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### **SCIENTIFIC APPROACH TO THE PROBLEM OF DIVISION AND RECIPROCAL INHIBITION AND COUNTERPOISES OF STATE AUTHORITIES IN UKRAINE**

#### **Abstract**

In the article were examined basic theoretical approaches and oddities of distribution and reciprocal inhibition and counterpoise of state authorities in Ukraine. Analyzed was basic components and oddities of principles of distribution of the state authority in the condition of fixation of the democratic state.

#### **Key words**

system of distribution of authority, reciprocal inhibition, mechanism of cooperation, state authorities

#### **Defining the problem**

It is worth noting that, until recently, the problem of the application of the inhibition and counterbalance system as a way of implementing the principle of separation of Ukrainian powers has not been taken into account in general. Ukraine was for a long time one of the countries of the Soviet Union, where such a rule was considered bourgeois and never was regarded even at the conceptual level. Regardless of the fact that according to the Constitution of the USSR supreme power of the state belonged to the Verkhovna Rada of the Ukrainian SSR, in fact, it was the power of the CPSU on the basis of Art. 6 of the Constitution, which announced it the center of the political system. The local councils were considered as the local government bodies, therefore the local government in fact did not exist.

Nowadays, during the building of a democratic state we realize the idea of inhibition and counterbalance to not only prevent the excessive concentration of state power, but also to ensure the stability and sustainability of the activities of state

institutions, to their better organization and harmonization, and to defeat any confrontation within the mechanism of the state.

### **The analysis of existing research and publications**

The basis for writing this article are ideas of well-known scientists, among whom it is worth mentioning A. S. Awtonomow, N. W. Hajdajenko, W. I. Danylenka, M. W. Cwik, O. W. Petryszyn, Ł. W. Awramenka, W. W. Łazariew, H. F. Szerszeniewicz, M. N. Marczenka, O. F. Skakun and Ł. M. Entin.

### **The purpose of the article**

Regardless of the fact that in the scientific literature to issues of division, mutual inhibition and counterbalance the government paid a lot of attention, due to the overlapping judicial reform, a matter of examination of the principles and power of attorney between the legislative, executive and judicial powers becomes particularly timely now. Taking into account the mentioned above, the purpose of this article is a theoretical analysis of current issues related to the unity of government and the division of its branches, whose activities must not be contrary to the democratic development of the country.

### **The main contents of the study**

The system of inhibition and counterbalance plays an important role in the formation and the system of powers separation. "In a democratic constitutional state, – writes the Russian political scientist W. Danylenko, – the idea of distribution (including dismemberment, separation, in other words inhibition of power and controlling it) is an essential part of the political system" [1, p. 726].

The problem of power separation, as well as the issue of inhibition and counterbalance in modern societies such as were examined in the work of N. W. Hajdenko [2, p.11], where a theoretically methodological basis for shaping the optimal

model of inhibition and counterbalance in the political process of modern Ukraine and was analyzed in detail. "Modern system of inhibition and counterbalance, – says the author – is an independent, integral part of the process of rendering power in modern countries, including not only the state, but also the entire system of power in society by allocation of power to each institution, as well as to the nation, who is source of power in a democracy, the appropriate permissions to ensure the possibility of interaction between them, not only to avoid the concentration of power in one of them, but also to improve the relationship between them in the issue of organization and the implementation of the political process, promoting the progressive development and governance in society" [2, s. 11].

It is also worth noting that the system of inhibition and counterbalance is active if the competence of all organs of state power provides both unique and shared powers of attorney, which means building a mechanism of cooperation and interdependence of all branches of power.

Not offering a detailed analysis of the practical problems of power in Ukraine, we would like to emphasize what is most important. In the Art. 6 of the Constitution of Ukraine (1996) it is noted that "state power in Ukraine is exercised on the basis of the principles of its division into legislative, executive and judicial powers", and the bodies of legislative, executive and judicial powers "exercise their powers in the limits defined by the Constitution and accordance with the laws of Ukraine "[3]. Moreover, in Art. 7 of the Constitution of Ukraine it is noted that "in Ukraine is recognized and guaranteed local government." Accordingly, N. W. Hajdenko rightly emphasize: "In unitary states is almost impossible observation of inhibition and counterbalance components under vertical organization of power. This is due to the fact that the unitarity provides for the unity of state power and the transfer of powers to local authorities is very difficult "[2, p. 10]. This comment is very true of the system of government in Ukraine, where the functions and status of local government as part of the government are not sufficiently well defined.

The mechanism of reciprocal inhibition and counterbalance of the legislative and the executive branch is to ensure their cooperation as the branch of the only state authority. The legislative authorities inhibit the executive, because the executive authorities must not exceed the limits set by the laws passed in parliament. The epitome of the legislative branch is the Parliament, which shapes or participate in the shaping of the highest executive body – the government and parliamentary controls over its activities relating to the performance of his acts. [4, p. 131].

If the legislative and executive powers are united in one man or one government body, freedom is impossible, because the concerns may arise that the same sovereign (president) or the Senate (Parliament) may enter tyrannical law, to use it in a tyrannical manner only for own use and not for the good of society [5, p. 238].

In examining the question of the peculiarities of the powers separation, it is necessary to look at yet another aspect of the problem. In contemporary literature it is often to encounter criticism of the separation of powers, which according to some researchers may cause them to counter and undermine the government unity. In our opinion, this approach requires a precise demarcation and taking into account two important facts: firstly, modern Ukrainian political and legal realities are not entirely consistent with the classic understanding of the theory of separation of powers, and secondly, it is important to take into account the tendency to gradually blurring the concept of separation of powers, by including the new branches of government to the well-known triad.

Accordingly, interesting is thought that in 1908 gave H. F. Szerszeniewicz. Speaking about the unity of the state (high) power he marked: "Hence the obvious fallacy of view of known eighteenth century French writer Montesquieu's about the need of powers separation. In search of ways to achieve the state policy that would best ensure the freedom of citizens, Montesquieu came to the conclusion that the main danger lies in the concentration of power in one hand. The philosopher has proposed to establish

three powers: legislative, executive and judicial. But such reasoning was proved wrong, because practically three equal power authorities cannot exist. The legislation, execution (management) and the court - these are not three authorities, but only three forms of the absolute power of the state "[6, p. 33].

The proposed citation largely stands out from the general positive assessment of the theory of powers separation. It is worth noting that currently in the literature, some researchers have also expressed concern at the fact that the principle of separation of powers is often idealized, wrongly regarded as a kind of panacea for all problems, which even gives the impression that if in the state-legal mechanism this principle will be fully adopted, it will immediately establish a true democratic order [7, p. 363].

The principle of separation of powers cannot be absolutized. In no part of the world such a theory in the form in which Montesquieu formulated it, has not been completely accepted and reflected in the binding constitutions now and then.

In the Russian Empire, to which Ukraine also belonged, in its entire history the principle of separation of powers was rejected by the autocracy power of the monarch. This rule has not been also accepted in the era of Soviet power, because this power was conceived and shaped as a carrier of a formal "full power" of government councils. To appreciation of the concept of separation of powers has led only searching for ways to overcome the political regime in the Soviet Union in the late 80's of last century. In fact, only the introduction of the institution of the USSR and Ukraine President, as well as the proclamation of the independence of Ukraine, led to the constitutional consolidation of this principle of the power organization in Ukraine.

However, the state power by itself is not divided between the state authorities. The exercise of state power is related to the distribution of certain functions between the legislative, executive and judicial powers that are independent only at the level of the exercise of those functions, fixed and allotted to them by the Constitution and law.

It's not about authorities existing in parallel that are developing completely independently of one another, but about

their cooperation and collaboration, and even unity, within its limits they act and they guarantee in the Constitution the autonomy and independence of the legislative authorities, the management and the judiciary. This vision of the separation of powers is consistent with the fact that the only source from which derive all the authorities, as well as carrier of independence of these authorities is the nation of Ukraine, as it proclaims the Constitution of Ukraine.

So in today's conditions the national unity of government provides, firstly, that in its basis is the will of the people, which is its source, and secondly the state power is the only one at its social character and the only state power in a society, and thirdly it pursues common objectives and tasks facing the state, fourthly the state power in the legal and organizational unity performs only the functions of the state apparatus in different forms and with different methods.

The division of state power for independent to each other fields is set to provide the necessary balance of interests, which makes the power the only and overall as the result. This balance should be constitutionally guaranteed by the power of the legislative, executive and judicial authorities and disagreements should be resolved by way of constitutional and legal procedures (the Constitutional Court).

In such circumstances, there is a need for both rethinking the content of selected principles and finding ways of their connection and mutual influence. It is worth mentioning, that being “divided” authority in the country should remain comprehensive and unique. In one country there cannot be two or more independent authorities. State power as a holistic phenomenon is unique. However, it can be divided into different branches and levels due to the functions it perform. Consequently O. F. Skakun rightly says that legal expression of unity and harmony of power consists of the following:

- 1) public authorities are competent in all required to carry out the functions and tasks of the state;

- 2) various state authorities cannot dictate to the same subjects in the same circumstances mutually exclusive rules of behavior [8, p. 168].

The state power is above all a unified system in which the branches of government are part of the whole, they work systematically and harmoniously, and the system determines their quality, forms and methods. The system of inhibition and counterbalance, lying in the basis of the principle of power separation, provides not only the insulation of each branch of government, but also constructive functioning, interaction and interpenetration of state power branches. So the unity of state power and the distribution of its branches are not inconsistent with each other, and in the case of a true understanding of these phenomena they are combined under democratic regimes.

The division of branches of state power is possible only with retaining its unity. Each branch has the same social character and operates in directions designated by unity of government. The separation of powers cannot be treated as the tear. The branches of government are doomed to cooperation, they "penetrate" the other, performing the function of the other authority from time to time.

In the scientific literature, several authors point to the unilateral nature of the existing terminology of "the principle of separation of powers." W. J. Czirkin proposes to consider this principle as the concept of the unity of state power and the distribution of its branches. On the one hand, the new relationships that are affected by the state authorities lead to the spread of its integrating role. On the other hand, the new range of state management determine both decentralization and devolution of state power, which leads to the creation of new bodies and ways to manage the state [9, p. 103].

We share the opinion of A. N. Sokolov, that the separation of powers as the organizing principle of state power has a specific content, which includes the following provisions:

- 1) the act should have a higher legal force and be adopted only by the legislative (representative) authorities;
- 2) the executive authority should deal with the implementation of laws and only a limited creation of standards, subordinate to the head of state and only partially to parliament;
- 3) between the legislative and executive authority a balance of powers of attorney is to be provided, which excludes the transfer of the center of decision, and the more the fullness of power in one of them;
- 4) the judicial authorities are independent and within their competence they operate independently;
- 5) any branch of government should not interfere with the prerogatives of the other branches of government, much less connect with another branch of government;
- 6) misunderstanding of competence should be solved only by the constitutional legal procedure in the Constitutional Court;
- 7) the constitutional system should provide legal ways of inhibiting power by two others, which include mutual counterbalance to all the Authorities [10, p. 139].

At the same time, as a well-known Russian researcher L. Entin claims, by combining the principles of separation of powers and the rule of law, each of the branches of power, being independent, represents the unity of power, which is based on the unity and universality of the law [11, p. 20].

So the concept of the unity of state power and distribution of branches of government should be perceived as an opportunity to combine unity in diversity.

At the present stage the principle of unity of state power and the distribution of its branches with proper organization of relations between them quite organically combine to foster constructive cooperation of state authorities and help form an effective mechanism for the implementation of state power in shaping the conditions of the rule of law in Ukraine.

This rule shall be distributed to the entire system of state power in Ukraine. With regard to the analysis we can conclude that in the native model of state organization law principle of separation of powers has both organizational (static) and functional (dynamic) start. Article 6. of Constitution of Ukraine consolidates functional ("state power in Ukraine is conducted") and organizational ("by the rules") aspects of the division of state power. So, we believe that the essence of the principle of separation of powers is the legal fixation. It depends on the organizational and functional delimitation of major areas of state authority actions, while ensuring the efficient cooperation of its bodies.

### **Conclusions**

The analysis of the main scientific approaches to the problem of dividing, mutual inhibition and counterbalance to government shows that the main value of the principle of the separation of powers is not only that it allows to "promote and strengthen democracy" [12, p. 274], but also forms the general foundation for any political and legal interaction processes in system of the state authorities. At the same time the incentive to cooperate for separate branches of separate power is not only a normative regulation (or even constitutional), but the need to maintain the integrity of democratic power. Therefore, recognizing the role of introduction and implementation of the practical principle of separation of state power in the formation of a democratic state, we must remember that it hits the target only if it has an organic connection with other principles that underlie the foundation of modern constitutionalism, above all the rule of law. Indeed, the process of separation of powers acquires meaning only when all three branches operate within the one rule of law, which perpetuates their competence, power of attorney, the main objectives and their rights concerning the other branches of government.

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