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On the question of "inherent" powers of the President of Ukraine

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> Learn, read, and learn from others,
> and do not shy away from your own.
> Taras Shevchenko[1]

Since the adoption of the Constitution of Ukraine (hereinafter: the Constitution or the Fundamental Law), the status and place held by the President of Ukraine (hereinafter: the President) in the system of public authority have been reformed due to changes in the Constitution, sparking scientific debate.

The presidential-parliamentary type of mixed republic established in 1996 was changed during the events of the Orange Revolution.[2] The leading motive of this shift was the redistribution of powers between the President and the Verkhovna Rada of Ukraine (hereinafter: the Verkhovna Rada) in the field of formation and control

[1] T.G. Shevchenko, *I mertvym, i zhyvym, i nenarozhdennym zemlyakam moyim v Ukrayni i ne v Ukrayni moye druzhnyeye poslaniye*, http://litopys.org.ua/shevchenko/shev140.htm (accessed: 22.02.2022).

[2] Law of Ukraine on amendments to the Constitution of 8 December 2004, No 2222-IV, https://zakon.rada.gov.ua/laws/show/2222-15#Text (accessed: 22.02.2022).

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over the Cabinet of Ministers of Ukraine. Thus, the design of the Constitution was reoriented in the direction of the "parliamentary-presidential" type which, however, did not last long.

On 30 September 2010, the Constitutional Court of Ukraine declared the law amending the Constitution unconstitutional due to the violation of the procedure for its adoption. On the basis of this decision, the constitutional review body imposed on public authorities an obligation to bring normative legal acts into line with the previous version of the Constitution,[3] reversing the constitutional model which existed between 1996–2004. However, this form of government was also short-lived. In February 2014, during the Revolution of Dignity, the parliament recognized the Constitution of Ukraine as amended in 2004 to be valid.[4] This decision was based on the idea of the primary constituent power, which appears in the period of the "constitutional moment"[5] and allows the parliament to amend the Constitution in an exceptional manner.

From the above review of constitutional transformations that in one way or another affected the institution of the President, the following features of changes in the constitutional and legal regulation over the past 25 years regarding the role served by the head of state can be identified: recurrence and cyclicality, special political or revolutionary conditions of adoption, and extraordinary procedures for their implementation in the text of the Fundamental Law.

This confirms the great importance and interest of various authorities and participants of the political process to the powers of the President, which is not surprising. After all, the President is the guarantor of state sovereignty, territorial integrity of Ukraine, observance of the Constitution, human and civil rights and freedoms, and from 2019 also of the strategic course of the state to gain full membership by Ukraine in the European Union and the North Atlantic Treaty Organization.[6] At the same time, the head of state remains almost the only constitutional entity for which no special law has been adopted, which details his powers and reveals the procedure for their implementation.

Without going into discussion about the expediency of adopting such a normative legal act, let us pay attention to another feature of the constitutional consolidation of the President's powers. The last paragraph of the first part of Art. 106 of the Constitution, devoted to the powers of the head of state, provides for the possibility of the President excercising only those powers which are mentioned in the Constitution itself.

[3] Decision of the Constitutional Court of Ukraine of 30 September 2010, No 20-rp/2010, https://zakon.rada.gov.ua/laws/show/v020p710-10#Text (accessed: 17.09.2021).

[4] Resolution of the Verkhovna Rada of Ukraine of 22 February 2014 on the text of the Constitution of Ukraine as amended on 28 June 1996, as amended by the Laws of Ukraine of 8 December 2004, No 2222-IV, 1 February 2011, No 2952-VI, and 19 September 2013, No 586-VII, https://zakon.rada.gov.ua/laws/show/750-18#Text (accessed: 17.09.2021).

[5] Such a constitutional moment in the period 2013–2014 was the Revolution of Dignity and external threats to the existence of the Ukrainian state.

[6] Constitution of Ukraine of 28 June 1996 (as amended), https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text (accessed: 17.09.2021).

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As the Constitutional Court of Ukraine (hereinafter: the Constitutional Court) has repeatedly noted in this regard, such a provision makes it impossible to adopt laws which would establish other powers of the President.[7] Undoubtedly, this is a safeguard against the usurpation of power and an element of the checks and balances system. Therefore, it is no coincidence that this norm has become a litmus test for various political entities challenging the constitutionality of laws conferring powers on the President, the textual reproduction of which is absent in the Fundamental Law.

At first glance, everything is quite simple, because the Constitution rather exhaustively defines the powers of the President in a way which does not allow for appropriating additional powers. At the same time, such an approach raises the number of critical reservations and needs to be clarified, given the existence of the doctrine of "inherent powers" in constitutional law.

Therefore, the purpose of this article is attempting to investigate the emergence of the doctrine regarding "inherent" powers held by the head of state and to determine the feasibility of its implementation in the Ukrainian realities. In turn, its purpose is not to consolidate and defend certain views or axioms. It continues the existing debate in Ukraine on the need to implement and limit the application of the doctrine regarding "inherent" powers held by the President. The relevance of this research area is rooted in the fact that during the years of Ukrainian independence, most heads of state tried to increase their powers not only by amending the Constitution, but also by applying this doctrine in practice.[8]

It is worth mentioning that the doctrine of "inherent powers" was first tested in the United States during the 19th century. Therefore, firstly we consider the conditions in which this idea developed in the United States as well as its current content. Section 1 of Art. I of the US Constitution provides that all legislative powers established in the document belong to the Congress ("All legislative Powers herein granted shall be vested in a Congress of the United States"). Conversely, Art. II section 1 of the US Constitution, which deals with presidential powers, does not use the phrase "herein granted" and assigns the ownership of all executive power to the President of the United States ("The executive Power shall be vested in a President of the United States of America").[9]

In this regard, Alexander Hamilton and a number of other commentators on the US Constitution believed that this textual difference shows the desire of the creators to give the head of state "inherent" powers. However, not all their contemporaries

[7] Decision of the Constitutional Court of Ukraine of 8 October 2008, No 21-rp/2008, https://zakon.rada.gov.ua/laws/show/v021p710-08#Text (accessed: 17.09.2021).

[8] Dissenting opinion of the judge of the Constitutional Court of Ukraine O.O. Pervomaisky to Decision No 9-r/2020 of 28 August 2020, https://zakon.rada.gov.ua/laws/show/nb09d710-20#n2 (accessed: 6.03.2022).

[9] Constitution of the United States of 17 September 1787, https://www.senate.gov/civics/constitution_item/constitution.htm#a2 (accessed: 19.07.2021).

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agreed with this interpretation. Therefore, it is not known for sure whether the authors of the Constitution intended to give the president additional powers.[10]

Abraham Lincoln was one of the first US presidents who dared to use such powers. During the Civil War, he issued a series of decrees which were beyond his authority. The motives for such decisions were that the challenge posed by the South to the Union forced the head of state to act without waiting for a meeting of the US Congress, which under the US Constitution is authorized to resolve issues concerning war and peace. However, later both the US Congress and the US Supreme Court supported Lincoln's actions, which, in fact, became the basis for the doctrine of "inherent" powers.[11]

In any case, American legal science was faced with the issue that even in the presence of such powers, their nature and scope remain unclear. In modern American discourse, "inherent powers" are seen as powers not explicitly stated in the Constitution which allow the president to take measures necessary to effectively perform essential duties. The key provisions of this concept in the United States today are as follows:

— "inherent" powers of the president are subject to constitutional control;

— "inherent" powers are considered as a logical extension of constitutional powers, which is to say they can be derived from the constitutional text;

— it allows the president to take effective measures necessary for the performance of basic duties.[12]

Lincoln was not the only president who used "inherent" powers. Therefore, let us recall one of such cases, which has taken place in recent decades. Article II section 2 of the US Constitution stipulates that the president is the Supreme Commander-in-Chief of all state forces. In January of 1991, President George W. Bush used these "inherent" powers to deploy more than 500,000 US troops in Saudi Arabia and the Persian Gulf region without congressional approval, in response to the Iraqi invasion of Kuwait on 2 August 1990.[13]

Such an example strengthens the scientific discourse on the doctrine of "inherent" powers held by the head of state in the Ukrainian context. This is due to the long-term military aggression of the Russian Federation against Ukraine. After all, the President, who is the guarantor of Ukraine's state sovereignty and territorial integrity, plays a significant role in resolving this confrontation.

However, the Constitutional Court, unlike the US Supreme Court, in most cases has a rather restrained position on the "inherent" powers of the head of state. Thus,

[10] E. Chemerinsky, "Controlling inherent presidential power: Providing a framework for judicial review", *Southern California Law Review* 56, 1983, pp. 867–868, https://core.ac.uk/download/pdf/62566743.pdf (accessed: 19.09.2021).

[11] Dissenting opinion of the judge of the Constitutional Court V.P. Kolisnyk to the Decision of the Constitutional Court of Ukraine of 16 September 2020 No 11-r/2020, https://zakon.rada.gov.ua/laws/show/nb11d710-20#Text (accessed: 19.09.2021).

[12] R. Longley, *What Are Inherent Powers? Definition and Examples*, 23.06.2021, https://www.thoughtco.com/inherent-powers-definition-and-examples-5184079 (accessed: 20.09.2021).

[13] Ibidem.

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in 2019, in the decision on the functioning of the National Commission for State Regulation of Energy and Utilities, the Court confirmed its legal position that "the Fundamental Law does not give the Verkhovna Rada of Ukraine the right to determine in its acts the powers of parliament and the head of state, beyond those established by the constitutional norms."[14] As a result of this decision, the Verkhovna Rada hastily amended the legislation. Without imagining anything better, the Deputies of Ukraine identified the National Commission for State Regulation of Energy and Communal Services as a central executive body with a special status, whose members are appointed by the Cabinet of Ministers of Ukraine.[15]

In a high-profile case concerning the constitutionality of the Presidential Decree on the appointment of A. Sytnyk as Director of the National Anti-Corruption Bureau of Ukraine, the Court declared it unconstitutional in view of the following: "The norms of the Constitution unequivocally indicate that the list of powers of the head of state established in the Constitution, including the appointment of officials of bodies determined by the Constitution of Ukraine, is exhaustive."[16]

Less than a month later, the Constitutional Court declared unconstitutional the provisions of the Law of Ukraine on the National Anti-Corruption Bureau of Ukraine, which, i.a., empowered the President with the right to:

— appoint and dismiss the Director of the National Anti-Corruption Bureau of Ukraine;

— appoint three members of the Tender Commission and one member of the External Control Commission.[17]

The position of the Constitutional Court is simple and at the same time convincing: the Constitution does not provide such powers to the President. Therefore, giving him such powers by law is unconstitutional. Supporting this position, Olga G. Turchenko, in her opinion attached to the materials of the constitutional proceedings, also notes that the Constitution does not provide for the head of state having the above powers. Therefore, they expand the powers of the President, which does not comply with the Fundamental Law.[18]

However, such a position adds ambiguity to the President's exercise of certain powers which can reasonably be considered organically combined with the status of

[14] Decision of the Grand Chamber of the Constitutional Court of Ukraine of 13 June 2019, No 5-r/2019, https://zakon.rada.gov.ua/laws/show/v005p710-19#Text (accessed: 24.02.2022).

[15] Law of Ukraine on amendments to certain legislative Acts of Ukraine concerning ensuring constitutional principles in the spheres of energy and communal services of 19 December 2019, No 394-IX, https://zakon.rada.gov.ua/laws/show/394-20#n25 (accessed: 24.02.2022).

[16] Decision of the Grand Chamber of the Constitutional Court of Ukraine of 28 August 2020, No 9-r/2020, https://zakon.rada.gov.ua/laws/show/v009p710-20#Text (accessed: 24.02.2022).

[17] Decision of the Grand Chamber of the Constitutional Court of Ukraine of 16 September 2020, No 11-r/2020, https://zakon.rada.gov.ua/laws/show/v011p710-20#Text (accessed: 24.02.2022).

[18] O.G. Turchenko, *Naukovij visnovok shhodo vidpovidnosti Konstitutsiï Ukraïni okremikh polozhen' Zakonu Ukraïni «Pro Natsional'ne antikoruptsijne byuro Ukraïni» vid 14.10.2014 roku №1698-VII (zi zminami)*, https://ccu.gov.ua/dokument/11-r2020 (accessed: 24.02.2022).

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the head of the Ukrainian state. These are powers caused by specific historical conditions, in connection with which they could not be enshrined in the Constitution. For example, the establishment of military-civil administrations by the President is not provided in the Fundamental Law. However, such decisions are necessary to implement measures to ensure national security and defense, repel and deter armed aggression by the Russian Federation in Donetsk and Luhansk regions.[19] Thus, they essentially follow from the authority of the head of state to exercise leadership in the areas of national security and defense.

Therefore, it is not surprising that the abovementioned legal positions of the Constitutional Court do not have widespread support among scholars. As Lyubomyr I. Letnyanchyn points out, these arguments should be used very carefully in the situation of assessing the constitutionality of the President's authority to appoint three members of the commission for the competition for the post of Director of the National Anti-Corruption Bureau. Therefore, the scholar suggested that the Constitutional Court should develop the doctrine of "inherent" powers through the provisions of the Constitution on ensuring national security and leadership in this area.[20] A more categorical position is expressed in the textbook on constitutional law, edited by Mykola I. Kozyubra among others. The authors note that the mentioned part of the constitutional jurisprudence of Ukraine needs to be adjusted in general, as it does not fully comply with the modern doctrine of separation of powers.[21]

Support for the need to develop the idea of "inherent" powers can be found not only in the positions of scholars, but also in some opinions of Constitutional Court judges. For instance, judge Vasil V. Lemak repeatedly noted that the constitutional powers of the President defined in Art. 106 section 1 of the Constitution need to be specified (clarification, specification, specification in varieties), especially in cases where they are set out in open wording.[22]

Sharing the views of his colleague, judge Viktor P. Kolisnyk also considers such powers through the doctrine of "inherent" powers held by the head of state. Therefore, he proposes to clarify the nature of these powers in order to ensure "state independence, national security and succession of the state."[23] This is clearly logical, because corruption is no less a threat to national security than Russia's military aggression.

[19] Law of Ukraine on military-civil administrations of 3 February 2015, No 141-VIII, https://zakon.rada.gov.ua/laws/show/141-19#Text (accessed: 3.03.2022).

[20] L.I. Letnyanchyn, *Naukova pozitsiya shhodo pitan', porushenikh u konstitutsijnomu podanni 50 narodnikh deputativ Ukraïni shhodo vidpovidnosti Konstitutsiï (konstitutsijnosti) okremikh polozhen' Zakonu Ukraïni «Pro Natsional'ne antikoruptsijne byuro Ukraïni» vid 14.10.2014 roku №1698-VII (zi zminami)*, https://ccu.gov.ua/dokument/11-r2020 (accessed: 24.02.2022).

[21] *Konstytutsiyne pravo. Pidruchnyk*, eds. Y.G. Barabash et al., Kíïv 2021, p. 359, https://www.osce.org/files/f/documents/9/d/489959_1.pdf (accessed: 2.03.2022).

[22] Dissenting opinion of the judge of the Constitutional Court of Ukraine V.V. Lemak of 28 August 2020, No 9-r/2020, https://zakon.rada.gov.ua/laws/show/na09d710-20#n2 (accessed: 2.03.2022).

[23] Dissenting opinion of the judge of the Constitutional Court of Ukraine V.P. Kolisnyk to the decision of 16 September 2020, No 11-r/2020, https://zakon.rada.gov.ua/laws/show/nb11d710-20#n2 (accessed: 3.03.2022).

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History knows examples of many states which took the US Constitution as a model for their own constitutions in the hope of building their country of opportunities. However, this experiments usually ended in failure. With the exception of the United States, it is difficult to find a presidential republic in the world which can serve as an example of good democratic governance. Therefore, unconditional imitation, even of positive experiences regarding the organization and exercise of state power, would be irresponsible and any borrowing should take into account the national characteristics of statehood.

It should be recognized that over the last 30 years of building and rebuilding state institutions, examples of good governance are exceptions rather than the trend in Ukraine. We have not yet managed to build a successful model for the functioning of public power, as evidenced in particular by the aforementioned cyclical and permanent changes in the system of higher state power organization. Therefore, we should not forget that in the conditions of weak institutions, the risk of usurpation of power is no less a threat than the aggressive policy of our eastern neighbor. Under such conditions, flirting with the doctrine of "inherent" powers can easily turn from the lifeline for the nation into its enslaver.

Ukraine is a country with a long tradition of democratic governance, but with little practical experience in upholding constitutional values. Therefore, it is first necessary to define the red lines of using the doctrine of "inherent" powers to take into account Ukrainian realities. In modern republics, the president is usually granted broad powers regarding relations with the legislature, executive, and judiciary, which makes him a kind of arbiter between them, a symbol of unity of the state, and its official representative.[24]

Recognizing Ukraine as a republic, the Constitution does not define its specific form. However, the attribution of Ukraine to states with a mixed form of republican government of the parliamentary-presidential type is unlikely to provoke discussions. It is therefore reasonable to think that the President is not formally assigned to the legislature, the executive, or the judiciary, while remaining involved in each of these branches.

This should be taken as a starting point to determine the scope of "inherent" powers of the President. In this regard, it is advisable to seek such powers only in those areas which fall within the competence of the head of state. Although analyzing Constitutional Court's decisions in recent years has led to the conclusion that "inherent" powers have no place in constitutional jurisprudence, some decisions of the constitutional jurisdiction in recent decades still leave room for such powers.

Let us recall Case No 1–3/2009 which considered the Presidential Decree of 4 June 2008. This decree stipulated that a number of key positions in the field of foreign policy were appointed after prior agreement with the head of state. In

[24] *Konstytutsiyne pravo Ukrayiny. Pidruchnyk*, eds. V.P. Kolisnyk, Y.G. Barabash, Khárkiv 2008, p. 303, https://library.nlu.edu.ua/POLN_TEXT/KNIGI_2009_2/KONST_PR_2008.pdf (accessed: 23.02.2022).

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particular, they concerned the positions of First Deputy, Deputy Minister for Foreign Affairs of Ukraine, head of the structural unit of this Ministry, Consul General, etc.[25] However, the Constitution does not provide for such powers which were used by deputies who appealed to the Constitutional Court with a constitutional petition to verify the constitutionality of this decree.

However, the Constitutional Court took into account that only the President, as the head of state, is empowered to exercise leadership in the field of foreign policy. Therefore, recognizing the impugned decree as constitutional, the Court concluded that the head of state not only carries out the general direction of the state's foreign policy, but also uses appropriate means to influence the activities of foreign policy individuals in order to ensure the national interests and security of Ukraine.[26]

In Decision No 5-rp/2009, the Constitutional Court considered the constitutionality of another Presidential Decree, according to which, i.a., candidates for the positions of First Deputy and Deputy Ministers of Defense of Ukraine shall be approved by the President. At first glance, the head of state established powers not provided for in the Constitution.

When resolving this issue, the Court took into account that only the President has the constitutional authority to exercise leadership in the areas of national security and defense. This means that the President directs the activities of the entities in these branches, including the Armed Forces of Ukraine, the Security Service of Ukraine, and other military formations created in accordance with the Laws of Ukraine, to implement the basics of state security and border protection of Ukraine. Therefore, the President may approve the list of positions and candidates for appointment which agree with him.[27]

These positions of the Constitutional Court confirm the preliminary conclusion that the search for "inherent" powers of the President should be carried out in those areas that fall within the competence (responsibility) of the head of state, namely — foreign policy, national security, and defense.

It should be noted that this is not the first attempt to define the limits of the doctrine concerning "inherent" powers. In particular, Vasyl V. Lemak has already expressed his views on this issue. In his opinion, the following rules should be followed when applying this idea:

1. the specification (concretization) can concern only those formulations of the Constitution which have an open character (and on the contrary — it cannot concern textually defined provisions);

[25] Decree of the President of Ukraine on some issues of leading the foreign policy of the State of 4 June 2008, No 513/2008 (in the original version), https://zakon.rada.gov.ua/laws/show/513/2008/ed20080604#Text (accessed: 13.03.2022).

[26] Decision of the Constitutional Court of Ukraine of 15 January 2009, No 2-rp/2009m, https://zakon.rada.gov.ua/laws/show/v002p710-09#Text (accessed: 13.03.2022).

[27] Decision of the Constitutional Court of Ukraine of 25 February 2009, No 5-rp/2009, https://zakon.rada.gov.ua/laws/show/v005p710-09#Text (accessed: 13.03.2022).

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2. the provisions of the Constitution need to be specified exclusively in the content of the Laws of Ukraine and not in other acts (by law such a function cannot be delegated to the government);

3. "inherent" powers shall be immanently related to the relevant provisions of the Constitution, namely to transfer certain properties and organic essence of the enshrined powers of public authorities and express their constitutional role;

4. these powers should be aimed exclusively at achieving the constitutional goal pursued by the relevant public authority;

5. inherent powers may in no case contradict the constitutional principles and norms *expressis verbis*.[28]

The latter provision should also be supplemented by the impossibility of using "inherent" powers on matters which belong to other authorities under the Constitution or the Laws. After all, Art. 6 of the Constitution defines the principle of separation of state power, the purpose of which is to distribute powers between different bodies of state power and prevent one of the branches of the government from appropriating full state power.[29] Thus, "inherent" powers may not duplicate existing powers of public authorities enshrined in the Fundamental Law.

Sharing the opinion on the need to introduce "inherent" powers held by the head of state, I consider it necessary to emphasize the importance of their strict regulation and clear limits of application. Such limits seem crucial, because under other conditions there is a risk that the President will remain under the impression that this doctrine can be developed arbitrarily. Therefore, the introduction of "inherent" powers for the head of state in the national doctrine should be accompanied by effective constitutional review. The purpose of such powers is to take effective and urgent measures necessary to perform basic duties.

I offer to disclose the limitations of applying this doctrine due to the above requirements. I suggest, for the time being, keeping their list open to discussion and expansion. Further search for "inherent" powers of the President should be carried out in those areas which fall within the competence (responsibility) of the head of state, namely — foreign policy, national security, and defense.

This review makes it possible to state that this area of constitutional law has already become the subject of discussion. At the same time, the starting point for such a discussion — which is not a surprise — may have been certain positions of the body of constitutional jurisdiction of Ukraine, which contain the germs of the "inherent" powers idea. However, it should be borne in mind that the development of these ideas in practice is currently impossible without a review of the existing constitutional jurisprudence.

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[28] Dissenting opinion of the judge of the Constitutional Court of Ukraine V.V. Lemak concerning the Decision of 16 September 2020, No 11-r/2020, https://zakon.rada.gov.ua/laws/show/na09d710-20#n2 (accessed: 2.03.2022).

[29] Decision of the Constitutional Court of Ukraine of 24 June 1999, No 6-rp/1999, https://zakon.rada.gov.ua/laws/show/v006p710-99#Text (accessed: 25.02.2022).

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Vitalii Chornenkyi

On the question of "inherent" powers of the President of Ukraine

Summary

The purpose of the article is an attempt to research the origin and content of the doctrine of "inherent" powers of the head of state, as well as to clarify the expediency of its implementation in Ukrainian realities. The relevance of this research direction is due to the fact that during the years of Ukraine's independence, most heads of the state tried to increase their powers not only by amending the Constitution, but also by applying the aforementioned doctrine in practice.

Today, the Constitutional Court of Ukraine takes a restrained position on the issue of implementing "inherent" powers. Thus, the Court has repeatedly confirmed its legal position that the Fundamental Law does not grant the Verkhovna Rada of Ukraine the right to determine in its acts the powers of the parliament and the head of state beyond those established

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by constitutional norms. However, such legal positions did not receive universal support among scientists and have already become the subject of discussions.

Although analyzing the Constitutional Court's decisions passed in recent years leads to the conclusion that "inherent" powers have no place in constitutional jurisprudence, some decisions of the constitutional jurisdiction body in the past decades still leave room for the implementation of such powers. Thus, the analyzed decisions made it possible to reach the conclusion that the search for the "inherent" powers of the President should be carried out in areas included in the scope (responsibility) of the head of the Ukrainian state — namely, foreign policy activities, national security and defense. However, it should be noted that the further development of these ideas in practice is currently impossible without a review of the existing constitutional jurisprudence.

Sharing the opinion on the need to establish "inherent" powers of the President, we consider it necessary to emphasize the necessity for their strict regulation and the presence of clear limits of their application. Such limits seem extremely important, since under other conditions there is a risk of the President getting the impression that arbitrary development of this doctrine is possible. Therefore, the establishment of "inherent" powers in the national doctrine for the head of state should be accompanied by effective constitutional control, and the purpose of such powers is to take effective and urgent measures necessary for the performance of basic duties. After all, in conditions when state institutions are weak, the risk of usurpation of power is no less a threat than the aggressive policy of Ukraine's eastern neighbor. Under such conditions, flirting with the doctrine of "inherent" powers can easily turn from the saving straw of the nation into its enslaver.

With that in mind, the article analyzes the viewpoints already available in the scientific doctrine regarding the limits of application of the doctrine of "inherent" powers and makes proposals for their further implementation and improvement, in particular through the activities of the body of constitutional justice.

Keywords: "inherent" powers, separation of powers, head of state, constitutional jurisprudence, Constitution

Віталій Чорненький

До питання про «приховані» повноваження Президента України

Анотація

Метою статті є спроба дослідити виникнення та зміст доктрини «прихованих» повноважень глави держави, а також з'ясувати доцільність її імплементації в українські реалії. Актуальність такого напрямку дослідження пов'язана із тим, що за роки незалежності України більшість глав держави намагались збільшити свої повноваження не лише шляхом внесення змін до Конституції, але й у спосіб застосування зазначеної доктрини на практиці.

На сьогодні Конституційний Суд України займає стриману позиції в питанні впровадження «прихованих» повноважень. Так, Суд неодноразово підтверджував

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свою юридичну позицію про те, що Основний Закон не наділяє Верховну Раду України правом визначати у своїх актах повноваження парламенту і глави держави виходячи за межі тих, що встановлені конституційними нормами. Проте такі юридичні позиції Конституційного Суду не отримали повсюдної підтримки поміж науковців та вже стали предметом дискусій.

Хоч аналіз рішень Конституційного Суду, ухвалених протягом останніх років, наштовхує на висновок, що «прихованим» повноваженням немає місця в конституційній юриспруденції, окремі рішення органу конституційної юрисдикції минулих десятиліть все ж залишають простір для впровадження «inherent powers». Так, проаналізовані рішення Конституційного Суду України дозволили сформувати висновок, що пошук «прихованих» повноважень Президента доцільно здійснювати у тих сферах, які належать до компетенції (відповідальності) глави Української держави, а саме — зовнішньополітична діяльність, національна безпека і оборона. Однак слід зважити на те, що подальший розвиток цих ідей на практиці наразі неможливий без перегляду існуючої конституційної юриспруденції.

Поділяючи думку про необхідність запровадження «прихованих» повноважень Президента, вважаємо за необхідне наголосити на необхідності їх суворого регламентування та наявності чітких меж застосування. Такі межі видаються вкрай важливим, оскільки за інших умов існує ризик формування у Президента враження про можливість довільного розвитку цієї доктрини. Тому запровадження в національній доктрині «прихованих» повноважень для глави держави повинно супроводжуватися ефективним конституційним контролем, а ціллю таких повноважень — приймати ефективні та нагальні заходи, необхідні для виконання основних обов'язків. Адже в умовах слабкості державних інституцій ризик узурпації влади становить не меншу загрозу ніж агресивна політика східного сусіда. За таких умов загравання із доктриною «inherent powers» легко може перетворитися із рятівної соломинки нації в її поневолювача.

З огляду на це в статті проаналізовано уже наявні в науковій доктрині позиції щодо меж застосування доктрини «прихованих» повноважень та зроблено пропозиції щодо їх удосконалення для подальшої реалізації, зокрема, через діяльність органу конституційної юстиції.

Ключові слова: «приховані» повноваження, поділ влади, глава держави, конституційна юриспруденція, Конституція

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W sprawie „ukrytych" kompetencji prezydenta Ukrainy

Streszczenie

Celem artykułu jest próba zbadania genezy i treści doktryny o „ukrytych" kompetencjach głowy państwa, a także ustalenie, czy jej realizacja w realiach ukraińskich jest sensowna.

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Aktualność tego obszaru badań wynika z tego, że w latach niepodległości Ukrainy większość głów państw starała się zwiększyć swoje kompetencje nie tylko przez nowelizację Konstytucji, ale także przez stosowanie tej doktryny w praktyce.

Sąd Konstytucyjny Ukrainy zajmuje powściągliwe stanowisko w kwestii realizacji „ukrytych" kompetencji. Wielokrotnie potwierdzał swoje stanowisko prawne, że ustawa zasadnicza nie daje Radzie Najwyższej Ukrainy prawa do określania w swoich ustawach kompetencji parlamentu i głowy państwa wykraczających poza kompetencje określone w normach konstytucyjnych. Takie stanowisko prawne Sądu Konstytucyjnego nie zyskało jednak powszechnego poparcia wśród naukowców i stało się przedmiotem debaty.

Chociaż analiza orzeczeń Sądu Konstytucyjnego z ostatnich lat doprowadziła do wniosku, że w orzecznictwie konstytucyjnym nie ma miejsca na „ukryte" kompetencje, niektóre decyzje sądownictwa konstytucyjnego z ostatnich dziesięcioleci pozostawiają jednak pole do ich realizacji. Przeanalizowanie orzeczeń Sądu Konstytucyjnego Ukrainy pozwoliło stwierdzić na przykład, że poszukiwanie „ukrytych" kompetencji prezydenta powinno odbywać się w obszarach wchodzących w zakres kompetencji (odpowiedzialności) głowy państwa ukraińskiego, mianowicie — polityki zagranicznej, bezpieczeństwa narodowego i obrony. Należy jednak pamiętać, że dalszy ich rozwój w praktyce jest niemożliwy bez rewizji dotychczasowego orzecznictwa konstytucyjnego.

Podzielając opinię o potrzebie wprowadzenia „ukrytych" kompetencji prezydenta, autor uważa za konieczne podkreślenie potrzeby ich ścisłego uregulowania oraz wyznaczenia wyraźnych granic ich stosowania. Takie granice wydają się niezwykle ważne, gdyż w innych warunkach istnieje ryzyko, że prezydent nabierze przekonania o możliwości arbitralnego rozwijania tej doktryny. Dlatego wprowadzeniu „ukrytych" kompetencji głowy państwa musi towarzyszyć skuteczna kontrola konstytucyjności, a celem tych kompetencji ma być podejmowanie skutecznych i pilnych działań niezbędnych do wykonywania podstawowych obowiązków. Przecież w warunkach słabości instytucji państwowych ryzyko uzurpacji władzy jest nie mniejszym zagrożeniem niż agresywna polityka sąsiada zza wschodniej granicy Ukrainy. W takich warunkach flirtowanie z doktryną *inherent powers* może łatwo zmienić się z ostatniej deski ratunku narodu w przyczynę jego zniewolenia. W związku z tym autor analizuje dotychczasowe stanowiska w doktrynie naukowej dotyczące granic stosowania doktryny „ukrytych" kompetencji oraz przedstawia propozycje ich doskonalenia w celu dalszej realizacji, w szczególności w wyniku działalności organu sądownictwa konstytucyjnego.

Słowa kluczowe: „ukryte" kompetencje, podział władzy, głowa państwa, orzecznictwo konstytucyjne, Konstytucja

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