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PECULARITIES OF THE CHECKS AND BALANCES SYSTEM BETWEEN THE BRANCHES OF STATE POWER IN OTTO EIHELMAN'S DRAFT OF THE UNR CONSTITUTION

The article deals with the constitutional views of Otto Eihelman, a well-known Ukrainian lawyer, public and political figure and national liberation competitions ideologist of the XIX - beginning of the XX century. The mechanism of checks and balances in the system of organization of state power proposed by him in the draft of Constitution of the UNR is analyzed by considering its basic elements. It is emphasized that the system of state power must be based on the principles of federalism and popular sovereignty. The latter should be implemented through popular referendums.

The basic components of the state power mechanism that Otto Eihelman proposes in his constitutional project of the UNR are investigated: Federal State Constituent Power of the UNR (owned by the people of the UNR and is implemented through referenda); supreme legislative body of the UNR (belongs to the Federal State Parliament, which consists of two chambers: the Land State Chamber and the Federal-State Council); executive power of the UNR (belongs to the Federal Head of the State, who was elected at a joint assembly of two chambers of Parliament and members of the Federal State Court, as well as the Council of Ministers of the UNR); judicial power of the UNR (belongs to the Federal State Court and the Court of Cassation); control power of the UNR (belongs to the Federal State Control).

The basic elements of the system of checks and balances proposed by Otto Eihelman in the draft of UNR Constitution are analyzed: the duality of the government formation sources; removal of the head of state by the legislature, dissolution of parliament; institute of presidential veto. It is emphasized that Otto Eihelman's primary role in ensuring the functioning of the checks and balances system has given the people sovereignty, combining forms of representative and direct democracy with the dominant role of the latter. Therefore, the people, through a referendum, as Otto Eihelman planned, were able to exercise effective control over the functioning of the state power of the UNR.

Keywords: *Otto Eihelman, system of checks and balances, UNR, state power, referendum, democracy.*

1. INTRODUCTION

Formulation of the problem. The system of checks and balances, which ensures mutual control of different branches of power and prevents the concentration of powers in one branch or in the hands of one person is a prerequisite to the stable functioning of state power. It is quite obvious that the issue of power distribution in the conditions of reforming Ukrainian society and development of state-building processes plays a special role, because it is an important and necessary element of becoming a democratic, legal and social Ukrainian state. The practical implementation of the checks and balances idea connected to the need to not only prevent excessive concentration of power, but also to ensure stability and sustainability in the activities of state institutions, improve their organization and interaction, overcome possible confrontations within the state mechanism, etc.

The young Ukrainian state is taking the first steps towards mastering and implementing a system of power distribution that follows the values of a democratic and legal society. Taking into account the small state-building experience of Ukraine, inconsistencies in the functioning of the branches of power are evident, and in some cases a direct confrontation between them also appears. We can state that, from the point of view of relevance, both foreign models of the checks and balances system and our own Ukrainian experience of organizing state power require further study.

In the context of these issues, the figure and views of a well-known domestic lawyer, social and political figure of the late XIX - the first third of the XX century, the ideologist of the Ukrainian national liberation movement – Otto Eihelman occupies a special place. In particular, he is known for his authorial draft of the UNR Constitution (1921), which has been praised by both contemporary scholars and current scholars. During the Soviet totalitarian regime, the scientific and theoretical heritage of the scientist was inaccessible to research. Only since the proclamation of Ukraine's independence scientists have been able to analyze O. Eihelman's theoretical and practical assets. Most of the general information about him we can find in single reference editions. The views of the scientist were considered by V. Potulnytskyi, O. Myronenko, V. Chekhovych, P. Stetsyuk, O. Moshak and others, but these studies are fragmentary. Therefore, O. Eihelman's state-building ideas are poorly researched and need further study in view of their applied value.

The Purpose of the Article. The purpose of the article is to analyze the constitutional views of O. Eihelman, to highlight their features, to examine the main elements of the checks and balances system in the organization of branches of government and the mechanism of their interaction.

2. RESULTS OF THE RESEARCH

O. Eihelman emphasizes that the UNR Constitution is based on the principle of federalism, «so that all statehood can be connected with the people as closely as possible», and the principle of popular sovereignty. The latter was embodied in a nationwide referendum as a right of «direct popular vote to resolve not only issues related to changes in the content of the Constitution – the Basic State Law – but, optionally, to address issues of ordinary law, as well as some issues of public administration» [1, p. 149].

According to O. Eihelman, the Ukrainian state was defined as a democratic federal republic with a significant restriction on the head of state power. It should be noted that it is based on the best experience of the governmental organization of Switzerland, as well as the USA [2].

The Federal state constituent power of the UNR, which belonged to the people was proclaimed the supreme state power. It included UNR citizens who have reached the age of 25, had some work, lived on their own funds, were unspotted by the court and had the right to vote. The constituent power was vested with the exclusive right to overturn and amend the Basic Law, as well as to resolve issues in the field of legislation, administration, judicial and financial control in the state.

The activities of the constituent power were carried out through a referendum initiated by: one-third of the composition of each of the Houses of Parliament; Head of State; Federal State Council of Ministers; Federal State Court; ¼ part of the general composition of land parliaments; 2 million citizens-members of the UNR Federal state constituent power. The results of the people's were not subjected to appeal in the Federal State Court, the decision of which was peremptory [3].

Thus, it can be stated that, firstly, the Draft envisaged the possibility of widespread involvement of UNR citizens in the constituent power; secondly, the constituent power was vested with significant powers of decision-making, public administration, formation of the system of power and control over it; thirdly, referenda were envisaged both at the national and regional levels. Through the organization of the constituent branch of power, O. Eihelman sought to resolve the complex issue of popular sovereignty in the federal republic. Its contents consisted of direct (by referendum) supreme oversight by the constituent power over the legislative activity of the parliamentary institution, as well as the judicial and financial control.

The supreme legislative body of the UNR, according to O. Eihelman, was the Federal State Parliament, which consisted of two chambers: the Zemsky-State Chamber and the Federal State Council. If the composition of the first chamber was formed with the represented land parliaments, the Federal State Council – at national, secret, direct and proportional elections. Both chambers had the same right of legislative initiative, which at the same time was granted to the Federal State Chairman, the Federal State Court, the Federal State Control, the Federal State Council of Ministers, the UNR citizens.

The Parliament's powers included: legislative work, budget approval; overseeing the policies of the executive power; approval of ministers and government officials nominated for the post by the Head of State; appointment of half judges of the Federal State Court from among the candidates submitted to the land parliaments and one third of the judges from among the candidates proposed by both chambers of the Parliament [1, p. 167-168].

The resolutions of the Parliament were considered by the Federal Head of the State, who could reject the request for a second time no later than the tenth day after their receipt. The resolution could be approved, provided that it was again supported by an overwhelming majority of parliamentary votes, with a quorum of 3/5 of its total membership. In that case, the Federal Head of the State could have called for a referendum, the decision of which was final. Provided that the bill was approved by only one of the chambers and rejected by the other, the Federal Head of the State was empowered to submit the bill for national consideration. Instead, when a bill was passed by one chamber three times unchanged and rejected by another, the Head of State had the right to approve it, thus giving it the force of law.

The early dissolution of Parliament was carried out on the proposal of the Parliament itself, the land parliaments, and the Constituent power. In all cases, this procedure was agreed with the Federal Head of the State. He also had the right to initiate a referendum on the dissolution of one or both chambers. On the eve of the referendum, the Federal Head of the State was obliged to consult with the Council of Ministers and the Presidium of both chambers of Parliament, which had advisory nature. Instead, the results of the referendum were final. In the event of a negative decision, the parliament received the status of inviolability within a year [3].

It is obvious that in this way O. Eihelman tried to prevent the unjustified exercise of the right to dissolve parliament. The author also provided for an additional mechanism for controlling the parliamentary activity, which could have led to the deputies dismissal: absent members of one of the chambers who did not appear at the Parliament session without good reason were expelled from the chamber and deprived of voting rights from three to five years according to the Federal-State Court decision. Punitive sanctions were also envisaged in case of inappropriate, rude behavior by members of the Parliament during its meetings.

On the other hand, the Parliament initiated the procedure of removal from office as Federal Head of the State, including holding him accountable after the term of office, as well as judges of the Supreme Federal State Court, members of the Parliament, ministers, vice ministers and other government officials for improper performance their job responsibilities.

Therefore, the Parliament had the powers: a) in the system of executive power (formation of government), including the procedure for removal of the Federal Head of the State from office; b) in the judicial branch through participation in the formation of the Federal State Court; initiated the prosecution of senior public officials; c) in the sphere of Federal State Control, approving its conclusions. In order to implement the system of checks and balances, O. Eihelman also envisaged some forms of influence of the executive branch on the legislative process. It is about the legislative initiative of the President and his ability to reject the resolutions of the Parliament, the provision for early termination of the legislative body. As for the latter, the «ambitions» of both chambers of Parliament, the Constituent power and the land parliaments were limited by the Head of state and the latter by a national referendum.

It can be stated that the control over the activity of the Parliament belonged to both the Constituent power, the Federal Head of the State, and the Federal State Court. National referendum according to O. Eihelman played a special role in the sphere of functioning of the legislative branch of the government, whose decision was final. The views of the scientist on stimulating the activity of parliamentarians, as well as the judicial responsibility for its consequences, are relevant.

The Federal Head of the State was the supreme body of executive power both in the civil and military administration of the State. His election was conducted by a joint assembly of two chambers of Parliament and members of the Federal State Court. Within two months of the election of the Federal Head of the State, UNR citizens had the right to challenge his candidacy in a referendum. In case of negative results of the popular vote, the Head of the State terminated his powers. In a similar order, his deputies were elected.

The Federal Head of the State was given broad powers in the executive sphere. He appointed ministers from the nominations approved by the joint assembly of the two houses of the Parliament. The Council of Ministers was formed not on parliamentary grounds but on mixed grounds: the Federal State Chairman nominated members of the government to the united assembly of the Parliament and appointed them to

positions, subject to a positive decision of the legislature. The Council of Ministers elected a Head of Government, which was approved by the President. The latter monitored the implementation of laws by the executive branch, approved senior civilian and military officials submitted by relevant agencies [3].

In case of rejection of the proposed nominations by the President, the respective institution (or person) submitted the following three candidates, from among whom the Federal State Chairman selected one and appointed to the respective position. At the proposal of the Council of Ministers, he introduced candidates for diplomatic posts for approval to the Federal State Parliament. In urgent cases, upon the submission of the Government, the Federal Head of the State appointed them on a temporary basis on the basis of their own orders. If the parliament did not approve these candidates in the future, then they were recalled from their posts. The President also approved the Government's decree on declarations of emergency or martial law in certain areas, as well as the state of the siege.

The Federal Head of the State was empowered to temporarily remove or dismiss civil and military government ministers from the Council of Ministers, except judges and governmental control officials. The Federal Head of the State approved the resolutions of the Council of Ministers on the enactment of laws passed in the intervals between parliamentary sessions. His authority included the total or partial release of criminals from punishment.

The draft of Constitution describes in detail the procedure for instituting criminal proceedings against the President for abuse of office and private life. At the same time, O. Eihelman warns that «... a criminal case against Federal Head of the State in the event of his transgression, whatever they may be, should be treated with extreme caution and delicacy in order to avoid possible accidental, malicious, vengeful and groundless persecution against him» [3].

Several institutions were able to accuse the President: one of two chambers of the Parliament; Federal State Court; Federal State Control or the Court of Cassation of the UNR. Provided that 1/3 of one of these institutions made a positive decision to file charges against the President, the case was referred to a panel. She discussed the case at a closed meeting with a quorum of at least 3/5 of all its members, and in the presence of grounds to confirm guilt, made a decision to open a criminal case by a majority of 2/3 of its total membership. Later, on the initiative of the board, a temporary committee was formed, consisting of the Heads of a number of Departments, such as: both chambers of parliament, the Federal State Court, the Federal State Control and the Court of Cassation of the UNR. The Committee elected a Chairman from among its members, who suggested that the three institutions be represented by three individuals who would be members of a special meeting, which had the opportunity to involve three highly qualified lawyers and a member of the UNR Cassation Court. The established meeting conducted preliminary inquiries into the case against the Federal Head of the State and was empowered by judicial investigators during interrogations, experiments and searches.

The summary report of the meeting was announced at the consolidated meeting of the institutions whose heads were part of it. Subject to the support of the prosecution, the majority of those present (3/4 of those present), as well as 3/4 of the attorneys present at the assembly of lawyers, were referred to a separate tribunal. Under these conditions, the Federal Head of the State had the power to draw up the conclusions of the newly formed tribunal. In the event of acquittal of the accused, the Federal Head of the State returned to his duties. However, when the indictment was negative, the restoration of the Federal Head of the State in his post depended on the decision of the united assembly. The resolution was approved by an absolute majority of the members present at the meeting [4, p. 277-278].

The Federal Head of the State could voluntarily refuse to fulfill his duties before the set deadline. In this case, the combined assembly of the two chambers of the Parliament and the Federal State Court considered the request for dismissal and granted it in the absence of additional difficulties in state regulation.

If, in the event of unsatisfactory physical or mental condition, the Federal Head of the State could not perform his duties but did not voluntarily relinquish them, then each chamber of the Parliament or the Federal State Court considered his dismissal from office. The same procedure was carried out in the case of the President's indifferent attitude towards the performance of his duties, as well as the inconsistency of the direction of his official activity with the national interests of the State. Provided that the resolution was passed by a combined assembly of the Parliament and the Federal State Court by a majority of votes, but less than 4/5 of the total number of members of the assembly, the deposed Federal State Chairman could appeal the referendum. If the results of the popular vote confirm the resolution of the united assembly, then the Federal Head of the State must compensate for the material damages spent for its holding [4, p. 279].

The procedure for the removal of the Federal Head of the State from his post, O. Eihelman, tried to create according to the best democratic models of the time, clearly defining the legal powers of both the prosecution and the accused. The latter, at all stages of the criminal investigation, had the right of access to information which was provided to him personally or through proxies; presence at all stages of the case; familiarization with documents and protocols; expressing explanations and the like. A separate state tribunal which dealt with the case could require the personal presence of the Federal Head of the State during the hearing of the case and the investigation process.

The State Tribunal for the Federal State Court was formed as follows: First, from the lists of all members of both chambers of Parliament, the Federal State Court and the Court of Cassation of the UPR, 36 candidates were chosen by lot; secondly, three more representatives were elected from the members of the Zemsky Parliaments in a similar way.

The accused was granted the right to remove from the candidates of the first group not more than six persons, and from the second – not more than 1/6 part from its general structure. The composition of the tribunal was then formed by the remaining persons. The functions of the prosecutor in the tribunal were performed by the Senior Chairman of the UNR Cassation Court. The decision on the prosecution was made by the State Tribunal by a majority of 2/3 votes. The conclusions adopted by them gave consideration to the joint assembly of both chambers of the Parliament. The meeting was empowered to approve, reduce, or completely release a convicted person, determined by the tribunal, by an absolute majority of votes at a quorum of 3/5 of the total number of its members. The resolution of the consolidated assembly was considered final.

It is important that citizens with the right to participate in the constituent power of at least half of the votes cast in the general election to the Federal State Council could protest the decision of the united assembly. In this case, the decision of the merged assembly was considered invalid and the indictment of the tribunal was enforced.

Initiatives to initiate criminal proceedings in connection with the abuse of office of ministers, vice ministers, directors of departments could be put forward by both chambers of the Parliament, the Federal Head of the State, the Federal State Court, the Federal State Control and the Court of Cassation, separate Land Parliaments, as well as individuals and institutions, if their rights have been violated by the actions of those persons. In addition, the ministers were also responsible for official misconduct, which did not bear the statutory features of the crime, but caused great harm to the public interest.

The Federal State Court was the highest judicial body of the UNR. The members of which were elected for life. Half of its composition was formed by the united assembly of the chambers of the Federal State Parliament from the candidates proposed by the Land Parliaments, two sixth from among the candidates were submitted by the chambers themselves, and one sixth was appointed by the Federal Head of the State [3].

The powers of the Federal State Court included: resolving disputes over the conformity of law; interpretation of the norms of the Constitution on the basis of the appeal of the chambers of the Parliament, the Federal Head of the State, the Council of Ministers, the Federal State Control, as well as the legislative and higher administrative and judicial institutions in separate lands; conducting disciplinary and punitive actions of the Federal President, his deputies and members of the Federal State Court, as well as court clerks for malpractice.

Control power in the form of auditing financial activities mainly relied on Federal State Control. The Federal State Parliament, the Federal State Chairman, the Land Parliaments, as well as the Federal State Court and the Court of Cassation participated in the formation of its Board [3].

3. CONCLUSIONS AND PROSPECTS FOR FURTHER RESEARCH

To summarize, we would like to point out that O. Eihelman tried to organize the basic elements of checks and balances, such as the duplicity of sources of government formation, the procedure for the removal of the head of state by the legislature, the mechanism of dissolution of parliament, the institute of presidential veto, etc. The general democratic foundations of the Constitution of O. Eihelman are expressed in the constant emphasizing of the idea of national rule, the sovereignty of the people, the rule of power, and so on. The scientist has combined forms of representative and direct democracy, giving the latter a dominant importance. He identified democracy with a genuine democracy.

On the other hand, it is quite clear that such an organization of the state-government sphere requires a high level of awareness, political consciousness and culture not only among the representatives of the national elite, but also among the masses of the population. Therefore, the characterized system of checks and balances is too democratic even for the current stage of state development in Ukraine. However, it has many advantages. Firstly, it is a detailing of constitutional norms, which makes it impossible to interpret and implement them at the discretion of politicians, and also clearly defines the constitutional powers of the branches of power, which reduces the possibility of confrontation between them. Secondly, it was an effort to maximize the decentralization of power by dividing it between five branches. Thirdly, the proposals of O. Eihelman on the responsibility of the highest state officials for the results of their work, as well as the ways to increase its efficiency, are quite relevant. Obviously, based on the world's best models of democratic and legal societies, the scientist tried to offer such a mechanism of organization of state power, which would not only stop the chaos in state-building processes at the time, but also raise Ukraine to the level of developed, civilized and democratic states. It should be emphasized that the constitutional views of O. Eihelman were constantly evolving, modified and improved, taking into account the practice of other countries and the peculiarities of Ukrainian state-building.

We can state that O. Eihelman's theoretical heritage has not lost its relevance and can be used in the conditions of adjustment of the current system of checks and balances in Ukraine in order to give all its elements an effective, real character, which can become a promising direction for our further research.

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ОСОБЛИВОСТІ СИСТЕМИ СТРИМУВАНЬ І ПРОТИВАГ МІЖ ГІЛКАМИ ВЛАДИ В КОНСТИТУЦІЙНОМУ ПРОЄКТІ УНР ОТТО ЕЙХЕЛЬМАНА

У статті розглянуто конституційні погляди відомого українського правника, громадсько-політичного діяча, ідеолога національно-визвольних змагань кін. XIX – поч. XX ст. Отто Ейхельмана. Проаналізовано запропонований ним у конституційному проєкті УНР механізм стримувань і противаг у системі організації державної влади через розгляд його основних елементів. Наголошено на тому, що система державної влади повинна ґрунтуватися на принципах федералізму й народного суверенітету. Останній має реалізуватися шляхом проведення всенародних референдумів.

Досліджено основні складники механізму державної влади, які пропонує Отто Ейхельман у своєму конституційному проєкті УНР: Федерально-державна установча влада УНР (належить народові УНР і реалізується через референдуми); Вищий законодавчий орган УНР (належить Федерально-державному парламенту, який складається з двох палат – Земсько-державної палати й Федерально-державної ради); Виконавча влада УНР (належить Федерально-державному голові, котрий обирався на спільному зібранні двох палат парламенту та членів Федерально-державного суду, а також Раді міністрів УНР); Судова влада УНР (належить Федерально-державному суду й Касаційному суду); Контрольна влада УНР (належала Федерально-державному контролю).

Проаналізовано основні елементи системи стримувань і противаг, запропоновані Отто Ейхельманом у конституційному проєкті УНР: подвійність джерел формування уряду; усунення глави держави законодавчим органом, розпуск парламенту; інститут президентського вето. Підкреслено, що основну роль у забезпеченні функціонування системи стримувань і противаг Отто Ейхельман відводив суверенітету народу, поєднанню форм представницької й прямої демократії за домінуючої ролі останньої. Відтак народ шляхом референдуму, за задумом Отто Ейхельмана, отримував змогу здійснювати ефективний контроль за функціонуванням державної влади УНР.

Ключові слова: Отто Ейхельман; система стримувань і противаг; УНР; державна влада; референдум; демократія.

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