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## **HISTORICAL-THEORETICAL AND PRACTICAL PRINCIPLES OF APPLICATION OF DISCRETIONAL POWERS OF THE PRESIDENT OF UKRAINE**

The introduction of the presidency is of great importance for the historical development of Ukraine as a sovereign, independent, democratic and legal state, as the consolidation of the President's position at the legislative level testifies to the international experience of democratic institutions, the main place among which is occupied by the presidency. The Constitution of Ukraine provided great opportunities for the President as a representative of the "interests of the whole people" to remain the dominant element of the political system of Ukraine. The powers of the President, in contrast to the powers of many other bodies and officials of the state, are provided exclusively at the level of the Constitution of Ukraine, and their expansion through ordinary laws is not allowed. The latter determine only the procedure for exercising a particular authority of the President of Ukraine in a particular sphere of public life. And this week it is very interesting to study a separate function of the President, namely the ability to act "in the spirit of the law (Constitution)" - discretionary powers. Many decisions and drafts of heads of state see discretionary powers, and this does not mean that there is an excess of power or even going beyond the law. After all, in the legal encyclopedia, discretionary powers are defined as the right of the head of state, head of government, and other officials of public authorities to act under certain conditions at their own discretion within the law. Discretion in a particular situation is indicated in the rule of law by such appeals as, for example, "may", "has the right", and not "should", "must". In the recent history of Ukraine, during the transformation of the institution of the presidency, we have already seen the exercise of their discretion by the heads of state. For the most part, we must mention the resonant decisions "in the spirit of the Constitution" of V. Yushchenko and P. Poroshenko. Thus, we will consider the poll of the President of Ukraine V. Zelensky, conducted on October 25, 2020, from the standpoint of his exercise of his discretion, namely the right to act based on his legal status, which is primarily defined in Article 102 of the Constitution of Ukraine, where it is written that "the President of Ukraine is the head of state and acts on its behalf."

**Key word:** *President of Ukraine; discretionary powers; functions of the President; Constitution; polls.*

### **Introduction**

It is known that under such circumstances, which developed in the country after independence, the constitutional status of the President and his real powers changed significantly and acquired a new meaning throughout the period of existence of independent Ukraine. The process of formation of the political system implies that state institutions are changing, which must meet the requirements of society to the system.

That is why the process of transformation of the institution of the presidency in Ukraine continues to this day, having gone through difficult periods of formation and re-formation in the case of the adoption of the Constitution

and various legislative acts, as discussed in previous sections.

The President of Ukraine occupies a special place in the state mechanism of the country. According to the legislative acts and the Constitution, which remained unchanged from June 1996 to December 2004, he had exceptionally great powers, which determined his essential capabilities in the real maintenance of the stability of the constitutional system and its protection.

According to the 1996 Constitution, the President is the head of state and acts on its behalf. He is the guarantor of state sovereignty, territorial integrity of Ukraine, observance of the Constitution of Ukraine, human and

civil rights and freedoms. The President's oath reads: "I undertake to defend the sovereignty and independence of Ukraine in all my affairs, to care for the good of the Fatherland and the welfare of the Ukrainian people, to defend the rights and freedoms of citizens ..." (*Article 104 of the Constitution of Ukraine, 1996*). Thus, his powers in the field of ensuring constitutional legality, national security, stability of the constitutional system and its protection occupy a central place in its competence.

In the research of the presidency directly in Ukraine, the constitutional and legal direction is represented by the works of M. Malysenko (2003), Y. Todyka (1999: 203-208), N. Plahotniuk (1998), M. Zelinska (2017). All these works summarize the characteristics of the institution of the head of state in different ways, provide historical information on the stages of its formation in Ukraine and analyze in detail the provisions of the Constitution and laws on the status, election and powers of the head of state. G. Zadorozhnyia reveals the discretionary powers of the President of Ukraine in her study (*Zadorozhnyia, 2013*).

As for Western studies, it is interesting to work on an index analysis of the powers of President M. Shugart and J. Carey (1992), as well as a series of works on the study of discretionary powers of the President of India, as the most widely known case when the President acts and accepts important political decisions based on the discretion of their powers, H.C Yadav and Sunita Gautam (2017), Mahendra Prasad Singh (2017), Alex Andrews George (2020).

Therefore, the purpose of this publication is to study the historical-theoretical and practical principles of the exercise of discretionary powers of the head of state in Ukraine.

To achieve the goal of the study, the authors set the following objectives:

- to analyze the historical principles and processes of formation of the functions of the presidency in Ukraine in the context of transformation processes in the state;
- to outline the content of the constitutional status of the President of Ukraine in the framework of his exercise of discretionary powers;
- to determine individual cases of application by the President of Ukraine of his discretionary powers.

#### Research methods

The main methods of scientific knowledge used in the present study are systemic (presidency is considered as a separate system that exists among other government systems), structural and functional (presidency institution is studied taking into account all its components that determine its functionality and interact with each other), comparative (to identify commonalities in different legal systems and their institutions), institutional and neo-institutional methods of scientific knowledge (study of the presidency as a formal institution and its existence within the informal relations between major policy actors).

#### Research results

In this context, the main scientific results of the work are formulated, which are characterized by novelty and reveal the logic and basic concept of the article:

- Clarifications are given on the concepts of "presidential functions", "presidential powers", "discretionary powers";

- Theoretical bases of the sources of discretionary powers of the President of Ukraine are analyzed, seeing from his constitutional powers;

- Examples of application of this type of authority in the recent history of Ukraine during the transformation of the institution of the presidency are given;

- The connection between the theory of "delegate presidents" and the dangers of their use of discretionary powers is analyzed;

- An explanation of the practical implementation of the right to discretionary powers of the head of state in Ukraine on the example of V. Zelensky and his "Poll of October 25, 2020".

#### Discussion.

The introduction of the presidency is of great importance for the political and legal development of Ukraine as a sovereign, independent, democratic and legal state, as the consolidation of the President's position at the legislative level testifies to the international experience of democratic institutions, the presidency.

One can argue for a long time about the general expediency of the existence of such an institution as the presidency in the world, however, since the Declaration of Independence in the United States and the establishment of the presidency there, today there are very few countries in the political system of which there is no head of state.

In some countries, the President acts as head of the executive branch, in others as an arbiter between branches of government; he may even be only a nominal figure with representative powers, but he always acts as the main person representing the state in the world and, above all, as the guarantor of the constitution. Therefore, in any historical or political-legal study, the person of the President or the institution of the presidency in general will appear, because it is he who represents the state. Studies of this object have been repeatedly conducted by foreign researchers (from different points of view and in different formats), Soviet scientists (mainly through the analysis of the functions of this institution in other countries) and Ukrainian experts (since the founding of the President in the USSR the fact of Ukraine's independence and the establishment of the institution of the head of state).

It should be noted that the Constitution of Ukraine formally enshrines the separation of powers (Article 6), according to which the President may perform his duties. The scope of its constitutional powers has been limited from the outset by this principle.

It is important to take into account that the need to ensure the stability of the constitutional system, unity and integrity of the state, the functioning of society by consensus does not allow to raise the question of which power is more important and should have more powerful powers. All branches of government are interdependent and in a civilized state can not exist without each other. It is known that the President of Ukraine does not belong to the three main branches of government, but functionally he is closer to the executive branch, although from a formal and legal point of view he is still not part of it. At the same time, the Constitution of Ukraine and laws, a number of bylaws give the President broad powers in the sphere of executive power (*Todyka, 1999, 203-208*). As the American scholar D. McGregor noted: "the essence of presidential institutions is determined by the personnel

and political powers of the head of state" (McGregor, 1994: 14). The Constitution of Ukraine provided great opportunities for the President as a representative of the "interests of the whole people" to remain the dominant element of the political system of Ukraine. In view of the above, it is necessary to pay attention to the issues of the functions of the President of Ukraine and their relationship with his powers. The term "functions of the president" is non-normative in view of the content of the Constitution of Ukraine, i.e. there is no separate article or indication in the text of the functions to be performed by the head of state, which does not deny the possibility of doctrinal definition. However, their characterization is real only when it reflects the content of its constitutional status. The relationship between the functions of any state body and its powers looks like a ratio of general and specific. Therefore, the functions can be formulated primarily on the content of the analysis of the relevant powers, and their implementation is objectified by the implementation of the latter. Sometimes functions are nominated as powers, so they are "materialized" in its specific powers set out in the Basic Law (Kostytska, 2003).

In general, we can say that the functions of the President of Ukraine are the main areas of his activity, which are the basis of the competence of the head of state. They also reflect the real role that the president plays in resolving political issues. Unlike the functions of many state structures, which were specially formed to solve specific tasks, the activities of the president are associated with the implementation of all internal and external functions of the state, which, of course, does not diminish the role and importance of specialized bodies.

The general system of functions of the President is as follows: 1) ensuring the unity of state power, 2) representation of the state, 3) ensuring state sovereignty and national security of Ukraine, 4) ensuring the realization of fundamental rights and freedoms of citizens, 5) founding, 6) rule-making, 7) personnel, 8) management of foreign policy activities. Moreover, the first two functions are a priority, they belong only to the head of state and determine the need for the institution of the presidency. The latter can be assigned to other government agencies. The following functions of the President of Ukraine are important for ensuring the stability of the state: economic, social, observance of law and order, mutually beneficial cooperation with other countries of the world, ensuring the country's defense. They are all closely interconnected.

The functions of the President of Ukraine can be divided into internal and external, permanent and temporary. Permanent ones are carried out by the president at all stages of his activity, temporary ones are usually connected with the solution of a specific task, which is mainly of an extraordinary nature. As a temporary function can be considered rule-making in the form of issuing decrees on economic issues that are not regulated by law, as provided for in paragraph 4 of the Transitional Provisions of the Constitution of Ukraine. Moreover, the deadline for the adoption of such presidential decrees is June 28, 1999, i.e. three years after the adoption of the Basic Law.

The functions of the president can also be divided into those that are performed individually, i.e. do not require countersignature by the Prime Minister of Ukraine and the relevant ministers, and collegial, which are performed by the president after the corresponding countersignature. Internal and external functions are closely interrelated

and interact with each other (Shapoval, 2004).

If we talk only about the powers of the head of state exclusively within the law, then according to his legal status, the President is a subject of various constitutional and legal relations, acts within the constitutionally defined competence. The President has a special place in the system of state bodies, and therefore, ensuring the interaction of public authorities largely depends on his actions. Giving a definition of the competence of the head of state, we note that this is a set of powers of the President of Ukraine. In this regard, it is important to emphasize that the powers of the President, unlike the powers of many other bodies and officials of the state, are provided exclusively at the level of the Constitution of Ukraine, and their expansion through ordinary laws is not allowed. The latter determine only the procedure for exercising a particular authority of the President of Ukraine in a particular sphere of public life (Siegan, 1994).

As we have already clarified, the scope of powers of the President of Ukraine is derived from his legal status, which is primarily defined in Article 102 of the Constitution of Ukraine, which states that "the President of Ukraine is the head of state and acts on its behalf" (Constitution of Ukraine, 1996). It is in this provision that the understanding is presented that he is a representative of the state, while, for example, the Verkhovna Rada logically acts as a representative of the people. As a representative of the state, the president acts both in Ukraine's relations with other countries and within the state, supporting its authority before the people.

We should note, however, that the powers of the President of Ukraine are mostly provided for in Article 106 of the Constitution of Ukraine. They cover a wide range of issues related to the field of legislative activity, the organization of parliamentary activities, cooperation with the executive branch, the judiciary, personnel issues, national security and defense, international relations, etc. The President of Ukraine occupies a special place in the state mechanism of the country. Under the Constitution, which remained unchanged until December 2004, he had exceptionally great powers, which determined his essential capabilities in the actual ensuring of the stability of the constitutional system and its protection. According to the 1996 Constitution, the President is the head of state and acts on its behalf. He is the guarantor of state sovereignty, territorial integrity of Ukraine, observance of the Constitution of Ukraine, human and civil rights and freedoms. The President's oath reads: "I undertake to defend the sovereignty and independence of Ukraine in all my affairs, to care for the good of the Fatherland and the welfare of the Ukrainian people, to defend the rights and freedoms of citizens ..." (Article 104 of the Constitution of Ukraine) (Constitution of Ukraine, 1996). Thus, its powers in the field of ensuring constitutional legality, national security, stability of the constitutional system and its protection occupy a central place in his competence.

Returning to the analysis of the main functions of the President, it should be emphasized that the function of the guarantor of the Constitution provides a broad right to act at its discretion, based not only on its letter but also on the spirit, filling gaps in the legal system and responding to unforeseen life situations. Such discretionary power is not a violation of democracy and a departure from the rule of law, unless, of course, the actions of the head of state lead to repression and widespread human rights violations, undermine the mechanism of social harmony

and mass disobedience to the authorities. Discretion does not violate the constitutional right of citizens to appeal against the actions of the President. As a guarantor of their rights and freedoms, he is obliged to draft and propose laws, and in their absence to adopt appropriate decrees (Shatilo, 2004: 7).

Thus, discretionary powers give the head of state the right to make certain important decisions of public administration independently, without any consent from other institutions of power (government, parliament, vice president, etc.), guided by legal norms.

Analysis of the source base showed that in the legal literature such concepts as "discretionary powers" and "discretionary power" are mostly used. Obviously, a meaningful understanding of these concepts, including the concept of "discretionary powers of the head of state", it is logical to begin with an analysis of such a term as "discretion". Thus, the Modern Dictionary of Foreign Words defines the term "discretion" as "the resolution of any issue at its discretion" (it refers to an official or government agency). "Discretion" - is the decision of an official or government agency of any issue at its discretion; respectively, "discretionary" - one that acts at its discretion.

In this regard, the Legal Encyclopedia states that in Latin - *discretio* and in English - *discretion* - is a decision of an official or government agency, which relates to its jurisdiction at its discretion in the implementation of discretionary power (Tikhomirova, 2006, 351).

Thus, from the above it can be seen that in the theory of law the terms "discretion" and "reason" are synonymous. From the analysis of primary sources it follows that the term "discretionary power" is practically identified with such a concept as "discretion". Thus, "discretionary power (from the French. *Discretionnaire* - dependent on its own discretion) - the right of a state to act officially at his own discretion in certain circumstances and within the law without prior decision of other state bodies and officials; giving the body or official authority to act on in the constitutional and administrative law of some states, the right of a higher executive body, administrative and other bodies to act at their own discretion, depending on the circumstances, to make independent decisions on matters within their competence. Thus, the theoretical basis of such concepts as discretionary authority and discretion is legal discretion (Zadorozhnyia, 2013).

We are considering the further the historical origins of the practical application of the President's discretionary powers. The first such attempts were recorded during the transformation of the presidency in Ukraine. A striking example is the period of Yushchenko's presidency. On April 2, 2007, President Yushchenko issued a decree "On Early Termination of the Powers of the Verkhovna Rada of Ukraine" (as last amended on July 31, 2007), the formal reason for which was a majority in parliament ignoring constitutional requirements inclusion in the coalition majority of individual deputies from other factions after the formation of the coalition).

Moreover, in his address to the Ukrainian people, Viktor Yushchenko emphasizes: "The President is the guarantor of the state sovereignty, territorial integrity of Ukraine, observance of the Basic Law, human and civil rights and freedoms. It is the duty of the President to stop any encroachment on the state and the people. This is the letter and spirit of the Constitution.

This is the letter and the spirit of my oath "... My decision is constitutional and legitimate, there will be no turning back"<sup>1</sup>. However, this presidential decree did not comply with the Constitution, as Article 90 sets out an exhaustive list of grounds on which the head of state has the right to terminate the powers of parliament early. During the decision-making process, the President did not follow the established procedure, which provides for consultations with the Speaker of Parliament, his deputies and heads of factions. Instead, the then representative of the President in the Constitutional Court V. Shapoval noted that the head of state as a guarantor of the Constitution is obliged to stop the violation of the Basic Law by the Verkhovna Rada, including by early termination of its powers. Proponents of Yushchenko's decision to dissolve the Verkhovna Rada point out that the president acted in the "spirit of the Constitution" - this right belongs to the discretion of the head of state. Returning to the definition of its constitutional functions, it should be added that Article 102 of the Constitution defines the head of state as the guarantor of observance of the provisions of the Constitution. Thus, in our opinion, another separate function follows from this provision - the right to establish the constitutionality or unconstitutionality of certain normative legal acts. Moreover, "de jure" only the Constitutional Court of Ukraine has the right to do so, but the "de facto" status of the guarantor of the Constitution creates an opportunity for the President, justified by the need to protect it, to interpret the scope of his powers, interfering in the competence of other bodies and violating the principle of separation of powers.

Petro Poroshenko as President of Ukraine goes far beyond his predecessor, and forces the court to recognize the fact that the decrees of the National Security and Defense Council, which are actually issued by the President as head of the National Security and Defense Council, are the embodiment of discretionary powers. On July 3, 2017, the decision of the Supreme Administrative Court of Ukraine "On the legal opinion on the discretion of the President of Ukraine in issuing decrees implementing the decisions of the National Security and Defense Council of Ukraine" (*On the legal opinion...*, 2017).

Since, according to the logic of the creators of this resolution, the National Security and Defense Council is a subsidiary body under the President of Ukraine with special competence, its activities allow the head of state to fully and effectively ensure the legal regime of national security and defense.

Thus, the decree of the President of Ukraine, which puts into effect the decision of the National Security and Defense Council - a subsidiary body of the President of Ukraine, is issued by the President of Ukraine not forcibly, but within its discretion. At the same time, the content of such a decree is the joint responsibility of the President of Ukraine, the Prime Minister of Ukraine and the Minister responsible for the implementation of such a decree, through the countersignature procedure. That is, in this way, former President Petro Poroshenko expanded his powers to issue decrees and put them into effect. It is

<sup>1</sup> Address of the President of Ukraine Viktor Yushchenko to the Ukrainian People. *Ukrinform*. 2007. April, 8: [https://www.ukrinform.ua/rubric-society/457617-zvernennya-prezidenta\\_ukrani\\_vktora\\_yushchenka\\_do\\_ukranskogo\\_nar\\_odu\\_559815.html](https://www.ukrinform.ua/rubric-society/457617-zvernennya-prezidenta_ukrani_vktora_yushchenka_do_ukranskogo_nar_odu_559815.html)

quite clear that such exclusive and "in the spirit of the Constitution" powers of the President are somewhat correlated with his important and special status of a representative of the state. However, isn't such an interpretation too attractive for certain sections of the Basic Law? Is there any danger in these powers? Given that the theory of discretionary power, according to modern scholars, was originally based on the concept of the dominance of expediency over legality in emergencies or special situations, when the achievement of this goal was allowed by any reasonable means.

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It is worth mentioning here the theory of Guillermo O'Donnell (O'Donnell, 1994) about "delegate presidents" in "weak countries", and the dangers of free interpretation and use of discretionary powers, including. Analyzing the work of political institutions in countries that have just embarked on the path of democracy (the so-called "weak states", according to our previous research (Zelinska, 2017), Guillermo O'Donnell identifies several important points in the formation and functioning these institutions.

Guillermo O'Donnell identifies several important points in the formation and operation of these institutions. This allowed him to speak of the commonality of history and transformation in these states and to unite them by the term "state of delegative democracy".

Describing delegative democracy, which Guillermo O'Donnell contrasts with representative democracy and exemplifies new democracies, he emphasizes that in such countries there are signs of both a hidden threat to a return to authoritarianism and a development toward representative democracy.

Delegative democracies are based on the premise that winning a presidential election gives the winner the right to govern the country at will (one might even say in the spirit of the Basic Law), and is limited only by the circumstances of the existing power relationship and the constitutional term.

The president is seen as the head of the nation, the chief guardian and expert on its interests. Under such conditions, the policies of his government can only remotely follow the election promises. From these positions, other institutions - the courts and the legislature - are only an obstacle to the benefits that the status of a democratically elected president provides in the domestic and international arena.

Accountability to such institutions is considered an obstacle to the full exercise of power delegated to the president. Delegate presidents find it unfair to limit their term of office to the Basic Law, they are reforming the Constitution so that it gives them the opportunity to be re-elected. However, it cannot be said that delegative democracy does not recognize democratic traditions, it simply forms a majority through democratic elections, which allows one person to become the sole embodiment and interpreter of the nation's highest interests for several

years. Power is delegated to the president, and he acts in accordance with his ideas of good. As a result of the accumulation of failures, the country is gradually in crisis, and the president, who disappointed everyone, aims only to hold out until the end of his term. In the run-up to the new elections, new candidates are emerging with the same hope of "saving" the country. In his findings, O'Donnell speaks of a paradox in the institutional development of the new democracies, as they must fight the negative effects of the authoritarian past and at the same time solve socio-economic problems that the old democracies did not face at birth. And given the fact that effective institutions and relevant practices cannot be created in one day, because their emergence, strengthening and legitimization require time, during which there is a complex process of acquiring positive knowledge, we can only hope that the basic mechanisms of delegative democracies are defined and easily predicted. If leaders really contribute to the work of effective institutions for the welfare of the nation, it is only through a change in the existing rules of the game in the political field and governance. Unfortunately, Guillermo O'Donnell did not identify opportunities to break the vicious circle of self-destruction of delegative democracies, but it can be assumed that the principles outlined in the script "do not repeat mistakes" and prevent difficulties apply. In this situation, it was only a matter of the President successfully using his numerical powers to effectively govern the country and direct the subordinate bodies to ensure the welfare of citizens. Perhaps this is the essence of the institution of the presidency in the model of a semi-presidential republic, which is enshrined in the 1996 Constitution. After all, it is the President who is defined as the guarantor of the Constitution and ensures the unity of the state. He has an important right to represent Ukraine at the international level, and his position on many issues within the country significantly affects the perception of Ukraine by the international community.

All steps of the President to expand his powers may meet resistance not only within the country (amendments to the Constitution are adopted exclusively by the Verkhovna Rada), but also around the world, if it is an attempt to usurp power. The basic position of political reform is the establishment of constitutional mechanisms of interaction and mutual responsibility of the executive and legislative branches, the formation of a viable coalition government. That is why it is necessary to involve as many experts as possible, representatives of all branches of government, political parties, non-governmental organizations, and a wide range of Ukrainian citizens in the discussion of constitutional issues. Only under such conditions can the Constitution become a documentary confirmation of the understanding between society and the state, an act of concluding a political agreement between the people and the government.

While addressing to the work of M. Shugart and J. Carey (1992), who first proposed a numerical assessment of the powers of presidents, it is possible not only to accurately determine the scope of powers of the President (such analysis can be used in studies of the effectiveness of any institution), but and to compare the scope of power according to the text of the Constitution and in reality, which may differ significantly from the adopted legislative norms. The evaluation criteria are the main indicators of the work of institutions, in our case - the rules of regulation of relations between the President,

government and parliament. Moreover, when assessing the scope of the President's powers, it is important to take into account the political reality and those informal institutions that may influence his work. With the help of the so-called "index analysis", which we have repeatedly referred to in our previous studies (*Zelinska, 2011*) the degree to which the head of state exercises his discretionary powers, however, since the objectives of this study are not such an accurate measurement, we will not dwell on this in detail.

Thus, from theory we turn to the practical application of the head of state of his discretionary powers. Without going into the past, we will take as an example a rather resonant situation, which I have not yet regarded as the use of discretionary powers by the President, although it seems to us quite obvious.

On October 25, 2020, the President of Ukraine V. Zelensky conducted a survey of the population on the main acute issues that need to be addressed in the political realities of Ukraine. In his video address to the Ukrainian people, President Volodymyr Zelensky stated: "On October 25, at the polling station, I will ask you five important questions about what we are discussing on the street, in the kitchen and on the Internet, what we are arguing with friends, parents or taxi drivers. about something we've never been asked before. Five important questions to find out what you think."

Note that the questions from the President sounded like this:

1. Do you support the idea of life imprisonment for corruption on a particularly large scale?
2. Do you support the creation of a free economic zone in Donetsk and Luhansk regions?
3. Do you support the reduction of the number of people's deputies to 300?
4. Do you support the legalization of cannabis for medical purposes - to reduce pain in critically ill patients?
5. Do you support Ukraine's right to use the security guarantees set out in the Budapest Memorandum to restore its state sovereignty and territorial integrity?

Why these questions? We see quite hot and debatable aspects in these issues, what divides the country and at the same time what can unite the Ukrainian people, unite them for the sake of prosperity. O'Donnell once spoke of this purpose of exercising the president's discretion, and this is what the founders of the theory of discretion see in this.

Moreover, solving these issues is mostly possible only through unpopular tough decisions. According to the results of our research, we see in this poll, firstly, the President's exercise of his discretionary powers, and secondly, his receipt of a kind of *carte blanche* from the Ukrainian people to make the already mentioned unpopular decisions in the Ukrainian political field. Zelensky confirmed that the results of the poll will have no legal consequences, and he plans to use his data for his future proposals to deputies. Subsequently, the President's Office explained that this poll, unlike the constitutional referendum, will not have direct legal consequences. Although, in the political practice of Ukraine, there were situations when even the results of the referendum did not have direct legal consequences, it is only worth mentioning the Referendum of April 16, 2000. Of course, political opponents of V. Zelensky, immediately after announcing his intention to conduct a poll, was accused of not having the authority to hold the event.

Here are some striking quotes about it:

"The poll, which is not provided by any law, will not have any legal consequences and trust from the people," Yulia Tymoshenko commented on the initiative.

"Zelensky and his political force shamelessly violate the Constitution, disregard the laws and try by all means to raise their ratings before the local elections." This was stated in Prykarpattia by the fifth President, the leader of "European Solidarity" Petro Poroshenko<sup>2</sup>.

"A poll with five questions from Ukrainian President Volodymyr Zelensky is illegal, illegitimate and unrepresentative". This was announced on the broadcast talk show "17" on the ZIK TV channel by a lawyer, Honored Lawyer of Ukraine Olena Lyoshenko. "The president does not have the authority to initiate a poll," she said. "Zelensky's poll is illegal. The laws of Ukraine do not provide for this. In a year and a half in power, the "servants of the people" were supposed to develop and pass a law on referendums, but they did not do so." - stated in his blog Yuri Butusov<sup>3</sup>.

The President of Ukraine has powers - namely, discretionary powers. Moreover, the court found that such actions of the President did not violate the current legislation. It will be recalled that the District Administrative Court of Kyiv has completed consideration of the case on the lawsuit to declare illegal the announcement of the President of Ukraine Volodymyr Zelensky to conduct a nationwide public opinion poll on October 25, 2020 at polling stations. A resident of Ivano-Frankivsk region filed a lawsuit against the President of Ukraine. Based on the stated requirements and analysis of the provisions of current legislation, the court concluded that the claim is unfounded and unproven sufficient evidence, and denied the plaintiff his satisfaction<sup>4</sup>.

Therefore, we see that the expediency of the head of state's own discretion to perform certain legally significant actions in a state governed by the rule of law should be carried out within the statutory framework, because the law, as a regulator of public relations, should ensure the rule of law and be the highest expediency. Thus, discretionary powers entitle the head of state independently, without any agreement with other institutions of power (government, parliament, vice president, etc.), only guided by legislation, to make certain important decisions of public administration (*Zadorozhnyia, 2013*).

Therefore, in order for the President, who does not belong to any branch of government, to be a true arbiter between other branches of government and a representative of the interests of the majority of the people (because he is elected by direct universal suffrage), it would be appropriate to introduce a rule that state of crisis (when all branches of government or one of them can not make decisions and work effectively, are in conflict with each other) or the imposition of a state of emergency, the President may take decisions beyond his competence (issuing decrees without the need to adopt them Parliament). However, in order to prevent the head of state from being tempted to resort to a dictatorship in such a situation, he must obtain the consent (counter-

<sup>2</sup> <https://www.pravda.com.ua/news/2020/10/13/7269793/>

<sup>3</sup> <https://www.facebook.com/butusov.yuriy/posts/4746433-578730234>

<sup>4</sup> <http://oask.gov.ua/node/4644>

signature) of the Speaker of the Verkhovna Rada and the Prime Minister to implement his decisions. If the President does not receive such consent, then simultaneous parliamentary and presidential elections are called (Zelinska, 2010: 73).

### Conclusions

After analyzing the historical origins of the discretionary powers of the President of Ukraine, it should be noted that the actions of the head of state "in the spirit of the Constitution" are not new. Although, I would like to note that these were decisions in exceptional situations, mostly to resolve political and historical crises in the state, and this is in line with the canons of discretion. Thus, in a situation of practical application of the head of state's discretionary powers, the only thing was that the President successfully used them to effectively govern the country and direct his subordinate bodies to ensure the welfare of citizens. Perhaps this is the essence of the institution of the presidency in the model of a semi-presidential republic, which is enshrined in the Constitution in 1996.

After all, the President is defined as the guarantor of the Constitution and ensuring a single state. It is he who gives the best right to represent Ukraine at the international level, and his position on many issues throughout the country significantly influences Ukraine's perception of international cooperation. All steps of the President to expand his powers may meet resistance not only within countries (amendments to the Constitution are adopted exclusively by the Verkhovna Rada), but worldwide, if proposed by the usurpation of power. The basic position of political reform is the approval of constitutional mechanisms of interaction and mutual responsibility of the executive and legislative branches, the formation of a viable coalition government. In the same way, as many experts as possible, representatives of all branches of government, political parties, non-governmental organizations, and a wide range of Ukrainian citizens need to be resolved before discussing constitutional issues. Only under such conditions can the Constitution become a documentary confirmation of the understanding between society and the state, an act of concluding a political agreement between the people and the government.

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## ІСТОРИКО-ТЕОРЕТИЧНІ ТА ПРАКТИЧНІ ЗАСАДИ ЗАСТОСУВАННЯ ДИСКРЕЦІЙНИХ ПОВНОВАЖЕНЬ ПРЕЗИДЕНТА УКРАЇНИ

Запровадження інституту президентства має велике значення для історичного розвитку України як суверенної, незалежної, демократичної та правової держави, оскільки закріплення на законодавчому рівні посади Президента свідчить про врахування міжнародного досвіду функціонування демократичних інститутів, головне місце серед яких посідає президентура. Конституція України надала великі можливості Президенту, як представникові “інтересів всього народу”, залишатися домінуючим елементом політичної системи України. Повноваження Президента, на відміну від повноважень багатьох інших органів і посадових осіб держави, передбачаються винятково на рівні самої Конституції України, і їх розширення через звичайні закони не допускається. Останні визначають лише порядок реалізації того чи іншого конкретного повноваження Президента України в певній сфері суспільного життя. І в цьому сенсі дуже цікавим є дослідження окремої функції Президента, а саме можливість діяти «... в дусі закону (Конституції)» - дискреційні повноваження. В багатьох рішеннях та проектах глав держави вбачаються саме дискреційні повноваження, і це не має означати, що виникає перевищення повноважень або навіть вихід за рамки законності. Адже в юридичній енциклопедії дискреційні повноваження визначаються як право глави держави, голови уряду, інших посадових осіб органів державної влади діяти за певних умов на власний розсуд у межах закону. На наявність дискреції в окремій ситуації в нормі закону вказують такі звороти, як, наприклад, «може», «має право», а не «повинен», «зобов’язаний».

В новітній історії України, в ході трансформації інституту президентства, ми вже бачили застосування главами держави своїх дискреційних повноважень. Здебільшого, маємо згадати резонансні рішення «в дусі Конституції» В. Ющенка та П. Порошенка. Таким чином ми розглянемо і опитування Президента України В. Зеленського, яке було проведене 25 жовтня 2020 року, саме з позиції застосування ним своїх дискреційних повноважень: права діяти, виходячи з правового статусу Президента України, який передусім визначено в статті 102 Конституції України: “Президент України є главою держави і виступає від її імені”.

*Ключові слова:* Президент України; дискреційні повноваження; функції Президента; Конституція; опитування.

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