essence (composition) of the judicial nullification of normative legal act on the branches of administrative and civil (arbitral) procedure, aimed at protection of both private and public interests, we examined in detail nullification mechanisms, performed in the procedures of normative control, as stipulated by the Codes of Administrative Court Procedure and Arbitration Procedure.

Concerning such consequences of act nullification as retaining it in the legislative system while proclaiming it inoperative, the study shows, that normative

legal act after being proclaimed inoperative, until it is repealed, is a "deposed" act, i.e. an act (legal provision) with the deformed, as author considers, legal nature, which is supported by the legal position of the Constitutional Court of the Russian Federation. While definition of the concept of "inoperative normative legal act" is absent from the legislation of the Russian Federation, which attests to a certain gap in theory and lawmaking, it does not create grounds to dispute author's conclusion, that non-exclusion of the nullified normative legal acts from the legislative system may lead to contradictory law enforcement practices.

Meanwhile, Code of Administrative Court Procedure and Code of Arbitration Procedure differ in defining procedures to overcome lack of legal regulation of the legal relations, which may arise due to the court proclaiming a normative legal act inoperative. The study proposes to align provisions of Code of Administrative Court Procedure and Code of Arbitration Procedure based on the model, stipulated by the Code of Arbitration Procedure.

Further, the author reveals issues of contestation in judicial proceedings of a normative legal act that by the time of application to the court has become inoperative upon decision of a norm-making authority. Federal legislator and Plenum of the Supreme Court of the Russian Federation hold a position, according to which such legal acts may be a subject to the judicial contestation, that, at the time of their contestation in judicial procedure or consideration on the merits of the claims, are effective and cause violation of civil rights and liberties, which, consequently, requires judicial suppression. However, such position contravenes the position of the Constitutional Court of the Russian Federation, according to which cessation of the proceedings on the case on the grounds that a contested normative legal act has become inoperative is only possible if it doesn't have right-violating consequences for the claimant, which, in the opinion of the author, suggests necessity for the administrative claimant to agree to the cessation on these grounds and, respectively, calls for amendments to the Code of Administrative Court Procedure. We also propose to exclude from the Code of Administrative Court Procedure a provision, according to which it is possible to refuse to receive complaint on the grounds, that it cannot be inferred from it that the contested act violates or otherwise affects rights, liberties and legal interests of the claimant, which contravenes the position of the Constitutional Court of the Russian Federation.

The study examines, as a particular aspect of normative control, issues of the contestation of acts, containing interpretation of laws and possessing normative qualities. We also analyze prejudicial significance of resolutions of the Plenums of the Supreme Court of the Russian Federation and of the Supreme Court of Arbitration of the Russian Federation as a moving force for the nullification processes of the *"lex superior derogat inferiori"* type.

The study also deals with specifics of nullification of law in the criminal proceedings with the jury trial, which represents the only extraordinary procedure of the sub-institute of judicial nullification. We distinguish certain aspects of the legal nature of this type of judicial nullification; examine its particular features, lying in the refusal by the jury to find a defendant guilty and, therefore their willingness not to allow applying to him/her norms of criminal law, based on suprapositive legal, moral, ethical and (or) political motives. We establish that nullification in the trial by jury does not contravene legal order, existing in Russia, which is supported by the Supreme Court of the Russian Federation.

Sociological study, conducted by the author, consisting of the interviewing of potential jurors and judges of the federal general courts, allows us to conclude, that in administering justice in the trial by jury constituting reasons of nullification of laws are lawmaking factors (sources of law)[9]. Based on the obtained results, we propose amendment to the Code of Criminal Procedure on explaining the jurors obligatory nature of their verdict for the presiding judge and possible types of decisions, taken by the presiding judge based on their verdict (without directly pointing to the possibility of nullification of law to prevent possible abuse of a right in this case).

In the **conclusion** we establish brief theoretical and practical inferences and proposals for the improvement of legislation.

The **annexes** contain tables, explaining mechanisms of nullification, composing sub-institutes of the inter-branch institute of nullification of the normative legal act; essence (composition) of the mechanisms of nullification of the normative legal act; drafts of amendments to a number of federal normative legal acts (according to the proposals set out in the thesis); data of the sociological study (questionnaires, diagrams with the results of an interview and tables, containing responses to the open questions).

List of publications of the author of the thesis, reflecting the main scientific results of the thesis:

[9] Resulting from the analysis of the data obtained in the sociological study, we confirmed a number of hypotheses, namely (1) the level of citizens' confidence in the Russian judicial system tends to lower; (2) majority of the citizens has a positive attitude towards the restoration of trial by jury in 1993, while majority of the judges has a negative one; (3) jurors look to the opinion of the professional judge (try to understand it), while deciding on the guilt of the defendant; the jurors believe the professional judge; 4) the Russian public justice is accusation-oriented; 5) federal judges are not eager to admit the existence of destructive processes in the Russian judicial system; 6) nullification in trial by jury processes actually takes place within in the Russian public justice.

The following hypotheses were not confirmed: 1) federal judges treat jurors as allies and subordinates, with general negative stance towards juror' institute; 2) jurors treat the defendants with more clemency, than federal judges.

Articles published in the leading magazines and literature under review, shown in the list of the Higher Attestation Commission under the Ministry of Education and Science of the Russian Federation:

1. *Shmelyov, A.N.,* Osporimost' pravovogo akta kak faktor formirovaniya neprotivorechivoy sistemy zakonodatel'stva v Rossiyskoy Federatsii [Voidability of a legal act as a factor in the formation of a consistent system of legislation in the Russian Federation] // Rossiyskiy sud'ya [The Russian Judge]. 2015. No. 10. Pp. 10-14. - 0.62 p.s.

2. *Shmelyov, A.N.,* Nullifikatsiya normativnogo pravovogo akta kak mezhotraslevoy pravovoy institut, obespechivayushchiy povysheniye standarta pravovoy zashchity [Nullification of a regulatory legal act as an intersectoral legal institute providing an increase in the standard of legal protection] // Yuridicheskiy mir [Juridical world]. 2016. No. 1. Pp. 42-47. - 0.69 p.s.

3. *Shmelyov, A.N.,* Sudebnaya nullifikatsiya normativnogo pravovogo akta kak printsipial'no vazhnyy bazis obespecheniya verkhovenstva prava v Rossiyskoy Federatsii: tendentsii, problemy, perspektivy [Judicial nullification of a regulatory legal act as a fundamentally important basis for ensuring the rule of law in the Russian Federation: trends, problems and prospects] // Yurist [Lawyer]. 2016. No. 23. Pp. 41-46. - 0.75 p.s.

4. *Shmelyov, A.N.,* O prave subyekta Federatsii na vozrazheniye // Vestnik Sankt-Peterburgskogo universiteta [On the right of the territorial subject of the Federation to Objection // Bulletin of St. Petersburg University.] Pravo [The Law.] 2018. Vol. 9, B. 1, Pp. 52-66. - 1.67 p.s.

Articles published in other scientific literature:

5. *Shmelyov, A.N.,* Nullifikatsiya zakona v sude prisyazhnykh kak mekhanizm kontrolya obshchestva za gosudarstvom v sfere ugolovnoy politiki i praktiki ugolovnogo sudoproizvodstva // V kn.: Evolyutsiya Rossiyskogo gosudarstva i prava [Nullification of the law in a jury trial as an instrument for society to control over the state in the field of criminal policy and practice of criminal proceedings // In the book: Evolution of the Russian state and law]. Sbornik nauchnykh statey [Collection of scientific articles]. November 30, 2012. Magenta, 2012. Pp. 274-283. - 0.58 p.s.

6. *Shmelyov, A.N.,* O chem molchat sud'i?, ili «Nullificatio legis» v pravosudii, osushchestvlyayemom s uchastiyem prisyazhnykh zasedateley [What are the judges silent about?, or "Nullificatio legis" in the justice, carried out with the participation of jury] // Mirovoy sud'ya [The magistrate]. 2013. No. 6. Pp. 29-32. - 0.5 p.s.

7. *Shmelyov, A.N.,* Kontseptual'nyye osnovy pravovoy prirody nullifikatsii normativnogo pravovogo akta v ugolovnom sudoproizvodstve (na primere sostava suda s uchastiyem prisyazhnykh zasedateley) // v kn. XX Kirillo-Mefodiyevskiye chteniya [Conceptual bases of the legal nature of the nullification of a regulatory

legal act in criminal proceedings (using an example of the composition of a court with the participation of jury) // In the book: XX Readings of Cyril and Methodius]: Materialy nauchno-prakticheskoy konferentsii [Materials of the scientific conference] (Smolensk, May 22, 2014) - Smolensk: Universum, 2014 - 240 p. Pp. 118-134. - 0.99 p.s.

8. *Shmelyov, A.N.,* Razvitiye protsedur sudebnoy nullifikatsii normativnogo pravovogo akta kak odno iz usloviy postroyeniya diskursa pravovogo i politicheskogo razvitiya Rossii na osnove konstitutsionno priznannykh liberal'nykh tsennostey svobody, ravenstva i spravedlivosti // V kn.: Problemy realizatsii printsipa spravedlivosti v pravotvorcheskoy i pravoprimenitel'noy deyatel'nosti [Development of procedures for judicial nullification of a regulatory legal act as one of the conditions for constructing a discourse of legal and political development of Russia on the basis of constitutionally recognized liberal values of freedom, equality and justice // In the book: Problems of the implementation of the principle of justice in lawmaking and law enforcement activity]: Sbornik nauchnykh statey [Collection of scientific articles]. Smolensk: Magenta, 2015. Pp. 127-145. - 1.1 p.s.

The total volume of the author's publications is 6.9 printed sheets.