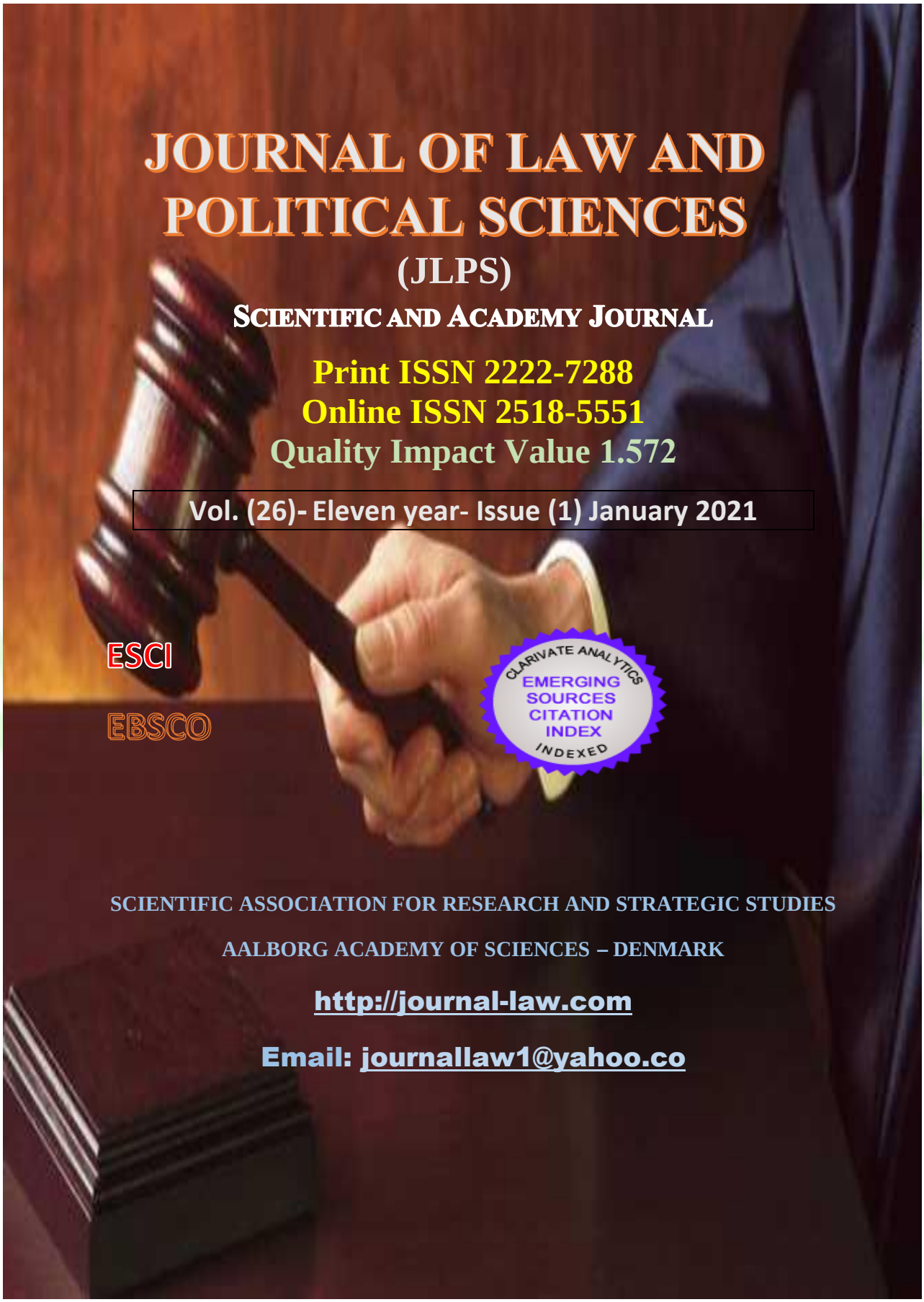

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(1)

POLITICAL ELITES FACING THE CHALLENGE OF COVID-19: PROBLEMS OF IDENTITY AND FUTURE OF SOCIO-POLITICAL DEVELOPMENT

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Abstract.

Recent political events show that the Covid-19 crisis is accompanied by a partial loss of identity by many political structures and individual political actors. The question of "who we are" and "who are they" is again acutely faced by modern mankind which faced with the crisis caused by the coronavirus pandemic and forced to revise its previous theories and values that have not passed the test of time. The coronavirus epidemic has become a kind of dividing barrier and will go down in history as the moment when it was "before" and has become "after". Currently, this transition is still faintly felt. But the feeling of it will grow with the passage of time. By 2020, the world has reached the border of a serious crisis, and the Covid-19 pandemic that happened at the beginning of the year has become a kind of catalyst, having accelerated all processes and revealed all the weaknesses of the world system built by the United States. It turned out that the old proven schemes in which the elites are accustomed to operate are violated and are ineffective. There is simply no time to search and test new algorithms. Elites and their leaders have to improvise during the course of events, and this improvisation is not always successful for them. The ruling elites lost their former confidence and an identity crisis

began inside of them. It is the analysis of this crisis that this work is devoted to.

Keywords: elite, identity, world crisis, coronavirus (Covid-19), shock, chaos, threats, conflicts, responsibility, solidarity, world leadership, globalism.

I. Consideration of question.

In the political process of modern societies, a change in worldview coordinates is also taking place, the once stable value-normative systems which ensured the stability and resistance of socio-political relations and acted as a framework for identity and group solidarity are being transformed. Various scenarios for the development of society, transformation of socio-political and economic organization are projected in modern research [Mamychev A.Yu., 2020]. Summarizing the latter, we can conditionally distinguish three groups of approaches.

The first group **predicts the development of convergence processes of the traditional value and normative foundations of society with innovative priorities, benchmarks and value attitudes of digital culture. It is clearly seen during a pandemic that the latter both entered into contradictions and converged (mixed, fused) in different spheres of social interaction.**

The second projected scenario **is, on the contrary, the replacement and erasure of the traditional foundations of society, the replacement of the old spiritual and moral systems with new post-humanitarian values and, in general, the displacement of social development guidelines from the new digital reality. For example, Adam Greenfield designates the modern period of development as the *"era of post-humanitarian everyday life"*, where the main guidelines for future development and key priorities of transformation "are determined not so much by our needs as by the needs**

of systems (technical, information, digital – *author's note*) that nominally serve us, but for those human perception, scales proportionate to a person and his desires *are not the main measure of value* (emphasis ours – *author's note*) " [A. Greenfield, 2018, p. 249].

***The third scenario* is co-evolution, in the context of which it is argued that a fundamentally new system of complex forms of interaction between social and digital priorities will be formed, where the former and the latter will retain their uniqueness, and the very "interweaving" of social and digital foundations and forms of social and political communication is impossible. The latter "presupposes complex interaction as a functional unity of its parts with the preservation of their substrate differences, independence ... In the circumstances of the innovationism expansion, this is the only possible attitude towards technologies" [Kutyrev V.A., 2020, p. 8].**

The Covid-19 crisis that erupted in early 2020 caused numerous unpredictable losses in the economy, politics and healthcare. Moreover, even the world's leading economists and political scientists do not undertake to predict all its consequences. None of them know how the world economy will recover from the shock it has endured and what will happen to the political systems. Conflicting forecasts create an eclectic picture of the world, devoid of common meaning and the same assessment. All this creates chaos and increases the risks of unpredictability. The global project has cracked and it seems that its ideologists and apologists have no recipe for how to get out of this difficult situation. Expert communities have spoken openly about the crisis of solidarity even in those structures that were previously proud of their collective decisions

and iron consensus. There is no unity among the scientific expert community itself - the scientific elites either remain silent or give extremely contradictory assessments and forecasts [Kapto A.S., 2019].

The general world crisis consists of a whole set of secondary crises - the crisis of globalization, the crisis of US world leadership, the crisis of European unity, the crisis of solidarity, etc. In sum, they make up what is commonly called the global financial and economic crisis, which began in 2008 and has not yet ended. The task of this work is to assess current events that are not yet completed and therefore are rationally extremely unpredictable. The object of this work will be a new wave of the global financial and economic crisis provoked by the Covid-19 pandemic, and the subject will be the reaction of the world's political elites to these events. All of the aforementioned secondary crises directly or indirectly relate to the problem of identity, the need to adjust or even radically revise the existing systems of values and ideals.

II. The crisis of globalism.

In 2020, the process of globalization actually stopped, and it turned out to be very difficult to restart it. Many experts talked about the end of the American-style globalization project and the end of the US world leadership. Indeed, if in the course of previous global crises, such as the 2008 financial crisis and the 2014 Ebola epidemic, the United States assumed the role of global leader, then in 2020 the US administration resigned from the position of leader in saving the world. President Donald Trump has made it clear that he cares much more about America's greatness than about the future of humanity. [Harari, 2020]

The growth of crisis phenomena in the globalization process was also recorded by the supporters of globalization themselves, in whose opinion

globalism solves some problems and creates others. [Stiglitz, 2016] Moreover, the elite will not be able to cope with the new problems, since they are accustomed to working according to the old protocol norms. Back in 2011, after the first wave of the global financial and economic crisis, D.Stiglitz pointed out that the United States would no longer be able to be what it was before; that the world is changing, and the States must not only rebuild themselves, but also have time to lead this process of change. [Stiglitz, 2011] At the same time, the crisis of globalism is understood by many as an ideological crisis of the very liberalism in general.

The Covid-19 crisis has shown that the global cooperation of the world's leading countries needs serious adjustment. During the coronavirus pandemic crisis, most countries isolated themselves, deciding to deal with this problem on their own. The decisions of many European Union countries to isolate themselves caused a wave of criticism and the threat of the collapse of unity, about which the Brussels European bureaucracy spoke so often. According to Russian experts, the general "decline in attention to the problems of globalization in recent years is due to the development of the phase of chaos and, as a reaction to it, the activation of the trend of isolationism." [Lebedeva, 2019: 32]

Countries should be ready to share information openly and be able to seek advice and receive qualified scientific knowledge. The world community also needs a global effort to manufacture and distribute medical devices. *One of the most influential thinkers of the modern world, Israeli historian and philosopher Yuval Noah Harari (author of the bestselling books "Sapiens. A Brief History of Humankind" and "Homo Deus. A Brief History of Tomorrow"), argued that* "just as countries

nationalize key industries during wars, the human war against the coronavirus may require us to "humanize" critical production lines. A rich country with few coronavirus cases should be prepared to send the necessary equipment to a poorer country, in many cases believing that if and when it subsequently needs help, other countries will come to its aid." [Harari, 2020] It is necessary to strike at the centers of the epidemic, and not to scatter efforts on all local foci.

Global cooperation is vital on the economic front as well. Considering the global nature of the economy and supply chains, if each government does its own thing while completely ignoring the others, the result will be the chaos and a deepening crisis. For a softer way out of the crisis, the world elites need a global action plan, and they needed it yesterday already. [Harari, 2020]

The crisis has complicated not only the economic schemes for the exchange of goods, brought to naught the tourism industry, but also interrupted scientific contacts in some segments. The latter can turn out to be a very serious problem, since the coordination and cooperation of the entire world scientific community is required for a successful fight against coronavirus. The role of scientific elites is increasing many times over. And in this growth we can see a clear domination of the principle of meritocracy over the principles of oligarchism.

There is an obvious crisis of global *solidarity* [Baranov P.P., 2019]. If politicians choose disunity and can convince and entice their citizens with them, this will not only prolong the crisis but will likely lead to even worse disasters in the future. "If we choose global solidarity, it will be a victory not only against the coronavirus but also against all future epidemics and crises that could hit humanity in the 21st century." [Harari, 2020] The

world is at war with the coronavirus, and the virus could redistribute the order. A pandemic has the potential to undermine the power of the dollar, and with it the era of overconsumption is ending. The world is going into economy mode (exorbitant expenses will be revised).

The crisis of globalization is also associated with the crisis of world political and economic leadership, which the world community is currently experiencing. For many countries previously focused exclusively on the main hegemon (the United States), difficult times now have come. Their policy of focusing on Washington is bursting at the seams and deeply cracked. And all because their overlord is reneging on his previous obligations since he himself has become chronically lacking in resources to support his foreign policy.

III. Political elites and problems of world leadership. The policy of the global regulator (USA & Co.) is anti-strategic in nature. It is mostly random. The split of the elites in the United States is putting this country on the brink of a cold civil war. Hopes for the strength of economic ties with China did not materialize. As you know, Chimerica denoted a bipolar picture of the world, where there is confrontation and cooperation between two superpowers - the United States and People's China. America hastily considered China to be its part as very powerful leading part. They often viewed the Chinese financial system as an extension of the American system. But Chimerica went deep cracks when the US decided to enter the Chinese market and open it up to its multinationals. And the alliance of the liberal US and communist China turned out to be a chimera.

American political scientist and professor of the Hamline University David Schultz argues that the United States is losing its economic

independence. The economic recovery will go much slower than in 2008. In his opinion, in the near future China will become the first world power, since the USA no longer dominates the world economy.

According to Chinese experts, in the future, there will be more noticeable double standards between China and the United States, and competition, deterrence and resistance to containment will be more noticeable. [赵全胜, 2012]. Zbigniew Brzezinski once insisted on the need to form The Group of Two (G2) with the participation of China and the United States. Henry Kissinger, the former US State Secretary also spoke about the fact that these two powers should form the core of the future world order. Back in 2018-2019, in The Group of Two the first cannons of the trade war thundered. It seemed to the US that they were shooting at China. It turned out that they were shooting themselves. For a long time, the American political elites will not be able to come to terms with the loss of the first power status. But the more they persist in upholding their outgoing hegemony the more tragic a multipolar world with completely different global centers of power will be for them.

World systems have lost their stability and have become more sensitive to crisis changes. The danger of an imbalance of power and the risk of conflicts are entering an active phase of development have increased. Many organizations have lost their former authority and status [Mamychev A.Yu., 2019]. They are no longer what they were before. The loss of orientation led to an identity crisis.

To be fair, it should be noted that the American elites themselves long before this had very serious claims to their authorities regarding how they provided (or rather, did not provide) the US world leadership. Thus, even before his election, D. Trump accused Barack Obama of missing the

moment to strengthen America and plunging it into a severe crisis of self-destruction. [Crippled America, 2015] B. Obama himself blamed his predecessor, Republican President D. Bush Jr. for his difficulties and blamed him for inaction and criminal self-confidence. The latter, in turn, accused the democrat B. Clinton of not finishing off Russia in time after the collapse of the USSR, etc. [Bush, 2010] There is no need to speak about the accusations of D. Trump himself of incompetence and betrayal of the US national interests. [Clinton, 2017] There were also those who insisted that the American elites had lost their sense of reality and were leading the country towards imminent disaster. [Paul Craig Roberts, 2014] Some European politicians who believed that Europe was losing its monopoly on political leadership also languished with a premonition of the impending turmoil. [Macron, 2016; Hollande, 2018] Thus, the split of the elites in the United States was superimposed on the crisis of their world leadership which significantly increased the instability of the world order built by Washington. The Hegemon himself renounced his obligations. Olympus has become empty. [Harari, 2020]

The Covid-19 crisis is most often characterized by analysts as a shock that causes the most real panic and confusion in the power structures. The coronavirus will be a stress test for many governments. Thomas Frey, executive director of the Da Vinci Institute, pointed out that "by quarantining millions, we have pressed a giant reset button for all of humanity in many areas of life." At the same time, the “state of fear and panic” plays a significant role in this situation. [Frey, 2020] This is exactly what the Western European EU members experienced when, during the

pandemic, their notorious unity cracked at the seams and the voice of Eurosceptics spoke even more strongly.

III. Problems of European Union.

The UK's exit from the EU punched the budget deficit by almost 20%, which already required a reduction in overall spending. The resource base of donor countries has shrunk. EU members from Central and Eastern Europe, who were the main beneficiaries, find themselves "up in the air" and insist that "old Europe" continue the funding program. [Coronavirus, 2020]

Brussels has no clear plan to get the EU out of the crisis. A serious economic depression will put even the rich EU countries with a choice - why should they finance "others" when they need to pull themselves out of the quagmire. One of the main problems of the EU economy is the overvalued euro, which increases the cost of production and provision of services. In this regard, the question arises, how to get out of depression - together or separately? The latter implies leaving the European Union, or limiting one's presence in it. Some analysts point out that this "exit from the influence of Eurocracy will take place not into a void, but into a zone of Russian gravity. There is only one counterbalance on the continent in Europe - this is Russia, and many European peoples will now begin to seek normalization of relations with it. We are witnessing the emergence of centrifugal trends in the EU." [Coronavirus, 2020] During the Covid-19 quarantine, some national leaders of the EU expressed doubts about their continued stay in this Union, which did not meet their expectations. It turned out that Europe does not want to decide anything for itself. The problem of European sovereignty turned out to be a dangerous and

forbidden topic. The heyday of European integration has passed, and there will be no such comfort.

Among the pessimists was the leader of the French political party "National Front" ("National Association") Marine Le Pen, who said that the coronavirus heralds the collapse of the European Union according to the scenario of the USSR - the Soviet empire also collapsed due to its "ideological absurdity". In her opinion, the days of the European Union which is an "artificial construction" are numbered. In return, Le Pen proposes to create a "Europe of Nations" based on respect for the national characteristics of each country. The French politician noted that the coronavirus crisis marked the beginning of these changes, bringing back words such as "borders", "sovereignty" and "national interests" to Europeans. [Coronavirus, 2020]

Her ardent opponent, financier George Soros, also warned about the threat of disintegration. Both of these predictions came after the EU leadership, for the first time in history, threatened to impose sanctions on its pivotal country, Germany. Will Germany leave the European Union because of the conflict with Brussels, as Britain has already done? [Coronavirus, 2020] During the pandemic, the EU's political elites looked extremely confused. Their behavior grew in discontent and irritation with the Brussels bureaucracy. Eurosceptics got another reason to doubt the durability of the EU's declarations of solidarity and integrity of the policy pursued by the official Brussels.

French President E. Macron also spoke about the need to reform the political system. Judging by many of his statements, he adheres to the principle of situational ideology (when necessary, he can be right, when

necessary - left, etc.). "I decided not to become a prisoner of the disagreements of a past era. - He stated in one of his works. - If by liberalism we mean trust in a person, I definitely agree to be a liberal. But, on the other hand, being leftist means thinking that the poorest and the weakest should be protected without being discriminated against, then in this case I will willingly agree to be leftist " [Macron, 2016: 46]. The President has stressed many times that traditional political systems are increasingly failing and have begun to fail in allowing politicians to respond to the challenges of the world and the country.

V. Lost elitism. Among the losses incurred by the world community from the Covid-19 pandemic, the most imperceptible, but not the safest one, was the partial loss of identity by the subjects of politics. This mainly affected representatives of political elites and their leaders. Their image suffered the most from Covid-19 - their competence has had serious restrictive barriers. Therefore, along with the economic and political crisis, the crisis of the elites themselves should be also mentioned. And a clear sign of this crisis is the loss of the usual identity by the elites.

As it is known, loss of sameness is a serious violation of identity. Many political actors have a clear deficit in a concentrated form to express their former belonging to those structures or those statuses that they previously occupied. It was the elite status positions that suffered the damage. Many of them have disappeared during the pandemic from the information political space. They went into "creative quarantine". The official statements were inconsistent and fragmentary.

The main problem for the elites is that the crisis of their own identity was superimposed on the global crisis [Vorontsov, 2018]

The elitological community noted that in 2010s criticism of political elites regarding their professional level of training increased. People with mediocre knowledge of political science basics and political realities came to power. They are used to acting in a formulaic manner, in accordance with the rules of familiar patterns. Taking initiative and going beyond these proven formulas was not within their purview. They deliberately avoided solving serious problems focusing public attention on the problems they invented. As a result, at the first serious collision with objective reality, all their "knowledge base" turned out to be unnecessary trash. Fashionable theories in the spirit of Z. Brzezinski and F. Fukuyama do not help either. K. Popper's dogmas about an open prosperous society also turned out to be an empty fantasy. The usual comfortable unipolar world turned out to be a glass castle on the sand, and popular scientific theories - untenable scholastic constructions.

Instead of a scientific explanation of what is happening in the civilized and educated world, various kinds of conspiracy theories and outright fakes are spreading. Elites began to trust conspiracy theorists more than political scientists. And these are the fruits of Western university education. They believe in what is convenient and beneficial for them. They are still not interested in the truth. They live in a post-truth world. In such conditions, the elite itself also receives the prefix "post". By virtue of all these circumstances, the elites themselves turn out to be invented, turn out to be a kind of political fake. It gives rise to the effect of the withdrawal of the elites - the elites sit quietly and keep their distance from all dangerous events: some of them are afraid, others simply cannot do

anything. As a result it paralyzes the will of the elite of the politicians masses making it incapacitated.

The loss of elite identity is the most serious loss of today's political elites. We can talk about a systemic failure in the professional activities of elite groups. Partial or complete loss of identity threatens the elites themselves with serious systemic problems. Their new norm may turn out to be completely unacceptable for the previous norm of their existence, which may erase and annul all their previous achievements. Elites had a hard time of understanding each other before. Now they face a real war of meanings. The crisis of the elites is a crisis of the quality of not only the ideas they produce, but also a crisis of the very idea of the elite. The boundaries of this idea are blurring, the criteria are becoming more simplified and poorly verifiable. All this makes the elite little recognizable not only for the scientific community, but also for themselves. The struggle for own identity threatens with much more acute problems and conflicts [Kapto A.S., 2019].

Thus, the coronavirus epidemic turned out to be a serious test for society and governments of states of their responsible behavior and the fulfillment of their civic and professional duties. At the same time, the role of the scientific expert community, the so-called scientific elite, is increasing. However, the lack of consensus among all these three elements (society, government and scientific elites) raises serious concerns about an effective solution to the Covid-19 problem and the next round of the global financial and economic crisis. Covid-19 itself is not so terrible as the abyss of global economic catastrophe that has been opened up after it. But it is known that any crisis opens up new opportunities. The most important thing is to understand them and use them on time...

VI. Conclusions.

As political history testifies, it is up to the elites to choose a strategy to combat Covid-19. And this choice is not always correct and responsible. More often the solution to a problem is drowned in endless discussions and mutual recriminations. Elites are replicating old protocols of competition. In such situations, there is no talk of constructive discourse at all. The coronavirus crisis has highlighted the weaknesses where the elites are most vulnerable. In particular, it exposed economic, political and, most importantly, unexpectedly revealed medical problems. The world's best health care system (as it was believed), unexpectedly for many people, has failed. The mortality statistics from coronavirus in the United States and the United Kingdom at the end of May 2020 beat all anti-records. [Chris Harris, 2020] Ill-wishers started talking about the complete failure of health policy in these leading countries of the Western world. And it was the top leadership of these countries that were named guilty. Instead of fixing the weaknesses in the health care system, the US authorities blamed China and the WHO for everything, and defiantly withdrew from this organization. Then, when it was necessary to unite in the fight against the coronavirus, some politicians continued to incite hostility, thereby trying to absolve themselves of responsibility for previously made unpopular decisions. The crisis of 2020 exposed the crisis of the elites with anatomical precision, putting them before a serious civilizational choice - whether they will remain within the framework of a decaying unipolar world or will go over to the side of flourishing diversity.

As result, political elites wanted to see only their local interests and searched possibilities to consideration other countries or organizations as main their problems. We can conclude that many politics underestimate situation with pandemic because considered it only from their egoistic positions. Some politic elites in the world tried to use speculative policy, but it can give correct decisions.

In this situation can be possible to consider this problem from different aspects. Clearly, the Covid-19 could not to destroy many economic branches or international trade, but it can be give important experience for struggle against more serious situations in the future. At first, It can be useful with mobilizations of the different kinds of the resources, reaction for complicated situation, fast contacts with different countries and organizations.

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m) **Thomas Frey. *How the Coronavirus has Altered the Course of Human History*, March 26, 2020. – URL: https://futuristspeaker.com/futurist-thomas-frey-insights/how-the-coronavirus-has-altered-the-course-of-human-history/**

n) **Yuval Noah Harari: the world after coronavirus *Financial times.* // 20.03.2020.**

o) **Hollande François. *Les leçons du pouvoir.* Pari, 2018.**

p) **Kapto A.S., Uvarova G.G., Mamychev A.Yu., Ponedelkov A.V., Vorontsov S.A. Ecological culture of political perception of global environmental problem, *Amazonia Investiga*. 2019. Vol. 8. № 20. 80-90.**

q) **Macron E. *Révolution.* Paric, XO Éditions, 2016.**

r) **Mamychev A.Yu., Okhottsky E.V., Frolov S.S., Ponedelkov A.V., Vorontsov S.A. Statement and Implementation of goals of the political strategy is the basis of effective public administration. *Revista Inclusiones*. 2019. Vol. 6. S. 4-8. 475-486.**

s) **Paul Craig Roberts. *How America was Lost. From 9/11 to the Police/Warfare State.* Clarity Press, 2014.**

t) **Stiglitz Joseph. *Freefall: America, Free Markets, and the Sinking of the World Economy.* Moscow, Eksmo, 2011.**

u) **Stiglitz Joseph. *The Great Divide: Unequal Societies and What We Can Do About Them*. Moscow, Eksmo, 2016.**

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PLURILATERAL NEGOTIATION OF WTO E-COMMERCE IN THE CONTEXT OF DIGITAL ECONOMY: RECENT ISSUES AND DEVELOPMENTS

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ABSTRACT:

In January 2019, 76 WTO members representing 90% of world trade economy launched the "E-Commerce plurilateral negotiations" aimed at developing international rules in the E-Commerce/digital trade field to adapt to the globalization and digital development of the economy. The negotiations covered

both trade facilitation issues of necessary consensus among members and new rules on high standards of digital trade. With different levels of digital economic development and different demands for core interests, the coordination of positions among key members such as the United States, China and Europe is a decisive factor in the success of the negotiations. In this regard, it is necessary to focus on the analysis of cross-border data flows and prohibitions in negotiations. The core issues in dispute are localization requirements, source code and algorithm regulation. As the largest country in e-commerce and the second-largest country in the digital economy, China needs to actively participate in the negotiation, at the same time, pay attention to promoting the negotiation in line with the interests of the most substantial majority of members, and enhance China's rule voice in the field of e-commerce.

Keywords: cross-border data flow, digital economy, e-commerce negotiation, electronic transmission, SMEs, WTO.

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I. INTRODUCTION

The Internet system defined by the national policies and regulations of various countries is increasingly divergent, and this trend has a significant impact on international trade and the global digital economy. In the present era, when information technology comprehensively reshaped the world economy, the application of digital technologies such as the Internet, cloud computing, and artificial intelligence has had an essential impact on the global trade.[1] Using the Internet as the transmission medium, cross-border data flow as the exchange means, and electronic payment as the settlement method has become the new standard of trade. Small and medium-sized micro-enterprises (SMEs) can easily engage in international trade. Some developing countries, including China, have developed rapidly in the field of e-commerce/digital trade. The digitization of the economy requires changes and updates in trade rules to promote the rapid development of the economies of all countries. The European Union, China and other WTO members, jointly launched e-commerce plurilateral negotiations aimed at updating trade rules to boost the digital economy on January 25, 2019, at Economic Forum in Davos.[2] The negotiation is significant in at least three levels: first, the multilateral negotiation including China, the United States, Europe, and other WTO members shows that even in the face of unprecedented crisis, the WTO is still dominating global e-commerce/digital rulemaking in the most active area of trade. This has a key role in restoring the confidence of all parties in the

[1] Goldfarb, Avi, and Daniel Trefler. *AI and international trade*. No. w24254. National Bureau of Economic Research, 2018.
[2] European Commission, "76 WTO Partners Launch Talks on e-Commerce," January 25, 2019, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1974.

multilateral trading system. Second, successful plurilateral negotiations suggest that WTO members can use plurilateral approaches to formulate new rules after years of stagnation in traditional multilateral approaches based on consensus among all members. This is a significant attempt to restore the negotiating function of the WTO. Third, the current multilateral trade rules are based on trade in goods and services, and it is difficult to adapt to the new demands of the digital economy. Timely updating of digital trade rules has an irreplaceable boost to the global economy.

Digital trade is highly internationalized, and China must pay close attention to the development of relevant international rules, and actively participate in and lead the formulation of new rules to enhance the right of international rules in the digital economy. In November 2016, China first submitted a proposal on e-commerce to the WTO as an initiator actively participated in multilateral negotiations on e-commerce of the WTO on this issue. In this context, the author will first pay attention to the current regulation and deficiency of the WTO framework on e-commerce and extract the latest progress and primary position of the proposal submitted by the main WTO members in the current multilateral negotiations. The author then focused on the three core disputes in the negotiations over proposals from key members, including cross-border data flows, localization requirements, software source code, and algorithmic regulations. Considering that the position coordination between China, the United States and Europe is significant for the success of WTO e-commerce multilateral negotiations. This further paper analyzes the differences between the positions of the three parties and the relevant

background and the actual situation of China and tries to put forward a relatively pragmatic and balanced negotiation proposal.

II. THE CURRENT FRAMEWORK AND RULES NEGOTIATION OF WTO REGULATION OF E-COMMERCE

After the Uruguay Round Negotiation, the World Trade Organization a system based on the rule was established in 1995.[3] In the beginning prediction of the rapid development of digital technology and its impact on commerce was not possible, which has led to the spread of electronic commerce as we see today[4]. However, the WTO agreements presently regulate the multilateral trading system, covering a wide range of cross-border trade, including some aspects related to e-commerce. Understanding their relevance to e-commerce is one of the key objectives of the WTO e-commerce work programme. WTO adopts the term "e-commerce" and defines it as "production, distribution, marketing, sale or delivery of goods and services through electronic means".[5]However, the proposal of the majority of members in the plurilateral negotiations does not strictly distinguish between the concepts of "e-commerce" and "digital

[3] WTO, "What Is the WTO?," accessed October 28, 2020, https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

[4] Ismail, Yasmin. "E-commerce in the World Trade Organization: History and the latest developments in the negotiations under the Joint Statement." *International Institute for Sustainable Development. https://www.iisd.org/library/e-commerce-world-trade-organization* (2020).

[5] General Council, "WORK PROGRAMME ON ELECTRONIC COMMERCE, WT/L/274 ," September 25, 1998, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=31348&CurrentCatalogue- .

trade," but covers the cross-border sale of goods and the cross-border transmission of digital content and services using the platform.[6]

A. The current framework and deficiency of WTO regulation of e-commerce

The current rules of WTO were mainly formed in the Uruguay Round negotiations in the late 1980s and early 1990s when the development of e-commerce was still in its early stage. General agreement on trade in services (from now on referred to as GATS) is an important agreement involving e-commerce.[7] GATS defines "trade in services" as providing services in four ways: first are cross-border provision, second overseas consumption, Third commercial presence and four natural person presences. These four models are related to e-commerce, especially the first. The obligations of WTO members under GATS are reflected in the specific commitment forms, most of which include services related to e-commerce, such as computer and related services and telecommunications services. The existing case rulings show that GATS does not distinguish between technical means of service delivery. If WTO members do not explicitly exclude, their specific commitments extend to services provided by electronic means, which are typically reflected in the adjudication of "U.S. gambling case"[8] and" China publications and audio-visual products

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[6] WTO, "Joint Statement on Electronic Commerce-Communication from Brazil, INF/ECOM/27," 30 April 2019. WTO, "Joint Statement on Electronic Commerce-Communication from Canada: Concept Paper-Building Confidence and Trust in Digital Trade, INF/ECOM/29," 9 May 2019.

[7] "World Trade Organization Electronic Commerce." WTO. Accessed October 28, 2020. https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm .

[8] WTO, "United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services," WTO, April 25, 2013, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.

case".[9] In addition to GATS, other WTO agreements are also related to e-commerce to varying degrees, including the general agreement on trade in goods (GATT), the agreement on trade-related intellectual property rights (TRIPS). The TRIPS agreement also embodies the characteristics of technology neutrality, and the protection of intellectual property extends to online digital content. Therefore, in general, trade through e-commerce and digital means are subject to WTO rules.[10] However, due to the stage limitation of technology development in negotiation, the current WTO framework lags behind in the regulation of e-commerce, and there are deficiencies in product classification, market access, data flow and trade facilitation.[11]It is necessary to form new rules of e-commerce through WTO members negotiations for the development and meet the needs of the digital economy.

B. E-commerce issues under the WTO framework: from multilateral discussions to multilateral negotiations

E-commerce is not a new issue under the framework of WTO. In 1998, the second WTO Ministerial Conference adopted the "Global E-Commerce Declaration", which imposes tariffs on electronic transmissions, or that electronic transmissions are duty-free.[12] In September 1998, the General

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[9] WTO, "China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products," WTO, May 11, 2012, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm.

[10] WTO, "Overview: the TRIPS Agreement," WTO, January 1, 1995, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

[11] Kende, Michael, and Nivedita Sen. *Cross-border e-commerce*. No. BOOK. The Graduate Institute of International and Development Studies, Centre for Trade and Economic Integration, 2019.

[12] WTO. "Minutes Of The Meeting Of 24-25 March 2011 G/TBT/M/53 ," May 26, 2011. https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=89194&CurrentCatalogueIdIndex=0&FullTextSearch=

Council of the WTO adopted the "Work Plan for Electronic Commerce", which further lists the issues that members need to discuss in different councils.[13] However, due to the lack of progress in the first round of multilateral negotiations "Doha development round" since the establishment of WTO, the multilateral discussions on e-commerce issues have not produced practical results.

Compared with the lack of progress in multilateral discussions, in recent years, WTO members have begun to emphasize and strengthen the formulation of e-commerce/digital trade rules in Regional Trade Agreements (RTAs). In addition to many RTAs containing special chapters on "e-commerce", the US-Mexico-Canada Agreement (US-Mexico-Canada Agreement), which is an upgraded version of the NAFTA, was reached in 2018.[14] The Mexico Agreement or USMCA set up a particular chapter on "Digital Trade" for the first time.[15] However, many RTAs have various limitations in inclusive trade concepts, specific rules, and dispute resolution and enforcement. In the various efforts of members to seek to restore and revitalize the WTO negotiation function, the multilateral approach has become an attempt. This method is different from the multilateral negotiation tradition in which all members have reached consensus. Some members with common will negotiate first to reach an agreement in a specific field, and form new rules by gradually opening up to other members. Negotiation areas that have been involved

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[13] WTO. "Work Programme on Electronic Commerce WT/L/274," September 30, 1998. https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=31348&CurrentCatalogue- .

[14] WTO. "Regional Trade Agreements Database." Accessed October 28, 2020. https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx .

[15] USRT. "Chapter 19, Digital Trade." In *Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text*, n.d.

include environmental products, investment facilitation, border carbon tax adjustment, and e-commerce. If there are too many negotiations on the various sides, it may cause fragmentation of the WTO system and worry about the loss of the overall negotiation function.[16] Therefore, coordination between the multilateral and multilateral modes needs to be considered.

In December 2017, 71 WTO members issued a "Joint Statement on E-commerce" at the 11th WTO Ministerial Conference to start negotiations on "trade-related e-commerce issues" under the WTO framework.[17] On January 25, 2019, 76 WTO members, including China, the United States and Europe, representing 90% of world trade, signed the "Joint Statement on Electronic Commerce" to initiate WTO e-commerce negotiations.[18] Since the official launch of the negotiations in March 2019, WTO members have submitted more than 30 proposals covering a wide range of traditional issues of e-commerce and new digital trade rules. Many of them have proposed specific provisions.[19] At the small ministerial meeting in Davos, Switzerland on January 24, 2020, WTO Director-General Azevedo once again called on the negotiating members to continue to maintain the inclusiveness and openness of the negotiations and to use the opportunity of the twelfth ministerial meeting to produce

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[16] Basedow, Robert. "The WTO and the rise of plurilateralism—what lessons can we learn from the European Union's experience with differentiated integration?." *Journal of International Economic Law* 21, no. 2 (2018): 411-431.
[17] WTO. "Joint Statement On Electronic Commerce WT/MIN(17)/60," 2018.
[18] WTO. "Joint Statement on Electronic Commerce WT/L/1056, 25 January 2019.
[19] WTO, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx

Substantial results, rather than stop counting the progress of negotiations or planning a negotiation roadmap.[20]

III. BASIC FEATURES AND CORE CONCERNS OF PROPOSALS BY MAJOR MEMBERS

Although WTO members have some consensus on the negotiation of e-commerce, there are apparent differences in specific concerns, reflecting their interests in different stages of e-commerce development. This section refines the features and main concerns of the important members of China, the United States and Europe, and lays the necessary background and foundation for the analysis of specific controversial issues below.

A. U.S. proposal: comprehensively advocating new rules for "digital trade"

In contrast to its dissatisfaction and disruption with the WTO's dispute-settlement appellate body, the U.S. is an active promoter of the WTO's multilateral negotiations on e-commerce, arguing that "comprehensive and ambitious" high-standard trade rules can ensure an open, fair and competitive global digital economy and reduce digital trade barriers. In April 2019, the proposed text of the "Digital Trade Agreement" submitted by the United States replaced "e-commerce" with the concept of "digital trade". Most of the content is beyond the scope of the existing WTO agreements, and contained clear obligations and rules, showing the goal of the United States to promote the development of high standards and more open digital trade rules.[21] The United States has previously negotiated and formulated detailed rules on e-commerce/digital trade in several RTAs,

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[20] **"In Davos, DG Azevêdo Hears Support - and Urgency - for WTO Reform," WTO, January 24, 2020, https://www.wto.org/english/news_e/news20_e/minis_24jan20_e.htm .**
[21] **WTO. "Joint Statement On Electronic Commerce Communication From China INF/ECOM/19," April 24, 2019.**

especially the "Trans-Pacific Partnership Agreement" that the United States withdrew after negotiating (the name of the agreement was changed to "Full Progressive" "Trans-Pacific Partnership Agreement", Comprehensive and Progressive Trans-Pacific Partnership Agreement (hereinafter referred to as "CPTPP") and USMCA.[22] Based on the United States high interest in digital trade and the existing foundation in this field, its proposal has a key impact on the agenda-setting and future direction of WTO e-commerce negotiations.

B. E.U. proposal: high-standard trade rules and strict privacy protection

The goal of the E.U. negotiations is to achieve high standards of rules and commitments, increase regulatory predictability and improve market access conditions. The content of its proposals has many overlaps with the United States. In addition to e-commerce, the E.U. also particularly emphasized the rules and commitments for further liberalization of telecommunications services. The main body of the proposal is divided into three parts: the text of WTO e-commerce multilateral negotiation proposals, including both traditional rules and trade facilitation provisions in the field of e-commerce It also covers cutting-edge issues such as the cross-border flow of data; recommendations for revising the WTO Telecommunications Service Reference Document; requiring more open market access, including accession to the WTO Information Technology Agreement and Enlargement Agreement, computer services and telecommunications The service is further opened.[23] At the same time, the

[22] Leblond, Patrick. "Digital Trade at the WTO: The CPTPP and CUSMA Pose Challenges to Canadian Data Regulation." (2019).

[23] WTO. "Joint Statement On Electronic Commerce Communication From The European Union INF/ECOM/43," April 24, 2019.

E.U. adheres to the high-standard privacy rules in the network environment, making it clear that any commitments regarding the cross-border flow of data should not prioritize privacy protection and treat it as a fundamental right. Besides, the E.U. cited the reasons for protecting cultural diversity and continued to not commit to audio-visual services.[24]

C. China proposal: Improve the trading environment for cross-border e-commerce

China made three proposals compared with the US-Europe proposal, the content of China proposal submitted on April 23, is more principled and declarative, with no specific provisions. However, it reflects the negotiation goals, principles, directions, and priorities that China advocates. The proposal emphasizes that the multilateral negotiation of e-commerce should complement the multilateral discussion of WTO that is helping to support the multilateral trade system and revive the negotiation function of WTO. Compared with the United States and Europe, China proposes to set reasonable negotiation and objectives, based on the existing agreements and frameworks of the WTO, focus on cross-border trade in goods and related payment and logistics services through the Internet, while paying attention to the trend of digitalization of trade in services. The negotiation issues and areas proposed by China include: clarifying the meaning of "trade-related e-commerce" and the scope of application of future rules, establishing a flexible e-commerce transaction environment, and creating a safe and trustworthy e-commerce market environment. As for the new rules on digital trade, China believes that data flow and storage and digital

[24] **Yakovleva, Svetlana, and Kristina Irion. "Pitching trade against privacy: reconciling EU governance of personal data flows with external trade."** ***International Data Privacy Law*** **10, no. 3 (2020): 201-221.**

data are the keys to the development of digital commerce. Issues such as product treatment involve the core interests of each member; however, given the complexity and sensitivity of these issues, members should have more discussion.[25] The May proposal includes conventional issues, such as electronic authentication, electronic contract, spam, domestic regulation, general and security exceptions, transparency, e-commerce rules and existing WTO rules.[26]

D. Proposals from other WTO members

Members such as Japan, Canada, Australia, and Singapore also submitted specific proposals.

a) Japan

The content of the Japanese proposal was not disclosed, but from the related reports and the exploratory documents submitted before, the proposed text is mostly close to the U.S. proposal. Japan noted that the current WTO framework is "developed before the development of Internet technology" and "may not fully consider the impact of the latest technology", emphasizing the need to make WTO obligations more relevant to the digital economy.[27]

b) Canada

The second proposal on specific provisions, including 17 content, covers the traditional issues of e-commerce and the new rules of digital trade,

[25] WTO. "Joint Statement on Electronic Commerce Communication from China INF/ECOM/19," April 24, 2019

[26] WTO. "China's Proposal on WTO Reform Communication from China WT/GC/W/773," MAY 13, 2019.

[27] WTO. "Joint Statement on Electronic Commerce Initiative Proposal for The Exploratory Work by Japan, INF/ECOM/4," March 25, 2019.

basically reflects the relevant provisions of CPTPP and USMCA. Canada's first proposal focused on consumer and privacy protection, cross-border data flows and strong prohibitions on data localization (among other provisions such as source code protection and cybersecurity measures) which is essential for building a trusted digital trading environment.[28]

c) Singapore

The Singapore proposal is relatively softer than the U.S. provisions and provides policy space for WTO members to monitor the digital trading environment. The Singapore proposal involves not only the traditional issues of e-commerce, but also the new rules of digital trade, including the activation of e-commerce, openness, market access, source code, and cross-border data flows.[29]

d) Australian

The Australian proposal is relatively simple, emphasizing the facilitation of e-commerce trade and recommends learning from RTAs experience.[30]

e) Brazil

Brazil is actively proposing among developing countries and has submitted three proposals individually and jointly, covering market access, e-commerce trade facilitation, and some new digital trade rules,

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[28] WTO. "Joint Statement on Electronic Commerce Communication from Canada Concept Paper – Building Confidence and Trust in Digital Trade, INF/ECOM/29" May 9, 2019.

[29]WTO. "Joint Statement on Electronic Commerce Communication From Singapore, INF/ECOM/25" April 30, 2019.

[30] WTO, "Joint Statement on Electronic Commerce-Communication from Australia, INF/ECOM/15" March 25, 2019.

and granting copyright protection, fair competition, regulatory environment, and cooperation issues.

From the proposals of the above main members, the less controversial issues in the multilateral negotiations of WTO e-commerce are mainly the traditional rules in the field of e-commerce, including the recognition of the effectiveness of e-contracts, e-signatures, e-invoices and e-certifications, the protection of online consumers from fraudulent or deceptive business practices, and the prohibition of spam e-information. These contents have been stipulated in the model law on electronic commerce of the United Nations Commission on International Trade Law (UNCITRAL).[31] Many WTO members have requirements in their domestic laws or signed RTAs. There is a high degree of consensus among members on this type of issue.[32]

The core controversy of the negotiations mainly lies in the attitudes and demands of the significant members such as China, the United States and Europe. The U.S. proposal focuses on the cross-border free flow of digital information and the protection of software source code and algorithms. The European Union supports data flow and prohibits localization measures, but the text rules on personal data and information protection conflict with the free flow of information emphasized by the

[31] UN. "Working Group IV: Electronic Commerce Commission On International Trade Law." UN commission on international trade law: United Nations Commission, October 2020.

[32] "Free Trade Agreement Between the Government of Australia And The Government Of The People's Republic Of China." Australian government Department of Foreign Affairs and Trade. For example, the FTA of China and Australia requires that the domestic legal framework governing electronic transactions should conform to the provisions of the UNCITRAL Model Law on electronic commerce of 1996. China-Australia FTA, Art. 12.5.

United States. China current focus is still on the development of cross-border trade in goods on the Internet. Digital products are still in their infancy, and there are doubts about the acceptance of the new rules of digital trade. Due to multiple discriminatory treatments taken by the United States against Huawei, China took the opportunity of negotiations to require equal market access opportunities for ICT products and equipment that are "related to e-commerce." It can be seen that in addition to the traditional rules, China negotiations with the United States and Europe have a low degree of overlap.[33] There is a view that the United States, Europe and China respectively represent the liberals, regulators and mercantilists in the digital economy era. As far as China and the United States are concerned, the United States is mainly concerned with rules at the "digital" level, so the term "digital trade" is used, while China is more concerned about the contents of the "trade" level, and still uses the term "e-commerce".[34] This is due to different stages of the development of the digital economy of various parties and differences in regulatory history and concepts.

Because of the significance of the roles and positions of the members such as the United States and Europe in the WTO e-commerce negotiations, the author then analyzes the members' proposals and the position of China position given the three most controversial issues in the negotiations.

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[33] Hillman, Jonathan E. "The Global Battle for Digital Trade: The United States, European Union, and China Back Competing Rules." The Global Battle for Digital Trade | Centre for Strategic and International Studies, July 11, 2018.

[34] Gao, Henry. "Digital or trade? The contrasting approaches of China and US to digital trade." *Journal of International Economic Law* 21, no. 2 (2018): 297-321.

IV. REQUIREMENTS FOR CROSS-BORDER DATA FLOW AND LOCALIZATION

The collection, processing, control and use of data are the key elements of the digital economy, and the cross-border flow of data is an essential part of digital trade. Under the conditions of the digital economy, the provision of new technologies and new services such as the cloud computing, artificial intelligence and other new technologies and services cannot be provided without the global interconnection of the network and the cross-border flow of data. Not only does the daily operation of multinational companies depend to a large extent on data flow, but small and medium-sized enterprises have also become "micro-multinational companies" operating cross-border due to data flow. Based on various considerations such as network security, privacy protection, and industrial competition, countries have different measures for how data is used and flowed. Closely related to localization requirements, including the localization of computing facilities and data storage. Developed members regard the restriction of cross-border data flow and localization requirements as significant digital trade barriers while developing members put forward "data nationalism" reasons to implement such measures.[35] The complexity of interests involved, the difference in value identity and the lack of trust between countries have made data flow and localization requirements one of the core disputes in WTO e-commerce negotiations.

[35] Chander, Anupam, and Uyên P. Lê. "Data nationalism." *Emory LJ* 64 (2014): 677.

A. Requirements for cross-border flow and localization of data in member proposals

As the United States is most advanced in the world in terms of the Internet and digital technology, the free flow of data across borders is an essential boost to its economy. The measures of restricting the flow and localization are important digital trade barriers that the United States has paid attention to in recent years. The "cross border information transfer by electronic means" clause in the U.S. proposal ultimately transplanted the provisions of USMCA from title to content.[36] Generally, the United States advocates that members should not prohibit or restrict the cross-border transfer of information (including personal information) electronically by businesses or individuals for commercial purposes. The U.S. proposal prohibits data localization requirements, stipulating that companies or individuals should not be required to use computing facilities within their home country or to locate computing facilities within their home country as a condition for doing business in that country.[37] Unlike the terms of cross-border data flow, the U.S. proposal does not provide for exceptions to the prohibition of data localization, but only provides special regulations for data storage in the financial industry. If member financial regulators have immediate, direct, complete and continuous access to information processed or stored by overseas financial service computing facilities used by "covered financial service providers", they should not be required to localize their financial service computing facilities. However, if financial regulators cannot obtain such information, they may require the financial service providers to localize their computing facilities, but they

[36] WTO, "Joint Statement on Electronic Commerce-Communication from the United States-WTO Agreement on Digital Trade, INF/ECOM/23", April 26, 2019.
[37] Ibid

should be given reasonable relief opportunities before making localization requirements. This clause indicates that the United States recognizes the importance of access to financial service provider information by WTO member financial regulators.[38] This is very necessary for financial supervision, so it is necessary to remove the obstacles for regulators to obtain such information. Requiring cross-border data flow and restricting localization reflects the United States' intention to break down data barriers through WTO negotiations to maintain its competitive industrial advantage. The special regulations for the localization of computing facilities in the financial industry reflect the regulatory requirements of sensitive and important industries. The difference is that the localization prohibition requirement also allows members to make exceptions based on legitimate public policy objectives. The Singapore and Brazil[39] proposals follow the provisions of the CPTPP, which are essentially the same as the U.S. and Canada proposals but recognize the regulatory requirements of members on data flow.[40]

The "cross-border data flow" clause in the E.U. proposal prohibits members from restricting cross-border data flow in four ways, including

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[38] Leblond, Patrick. "Digital Trade at the WTO: The CPTPP and CUSMA Pose Challenges to Canadian Data Regulation." (2019). The CPTPP's article 14.13, paragraph 3 states: "Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure: (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and (b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective."

[39] WTO, "Joint Statement on Electronic Commerce-Communication from Brazil, INF/ECOM/27", April 30, 2019.

[40] WTO, "Joint Statement on Electronic Commerce -Communication from Singapore - Text Proposal, INF/ECOM/25", April 30, 2019.

requiring the use of domestic computing facilities to process data, requiring the localization of data storage and processing, prohibiting the storage or processing of data within other members' borders, and The use of local computing facilities or data localization will be used as conditions for data flow. The exception is that members may take measures that they deem appropriate to ensure that personal data or privacy is not violated. It is advocate that data flow should be based on security. At the same time, due to the sensitivity of the issue, it is recommended that members conduct more exploratory work. The outside world interprets this as our country will not make a commitment to cross-border data flow and prohibit localization measures in WTO e-commerce negotiations.

B. China proposal on data cross-border flow and localization requirements

a) **China overall consideration of the formulation of cross-border data flow rules**

At the domestic level, there are clear restrictions on the cross-border flow of data in China, and the requirements for data localization are stipulated. For example, the Cyber Security Act provides for security assessment of critical information infrastructure data before exit.[41] The "Key Information Infrastructure Security Protection Regulations (Consultation Draft)" defines "critical information infrastructure" and reiterates the requirements for local storage and outbound assessment of personal

[41] According to Article 37 of the Network Security Law, personal information and important data collected and generated by a key information infrastructure operator during its operations within the territory of China shall be stored within the territory of China. Where it is necessary to provide such materials overseas for business purposes, a safety assessment shall be conducted in accordance with the relevant provisions.

information and important data.[42] The "Measures for Personal Information Outbound Security Assessment", "Data Security Management Measures" and "Network Security Review Measures" (both in 2019 draft for comments) further refine the security assessment requirements. Other laws and regulations also have explicit provisions on data localization. Unless these regulations are modified, there are internal legal obstacles to China commitment to cross-border data flow and the prohibition of localization in negotiations.

Despite the current domestic legal requirements, how to achieve a balance between data security and trade growth in WTO e-commerce negotiations is directly related to China international governance capacity and rules of data. China should not evade the issue of data flow but should negotiate to construct rules for the cross-border data flow that is in the interest of most members. Whether to allow the free flow of data or to strengthen the localization of data should be based on the importance of data flow under the conditions of the data economy, the current proposals of major members and the actual situation in China, considering the following levels: First, as the second-largest country in the digital economy and the largest market for e-commerce in the world, China has important interests in ensuring data flow, and should actively participate in the formulation of new digital trade rules. Secondly, in the WTO negotiations, China's basic issues on data flow and localization. The negotiation position is to serve the strategic objectives of the network power and the real needs of the

[42] The Regulation, which was publicly solicited by the State Internet Office on July 10, 2017, is still in the process of being developed, with Chapter III defining the scope of "critical information infrastructure" and Article 29 defining requirements for data localization and exit security assessment.

development of the digital economy on the premise of ensuring national security.[43] With the gradual "going out" of China's Internet enterprises, appropriate forward-looking thinking and consideration should be given to the economic cost of restricting the cross-border flow of data and requiring localization. Thirdly, one belt, one road investment one belt, one road, is expanding from traditional infrastructure projects to data-intensive industries such as trade and Internet, and bilateral and regional data flows continue to grow. The emphasis on the construction of the "e-silk road" also requires China to re-examine and rethink the regulation of cross-border data flow.[44]

b) **based on the hierarchical management of data; allow a reasonable and orderly cross-border flow**

In the future data competition with cloud services as the core, cross-border data flow and localization measures will exist to some extent. China should allow this data to flow and determine the localization category according to development needs. Therefore, reasonable rules for cross-border data flow should adhere to the principles of moderation and necessity, and seek a reasonable balance of value between trade, security and development. In this way, after reviewing China current data cross-border flow policy, and take data outbound security assessment as a single compliance mechanism, In reality, it is difficult to meet the needs of massive data cross-border flow and the real needs of the development of the digital economy. In the negotiation, China can advocate the

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[43] **Cory, Nigel. *Cross-border data flows: Where are the barriers, and what do they cost?*. Information Technology and Innovation Foundation, 2017.**

[44] **Atik, Jeffery. "The Electronic Silk Road: How the Web Binds the World Together in Commerce. by Anupam Chander. New Haven, CT: Yale University Press, 2013." *World Trade Review* 14, no. 2 (2015): 381-384.**

establishment of strict and different flow standards for different types of data, and build a cross-border gradient system according to the data security attributes. Among them, important sensitive data with national security concerns at the core should be the focus of restrictions on cross-border movements. At the same time, it is recommended that members have the right to determine the meaning and scope of "important sensitive data", and allow consistent and orderly cross-border flows based on the hierarchical management of data. This method can clarify the range of data that restricts the flow, and can also keep the data flow controllable. The requirements and restrictions for data localization can also follow this idea and set up data localization standards for special or important industries that meet our national conditions and development needs.

C. Reasonable design of national security exceptions

Generally, the considerations of restricting cross-border data flow include privacy protection, national security and the development of domestic digital intensive industries. For example, restrictions on data flow due to the development of the domestic digital industry will cause criticism of trade protectionism.[45] In the WTO e-commerce multilateral negotiations, the current exceptions and restrictions on cross-border data flows are mainly reflected in the "legitimate public policy objectives" represented by the U.S. proposal and the privacy protection needs of the E.U. The institutional design of the two differs in the proposal. The U.S. is a "principle plus exception" institutional design, in which data flows across

[45] **Casalini, Francesca, and Javier López González. "Trade and cross-border data flows." (2019).**

borders are not restricted in principle unless required for legitimate public policy purposes. While "legitimate public policy objectives" have a broader meaning and may even cover privacy protection, the implementation of exception measures is subject to requirements such as "necessity and proportionality". This suggests the strong obligation of rules governing cross-border flows of US-style data. The Brazilian proposal provides for general exceptions and critical security interest exceptions similar to GATS, which can be applied to cross-border information transfers.[46] According to the legal theory and practice of WTO, it is difficult to legitimize the measures of restricting data flow with exceptions. The protection of personal data and privacy in the E.U. proposal is parallel to, and not an exception to, the cross-border data flow clause. Such an arrangement means that the measures taken by members to restrict the flow of data, as long as they comply with the provisions of this article, need not be treated as exceptions, thus leaving more policy space for members.

Therefore, although the U.S. and E.U. proposals support cross-border data flow on the surface, the implementation and application in practice may be quite different. The E.U. proposal has more space to restrict the flow. Cross border data flow, together with data platform centralization and intelligent processing, make trade and security issues closely linked. However, at present, major economies have a different emphasis on trade demands and security demands, which are difficult to be solved by security exceptions. China can draw lessons from the E.U. proposal and list the provisions to protect national security separately, which can not

[46] **WTO, "Joint Statement on Electronic Commerce-Communication from Brazil, INF/ECOM/27", April 30, 2019.**

only emphasize China's concerns about national security but also make full use of the universality of the concept of national security to leave ample room for China to restrict the cross-border flow of data when necessary.

V. PROHIBIT FORCED ACCESS, DISCLOSURE AND TRANSFER OF SOURCE CODE AND ALGORITHM

Although this seems to be a problem in the field of technology, due to the development of the digital economy, some regulatory requirements in the field of software source code and algorithm conflict with trade law. Regulatory considerations at different levels, such as national security, technological development, industrial competition, intellectual property protection, interpretability and transparency requirements of artificial intelligence algorithms, lead to difficulties in harmonizing trade rules in the field of software source code and algorithms. Another core controversy in the WTO negotiations on e-commerce is related to the treatment of software source code and algorithms, that is, whether to allow mandatory disclosure, transfer or acquisition of source code and open algorithms.

A. Technical background and disputes related to software source code disclosure and algorithm disclosure

Software source code refers to the combination of human-readable statements and statements written in programming languages (such as basic, Java, C++ language), which can be read and executed by computers after being converted into object code (binary form) by compiling programs. Source code is an element or module that constitutes computer

software, similar to a "recipe" made by the software.[47] Algorithm refers to a sequence of limited instructions. It is a clear and detailed step for a computer to solve a specific problem. It is usually used for calculation and data processing.

Computer software can be divided into closed source software (also known as proprietary software) and open-source software. The source code of closed-source software can only be obtained by software developers and can be distributed as computer-executable binary files. Other people, including the buyer, cannot copy, modify, improve or resell the software. The organizational structure of open source software is different from closed source software. In addition to developers, others can freely obtain the source code to modify or improve the software. Open-source software is regarded as a free product to a certain extent, and developers do not enjoy intellectual property protection. Although open-source software also has some problems unique to public products, such as "free ride", software development practices show that its model is sustainable.[48] Reasons for requiring open-source code include: First, open-source code provides a software cooperation development platform, which is conducive to cultivating the technical capabilities of software developers and IT practitioners and is of great significance for promoting software development.[49] Secondly, in terms of

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[47] Stoltz, Mitchell L. "The Open Source Revolution: Transforming the Software Industry with Help from the Government." (1999).

[48] Weber, Steven. "The political economy of open source software." (2000)., Ghosh, Rishab Aiyer. "Cooking pot markets: an economic model for the trade in free goods and services on the Internet." *Brazilian Electronic Journal of Economics* 1, no. 1 (1998).

[49] Sen, Ravi. "A strategic analysis of competition between open source and proprietary software." *Journal of Management Information Systems* 24, no. 1 (2007): 233-257., Economides, Nicholas, and Evangelos Katsamakas. "Two-sided competition of

security, the current network interconnection is ubiquitous, not only key equipment but also daily products such as mobile phones and routers also contain more and more software programs. Obtaining the source code is helpful for the regulatory department to quickly find and eliminate hidden security risks and system vulnerability issues.

On the contrary, the closure of source code leads to continuous payment to developers in terms of software update and maintenance. Although the rights of rights holders are protected, it causes software users to rely on developers' technology, eroding the development space of developing countries to stimulate independent research and development of software and Limit government flexibility in policies such as national security, fraud prevention, and consumer protection. Opponents of open source code pointed out that requiring open-source code to infringe intellectual property rights has allowed domestic industries to gain an unfair competitive advantage, and is not conducive to the government's achievement of policy goals in cybersecurity and other fields. In order to encourage developers to continue to innovate and ensure a fair market competition environment, the transfer of source code should be prohibited as a prerequisite for market access.

In terms of algorithm governance, countries are still in the exploration stage. The supervision and treatment of algorithms have caused public conflicts about interpretable AI decision-making rights, intellectual property protection, and trade rules. Intellectual property protection and market competition considerations prompted the U.S.

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proprietary vs. open source technology platforms and the implications for the software industry." *Management science* 52, no. 7 (2006): 1057-1071.

software technology industry to promote the prohibition of mandatory disclosure of algorithms in trade rules. Supporters of algorithm transparency worry that trade rules are entangled by industry and create new obstacles in obtaining explanations for AI decisions. Therefore, it is mainly the industry that determines the algorithmic regulation in trade agreements, which raises concerns that business benefits are superior to algorithmic regulation in other dimensions of value. The conflict in this regard is also reflected in the different opinions of members on the algorithm disclosure in WTO e-commerce negotiations.

B. the source code and algorithm clauses in the main member proposal

Article 10 of the "TRIPS Agreement" stipulates that computer programs, whether source code or target code, shall be protected by copyright as written works. However, copyright only protects the expression form of the work but not the ideas of the developers, and some countries require source code and algorithms for software copyright protection for registration. For example, if the software source code and algorithm are regarded as patents, the prerequisite for protection is disclosure. Therefore, there is a view that the protection of source codes and algorithms in current trade agreements is insufficient. Developed countries regard source code and algorithms as trade secrets that should be protected by intellectual property rights and believe that disclosure of source code and algorithms inhibits innovation in the software industry. Therefore, in the name of protecting source code, they tried to prevent other countries from requesting disclosure of software through trade rules in the name of protecting source code and algorithm approach. In the WTO e-commerce negotiations, the United States and Canada proposed to fully transplant the relevant provisions of the USMCA digital trade

chapter on source code and algorithms. The source code clause proposed by the EU does not include algorithms, but the entire clause is complicated. The source code and algorithm clauses in the main member proposal include three aspects:

First, in principle, it is forbidden to require disclosure of source code and algorithms. For example, the United States, Canada, the European Union, Singapore and other proposals stipulate that a member may not transfer or allow access to the software source code of the other member's individual or enterprise, or the algorithm represented by the source code is imported, distributed, and sold within its territory or the conditions for using the software or products containing the software. Japan believes that mandatory disclosure of important information should be prohibited, including trade secrets, including source code and algorithms.[50]

Second, the situation where mandatory source code disclosure is allowed. The US and Canada proposals stipulate that member regulatory agencies or judicial departments may require the disclosure of source code or algorithms for specific investigations, reviews, inspections, enforcement actions, or judicial process purposes.[51] The EU lists three situations that allow mandatory disclosure of source code, including remedies for violations of competition laws by courts, administrative tribunals, or

[50] WTO, "Joint Statement on Electronic Commerce-Communication from Canada: Text Proposal, INF/ECOM/34", 11 June 2019; WTO, "Joint Statement on Electronic Commerce- Communication from Singapore-Text Proposal, Source Code, INF/ECOM/25", 30 April 2019.

[51] For example, the United States requires the source code of financial transactions to be disclosed to the Treasury in order to prevent money laundering or avoid economic sanctions. In 2016, the "California Air Resources Commission" asked Volkswagen to submit the source code of its emission system in order to investigate Volkswagen's suspected installation of cheating software for illegal exhaust emissions of diesel vehicles.

competition authorities, protection and enforcement of intellectual property rights, and procurement information necessary to protect important national security interests. Besides, the EU recommends that members adopt or maintain measures in the certification process that apply to GATS general exceptions, security exceptions and exceptions contained in paragraph two of the Financial Services Annex. The source code clause proposed by Singapore restricts the software to mass-market software or products containing the software, excluding those used for critical infrastructure, and do not include source code disclosure in the execution of commercial contracts. This shows that Singapore advocates mandatory disclosure of source code for critical infrastructure software. The voluntary transfer of source code or authorized acquisition by the right holder based on commercial negotiations is not bound. Besides, members may request modifications to the source code, if the modifications are necessary for the software to comply with laws or regulations consistent with this agreement, on mandatory disclosure of the impact of the source code. The US-Canada proposal stipulates that if the right holder claims that its software source code is a trade secret, the disclosure does not affect this status. The Singapore proposal made it clear that the disclosure of source code does not affect the requirements related to patent applications or the grant of patents, including the decisions of judicial authorities on patent disputes.

China's proposal does not currently involve source code and algorithm regulation. The proposals of members of developing countries (regions) (including Brazil) currently do not include this aspect. This shows that the source code and algorithm clauses advocated by the members of developed countries (regions) are currently less accepted by

the members of developing countries (regions) than the requirements for cross-border data flow and localization.

C. China's negotiating position on source code and algorithm regulation

At present, there are no laws and regulations in China that explicitly require foreign companies to disclose software source code and algorithms. However, with the promulgation and implementation of the "Network Security Law", in the process of building a network security standard system, China has involved security reviews of network products and services, certification and evaluation of key network facilities, and safe and controllable products and services at different levels. Requirements, network security protection and encryption of critical information infrastructure may partially involve disclosure requirements for source code or algorithms. For example, whether a key network device or product meets the "safe and controllable" standard needs to be certified by a designated agency, and some material submission requirements in the certification process may involve the disclosure of source code. The "Guiding Opinions on Application Security and Controllable Information Technology" issued by the China Banking Regulatory Commission in September 2014, although it is only one of the measures taken by the Chinese government to strengthen the network security of the banking industry, has caused US and European companies to worry about selling computers to Chinese banks. The device needs to submit source code. The U.S. "FY 2019 Defense Authorization Program", in the name of ensuring network security and reducing risks in the supply chain of information technology products, bans the Department of Defense from using software from companies that allow certain foreign governments to review their

source code and requires the Secretary of Defense to begin in 2020 List foreign governments.[52]

In this context, it is not difficult to understand that in the WTO e-commerce multilateral negotiations, the regulation of source code and algorithms has become the core dispute and negotiation focus of major members such as China, the United States and Europe. China needs to pay full attention to this and do a good deal in negotiation. First of all, in terms of negotiating attitude, given that source code and algorithm regulation is one of the main demands of developed members of the United States and Europe, it is not advisable for China to completely avoid discussion on this issue. Secondly, in terms of negotiating stances, the author proposes to advocate the regulation of source code and algorithms based on the principle of equal emphasis on safety, controllability and open innovation. On the one hand, independent controllability must be regarded as an inevitable requirement of China's network security, and its core technology should be freed from dependence on foreign countries; on the other hand, because of the natural characteristics of the network information industry, it insists on open innovation in the field of software source code and algorithms. Based on this idea, we design our country's negotiating position on source code and algorithm regulation, and we can consider several aspects: First, encourage and promote the use of open-source software and the voluntary transfer or authorization of source code based on negotiation by rights holders, especially In transactions such as government procurement; second, in principle, disclosure, transfer, or

[52] **Thornberry, Mac. "Text - H.R.5515 - 115th Congress (2017-2018): John S. McCain National Defense Authorization Act for Fiscal Year 2019." Congress.gov, August 13, 2018**

authorization to obtain source code is not used as a condition for other members of individuals or enterprises to enter China's product or service market; third, considering China's special concerns about network security, etc., List the special circumstances that allow mandatory disclosure of source code, such as disclosure requirements that remain in areas such as critical information infrastructure, special investigations that are allowed for regulatory agencies or judicial authorities, enforcement actions, and disclosures related to national security, etc.; fourth, support The European Union recommends that GATS general exceptions, security exceptions and prudent exceptions contained in paragraph 2 of the Financial Services Annex apply to the certification measures for network information security products. This is of key significance to ensure the implementation of China Compulsory Certification (CCC) for information security products in China. These aspects take into account the pros and cons of the open-source code trade-offs and interest games, in principle, the right holders do not require compulsory disclosure, but they are encouraged to use open-source software and the right holders' independent opening. At the same time, based on China's important concerns about network security, we precisely design special cases that allow mandatory disclosure of source code and algorithms and ensure that there are appropriate exceptions for China's mandatory certification measures for information security products.

VI. CONCLUSION

The current proposals and progress of the WTO e-commerce negotiations show that the digital industry and trade policies of the members are very different. The United States and Europe have begun to transition from e-commerce to high-standard digital trade rules. The new digital trade rules proposed or supported reflect the business interests of their Internet companies in global expansion. In China, due to industrial development and governance capabilities, the main focus is on goods trade using the Internet as a platform, and more attention is paid to traditional issues at the level of trade facilitation. Based on the differences in the negotiation objectives and the degree of development of the member parties, the multilateral negotiations are indeed more difficult objectively. Especially concerning the scope of negotiation issues and the setting of rules, the interests of more than 80 negotiating parties differ, and it is particularly necessary to require common ground and difference to form a consensus. The positions of member countries such as China, the United States and Europe play a fundamental role in coordinating the success of the negotiations on various sides.

After analyzing the three core controversial issues in the negotiations, the author believes that although there are distinct differences between China's negotiation demands and developed members such as the United States and Europe at the current stage, they are not uncoordinated. This is primarily because China has already shaped global e-commerce/digital trade, the economic basis and technical capabilities of the rules. Against the background of the e-commerce market maturing and the increasing

globalization of major Internet companies, we should recognize the multi-level requirements China has for e-commerce/digital trade rules, that is, to maintain national cybersecurity as a prerequisite to promote e-commerce platform development. Export-oriented, to promote China's digital products and services, and ultimately promote the integrated development of China's digital economy. Therefore, even for the new digital trade rules such as the cross-border flow of sensitive data in negotiations, the prohibition of localization requirements, and the regulation of source code and algorithms, it is necessary to maintain a clear vision and forward-thinking while adhering to cybersecurity and national security. In short, China as the largest country in e-commerce and the second-largest country in the digital economy, should play an active role in these critical WTO e-commerce negotiations, and refute the unfounded accusations that China's participation will lead to a deadlock in negotiations. At the same time, as a responsible and vital member, China's must strive to promote the WTO negotiations on the e-commerce sides in line with the interests of most members.

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COMBATING CORRUPTION IN THE AGE OF DIGITAL TRANSFORMATION OF SOCIETY: EXPERIENCE, ISSUES AND DIRECTIONS OF IMPROVEMENT

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Abstract.

In this article the influence of digitalization processes on development of new illegal forms and practice is being analysed, as well as use of the internet and virtual environment for illegal purposes is being discussed. These processes are considered an example of such illegal phenomenon as "corruption". It is justified that corruption evolves and gets more complex under the influence of development of end-to-end digital technology. In the content of work it is argued that modern digital tools are used for development of such a phenomenon as "cyber-corruption", which is applied to all levels of public administration, as well as international level and opposition to it only using national juridical and political ways is impossible today. Authors analyze state legal experience and key problems of opposition to modern "cyber-corruption", determine the main direction of improving the efficiency of it in present conditions. In the conclusion of the work it is proved that, currently, social legal modelling of adequate forms of social and political legal prevention of corruption development in the new digital environment and improvement in anti-corruption legal policy is necessary. From authors' point of view, in the near future international framework legal documents and national doctrinal legal acts should be set up, that contains methodology and standardisation of development process, implementation and operation of end-to-end digital technologies.

Key words: anti-corruption policy, authority, state, corruption, cyber security, law, wrongful acts, digital technologies.

I. Consideration of question.

Modern development of end-to-end (disruptive) technologies (generic term, that reflects a whole spectrum of innovative digital technologies - systems of artificial intelligence, autonomous digital algorithms, robotic technologies, digital forms of virtual and augmented reality, and so on.) are radically changing social organization of society and are significantly transforming forms and practice of social interaction. It is obvious that these technologies directly affect the development of corruption itself as a social phenomenon. Over the course of the full history of development of state legal organization corruption has been evolving, and corruption interaction has been transforming with changes in society.

Metaphorically speaking, it can be concluded that development of public organism, establishment of effective forms of opposition to "corruption disease" has always caused a backlash as well - "corruption virus" has constantly mutated. Nowadays in foreign scientific practical discourse and enforcement practises, it is recorded that digital transformation of society: on one hand, results in transformation and mutation of familiar forms of corruption interaction, practice of involving into corruption networks, as well as development trajectories of corruption interaction; on the other hand, also initiates fundamentally new forms of corruption interaction, which so far have not received an adequate description (traditional dictionary of terms and categories does not fully meet the new forms of corruption development) and effective mechanisms of opposition.

Moreover, the complexity and ambiguity of digitalization of public organization so far only allows to formulate probabilistic scenarios and development forecasts of wrongful acts using contemporary forms of digital communication and interactive formats of engagement. In regard to certain works, dedicated to digital forms of corruption and methods to counter it, these are only starting to emerge. Predominantly the phenomenon of corruption in the digital world is analysed as one of the types of crime, which is understandable, since to date the main effort of scientific, expert and analytical communities is aimed at forecasting development of wrongful acts in the context of digital evolution of public relations.

II. Consideration of literature and approaches.

One of the key directions of scientific and expert developments in this field are focused on the analysis of forms and mechanisms of use of the Internet and virtual environment for unlawful purposes. For example, to counteract corruption and other unlawful interactions causal link algorithm of destructive use of information and communication technologies in the online-space[53] is being investigated. Moreover, it is noted that modern digital tools are being used for development of such phenomenon as "cyber-corruption", which is spread on all levels of public administration, as well as international level and opposition to it only using national juridical political ways is impossible today[54]. Corruption along with other crimes is also analysed in juridical criminological aspect as historically evolving event, which significantly transform and acquire new features, qualitative characteristics and development trajectory under the influence of introduction of information technologies in unlawful purposes[55]. In this work it is noted that, thanks to countless ways of abuse of information technologies, today there is a technological development in the nature of crimes. This work is the first comprehensive encyclopedia dedicated to various forms and types of cybercrime.

A whole galaxy of foreign scientific research works is dedicated to integrated interdisciplinary research of theoretical, practical and legal aspects of counteracting contemporary threat, which arises in cyberspace, in virtual interaction between citizens and state, as well as corruption risk and threat assessment, which people, enterprises and governments face on a daily basis in digital environment[56].

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[53] Augenbaum S. The Secret to Cybersecurity: A Simple Plan to Protect Your Family and Business from Cybercrime. Forefront Books. 2019. 192 p.

[54] Joshua B. Hill, Nancy E. Marion. Introduction to Cybercrime: Computer Crimes, Laws, and Policing in the 21st Century. Praeger Security International, 2016. 290 p.

[55] Samuel C. McQuade. Encyclopedia of Cybercrime. London: Westport, Connecticut. 2009. 2010 p

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Moreover, to understand the development tendency of corruption in the digital world and, consequently, formation of adequate forms to counter it, common developments and situations are used, which are contained in various analytical reports, scientific researches, dedicated to common vectors of digital transformation of society. This allows to forecast and model possible scenarios of evolution of corruption chains of interaction in the modern world. Here, a series of publications can be identified, representing analytical, expert, empirical and other material, which reflect development of digital technologies, potential risks and threats to society, national and international safety[57].

Generally, display of corruption and other cybercrime is analysed at present by four interlinked directions: 1) wrongful acts using ICT (information and communications technology), directed against confidentiality, integrity, accessibility, uninterrupted functioning etc of computer data and systems; 2) crime, aiming at various forms of scam using computer systems and receiving illegal financial benefit; 3) crime, related to breach of copyright and related tights; 4) crime, related to containing one or another content in digital environment, i.e. the content of illegal activity includes production, distribution or providing access, transfer, acquisition, utilization, possession of illegal content, images, actions etc.

It is obvious that this classification needs an expansion, justification and a clear compartmentalizing. These directions can be viewed as a generic class (surely, in need of expansion and clarification), as well as classification of wrongful acts as specific elements.

Moreover, in the conditions of emerging threats in cyberspace an urgent problem in adequate explanation of corruption impact on

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[57] Baldwin R. The Great Convergence: Information Technology and the New Globalization. M.: Publishing house "Delo" RANEPA, 2018. 416 p.; Greenfield A. Radical Technologies: The Design of Everyday Life. M.: Publishing house "Delo" RANEPA, 2018. 424 p.; Kaku M. The Future of the Mind. The 4th edition. M.: Alpina non-fiction, 2018. 646 p.; Kelly K. The Inevitable: Understanding the 12 Technological Forces That Will Shape Our Future. M.: Mann, Ivanov and Ferber, 2017. 347 p.; Schwab K. The Fourth Industrial Revolution. M.: Eksmo Publishing house, 2019. 208 p.; Darrel Menthe, Jurisdiction In Cyberspace: A Theory of International Spaces 4 Mich.Tel.Tech.L.Rev.3 April 23, 1998 URL: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1163&context=mttlr; David R. Johnson and David G. Post, Law and Borders—The Rise of Law in Cyberspace // Stanford Law Review, 1996, vol. 48, 1367, 1378–9. And others.

development of cybercriminal activity, cyberterrorism and other problems of modern social reality along with further identification of their legal contours[58] has been mainstreamed.

On a doctrinal level the question of law-enforcement efficiency of juridical measures regarding current and emerging threats of digital corruption also remains open. At present, there is a sufficiently significant number of literature, analytical material, data on implementation of certain strategies for development of normative regulation of relations in this area. In this aspect, opposition to cyber corruption is appropriate to be considered in the context of development of international conventional mechanism for combating this problem in contemporary environment[59], as well as in national legislation according to the level of development in legal awareness, legal culture, legal technique, and organizational technical potential of any individual country[60].

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[58] Bernik I. Cybercrime and Cyber Warfare. 2014. 176 p.; Lilienthal G. & Nehaluddin A. Cyber-attack as Inevitable Kinetic War // Computer Law & Security Review. 2015. Vol. 31, Iss. 3. pp. 390-400; Dinstein Y. War, Aggression and Self-Defence, 3rd ed. United Kingdom: Cambridge University Press. 2001.; Brownlie L. International Law and the Use of Force by States. UK: Clarendon, 1963; Bergsmo M., Ling Y. (2012) State Sovereignty and International Criminal Law . Oslo : TOAEP), as well as cyber terrorism from hacking and hacktivism (см., например, Jordan T., Taylor O. Hacktivism and Cyberwars: Rebels with a Cause? London: Routledge, 2004. 193 p.; Sauter M., Zuckerman E. The Coming Swarm: DDOS Actions, Hacktivism, and Civil Disobedience on the Internet. Bloomsbury Academic, 2014. 193 p.; Busch O., Palmas K. Abstract Hacktivism: The Making of a Hacker Culture. OpenMute, 2006. 132 p. And others

[59] Tsagourias N., Buchan R. Research Handbook on International Law and Cyberspace || Cyber terrorism [Electronic source]. Access mode: https://booksc.xyz/book/73098906/566da2 ; Harrison D., Heather A. The Threat of Cyber Terrorism and What International Law Should (Try To) Do about It // Georgetown Journal of International. 2018. Vol.19; Orji U.J. ExaminingMissing Cybersecurity Governance Mechanisms in the African Union Convention on Cybersecurity and Personal Data Protection // Computer Law Review International. 2014. Vol. 15.

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Generally speaking, the analysis of domestic and foreign specialized literature, dedicated to studying end-to-end technologies and digitalization of social relations in the context of current and emerging cyber threats, allows to state coverage of further problematic aspects: 1) lack of a precise theoretical methodological and juridical definition of "cyber-corruption" and digital forms of corruption related interaction; 2) lack of adequate criteria, allowing to undertake delineation of cyber-corruption from its related cyber threats; 3) existence of unsolved problems, related to development of adequate system of juridical forms and countermeasures for current and emerging threats of cyber-corruption development (different digital forms of corruption); 4) hypothetical and descriptive coverage of the risk of destructive effects occurring, projected in cyberspace as a result of widespread dissemination and intensive implementation of end-to-end technologies in contemporary conditions of scientific technical progress; 5) weak examination of criminological characteristics of digital forms of corruption interaction (condition, dynamics, deterministic complex, development trends, nature of public danger and contact with other forms and types of crime, social and economic consequences of crime resulting from information technology); 6) regulatory delay in development of normative legal framework in the context of preventing current and emerging threats from development of corruption digital forms.

III. Problem of understanding of combating corruption.

Summarizing modern research and legal practise in the area of countering corruption in the digital century of public relations transformation, it is worth noting that the traditional sustainable profile remains in perspective of this illegal phenomenon, as well as new elements are introduced in the interpretation of corruption.

***Firstly*, corruption is a social phenomenon, it is being established, developed and changed together with the evolution of public relations. Consequently, transformation of society, change in the nature of public relations, forms of communication, increasing complexity of social interaction, dynamics of social interaction etc., leads to a change in "corruption" phenomenon as well. The change in "corruption" phenomenon also explains the fact that to submit a full and meaningfully constant conceptualization of such a phenomenon is, basically, impossible. Every era, every dramatic change in society also requires constant**

updating of definition, forms and profile of corruption and corruption interaction.

***Secondly*, political legal and social economic prediction of development of corrupt conditions and factors, possible forms of corruption interaction, will be as adequate, as these predictions take into account the key areas and factors of public dynamics, rely on comprehensive analysis of these "drivers" that form reliable corridors of public political, social economic, legal cultural and other transformation of society. Only then is there a possibility of formation of an efficient system of not only a real fight with corruption, but also establishment of a system of juridical political, social economic prevention and opposition to its development. Efficient anti-corruption legal policy of the state, in our point of view, orients leading forms of law-making and law-enforcement juridical activity.**

***Thirdly*, understanding the key issues of modern reality, their relationship and mutual influence, also allows to adequately carry out modelling of importance of either forms, mechanisms and tools of anti-corruption policy. In particular, today there is a myth formed that digital technology is a panacea for corruption, as soon as we "transfer into a number" public power and economic interaction, then an objective number and its monitoring will completely eradicate this phenomenon. In the process it neglects the fact that machine learning itself, i.e systems of artificial intelligence, takes place on the basis of "human material" and social prejudice, imperfections etc. could be laid in the source code of digital algorithms. There are examples of works of law-enforcement systems, digital monitoring of criminality, digital indexing of crime risk levels etc[61].**

During machine learning the effect of "prejudice of artificial intelligence systems", which appears due to the fact that the prejudice is carried out based on existing material in the form of books, texts, images on the internet or interaction forms in practice, systems of existing judgements and decisions made by people. For example, it is well known that language algorithms are learning to associate the word "man" with the word "teacher", and the word "woman" with the word "teaching assistant". The researchers of The Alan Turing Institute in London have identified systemic bias in artificial intelligence. As it turned out, one of the

[61] **Greenfield A. Radical Technologies: The Design of Everyday Life. M., 2018. 424 p.; DeLanda M. War in the Age of Intelligent Machines. Yekaterinburg: Armchair Scientist; M.: Institut Obshegumanitarnykh Issledovaniy, 2014. 338 p. .**

AI systems, because the police most often stopped black men and Latin Americans, learned it and thought they were more likely to commit crime.

As another example, there is another quite stable prejudice that digitalization will solve if not all then the key problems of mankind. Therefore, "the less human factor is present in the process of decision making, the higher is probability of reduction in corruption level". Transferring to a number of human activities, as well as transfer of the right of decision making to the artificial intelligence systems is, of course, a way out, but a way out beyond human capabilities. Where is a guarantee that a human will not lose decision making and social life reproduction skills completely. Moreover, how to provide social legal control over the hidden (dark) area of all digital establishments, namely, over development process and implementation of end-to-end digital technologies in public life.

Referring to forms of combating corruption in the modern digital world, here, two aspects should also be highlighted.

***Firstly*, the use of digital technologies to provide "a common strategy" emerged from the international arena in the forms and methods of combating corruption formed on a basis of successful state experience in different countries that are leaders in Transparency International rating. *Secondly*, forms of resistance focused on innovative types of corruption interaction.**

In the first case this refers to such forms as:

1) **digital technologies and electronic forms of communication in order to significantly simplify forms of power communication in the system individual - society - state, reduce bureaucratic mechanisms, workflow and simplify various administrative procedures;**
2) **development of digital channels and mobile forms of feedback between the society and the state, digital organization of public control over the process of management decision making and realization;**
3) **ensuring digital monitoring and control over public power activities and process of power management decision making and realization, as well as an extensive system of social reprimand for corrupt officials through publication of corrupt officials' list on social media, in public resources etc.;**

4) **digital technologies provide a high degree of openness to public power activities as well as a transparent mode of operation of government authorities, departments, agencies, organizations etc.;**
5) **ensuring independence, openness and objectivity of judiciary during trials of corrupt officials, in a number of states interactive court hearings are used as well as forms of electronic justice as an experiment (USA, Germany, France);**
6) **digital control over the income and expenses of public officials, digital technologies and artificial intelligence systems are being actively implemented in the process of administrative reform and, above all, in delineation of power of public officials and negotiation of administrative decisions;**
7) **digital forms of communication will also be actively used within personnel policy, collection of information and selection of public officials;**
8) **improvement of anti corruption legislation and juridical technique for adequate response to dramatic changes in corruption development in the modern world, as well as use of big data and machine learning systems to predict and model corruption development.**

Digital technology and introduction of interactive technology have intensified the development of four innovative forms of public power organization which have been identified as high-priority in state development in the twenty-first century. Implementation of these forms in public organization and management process has to qualitatively change not only the system of organizing the operation of public authorities, in-house management system, forms and methods of management impact, but also principles and system of relations between the state and the civil society minimizing the possibilities for bureaucratic arbitrariness and corruption interaction.

In public administration these four innovative forms are interlinked and influence each other[62]. Firstly, an *e-public network*

[62] **Fountain J. Building the Virtual State. Information Technology and Institutional Change. Washington: Brooking Institution Press, 2001; SAGA: Standards and Architectures for e-government Application. KBSt. 2003.; E-Government Strategy: Implementing the President's Management Agenda for E-Government. Office of Management and Budget, 2002; UN Global E-Government Survey 2003. UN, 2003;**

represents an electronic public network, which provides mobile, and most importantly, constantly monitored by digital algorithms, interaction of various subjects (states, individuals, public, entrepreneurial and other organizations, establishments etc. created by them). Here, digital technology provides the mode of full disclosure and controllability of any public power interaction, minimizing the possibilities of any corruption interaction (both grass-root and topmost echelon of the power).

Secondly, digital forms *virtual state* and *e-public administration* of organization and realization of public administration systems (state and municipal) for social processes, meaning, information communication technology in management decisions making, coordination (power interaction, cooperative network), control over management process etc. This is a so-called concept of building a virtual state working without breaks and shutdowns on-line, which will fully reconfigure the forms of organization and functioning of public administration, relationship between the state and the citizens.

Thirdly, the forms of digital democracy, which also decrease potential possibilities to allow corruption interaction. E-democracy fixates the organization of political and legal processes, democratic forms, ways, means and tools of organization and implementation of public authority based on digital forms and online culture of the citizens. In this direction there is development, generally, of the realization process of democratic regime through electronic information forms, such as electronic vote, public interaction network, electronic participation of citizens in departures of public authorities. Fourthly, digital public services (e-services) related to the electronic format of providing state and municipal services, which minimize the possibilities of misuse of official positions and corruption interaction.

In the second mentioned aspect the situation is harder, because digital technology itself creates new forms of corruption interaction. Therefore, in many areas these forms implement not only

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Evansa D., Yenb D. E-government: An analysis for implementation: Framework for understanding cultural and social impact Government Information Quarterly. No22. 2005.; Extending the Public Sphere through Cyberspace: The Case of Minnesota E-Democracy by Lincoln Dahlberg First Monday, Volume 6, Number 3-5 March 2001 // http://journals.uic.edu/ojs/index.php/fm/article/view/838/747; A Public Service-Oriented Gov- ernment Building Path in Chinese City: An Example From Public Rental Housing of Chongq- ing. Canadian Social Science. Vol. 9, No 4. 2013.

deliberative/expert function, but also functionality with regulatory nature (i.e in the area of ensuring the public order digital algorithms not only label traditional political subjects by giving them a criminality index or social rating of trustworthiness, but also presenting a list of adequate responsive measures and actions of power structures or making their own decisions - blocking the access, changing the given list of powers, possible options for action etc.).

Here, it is important to record that new digital technology: one one hand, not only actively influence (sometimes even significantly stronger) the thought activity of traditional subjects, the nature of interaction and direction of development of public power relations in the system individual - society - state; on the other hand, most importantly, development of strategies in public as well as in individual (private) areas. Therefore, today any forecast, any strategy would be inadequate if there, apart from behavioral and other social factors, development modelling of digital and virtualized forms and technologies is not programmed. In other words, modern socio-political forecast and public administration no longer offers the social one as a fundamental element and dominant trend. Meanwhile, it seems to us that digital transformation leads to transformation of forms and technologies of corruption interaction, "shifts" corruption risks from everyday interaction to the level of development and implementation of technical systems. These processes, developments, implementations and operations are almost not settled by neither rules of the law, nor deontological code, nor ethical standards. At the same time, the existing doctrinal acts, normative documents and normative legal acts are of a general and quite limited nature, their terminology is quite unclear and not precise enough.

One of the key issues in this direction, apart from the discussed above, is the question of radical transformation of public power relations in society. In the whole series of researches the concept of power in the twenty-first century and specific nature of public power relations in the digital era[63] are problematized. First of all, radical changes are linked to the fact that real centers of powers and management decision making "leave" the public proscenium and focus on the "dark" sectors, "hidden" and spaces which cannot be controlled. For example, nowadays "the best way of getting an answer to the question of control in the world, full of

[63] Butler J. The Psychic Life of Power: Theories in Subjection. SPb.: Aletheia, 2018. 160 p.; Butler J. Notes Toward a Performative Theory of Assembly. M.: Ad Marginem Press, 2018. 248 p.

smart machines, is to understand the values of those, who actually create these systems"[64].

Meanwhile it is argued that in state legal organization of society the new regimes of power implementation are formed, where the real decision making centers focus on "behind society", "off" existing and operating system of public power relations. These power centers function in stealth and uncontrolled mode, are located in "the shadow" of traditional public power organization, represent the network of various factors, which are funded, developed by digital codes, programs, algorithms as well as those, who provide the process of their implementation in life of society, provide operation of autonomous algorithm technology and complexes[65]. In other words, power relations are mediated and regulated not only by a complex infrastructure that is hidden from social control, public influence, but is also actually behind the unfolding social economic, political and legal and other socially significant processes in society. At the same time, perception and assessment of political events and processes are formed in the subtlest way by information that "is given to us for no accidental reasons, which, however, does not reveal the underlying interest"[66].

In the framework of foreign scientific discourse, it also discusses the problems of such modern phenomenon as "projected corruption", as well as search and justification of adequate forms of both legal provinces of corruption and resistance to already functioning illegal corruption networks. "Projected corruption" phenomenon is linked to the use of digital technology which allows to hide one of the subjects of corruption interaction, to place it beyond the borders of corruption relations. As a matter of fact, the relationship itself is in question, because the other side is "absolute" or unknown. For example, the bribe or other preference can be presented remotely through various autonomously functioning digital algorithms. There is a danger that corruption interaction in the twenty-first century can become completely autonomous breaking traditional

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[64] Brockman J. What to Think About Machines That Think: Today's Leading Thinkers on The Edge Of Machine Intelligence M.: Alpina Non-fiction. 2017. 552 p. [electronic resource]. Access mode: https://www.litmir.me/br/?b=592732&p=1 (date of the request 30.04.2020 y.)

[65] Pasquale F. The Black Box Society: The Secret Algorithms Behind Money and Information. Cambridge, MA: Harvard University Press, 2015; Salthouse T.A. When Does Age-Related Cognitive Decline Begin? // Neurobiology of Aging. 2009. Vol. 30. № 4 (April). P. 507 – 514.

[66] Greenfield A. Radical Technologies: The Design of Everyday Life. M.: Publishing house "Delo" RANEPA, 2018. 424 p.

causal network using robotic systems and autonomous algorithms which will hide the real participants of corruption interaction.

IV. Conclusion.

As noted above, all the increasing complexity and inconsistency of processes of social relations' digitalization, allows modern political analysts to formulate probabilistic scenarios and forecasts of development of wrongful acts using modern forms of digital communication and interactive forms of engagement. Development of end-to-end (disruptive) technology rapidly changes the forms and practices of wrongful acts, initiates the emergence of new areas and relations, a part of which goes into the shadows (minimizing social and legal control), where criminal practise is intensively developing.

As key theoretical practical problems in the era of digital forms development interactions can be distinguished: firstly, lack of definitions and categories, which would allow to adequately describe modern transformation of legal definitions that fixate the new forms of wrongful acts using end-to-end digital technology, particularly, identification of cyber corruption etc.; secondly, in the modern legislative practice of modern states also lacks a precise demarcation of cyber corruption from related to it cyber threats; thirdly, hypothetical and descriptive definition of risks of destructive effects occurring, projected in digital space as a result of wide distribution and intensive use of digital technology; fourthly, today in state legal organization of society along with development of autonomous and complex algorithm systems new regimes of power are formed, where real centers of decision making focus on "behind the society", "off" the established and operating system of public power relations. It is due to the fact that algorithm development, principles of their functioning and implementation are outside the traditional system of value-based regulation, moral and ethical control. Implemented algorithmic solutions function in stealth and uncontrolled mode, are placed in the "shadows" of traditional public power organization, represent interaction networks of factors which are funded, developed by digital codes, programs, algorithms.

At present, social legal modelling of adequate forms of political legal prevention of corruption development in new digital conditions and improvement of anti-corruption legal policy is required. It is necessary to form framework legal documents that contain methodology and standardization of processes of developing, implementing and operating end-to-end technology, since situational response to emerging requests of

digitalization will significantly lower the social role and and purpose of law, will reduce anti-corruption policy to a situational response. In this case, it is advisable to also ensure harmonization of operating legal regulatory systems, regulating the life of society and ethical standards of functioning of artificial intelligence systems, robotic technology, digital algorithms.

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PROBLEM OF THE RANK OF INTERNATIONAL TREATY IN JORDANIAN LEGISLATION

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Abstract

This study aims to clarify the status of the international treaty in the Jordanian constitution of 1952 and its amendments and in the Jordanian judiciary, by showing the status of the international treaty in international law and international judiciary, and stating the status of the international treaty in foreign constitutions. The study found that the constitutional legislator in Jordan did not stipulate in Article (33) of the constitution the status of an international treaty from the Jordanian internal legislation when there was a conflict between them, which made it ambiguous. Therefore, this study calls on the Jordanian constitutional legislator to intervene to make the appropriate amendment to clarify the constitution's position on the status of the treaty and international agreements, similar to many foreign constitutions that explicitly stipulate that. The researcher used the descriptive and analytical method, as well as the comparative approach. This study, apart from the introduction and the conclusion,

consisted of three topics: The first topic: the position of the international treaty in international law and international justice, the second topic: the position of the international treaty in foreign constitutions, the third topic: the status of the international treaty in the Jordanian constitution and judiciary.

Keywords: international treaties, the Jordanian constitution, Jordanian legislation, parliament.

Introduction

The Hashemite Kingdom of Jordan occupies a prominent position in terms of its relations with Arab and foreign countries, as well as with international organizations. Accordingly, the Kingdom has concluded many international treaties and agreements related to public international law. There is no doubt that these treaties and agreements need a mechanism for their internal enforcement, and they also need to indicate their status in the internal legislation in case they conflict with it. Although the Constitution clarifies how international treaties can be enforced, it did not indicate their status, meaning whether the treaty takes precedence over domestic legislation in the event of conflict, or is it in an equal rank with domestic legislation, or is it in a lower level. On the other hand, we notice that the Jordanian judiciary has a clear position on the status of the treaty, which is its supremacy over national legislation, and this is what the international judiciary and the constitutions of many countries have adopted. Therefore, it is important to study this problem in order to clearly define the status of the international treaty from the internal legislation.

The study Problem:

When looking at the provisions of the constitution and its amendments, especially Article (33), we note that it does not explicitly state the status and rank of an international treaty when it conflicts with domestic legislation, which opens up a wide field for jurisprudential difference regarding the status of the international treaty. On the other hand, it is noticed that the constitution stipulated the entry into force of a certain type of treaties and agreements after the approval of the National Assembly, which puts the question before other treaties that do not require the approval of the National Assembly. All these issues will be the focus of our study in this study.

Objectives of the study:

This study aims to clarify the status of international treaties from the internal Jordanian legislation, especially since the legal text contained in Article (33 / Paragraph 2) of the Constitution was ambiguous, and therefore the jurisprudential opinions differed in its interpretation. In order to reach the desired goal, some Arab and foreign legislations that dealt with this issue have been used.

the importance of studying:

The importance of the study emerges from the importance of the topic itself, as determining the status of the international treaty from the internal legislation in the event of a conflict between them, facilitates the process of integrating international treaties into the internal legislation, which helps the relevant bodies, especially the judiciary, to apply it easily and easily, away from jurisprudence.

Study methodology

In this study we will follow the descriptive approach, especially when presenting the position of the international treaty in international law and international judiciary, as well as when stating the status of the international treaty in foreign constitutions. We will also follow the analytical approach, especially when explaining the status of international treaties in the Jordanian constitution and the Jordanian judiciary, as we will analyze the texts of the treaties. International and foreign constitutions and jurisprudential opinions, and methods of dealing with the status of international treaties in the internal legislation.

Study structure:

We will divide our study into three sections as follows:

The first topic: the status of the international treaty in international law and international justice.

The first requirement: the status of the international treaty in international law.

The second requirement: the status of the international treaty in the Jordanian judiciary. .

The second topic: the status of international treaties in foreign constitutions.

The first requirement: the constitutions that placed the international treaty in the rank of internal legislation.

The second requirement: constitutions that made the international treaty supreme over domestic legislation.

The third requirement: the constitutions that ceased to clarify the status of the international treaty.

The third topic: the status of the international treaty in the Jordanian constitution and judiciary.

The first requirement: the status of the international treaty in the Jordanian constitution.

The second requirement: the status of the international treaty in the Jordanian judiciary.

THE FIRST TOPIC

THE STATUS OF INTERNATIONAL TREATIES IN INTERNATIONAL LAW AND INTERNATIONAL JUSTICE

To express the international treaty [67], jurisprudence uses multiple terms, it uses the word (convention) [68], the word (charter)[69], and the word (protocol), as well as the word (memorandum)[70] and the word[71]. In general, it is interested in organizing important issues that are predominantly political, such as the Treaty of Versailles of 1919, the peace treaty between Jordan and Israel signed in Wadi Araba on October 26, 1994, and so on. Accordingly, the Vienna Convention on the Law of

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([67])An international treaty is a general term that includes all binding instruments under international law, regardless of their official designation that is concluded between two or more international legal persons. See: Treaty Handbook, issues of the Treaty Section of the Office of Legal Affairs, United Nations Publications for the year 2001.

([68])An example is the 1979 Convention on the Elimination of All Forms of Discrimination against Women.

([69])Such as the Charter of the United Nations of 1945, and the Charter of the League of Arab States in 1945.

([70])One example is the International Covenant on Political and Civil Rights of 1966.

([71])See, for example, the memorandum of understanding concluded between the Government of the Hashemite Kingdom of Jordan and the High Commissioner for Refugees in 1998 .

Treaties of 1969 defined the international treaty in Article (2/1 / A) as: "An international agreement concluded between two or more states in writing, and is subject to international law, whether it is done in one document or more, and whatever the name it is called. ".

To clarify the position of international law and international judiciary on the status of international treaties, we point out that many international instruments have decided in their texts the principle of the primacy of the treaty over domestic legislation in the event that it conflicts with it. In many of its provisions, the international judiciary embodied the principle of the primacy of international treaties over domestic legislation in the event that they conflict with it. To clarify this issue, we will divide this topic into two demands, the first requirement: the status of international treaties in international law, the second requirement: the status of the international treaty in international justice.

THE FIRST REQUIREMENT

THE STATUS OF THE INTERNATIONAL TREATY IN INTERNATIONAL LAW

The rules of international law represented in international treaties are an important source of general international law with international custom. Many international instruments have stipulated the principle of the primacy of an international treaty over domestic legislation when it conflicts. Among the international instruments that have provided for this, we mention, for example:

First: The Hague Convention of 1907 [72]

As it is stated in Article (3) of this agreement that: "The warring party who violates the provisions of the aforementioned regulation shall be obligated to pay compensation if necessary, and shall be responsible for all acts committed by persons belonging to its armed forces."

It is known that the obligation to compensate is only in the event of a breach of the provisions of the international convention, which indicates that the obligations arising from international treaties must be implemented in good faith, otherwise international responsibility is imposed on the violating state.

Second: The United Nations Charter of 1945

The Charter of the United Nations[73] did not explicitly stipulate the supremacy of an international treaty, but it is implicitly understood through a statement in the preamble of the charter, as it states the obligation to respect the obligations arising from international treaties and international norms whose rules have become peremptory as a result of states repeating their application.[74]

([72])It is the Hague Convention of 18 October 1907 Respecting the Laws and Customs of War on Land, referenced on the website:

https://www.icrc.org/ar/doc/resources/documents/misc/62tc8a.htm, date of entry. 27/8/2020.

([73])The Charter of the United Nations was signed on June 26, 1945 in San Francisco at the conclusion of the United Nations Conference on the System of the International Body, and it entered into force on October 24, 1945.

([74])It was stated in the following preamble: We, the peoples of the United Nations, have devoted themselves to ourselves ... and to indicate the conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be achieved.

Article (103) of the United Nations Charter also stipulates: "If the obligations that the members of the United Nations bind to in accordance with the provisions of this charter contradict any other international commitment to which they are bound, then the culmination of their obligations arising from this charter."

It is understood from this text that the Charter of the United Nations takes precedence over all international obligations represented in international treaties, which states are bound to in case they conflict with it.

Third: The draft declaration issued by the United Nations General Assembly No. 375/4 of 1949 regarding the rights and duties of states

This declaration was prepared by the International Law Commission of the United Nations, where it was stated in Article (13) that among the duties of states: "To implement their obligations arising from treaties and other sources of international law in good faith, and they shall not invoke the provisions of their constitution or laws for dissolution. From this duty[75]"

Fourth: The Vienna Convention on the Law of Treaties of 1969

This convention stipulates that international treaties are obligatory, and that they must be respected. This is evidenced by Articles (26) and (27). Article (26) states: "Every treaty in force is binding on its parties and they must implement it in good faith." Article (27) of the convention also stipulates: "A party to a treaty may not invoke the provisions of its internal law as a justification for its failure to implement the treaty"...

([75])Referred to by: Attorney Dr. Essam Jamil Al-Asali, International Studies, published by the Arab Writers Union 1998, p. 122, at the website https://elibrary.mediu.edu.my/books/MAL05958.pdf, entry date 8/27/2020.

This text gives a clear indication of the status of international treaties and their priority over domestic legislation in case of conflict. In Article (26), we see an embodiment of the principle of good faith when implementing every treaty in force that is binding on its parties. What this means is to completely abstain from performing any act, conduct, or action that prevents the achievement of the purpose or purpose of the treaty, and it follows that non-compliance with the international treaty may not be justified because of difficulties in the relationship between the parties, or that the treaty has become a burden, or that the state She was forced to accept as a result of special circumstances.[76] In Article (27), we find an embodiment of the principle of the inadmissibility of invoking domestic law to justify non-implementation of the treaty, as the state may not invoke domestic law to justify failure to implement the treaty.[77]

THE SECOND REQUIREMENT

THE STATUS OF THE INTERNATIONAL TREATY IN THE INTERNATIONAL JUDICIARY

There are several judicial rulings issued by the international arbitration courts, the Permanent Court of International Justice of the League of Nations, as well as the International Court of Justice of the United Nations, all of which affirmed the supremacy of international treaties on the internal laws. In this paper, we will present some of these provisions in the following three sections:

([76])See: Dr. Nabil Muhammad Saad Abu Hadi, The Enforcement and Implementation of International Treaties in the Internal Law System, Journal of Legal and Social Sciences 2019, p. 23. On the website: www.ojs.sabauni.net ›SJL›, date of entry 28/8/2020.

([77])See: Dr. Nabil Muhammad Saad Abu Hadi, same reference, p. 23.

The first section: the principle of the transcendence of the international treaty over the internal law of international arbitration courts

International arbitration courts have played a prominent role in resolving many international issues that have arisen between states. These courts have embodied the principle of the supremacy of the international treaty over domestic legislation, and among these cases that these courts have decided upon, we mention:

First: The Alabama Case in 1872

The facts of this case are summarized in the fact that the United States of America accused Great Britain of violating the rules of neutrality (during the American Civil War (1861-1865), for it provided covert assistance to the rebellious states of the South against the North, allowing them to build and supply ships in English ports, and inflicted heavy losses on the camp of the Northerners. In front of the International Court of Arbitration, which convened in Geneva to decide on this issue, Great Britain claimed to exempt it from any responsibility for the damage caused to the camp of the northerners due to the lack of the constitutional procedures necessary to prevent the building of warships on its territory for the southerners. The arbitration court refused to accept these allegations, and decided in Its judgment: The absence of national legislation does not constitute a reason for breaching its international obligations as a neutral country during the American War of Secession.[78] This case was the first precedent in the history of international relations between states, and it established the principle of arbitration to settle disputes between states.

([78])See: Ali Sadiq Abu Heif, Public International Law, Ma'arif Foundation, Alexandria 1985, p. 654.

Second: The case of the ship Montego 7/26/1875

The facts of this case are summarized in the fact that the US government asked the Colombian government for compensation for the damages it suffered as a result of the Colombian revolution's seizure of the ship Montego, which belongs to American citizens, but the Colombian government did not respond to this request, citing that the Colombian constitution does not authorize it except Limited powers to interfere in the internal affairs of the United States of America. When the case was brought before the arbitration court, the court held that the government of Colombia was responsible for the unlawful actions of its citizens. The decision issued in favor of the United States of America stated: "The treaty supersedes the constitution, and that the law of the republic must be in line with the treaty and not vice versa, and The state must issue appropriate laws to implement treaties."[79]

The second section: the principle of the transcendence of the international treaty on the internal law of the Permanent Court of International Justice

The Permanent Court of International Justice is one of the non-main organs of the previous international organization, the League of Nations, which was established after the 1919 Paris Peace Conference that ended World War I. This court has issued many international rulings, including:

First: The Chorzo Factory Case (Germany v. Poland)The facts of this case are summarized after Poland's acquisition of the German factory (Shorzo) without paying compensation to Germany, which contravenes the

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)See: Hasina Sharoun, the position of the international judiciary on the conflict [79](between agreements and internal law, Al-Mafiker magazine, issue three, Faculty of Law and Political Science, University of Muhammad Khidir Biskra, on the website: www.fdsp.univ-biskra.dz, entry date 10 / 5/2020.

agreement concluded between the two countries in 1922. After this crisis, Germany filed a lawsuit before the Permanent Court of International Justice for a decision. On July 26, 1927, the court ruled to apply the rule of transcendence of international agreements and treaties to domestic law[80]. In the court's decision, it was stated that: "Reparation for damage by means of financial compensation is the most important principle of international law, and is seen as the most common type of reparation."[81]

Second: The case of Polish nationals residing in the free city of Danzig

The facts of this case are summarized in the fact that the Polish government accused the German government of Danzig[82] of treating its Polish citizens in a discriminatory manner, in which it discriminated against the German citizens, which harmed their rights, in violation of Article 104/05 of the Treaty of Versailles of 1919 that prohibits any distinction or discrimination in Treatment against Polish nationals.[83]

) Hamza Ben Jeddou, Integration of International Treaties into the Internal Laws of [80](the State, Master Thesis, Mohamed Khaider University, Algeria 2016, p. 26

tional Responsibility, Institute for Arab Muhammad Hafez Ghanem, Interna)Dr.[81](Studies, League of Arab States, Cairo 1962, p. 125 .

([82])After the First World War, the Allies cut the city of Danzig from Germany in accordance with the Treaty of Versailles, and made it a free port to be used by Poland, which was reconstituted after the war. This city was of an international system and was directly supervised by the League of Nations, and they appointed a governor representing the League of Nations. A mixture of Polish and German residents coexisted within this city, and each had their own schools.

([83])Article 104/05 of the Treaty of Versailles of 1919 stipulated that: The allied and acceding states will be discussed upon the establishment of the Free City, and it shall enter into force on the same day that the city is formally formed, and that the parties to this agreement are Poland and the Free City of Danzig, and that In order to avoid

Poland said before the court that: "The maltreatment of the Poles in the territory of the free city of Danzig must be done in accordance with Article (104/05) of the Treaty of Versailles, which enjoys any distinction or discrimination in treatment against Polish citizens in exchange for German citizens, and not according to the constitution and laws of this city. ". The government of Danzig responded by saying: "Polish subjects are treated according to the provisions of the Constitution which recognizes for them and others the right to equality before the courts and individual liberty, freedom of expression and opinion, freedom to practice religious rites, freedom of private property, and that entering Poland to protect Polish subjects is an interference in the internal affairs of a city. Danzig, and that the constitution (Danzig) conforms to international custom in treating Poles on the land of Danzig" .

The court rejected that viewpoint and emphasized the primacy of the consensual law over domestic constitutional law, and affirmed that: "According to the general principles generally accepted, a state cannot adhere to another state by its constitution to get rid of the obligations imposed on it by international law or applicable conventions.[84]

Section Three: The principle of the transcendence of the international treaty over domestic law in the provisions of the International Court of Justice

The International Court of Justice is the principal judicial body of the United Nations, with its seat at the Peace Palace in The Hague, the

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any discrimination or discrimination in this city, it harms the rights of Polish citizens or people of Polish origin or who speak the Polish language.

[84](biskra.dz, entry date -) Referred to by Hasina Sharoun, on the website: www.fdsp.univ 5/10/2020.

Netherlands. The court began operating in 1946 when it replaced the permanent international court of justice. This court has issued many international rulings, including, for example:

First: The Notbaum case in 1955 (Liechtenstein v. Guatemala)

The facts of this case emerged after the state of Guatemala confiscated Notboom's money,[85] where the State of Liechtenstein filed a lawsuit before the International Court of Justice demanding that Notboom be protected from the confiscation carried out by Guatemala, and compensation on the grounds that he was a national of Liechtenstein, and that the Guatemalan government had acted against Mr. Notboom, who is a citizen of Liechtenstein in a manner inconsistent with international law, as for Guatemala, she has argued that the application may not be accepted for several reasons, one of which is related to the nationality of Notboom, which Liechtenstein intended to protect him in its ruling. The court accepted this claim and ruled that Liechtenstein's application was inadmissible. The court found that Notboom's association with the state of Liechtenstein was unreal, marred by bad faith, lack of seriousness in view of the long period he spent in Guatemala, and based on his business, economic interests, and family affairs there, and the lack of a real link between him and Liechtenstein, which results in the failure to recognize that nationality In the international system. The judgment was issued on

([85])Mr. Nottebohm was born in Hamburg in 1881 to German parents, and therefore holds German citizenship. In the year 1905 he went to Guatemala, which made it the center of his commercial activities, which increased and flourished. In 1939, and before the outbreak of the Second World War, he acquired the citizenship of the Principality of Liechtenstein, knowing that he did not meet the residency requirement for this last country.

4/4/1955, and it was stated: "The subject that the court has to decide is not a matter related to the legal system of Liechtenstein. States in exercising their internal jurisdiction without these acts necessarily or automatically having any international effect."[86]

Second: The case of closing the headquarters of the Palestine Liberation Organization (United Nations against the United States of America) The facts of the case are summarized in the fact that the United States of America issued a law to combat terrorism. This law resulted in a series of decisions, including the closure of the headquarters of the Palestine Liberation Organization in New York as a terrorist organization. This decision came after granting the Palestine Liberation Organization observer status according to the United Nations General Assembly resolution in 1987. The United Nations resorted to requesting an advisory opinion from the International Court of Justice on the grounds that closing the headquarters violates the headquarters agreement signed by the United States with the United Nations, and the court decided The United States of America is subject to arbitration, according to Article 21 of the Agreement. The court referred to the basic principle of international law that international law takes precedence over domestic law, a principle that has been upheld by judicial decisions for a long period of time[87]. This opinion was reflected in the decision of the New

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([86])The Notboom Case on the website:

https://www.quimbee.com/cases/nottebohm-case-liechtenstein-v-guatemala .

([87])The advisory opinion of the court, issued unanimously, states: "The United States of America, as a party to the agreement concluded between the United Nations and the United States of America regarding the United Nations headquarters on June 26, 1947, is bound in accordance with Article (21) of that agreement that Intervene in arbitration to settle the dispute between it and the United Nations. " See: Summary of

York Federal Court that refused to apply the US anti-terrorism law to this case, as it is in violation of the headquarters agreement, and must be interpreted in accordance with the agreement[88].

THE SECOND TOPIC

THE POSITION OF FOREIGN CONSTITUTIONS ON THE STATUS OF THE INTERNATIONAL TREATY

The positions of foreign constitutions differed from the status of the international treaty in the event that it conflicts with domestic legislation, as some of them made the international treaty in the rank of law, and some of them decided the supremacy of the international treaty on domestic legislation, and on the third side, some constitutions were silent on stating the status of the international treaty. To clarify the positions of these constitutions, we will divide this topic into three demands as follows:

THE FIRST REQUIREMENT

THE CONSTITUTIONS THAT MADE THE INTERNATIONAL TREATY IN THE SAME PLACE AS THE INTERNAL LEGISLATION

Some constitutions stated that the texts of the international treaty have the same status as the internal legislation, and among these constitutions we mention, for example:

Judgments, Fatwas, and Orders Issued by the International Court of Justice 1948 - 1991, United Nations, New York, p. 253

([88])Referred to by: Hindam Gibran Jaber Rajoub, The Legal Status of International Treaties in the Palestinian Legal System, Master Thesis, Birzeit University, 2018, p. 80

First: the Egyptian constitution issued in 2014

Article 151 of the Egyptian constitution stipulates that: "The President of the Republic represents the state in its foreign relations, concludes treaties, and ratifies them after the approval of the House of Representatives, and they have the force of law after their publication in accordance with the provisions of the constitution."

It appears from this text that the Egyptian President is the one who concludes international treaties and ratifies them after the approval of the House of Representatives, and these international treaties shall have the force of law after they are published in the Official Gazette.

The phrase (force of law) in the text raised a problematic interpretation. The Egyptian State Council resolved this problem when the General Assembly of the Fatwa and Legislation divisions interpreted the phrase (the force of law) contained in the description of the binding force of international agreements, and it was mentioned in its fatwa in response to a request for an opinion on an issue in which a national law subsequent to a ruling contained in a previous international agreement opposes it. : "The texts of the international convention are considered special texts with regard to the texts of national law. They are special in their meaning and especially in the way they are laid down. Therefore, they are not law, and if they have the force of law, which is explicitly stipulated in the constitution, they are not repealed or amended except by the same method of their placement, otherwise they are arranged." Therefore, it is not permissible to say that the provisions of international agreements are amended according to domestic laws, which is not permissible ... and therefore it is not permissible to say that the provisions of the international convention are to be abrogated according to general national legislation,

taking into account the conditions of international law vis-à-vis international agreements and to safeguard the credibility of states in their foreign relations. [89]

Although the aforementioned text specified the degree of international treaties in Egyptian legislation, as it stipulated that they are in the degree, rank and strength of the law, however, the constitutional judiciary has explicitly decided in many provisions that the rank and position enjoyed by international treaties is the rank and strength of laws with the priority of treaties And they held it higher in the event that it conflicts with ordinary laws issued by Parliament.[90]

Second: The Kuwaiti Constitution of 1962 and its amendments

Article 70 of the Kuwaiti Constitution promulgated in 1962 stipulates: "The Emir shall conclude treaties by decree and communicate them immediately to the National Assembly, accompanied by an appropriate statement, and the treaty shall have the force of law after its conclusion, ratification and publication in the Official Gazette.

However, peace and alliance treaties, treaties related to state lands or natural wealth, sovereign rights or citizens 'public and private rights, trade, navigation and residence treaties, and treaties that carry the state's treasury some of the expenditures not included in the budget, or include

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([89])Muhammad Abd al-Latif, The Problem of the Strength of International Treaties in the Constitution, Al-Youm Al-Sabea electronic newspaper, on the website: https://www.youm7.com/story/2019/4/5/, accessed 29/4/2019.

([90])Dr. Awad Abdul-Jalil al-Tarasawi, International Treaties before the Constitutional Court, Dar Al-Nahda Al-Arabiya, Cairo 2008, p. 19, and see also: Shatnawi, Faisal Uqla, Oversight on the Constitutionality of International Treaties, Studies, Sharia and Law Sciences, Volume 42, Issue 1, P.49.

an amendment to the laws of Kuwait, must be issued by law for their enforcement.

Under no circumstances may the treaty contain secret conditions that contradict its public terms[91].

The international treaties stipulated in Article (70) of the Kuwaiti Constitution that have the force of law after their conclusion, ratification and publication in the Official Gazette, and whose enforcement must be issued by law, only means that these treaties have no power and priority in application.) Of the Kuwaiti Constitution stating that: "The application of this constitution does not prejudice the treaties and agreements that Kuwait has entered into with states and international bodies".

The jurisprudence believes that the Kuwaiti legislator has granted the international treaty supremacy over national legislation, and its status is higher and first than the constitution, which means excluding the application of national legislation, whether it is a precedent or a successor

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([91])We note the same text in Article (68) of the Constitution of the State of Qatar of 2004, if it states: The Emir concludes treaties and agreements by decree, and reports them to the Shura Council, accompanied by an appropriate statement. A treaty or agreement shall have the force of law after its ratification and publication in the Official Gazette, provided that peace treaties and treaties related to the state's territory or to the rights of sovereignty or citizens' public or private rights or that include a violation of the state's laws, their enforcement must be issued by law. In no case may the treaty contain confidential terms that contradict its public terms). Article (143) of the Qatari constitution stipulates that: "Acting in the constitution shall not violate the provisions of international treaties and agreements to which the state is a party. The same text is also noted in Article (37) of the Bahraini constitution promulgated in 2002 as amended in 2012.

to the treaty when it conflicts with it. [92] The Kuwaiti judiciary also takes this direction.[93]

THE SECOND REQUIREMENT

CONSTITUTIONS MADE THE INTERNATIONAL TREATY SUPERIOR TO DOMESTIC LEGISLATION

In contrast to the constitutions that considered the texts of the international treaty to have the same status as the internal legislation, other constitutions held that the texts of the international treaty prevail over the texts of the internal legislation in case of conflict, and among these constitutions:

First: the Algerian constitution

The amended Algerian constitution promulgated on March 7, 2016 stipulates the supremacy of the treaty over domestic legislation. Article (150) states: "Treaties ratified by the President of the Republic according to the conditions stipulated in the constitution are superior to the law."[94]

([92])Al-Enezi, Nayef Rashid Hazza Al-Tayyar, The Relationship between the International Treaty and National Legislations, Studies, Sharia and Law Sciences, Volume 43, Issue 3, 2016, P.178.

([93])pe in which they apply without other legal texts.See: Al-Shammari, Fahd Nayef Hamdan Al-Barjas, The Legal Impact of International Treaties on the National System and Judiciary (Comparative Study), Letter Master of Public Law, United Arab Emirates University, November 2018, pg. 86 on the website: *https://scholarworks.uaeu.ac.ae/public_law_theses/17*

([94])Article (149) of the constitution stipulates the following: "The President of the Republic shall ratify armistice agreements, treaties of peace, alliance and union, treaties relating to state borders, treaties that entail expenditures not included in the state budget, and bilateral or multilateral agreements related to areas of free

What is observed on this article is that the constitution does not require the treaty to be issued in the form of a law. Rather, its mere ratification is sufficient to produce its effect as it is superior to the law. Likewise, the constitution does not even require a publication[95].

Second: the Russian constitutionArticle (15 / Paragraph 4) of the Constitution of the Russian Federation promulgated in 1993 and its amendments stipulates: "The rules of international law and the international treaties and agreements recognized for the Russian Federation shall be considered an integral part of its legal system. And if the international treaty or convention of the Russian Federation includes rules other than those Contained in the law, who applies the rules of the international convention. "[96]

One aspect of jurisprudence[97] believes that this article contained two features: The first feature is that it considered international law with all its components part of the internal Russian legal system, and the aforementioned article merged between international treaties and widely recognized principles and rules of international law, and the formulation of that article includes sources of law General international law, and in particular customary international law. The second advantage is that

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exchange, partnership and integration. Economic, after every chamber of Parliament explicitly approves it.

([95])Harmal, Khadija, previous reference, p. 19.

([96])The Constitution of the Russian Federation, on the website: http://www.constitution.ru/en/10003000-01.htm, entry date: 5/11/2020 .

([97])Mwafaq Samour Ali Al-Mahamid, The Legal Value of Treaties in the Jordanian Constitution of 1952 and Its Amendments: A Comparative Study, Section One, Journal of Law, Kuwait University, Academic Publishing Council, Volume 35, Issue 4, 2011, pp. 449-450 .

Article (4/15) places the convention rules in a higher position than the internal laws that violate them, and as a result, the national judiciary should give priority to the texts of treaties over national law[98].

Third: the Czech Constitution

Article (10) of the Czech Constitution promulgated in the year 1993 and its amendments until 2013 stipulated that: "International treaties agreed to by Parliament to ratify,[99] and which the Czech Republic is bound by, shall be considered part of the legal system, and if the treaty provides otherwise On him the treaty applies.

Fourth: The Polish Constitution:

Article 91 of the Polish Constitution promulgated in 1997 stipulates that:

1- The ratified international agreement, after its publication in the Code of Laws of the Republic of Poland, forms an integral part of the domestic legal system, and it is directly implemented unless its application is based on the enactment of a law.

2- The international agreement ratified under the law shall have priority in application over the laws if this agreement contradicts the provisions of these laws.

It is evident from the texts of the Russian, Czech and Polish constitutions that international treaties and agreements are part of the internal legal

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([98])It should be noted here that the Russian Federation, as is the case in some countries such as Mexico, issued in 1995 a law for international treaties in line with the Vienna Convention on the Law of Treaties (see: Lukashuk Igor Ivanovich, Public International Law, translated by Dr. Muhammad Hussein Al-Qudah, Dar Al-Warraq, Amman 2010, p.148 .

([99])Article (63/1 / b) of the Czech Constitution and its amendments states that the President of the Republic ratifies international treaties ....

system of these countries, after approval and ratification by Parliament, and that they will not be so until after their incorporation into the domestic legal system. But if the provisions of international treaties conflict with the provisions of domestic legislation, then the provisions of the international treaty shall apply.

THE THIRD REQUIREMENT

CONSTITUTIONS THAT ARE SILENT ON THE STATUS OF THE INTERNATIONAL TREATY

In contrast to the constitutions that took a position on the status of international treaties, we find on the other hand constitutions that never state their position towards international treaties, including:

First: The Yemeni Constitution of 2001 Article 92 of the Yemeni Constitution of 2001 stipulated the following: "The House of Representatives [100] shall ratify international political and economic treaties and agreements of a general nature, whatever their form or level, especially those related to defense, alliance, reconciliation, peace and borders, or which entail financial obligations for the state, or those whose implementation requires the issuance of a law.

Article (119 / Paragraph 12) of the Yemeni constitution stipulates that: "The President of the Republic shall assume the following powers ... issue a decision to ratify treaties and agreements approved by the House of

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([100])It is noted that the Yemeni constitutional legislator states that one of the powers of the Yemeni Parliament is to ratify international treaties and agreements, while Article (119/12) states that the President of the Republic issues a decision to ratify treaties and agreements approved by the House of Representatives, and which I see that the House of Representatives approves of International treaties and agreements and the President of the Republic ratify them, and a decision is issued in their regard.

Representatives." Paragraph (13) of the same article also stipulated that one of the powers of the President of the Republic is: "Ratification of agreements that do not need ratification by the Council of Representatives after the approval of the Council of Ministers."

It is clear from these texts that there are two types of international treaties according to the Yemeni constitution:

The first type: treaties that need the approval of the House of Representatives, and this decision is issued to ratify them by the President of the Republic, and they need to be enforced by law[101].

The second type: treaties that do not need the approval of the Council of Representatives, but the approval of the Council of Ministers only in accordance with Article (137 / Paragraph D) of the Constitution. [102] These treaties in which the President of the Republic issues a Republican decision to ratify them[103].

([101])For example, the former President of the Republic of Yemen, Ali Abdullah Saleh, issued Law No. 16 / of 2000 regarding ratification of the International Boundary Treaty between the Republic of Yemen and the Kingdom of Saudi Arabia, on June 26, 2000. See: The Presidency of the Republic, National Information Center on the website: https: : http://yemen-nic.info/presidency/detail.php? ID = 7013, entry date: 5/5/2020. .

([102])Article (137 / d) of the Yemeni constitution stipulates that: The Council of Ministers in particular exercises the following powers: Approval of treaties and agreements before submitting them to the House of Representatives or the President of the Republic according to their respective competences.

([103])An example is Republican Decree No. 54 / of 2009 ratifying the agreement on judicial cooperation in criminal, civil, commercial and personal status matters between the government of the Republic of Yemen and the government of Djibouti signed in Djibouti on November 25, 2002. See: Presidency of the Republic, National

International treaties and agreements in general need the approval of the Council of Ministers, which decides according to the importance of these treaties that need the approval of the House of Representatives, and which do not need its approval, as they pass directly to the President of the Republic who issues ratification[104].

Second: The Iraqi Constitution of 2005

The Iraqi constitution did not address the status of the international treaty in the internal legislation, but rather specified how it would be approved by the parliament and ratified by the president of the republic. Article (73 / second) stipulates that: "The President of the Republic shall assume the following powers: Ratify international treaties and agreements, after approval by the House of Representatives, and they are considered ratified after fifteen days have passed from the date of their receipt".

It is evident from this article that international treaties and agreements, after being approved by the Iraqi Council of Representatives, are ratified by the President of the Republic, provided that if a period of fifteen days elapses without approval, they are considered ratified.[105]

It is evident from the Yemeni and Iraqi constitutions that they did not determine the status of international treaties from national legislation in case of conflict, and the provision assumes that international treaties be

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Information Center on the website : https://yemen-nic.info/news/detail.php?ID=20908, entry date 5/5/2020.

([104])Al-Atiri, Saddam Hussein, Harmonization of Yemeni National Laws with International Treaties, Al-Qalam Magazine, Year Seven, Issue (16) January-March 2020, p. 420.

([105])It is noted that all treaties and agreements according to the Iraqi constitution must be submitted to the Council of Representatives before ratification by the President of the Republic after fifteen days have passed from the date of referring them to it.

given priority as did some Arab constitutions, such as the Algerian constitution, and foreign constitutions such as the Russian constitution, which emphasized that international treaties prevail. So that the constitutional text is not subject to interpretations and erroneous interpretations at times.

THE THIRD TOPIC

THE STATUS OF THE INTERNATIONAL TREATY IN THE JORDANIAN CONSTITUTION AND JUDICIARY

If the constitutions of different countries have specific positions regarding the status of international treaties and agreements from the internal legislation, then the Jordanian constitution and the Jordanian judiciary have different positions. While the constitution is silent on stating the status of international treaties, we find that the position of the Jordanian judiciary is clear, as it gives the international treaty priority in Application in conflict with domestic legislation. In order to clarify the status of the international treaty in the Jordanian constitution and judiciary, we will divide this topic into two requirements: the first requirement: the status of the international treaty in the Jordanian constitution, and the second requirement: the status of the international treaty in the Jordanian judiciary.

THE FIRST REQUIREMENT

THE STATUS OF THE INTERNATIONAL TREATY IN THE JORDANIAN CONSTITUTION

The basic Jordanian constitution was issued in the year 1952,[106] and in Article (33) it regulates the relationship of the constitution to international treaties. There have been two amendments to this article in the year 1958, and accordingly, in this requirement we will explain the original text of Article 33 and its interpretation, then we will deal with the two amendments to this article and its interpretation, and accordingly we will divide this requirement into two branches: Section I: the constitutional text and its interpretation Section Two: Jurisprudence views on the status of an international treaty in the constitution:

The first section: the constitutional text and its interpretation

Article 33 of the Jordanian Constitution of 1952 states that:

-1The King declares war, concludes peace, and concludes treaties.

-2Treaties of peace, alliance, trade, navigation, and other treaties that result in modification in the state's lands, a decrease in its sovereignty rights, or impose any expense on its treasury or prejudice to the public or private rights of Jordanians. That the confidential terms of a treaty contradict the public ones.

When looking at the provisions of this article, we note that it did not stipulate the status of the international treaty in domestic legislation, all in the matter that it granted the international treaty the status of enforceability after approval by the National Assembly, which makes the

([106])Published in the Official Gazette No. 1093 dated 1/8/1952.

door open to jurisprudence and jurisprudence in every dispute in which there is a conflict between the treaty International and domestic legislation.

In view of the ambiguity of Paragraph (2) of Article (33) of the Constitution, and based on the Cabinet Decision issued on 2/20/1954, the Supreme Council met to interpret this paragraph and indicate the types of treaties for which the approval of the National Assembly is required for their implementation. As follows: "It is clear from this text that the drafter of the constitution divided treaties for the purposes of this paragraph into two parts:

The first: treaties of peace, alliance, trade and navigation.

Second: Other treaties that result in modifications in the state's lands, a decrease in its sovereignty, or impose any expenses on its treasury, or prejudice the public or private rights of Jordanians.

The treaties that are of the first section are not effective in every case unless they are approved by the National Assembly, regardless of what they are and the obligations they have been created according to them, as such treaties are considered, according to their nature and the subject matter of the contract in them, affecting the basic rights of the state, its authority and sovereignty over Its land, sea and air territory.

As for other treaties, their enforcement does not need the approval of the National Assembly unless they result in an amendment in the state's lands or a decrease in its sovereignty rights ... etc., and if they do not result in such effects, then they are considered effective once they are concluded by the executive authority without the need for the approval of the National Assembly. This is due to the non-seriousness of the obligations involved.

What supports this conclusion is that if the drafter of the constitution wanted to make the phrase (which would result in an amendment in the state's lands or a decrease in its sovereignty rights ... etc) a description of all treaties including (peace treaties, alliance, trade and navigation), then he would not explicitly mention these treaties And he was satisfied with the generalization without specifying, such as saying (all the treaties that result in the amendment of the state's lands ... etc.), since the treaties of peace, alliance, trade and navigation enter into the concept of this circular without the need to explicitly stipulate them.[107]

it is noted that the interpretation of the High Council, upon the request of the Council of Ministers, was limited to indicating the types of treaties whose implementation is required to obtain the approval of the National Assembly, and it did not go to explain the status of the international treaty in the Jordanian constitution, which made the matter unresolved.

In 1958 there were two amendments to this article. In the amended constitution issued on May 4, 1958 [108] the text of Article 33 became as follows:

1- The king is the one who concludes treaties and agreements.
2- Treaties and agreements that result in burdening the state's treasury with something from the expenses or affecting the public or private rights of Jordanians shall not be enforceable unless approved by the National Assembly ....

In comparison with the text of Article 33 of the Basic Constitution of 1952, it becomes clear that the constitutional legislator did the following:

([107])High Council Interpretation Decision No. 2 / of 1955 issued on 3/28/1955, published in the Official Gazette No. 1224, p. 329.

([108])Published in the Official Gazette, Issue 1380.

1- In paragraph (1), he limited the powers of the king to conclude treaties and agreements only.

2- Abolished in Paragraph (2) the phrase: (peace treaties, alliance, trade, navigation and other treaties that result in modification in the state's lands or a decrease in the rights of its sovereignty), and kept the treaties and agreements that entail burdening the state's treasury with something of expenses or prejudice to the rights of Jordanians Public or private. These treaties need to be enforced with the approval of the National Assembly.

As for the constitutional amendment issued on (1) September 1958,[109] the legislator canceled the first paragraph of Article (33) and replaced it with the following:

He concludes peace and concludes treaties and agreements[110].

As for the second paragraph of Article 33 of the amended constitution promulgated in May 1958, no amendment has been made to it. Thus, the text of Article (33) of the Jordanian constitution became as follows:

-1The king declares war, concludes peace, and concludes treaties and agreements.

-2Treaties that result in burdening the state's treasury with something from the expenses or affecting the public or private rights of Jordanians, shall not be enforceable unless approved by the National Assembly....

Since the constitutional amendment issued in September 1958 and until now, Article 33, in its first and second paragraphs, has not undergone any

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([109])Published in the Official Gazette, No. 1396.

([110])It is the same text contained in the Basic Constitution of 1952 with the addition of a word and agreements at the end of the paragraph.

change or amendment.

When looking at the text of Article (33/2) of the Jordanian constitution, it becomes clear that the treaties and agreements that need the approval of the National Assembly are those that entail the burden of the state treasury some of the expenditures, or prejudice the public and private rights of Jordanians, but what is included in the concept of treaties Which leads to incurring the treasury some of the expenses, or prejudices the public and private rights of Jordanians? This issue was not clarified by the High Council of Interpretation, which we will try to answer in the following two items:

The first clause: treaties and agreements that entail the expenses of the state treasury

These treaties and agreements focus mainly on the economic aspect of the Hashemite Kingdom of Jordan, when it concludes treaties and agreements with other countries. Therefore, given their importance, they require the approval of the National Assembly. Through the extrapolation of several Jordanian attestation laws, it can be said that the loan agreements concluded by the Jordanian government with other countries incur some of the expenses for the state treasury. These loans are debts borne by the Jordanian government and must be repaid sooner or later. Therefore, they require the approval of the National Assembly, and are included in the content of Article 33/2 of the Jordanian constitution.

In this regard, the Hashemite Kingdom of Jordan concluded many loan agreements with other countries and submitted them to the National Assembly for approval, an example of which is the loan agreement

concluded between Jordan and Belgium[111] as well as the loan agreement concluded between Jordan and France[112].

As for the economic cooperation agreements concluded by the Hashemite Kingdom of Jordan with other countries, they are not included in the agreements in which the expenses are charged to the state treasury, because they contain mutual interests and benefits between the two countries.[113]

The same applies to the financial agreement concluded by the government with foreign private banks, as it does not need the approval of the National Assembly because it is not agreements concluded between two or more countries. In this regard, the High Council met based on the decision of the Council of Ministers issued in its session held on March 12, 1962, in order to explain Article 33 of the Constitution, and to indicate whether the financial agreement concluded by the government with a foreign private bank falls under the concept of (agreements 4) stipulated in this article so

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([111])Issued by virtue of the Ratification Law No. 378 / of 1991, dated 01/01/1991, on page (167).

([112])Issued by virtue of the Ratification Law No. 3817 / of 1992, dated 1/4/1992, on page (593).

([113])In this regard, the ruling of the Jordanian Court of Cassation in its legal capacity No. 844 / for the year 1999 issued on November 28 1999 stated the following: "The challenge to the unconstitutionality of the Agreement on Economic Cooperation and the Organization of Trade Exchange between the Syrian Arab Republic and the Hashemite Kingdom of Jordan is not due to the lack of approval by the Council. The nation is entitled to it in accordance with the provision of Article (33/2) of the Constitution, because the provision of this article relates to treaties that entail ... charging its treasury some of the expenses ... whereas the economic cooperation agreement has mutual interests between the two countries.

that that agreement is not effective unless approved by the National Assembly on the basis that it entails charging the state treasury some of the expenses.

The decision of the interpretation of the High Council came as follows: "Whereas, the term (treaties) in its general sense refers to agreements concluded by two or more states, whether they relate to political, economic or other interests, and in its special meaning it is devoted to important international agreements of a political nature, such as peace treaties and treaties. The alliance and the like, as for what states conclude in other than political matters, international jurisprudence has termed it an agreement or agreement. The use of the word (agreements) after the word "treaties" in Article 33 referred to indicates that the framer of the constitution was restricted when using these two terms With the aforementioned specialization, and for this reason, the agreements concerned in this article are agreements whose parties are two or more states and relate to other than political affairs.

The same applies to the financial agreements that the state concludes with any natural or legal person, such as banks and companies, for example, as they are not covered by the provision of this article, and their enforcement does not require the approval of the National Assembly even if these agreements bore the treasury some of the expenses.[114]

([114])Supporting this opinion is the fact that some foreign constitutions that contain a text similar to the text of Article 33 to be interpreted have included another text related to public loans that requires obtaining Parliament's approval for these loans because of their general importance. Such a special provision would not have been made if public loans obtained by the government from non-states were included in the concept of (agreements) stipulated in the article corresponding to the aforementioned Article 33.

The same applies to agreements concluded with foreign companies, as they do not enter into agreements that entail financial expenditures on the treasury, and in this came the Interpretation Decision No. 2 / of 2019 issued by the Jordanian Constitutional Court, based on the request of the Council of Ministers issued by Resolution No. (29372) dated on (7/18/2019) the following: Whereas what is required to be explained is an indication of whether the agreements concluded by companies wholly owned by the government with other companies fall within the concept of agreements stipulated in Paragraph (2) of Article (33) of the Constitution, and so that it does not These agreements shall be effective unless approved by Parliament. [115]

The Constitutional Court has decided that any company, whether wholly or partly owned by the government, does not deviate from being a company within the meaning of the special law and is subject to its provisions, and is not considered a public official institution, which was confirmed by the Bureau's decision on the interpretation of laws No. (4) of (2014)[116]The court affirms that Article (33) of the Constitution, as it was previously indicated that the agreements concluded must be parties to governments from persons of public international law, and thus any agreement between the government and natural or legal persons, or between Legal persons among themselves. Accordingly, agreements

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([115])The basis for the request for interpretation is that: The National Electric Power Company (NEPCO), a company wholly owned by the government, entered into an agreement on 9/26/2016 to buy and sell natural gas with Noble Energy Company (NBL JORDAN MARKTING LIMITED).

([116])Published in the Official Gazette No. (5296) issued on (3/8/2014), page (4779).

concluded by companies wholly owned by the government with other companies do not fall within the concept of agreements stipulated in Paragraph (2) of Article (33) of the Constitution, and their implementation does not require the approval of the National Assembly.[117]

The second item: treaties and agreements that affect the public and private rights of Jordanians

These are the rights stipulated in Articles (5-23) of the Jordanian constitution. The constitution provides for a guarantee of these rights, as it stipulates that the approval of the National Assembly must be obtained in order for an international treaty to enter into force. The constitution stipulates that treaties will not be enforceable if the legislative authority is not involved in them, due to their prejudice to the public and private rights of Jordanians.[118] The legislator intended that the case of infringement is directed towards the state of undermining these rights in any way[119]. Public and private Jordanian rights by stipulating them, given that these rights are of public order and it is not permissible to agree to violate them at all. Within the framework of these treaties and agreements are the following:

([117])See: Official Gazette, Issue No. 5595, issued on 16/9/2019, published on the website www.qarark.com, entry date 9/5/2020.

([118])Al-Akour, Omar Saleh Ali and others, The International Treaty Rank in National Legislation and the Jordanian Constitution, Studies, Sharia and Law Sciences, Volume 40, Issue 1, 2013, p.82.

([119])Al-Akour, Omar Saleh Ali and others, p.82.

1- Extradition treaties

The treaties and agreements concluded by the Hashemite Kingdom of Jordan with some countries regarding the extradition of criminals need the approval of the National Assembly, because they affect the public and private rights of Jordanians.[120] In implementation of this, the Jordanian Court of Cassation Decision No. 917 / of 2014 issued on 5/8/2014 stated the following: "As the extradition of a Jordanian citizen violates his public rights, and the agreement concluded between the Hashemite Kingdom of Jordan and the United States of America regarding the extradition of criminals has not It is submitted to the National Assembly for approval, as it is not effective in implementation of Article 33/2 of the Jordanian constitution, which indicates that the request for surrender and this situation becomes unacceptable[121].

([120])This includes the extradition agreement between Jordan and France issued under the ratification law issued in the Official Gazette No. 5141 dated February 16 2012 on page 517, and the extradition agreement between Jordan and Azerbaijan published in the Official Gazette No. 4885 dated February 17, 2008 On page 375.

([121])As stated in the decision of the Jordanian Court of Cassation in its penal capacity No. 3789 / of 2019 issued on 5/2/2020 as follows: "Article (37/1) of the 1999 Legal and Judicial Cooperation Agreement between Jordan and the United Arab Emirates states that:" It is not permissible. Delivery in the following cases: ... if the person whose extradition is requested is a citizen of the country to which the extradition is requested, and in this case the requested state shall prosecute this person upon the request of the other country benefiting from the investigations that the requesting country has conducted, and since it is proven in The application file states that the person requested to be extradited is a Jordanian citizen who holds the national number, which makes the conditions of extradition unavailable.

2 -Agreements on judicial cooperation in civil and criminal matters and personal status

Jordan has concluded several judicial cooperation agreements in civil and criminal matters and personal status,

For its enforcement, the approval of the National Assembly may be requested because of its importance in organizing and protecting the interests of the Jordanian citizen abroad. Examples include the Riyadh Arab Agreement for Judicial Cooperation,[122] as well as the bilateral judicial cooperation agreements concluded by Jordan with many Arab and foreign countries. Such as the judicial cooperation agreement between Jordan and the Republic of Yemen,[123] the judicial cooperation agreement between Jordan and Tunisia,[124] and other agreements.

International agreements related to human rights

The constitutions of some European countries give international treaties related to human rights great importance over the rest of the conventions and give them priority in application over domestic legislation. Among these constitutions, the Constitution of the Slovak Republic No. 640 / of 1992 and its amendments until 2014. Article (154 / C) states that:

-1International treaties related to human rights and fundamental freedoms that the Slovak Republic ratified and issued in the manner stipulated in the law before this Constitution came into effect, are

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([122])Issued by virtue of the Certification Law issued in the Official Gazette No. 4478 dated 3/1/2001, on page 963.

([123])Issued by virtue of the Certification Law issued in the Official Gazette No. 4478 dated March 1, 2001, on page 971.

([124])issued by virtue of the certification law issued in the Official Gazette No. 4346 dated May 2 1999 on page 1562.

considered part of the domestic legal system, and they have priority in application if they provide a greater range of constitutional rights and freedoms.

Based on that, it can be said that international agreements related to human rights, due to their great importance, need the approval of the National Assembly. Among the international conventions ratified by the Jordanian National Assembly, we mention, for example, the Convention on the Rights of the Child issued in 1989.[125] As well as the Convention on the Rights of Persons with Disabilities of 2006. [126]A part of jurisprudence believes that the Convention on the Rights of Persons with Disabilities entails expenses in terms of taking measures. Institutional and the establishment of a national reference body, monitoring and follow-up mechanisms, plans and strategies as one of the obligations that must be implemented, and the Convention on the Rights of the Child included provisions related to eligibility and rights of a political and civil nature, which may conflict with some other national laws, which may constitute a violation of the rights of Jordanians in terms of eligibility, family and inheritance provisions Adoption and other provisions, so the orientation towards these agreements was to be presented to the House of Representatives and to follow them within the course of normal legislative

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([125])See: The Law of Ratification of the Convention on the Rights of the Child No. 50 / of 2006 approved by the National Assembly, issued in the Official Gazette No. (4787) dated October 16, 2006 on page 3991.

([126])See: The Law of Ratification of the Convention on the Rights of Persons with Disabilities No. 7 / of 2008, approved by the National Assembly and issued in the Official Gazette No. (4895), page No. (1056).

procedures, and thus they would have acquired the legal value of ordinary legislation.[127]

Despite the previous interpretations, the status of international treaties and international agreements from the internal legislation has not been affected, but it is in a later and recent development to interpret Article (33) of the Jordanian constitution, and based on the decision of the Council of Ministers related to the request for the interpretation of Article (33) of the constitution, which is indicated in the Prime Minister's letter Ended with No. (9229) dated 4/29/2020, what is required to be explained by the Constitutional Court is an indication of whether it is permissible to issue a law that conflicts with the obligations established on the parties to a treaty ratified by the Kingdom under a law or includes an amendment or abolition of the provisions of that treaty. Or do the international treaties that are concluded, ratify them, and fulfill the procedures established for their enforcement have their binding power for their parties, and states must respect them as long as they remain in place and enforceable.

Interpretation Decision No. (1) of 2020 issued by the Constitutional Court came as follows:

First: It is not permissible to issue a law that contradicts the obligations established by the parties to a treaty that the Kingdom had ratified according to the law.

Second: It is not permissible to issue a law that includes amendment or cancellation of the provisions of that treaty.

Third: International treaties have binding force for their parties, and

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([127])See in this regard: Saddam Abu Azzam, international treaties and determinants of the debate about the legal value and safety of the constitutional procedure, on the website: https://jo24.net/article/329813, accessed 9/4/2020.

states must respect them as long as they remain in place and enforceable, as long as these treaties have been concluded and ratified, and the procedures established for their enforcement are fulfilled. [128]

It appears from the Constitutional Court's decision that the international treaty becomes an integral part of the domestic legislation, but in the event that it conflicts with previous or subsequent domestic legislation, it has priority in application. The resolution clearly affirms that international treaties, after completing the procedures established for their enforcement, have binding power over their parties as long as they remain in place and enforceable.

The second section: jurisprudential views on the status of the international treaty

Jurisprudence in Jordan regarding the status of the international treaty was divided into two parts: a section believes that the international treaty takes precedence over domestic legislation in application in case it conflicts with it, while another aspect of jurisprudence believes that the international treaty is in the rank of internal legislation, and this can be explained in the following:

A part of Jordanian jurisprudence went that international treaties take precedence over domestic legislation, [129] because treaties transcend the

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([128])This decision was issued on May 3, 2020, published in the Official Gazette No. 5155.

([129])Al-Akour and others, previous reference, p. 85, Sayel Muflih al-Momani, Ranking of International Treaties in Light of International Law and the Jordanian Constitution, Journal of Legal and Political Sciences, Volume (19), Issue (1), Year Nine, January 2019, page 124, Muhammad Yusuf Alwan, Public International Law, Introduction and Sources, Wael House for Printing, Publishing and Distribution, Edition (2), Amman 2000, p.102 .

interest of a single state, as they are considered the first source of international law, and the principle of the primacy of international treaties over domestic legislation aims to consolidate the interest of all the international community. Achieving stability in the relations of states that are bound between them by international treaties, which leads to the consolidation of international peace and security, in addition to the fact that establishing this principle prevents states from invoking their national law in order to evade their international obligations [130].

This trend of jurisprudence also adds that the primacy of international treaties over domestic law and their priority in application in the event of conflict is consistent with the general principle of the principles of law, which is (the principle of the supremacy of international law over domestic law). If it is acceptable for the state to invoke its national legal base to disavow implementation Its international obligations arising from an international treaty, this undermines international law, which is a product of the common will of states, while domestic law is a product of the individual will of the state.[131]

Contrary to the first trend, another aspect of Jordanian jurisprudence sees [132] that international treaties and agreements approved by the National Assembly are equivalent to laws approved by the National Assembly, and then these treaties and ordinary laws will be in one order.

This view which was adopted in jurisprudence may be influenced by what some constitutions of foreign and states have claimed. For example, the

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([130])Al-Akour and others, previous reference, p. 78, p. 85.

([131])Sayel Muflih Al-Momani, Previous Reference, pg. 124.

([132])Faisal Uqla Shatnawi, Oversight on the Constitutionality of Treaties, Studies, Sharia and Law Sciences, Volume 42, Issue 1, 2015, p.50.

Egyptian constitution stipulates in Article 151 that: "The President of the Republic concludes treaties and ratifies them after approval by the House of Representatives, and they have the force of law after their publication in accordance with the provisions of the constitution."[133]

Perhaps this opinion is correct in one aspect, which is that international treaties and agreements, after their approval by the National Assembly, are incorporated into the internal legislation and become part of it. The implementation of its international standing, as it is an expression of the will of states and not of the state alone. Many constitutions have stipulated that international treaties are considered an integral part of internal legislation, yet they have supremacy over the state's internal legislation in case of conflict, and among these constitutions we mention, for example, the Greek constitution promulgated from 1975 to 2008.[134]

A judge of the Constitutional Court in Jordan believes that international treaties, after fulfilling the constitutional procedures and the conditions required for their conclusion, ratification and publication, only have the force of law and do not reach the level of constitutional texts. [135] This viewpoint finds its justification in the fact that the Jordanian constitution is considered one of the rigid constitutions. Which require special

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([133])See also the Kuwaiti Constitution in Article (70), the Qatari Constitution in Article (68), and the Bahraini Constitution in Article (37).

([134])Article (28/1) stipulated the following: "The generally recognized rules of international law, as well as international agreements from the time of their ratification in accordance with a basic law and their entry into force in accordance with the conditions related to them, shall be an integral part of the internal Greek law, and shall prevail over any provisions. Legal opposition. "

([135])Referred to by Al-Momani, previous reference, pp. 122-123.

procedures to be amended, which differ from the procedures by which ordinary laws are amended, where the amendment of the constitution requires the approval of His Majesty the King to amend the amendment, and the approval of the National Assembly by a majority (two-thirds), as well as calling the members out loud by their names. [136] The constitution also remains. A symbol of national sovereignty, including the general principles related to the public order of the Jordanian state[137].

The second requirement

The status of the international treaty in the Jordanian judiciary

The Jordanian judiciary adopts a stance that differs from that of the constitution and the Jordanian jurisprudence regarding the issue of the status of an international treaty in the internal legislation. As it demonstrates the Jordanian jurisprudence on the superiority of the international treaty on legislation. There are many judicial rulings that confirm this, examples of which are:

First: Decision of the Jordanian Court of Cassation in its legal capacity No. 818 / of 2003 issued on 9/6/2003, stating: "International treaties and conventions take precedence over local laws and have priority in application when they conflict with them, and no local law may be invoked before The Arab Agreement of 1981 on the facts of this lawsuit when its rulings conflict with the provisions of any local law as long as they are in effect and have not been canceled.

([136])Al-Akour and others, previous reference, p.84.

([137])Al-Akour and others, previous reference, p. 84, Muhammad Ali Makhadmeh, Implementation of the International Treaty by the National Judge, especially the Jordanian, Dirasat Magazine, University of Jordan, Volume (27), Issue (12), p.80.

Second: As stated in the Jordanian Court of Cassation Decision No. 3726 / for the year 2013 in its legal capacity of February 16 2014: "And in this we find that the Maritime Trade Law No. 12 / of 1972 and its amendments stipulated in Articles (219 and 220) thereof on the statute of limitations for liability lawsuits. And he defined it as one year from the date of delivery of the goods, and we find that the United Nations Convention on Maritime Transport (Hamburg Rules of 1978) also stipulated the statute of limitations for the liability claim in Article (20/1) and defined it for two years, and it is one of the conventions ratified by the Hashemite Kingdom of Jordan, according to What was settled by the court of cassation, the international treaty that the Hashemite Kingdom of Jordan ratifies if it conflicts with the text of a national law, which is the Maritime Trade Law, it is more important to apply than the last law.

Third: The decision of the Jordanian Court of Cassation in its legal capacity No. (3965/2003) issued on 29/2/2004, stating: "The jurisprudence and judiciary in all countries of the world, including Jordan, have unanimously agreed that international agreements and treaties are supreme over domestic laws, and that provisions may not be applied. Any internal law that contradicts these international conventions and treaties so that they can be applied together, which is what our judiciary has been without dispute" .

Fourth: The Amman Court of Appeal confirmed in its judgment No. 44694/2018, on 3/21/2019, what the Court of First Instance went to implement the Warsaw Convention on the issue in dispute instead of applying the civil law. The ruling stated: "It is established that it is established in the jurisprudence and rule of the supremacy of

international agreements and treaties over internal laws, and that the provisions of any internal law may not be applied with these international agreements and treaties, and internal laws are only taken into account in the event that they do not conflict with these international agreements and treaties so that they can be applied together. And this is what our case has been without dispute" .

Fifth: The decision of the Amman Court of First Instance in its appellate capacity No. 1839 / of 2018, stating: "It is established that the jurisprudence and rulings of the highness of international agreements and treaties over internal laws, and that the provisions of any internal law may not be applied with these international agreements and treaties, and only domestic laws are taken into consideration In the absence of contradiction with these international conventions and treaties, so that they can be applied together, which is what our judiciary has been without dispute. "

Sixth: In the judgment of the Madaba Penal Conciliation Court No. 3557 / of 2018 issued on 12/12/2018, the court applied Article (15) of the International Covenant on Civil and Political Rights on the subject of the dispute instead of applying Article (6/421) of the Jordanian Penal Code. After amending it by Law No. 27 of 2017, related to the issuance of a check that is not matched with a balance, because it violates the principle of the law that is most favorable to the accused, and decided to lift the penal protection for checks issued on non-bank forms. The ruling stated: "The jurisprudence of the esteemed Court of Cassation has established that international treaties and agreements that have taken place in their constitutional stages have a higher rank than the rank of ordinary law, and therefore they are more likely to apply in the event that the texts of

the international treaty or international agreement conflict with ordinary national law."

By extrapolating from the previous decisions of the various Jordanian courts, the position of the Jordanian judiciary on the status of the international convention on the internal legislative system becomes clear, as the Jordanian judiciary is settled on the primacy of international agreements in the application of internal law, whether this law preceded the conclusion of that agreement or later on its conclusion.

It is new to mention that the national judge in practice applies the international convention as it has become part of the national law, and therefore the national judge must know and prove it, because the litigants are not required to prove the law because the burden of proving the law rests on the judge.[138]

A valid question arises about the Jordanian judicial system, as it is based on non-compliance with judicial precedents, which leads to the judge not being obligated to apply these precedents and jurisprudence.

We believe that the Jordanian judiciary has become settled on the transcendence of the international convention and its supremacy over national laws, and the presence of some violations of what is settled by the judiciary does not mean that judges may violate what is established on it, and on the other hand, the violation is usually in the majority of courts of first degree, which As a result, its judgments are appealed or distinguished in the event of a violation.

The Court of Cassation may also revoke its previous decisions by amending, reconsidering, or violating some of its decisions at other times,

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Akour, et al., Previous reference, p. 84.-) Al[138](

but the general principle is what is established by jurisprudence and judiciary within the Hashemite Kingdom of Jordan, which established the principle of the supremacy of the international agreement on national laws.

CONCLUSION:

After we completed this study, we reached many results and recommendations, which we list as follows:

First: the results

1- International instruments and international judiciary decide the primacy of international treaties over domestic legislation, because they express the will of the joint states, unlike domestic legislation, which is an expression of the will of the one sovereign state.

2- The constitutions of foreign countries differed regarding the status of an international treaty in terms of domestic legislation, as some of them went on considering the international treaty to be in the rank of law and has the same strength, and the constitutions of other countries went to the primacy of international treaties over domestic legislation, while some constitutions were silent on the status of international treaties From the internal legislation.

3- The Jordanian constitution is considered one of the constitutions that do not explicitly clarify the status of international treaties from the internal legislation. The constitutional legislator decided in Article (2/33) that treaties and agreements will not be enforceable except after the approval of the National Assembly, which indicates that international treaties and agreements have the force of law Internal.

4- The approval of the National Assembly on the treaty or international agreement is based on a decision by a law issued by the House of

Representatives and the other by the Senate and submitted to His Majesty the King for approval, and he orders its promulgation by a law called the ratification law, which is a term whose authority appears to be constitutional norm.

5- Several jurisprudence was made by the High Council to interpret the constitution regarding the interpretation of Article (33/2) of the constitution, at the request of the Council of Ministers, which did not address the clarification of the status of treaties and agreements from the internal legislation.

6- The Constitutional Court, in its Resolution No. 1 / of 2020, expressed the status of treaties and agreements and indicated their priority over domestic legislation, deciding the state's commitment to treaties and agreements and that it is not permissible to contravene them by a subsequent internal law, otherwise its international responsibility will be held.

7- Jurisprudence in Jordan differed regarding the status of treaties from internal legislation, as one side went to the supremacy of international treaties over internal legislation, while the other side went on the fact that international treaties have the force of internal law, unlike the Jordanian judiciary, which has one position which is the supremacy of international treaties and agreements On the internal legislation in case of conflict.

Second: Recommendations

1- We recommend that the Jordanian constitutional legislator add a new paragraph to Article (33) of the constitution, which shall be as follows: "Treaties and agreements in proper force shall be considered an integral part of internal legislation, and in the event of a conflict between

international treaties and agreements and domestic legislation, treaties shall be given priority and international agreements.

2- We recommend the relevant authorities to amend the name of the law on ratification of the treaty or agreement to the name of a law regarding the ratification of the treaty or agreement, given that the treaty or agreement has become an internal law that everyone must know about its content after its publication, and the competent authorities must implement it.

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Interpretation Decision No. (2) of 2019 issued by the Constitutional Court on 7/18/2019.

- Decision of the High Council for the Interpretation of the Constitution No. (2) of 1955 issued on 3/28/1955, published in the Official Gazette No. (1224), page 329.

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- **Greece's Constitution of 1975 with Amendments through 2008, www.constituteproject.org › constitution › Greece_2008.**
- **Nottebohm Case, https://www.quimbee.com/cases/nottebohm-case-liechtenstein-v-guatemala.**
- **Slovakia's Constitution of 1992 with Amendments through 2014, www.constituteproject.org › Slovakia_2014.**
- **The Constitution of the Republic of Poland of 2nd April, 1997, http://www.sejm.gov.pl/prawo/konst/angielski/konse.htm**
- **The Constitution of the Russian Federation of 1993, http://www.constitution.ru/en/10003000-01.htm**

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LEGAL MANAGEMENT OF BANKING RISKS IN UKRAINE AND ITS STAGES

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Abstract

Building an effective risk management system in banking requires an analysis of current legislation of Ukraine to establish unified approaches to risk management. The concepts and stages of risk management of banks are examined in the article, based on their

normative enshrinement in the current legislation of Ukraine and an interpretation of each stage is provided. By the functional point of view, risk management in banking is carried out through the stages of identification, assessment, control and monitoring of risks, optimization or minimization of risks, which are enshrined in regulations of the National Bank of Ukraine. It is assumed that the identification, assessment of risks, their control and monitoring, optimization and minimization of banks' risks as stages of banking risk management, will be implemented by banks in the meaning, which is given in the article based on analysis of current legislation of Ukraine.

Keywords: law, risk, banks, risk management, detection, assessment, control, optimization, minimization.

1-Introduction

The European Central Bank for Risk Assessment 2020 noted that over the next three years, the three most important risk factors are expected to affect the banking system: (i) economic, political and debt sustainability issues in the euro area, (ii) sustainability business models and (iii) deficiencies in cybercrime and IT. They are followed by: Risk associated with banks' strategies for repaying loans (chalks); weakening of lending standards; revaluation in the financial markets; misdemeanors, money laundering and terrorist financing (ML/TF); Brexit; global outlook and geopolitical uncertainty; reaction to regulation; climate change risks[139].

[139] **ECB. Banking Supervision: Risk assessment for 2020. https://www.bankingsupervision.europa.eu/ecb/pub/ra/pdf/ssm.ra2020~a9164196cc.en.pdf (accessed March 23, 2020).**

In today's context, the global pandemic of the coronavirus (COVID 19), which has a significant impact on banking risk management, is also a determining factor in banking risks.

2-The COVID-19 (coronavirus) outbreak and its global spread have created significant immediate challenges for society and risks to the economic outlook, including for banks and other financial institutions. Although the long-term magnitude of the economic shock cannot be quantified yet, it is likely to reduce economic activity. Following the financial crisis, European banks strengthened their capital position, created a strong liquidity buffer and improved asset quality on their balance sheets. A statement issued by the European Banking Authority on 12 March 2020 on measures to mitigate the impact of COVID-19 on the banking sector states that EU banks should take steps to ensure business continuity and adequate customer service, focus on their core operations and critical functions, support the households and corporate sectors, especially small and medium-sized enterprises, and meet the basic needs of their customers[140].

The overriding task of EU banks should be to address any operational problems that banks may face. The European Business Association recommends that governing bodies should plan oversight activities, including on-site inspections, pragmatically and flexibly, and possibly delay those deemed irrelevant. Official bodies may also give banks some leeway in terms of remittances in certain areas of supervisory reporting, without jeopardizing important information necessary to

[140] **EBA statement on actions to mitigate the impact of COVID-19 on the EU banking sector. https://eba.europa.eu/eba-statement-actions-mitigate-impact-covid-19-eu-banking-sector (accessed March 21, 2020).**

closely monitor banks' financial and prudential situation. In an effort "to ease the immediate burden on banks during this difficult period", national regulators are advised "to make full use, where appropriate, of the flexibility provided in the legal framework to support the banking sector"[141].

Banks should use adequate capital and liquidity reserves to absorb losses and ensure a sustained lending to the economy during a recession, as well as adhere to prudent dividend and other distribution policies, including variable remuneration. Supervisory authorities should avoid any action that may lead to fragmentation of funding markets[142]. Accordingly, banks are faced with the issue of adequate and effective response to global and internal challenges in order to minimize the negative impact of such risks. This, in turn, leads to a revision of the already established procedures and policies of risk management in banking and a rethinking of the concepts and approaches to risk management and clarification of regulatory stages of risk management in terms of interpretation of their content.

The purpose is to analyze the current legislation of Ukraine, to reveal the essence of risk management in banking and to provide an interpretation of the content of its stages for their proper application in terms of legal regulation.

1. Literature Review

[141] **De Sevres, Nicolette K., Sengupta, Joydeep. COVID-19: Compliance and Operational Risks for Financial Institutions: EU Financial Authorities Provide Initial Guidance. https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/covid-19--compliance-and-operational-risks-for-financial-institutions-eu-financial-authorities-provide-initial-guidance (accessed March 23, 2020).**

[142] **EBA statement on actions to mitigate the impact of COVID-19 on the EU banking sector. https://eba.europa.eu/eba-statement-actions-mitigate-impact-covid-19-eu-banking-sector (accessed March 21, 2020).**

Significant development and theoretical substantiation of banking risks management has been founded in the economic doctrine, which studies both the general problems of banking risks management and the issues of influence on certain types of banking risks. Particularly, in the monograph Bank Risk Management, edited by Dr. Econ. of sciences, prof. A.O. Yepifanov and Dr. Econ. of sciences, prof. T.A. Vasylieva outline the theoretical approaches and practical aspects of managing a bank's underlying risks[143]. The authors of this collective monograph have proposed the improvement of modern tools for effective banking risk management. In carrying out research into the problems of banking risk management, the authors conclude that the homeland issues are dominated by the solution of general issues of risk management, among which stands out the formulation of strategy, definition of principles, the separation of stages of management. Foreign research mainly focuses on specific methods of assessing and managing banking risks. Exactly risk management should be built on a top-down approach, which involves coordinating risk management with senior management, with the participation of each employee in such risk management within their authority. This makes it possible to balance management measures on a continuous basis, using a broad methodological framework. However, for this management system to function effectively, it is necessary to carry out this process at the level of the organization where the risk arises, and to independently review and control the risks at the highest levels of management and at the level of the Supervisory Board.

[143] **Yepifanov, A. O., Vasylieva, T. A., Kozmenko, S. M. et al. 2012. Banking risk management. DVNZ "UABS NBU".**

The financial crises of recent decades have already affected the management of banking risks. However, there are a number of trends that indicate that risk management in banking will be transformed. Particularly, according to scientists, such tendencies are: 1) continuation of expansion and deepening of regulation; 2) increasing customer expectations as technology changes; 3) development of technology and the advanced analytics; 4) the emergence of new risks; 5) the need to eliminate prejudice; 6) continued pressure to save money. Taking these trends into account should lead to changes in banking risk management, including building a strong risk management culture[144].

The very concept of risk management, which is developed both by economic and legal doctrines, largely coincides in its understanding of its essence. For example, risk management is defined as:

- technical term relating to a specific coordinated management and control activity within an organization, taking into account the nature of the risks to be specified[145];

- the process of measuring or assessing risk in order to develop risk management strategies[146].

The term "legal risk management" is also used to refer to a well-defined or well-defined concept that usually manages risk in general[147].

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[144] Härle, Ph., Havas, A., Samandari, H. 2016. The future of bank risk management. https://www.mckinsey.com/business-functions/risk/our-insights/the-future-of-bank-risk-management (accessed March 22, 2020).

[145] Legal Risk Management. http://www.jus.uio.no/ifp/english/about/organization/nrccl/research-areas/ongoing-research/legal-risk-management.html (accessed May 19, 2018).

[146] Trzaskowski, J. Legal Risk Management in a Global, Electronic Marketplace. http://www.legalriskmanagement.com/PUBLICATIONS/ 2006_SSL.pdf (accessed May 19, 2018).

Homeland risk management scientists understand as a process by which a subject identifies (identifies) risks, assesses their magnitude, monitors and controls their risk positions, and takes into account the relationships between different categories (types) of risks[148].

The scientific literature is dominated by the idea that strategies and tactics must be developed to manage banking risks. A strategy is understood as the directions and ways of using the means to achieve the goal, a certain set of rules and restrictions for making decision. Tactics are specific methods and techniques to achieve this goal in specific circumstances, the task of which is to choose the optimal solution and acceptable in a particular situation, methods and techniques of risk management[149].

4-In general, bank risk management is carried out in several stages, which in turn change each other. Current researchers[150] distinguish the following stages (stages) of banking risk management: 1) risk identification and analysis; 2) assessment of the consequences of the risk;

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[147] Trzaskowski, J. Legal Risk Management in a Global, Electronic Marketplace. http://www.legalriskmanagement.com/PUBLICATIONS/ 2006_SSL.pdf (accessed May 19, 2018).

[148] Matveev, P.S. 2010. Contracts for Currancy Dealingou in the Civil Law of Ukraine. Legal Unity.

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3) choice of risk management methods; 4) implementation of the chosen risk management method; 5) monitoring the results and improving the risk management system. Three key stages of risk management - risk analysis, risk assessment and risk mitigation - are also addressed in foreign sources[151].

The Committee of Sponsors of the Tradway Commission (COSO) identifies the following risk management components in the 2016 Risk Guide: Environmental Control; risk assessment; control of activity; information and communication; activity monitoring. By the way, there were eight in the COSO 2013 Guide: defining the internal environment; goal setting; identification of risk events; risk assessment; risk response; controls; information and communication; monitoring[152].

Thus, both economic and legal studies of risk management in general, and banking in particular, are characterized by the identical understanding of the concept of "risk management" and the stages (steps) of management. However, the question remains the basic principles of legal influence on the management of banking risks and regulatory regulation of algorithmization and stages (steps) of management.

2. Methods

Given that risk is a condition that has a specific life cycle, risk management should also be a process whose effectiveness depends on responding promptly to the development of the risk state. This, in turn,

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[151] Contract Review and Risk Management. https://www.hg.org/ article.asp?id=5454 (accessed June 22, 2018). Waugh, H. 2018. The Key Stages to the Risk Management Lifecycle. https://www.ideagen.com/company/blog/the-key-stages-to-the-risk-management-lifecycle (accessed March 21, 2020).

[152] Fraud Risk Management Guide Executive Summary. Research Commissioned by Committee of Sponsoring Organizations of the Treadway Commission (COSO). https://www.coso.org/documents/COSO-Fraud-Risk-Management-Guide-Executive-Summary.pdf (accessed July 19, 2017).

requires the study of risks, the identification of their peculiarities and patterns of transformation, the identification of the system and stages of risk management based on the integrated use of various methods of scientific knowledge in their unity and interaction. This will allow for approaches to forecasting and efficient risk sharing. It is advisable to expand the range of scientific research and services that are new to private law by methods inherent in other fields of science, such as economics. Accordingly, the justification of the algorithm for risk management in banking, the identification of its stages (stages) and the development of proposals should be carried out using the basic value of economic analysis of law – economic efficiency – in conjunction with the basic value of law – justice.

Therefore, methods such as analysis and synthesis were used to study and justify the stages of risk management, investigate their effectiveness, develop approaches to risk identification, identification and assessment. The analogy method was used to hypothesize that any risk can be managed in stages that are distinguished when managing economic risks. The comparative method helped to clarify the theoretical approaches to understanding the concept of risk management. Economic science methods, including alternative analysis and absolute and comparative advantage methods, have made it possible to explore risk management in the context of choosing the most effective behavior and the need to refuse such choices and to answer the questions as to when and how to act in risk, how to predict and adjust risks.

. Research Results

3.1. Risk management system in Ukrainian banks

Modern liberal legal culture is inherent in societies with a liberal understanding of law in particular, in matters of risk management, the defining principles of which have been formed in the Western tradition of law and which are only being formed in Ukraine, other post-Soviet countries, reflects the balance of worldview legal and over legal (economics, politics, professional ethics, morals, religion, etc.) phenomena.

Such approach, which is based on a broad understanding of law, and takes into account all socially important phenomena, provides a methodologically sound opportunity to proportionally and predictably manage and effectively influence risks in the banking sector.

The essence of legal management of banking risks is defined by legal acts, legislation and legal proceedings, the procedure for planning the impact on risks in the banking sector.

Legal management of banking risks is a legal manifestation of the normative consolidation of factual (economic, ethical, etc.) relations defined by legislation (laws, bylaws), legal proceedings (contracts, etc.), local legal acts (statutes, regulations of legal entities) procedures that determine the procedure, aimed at orderly impact on risks in the banking sector.

The defining component of the modern legal culture of banking risk management is pragmatic and flexible planning of banking risk management, priority solution of major, postponing insignificant issues, application of effective legal instruments for rapid and adequate impact on

banking risks on the basis of acceptable efficiency, balance of interests and proportionality of restrictions.

Legal management of banking risks uses methods of economic and legal analysis of law, taking into account the peculiarities of property rights, obligations and other legal relations in the banking sector.

Legal management of property rights risks in the banking sector should be based on the principles of confidence or transferring these risks. The risks of accidental destruction of property, expropriation, etc. are borne by the holder of the property right (owner, entity of limited property rights) or its counterparty (tenant, borrower, etc.) in accordance with the provisions of the law. Management of other risks of property rights is carried out, in cases specified by law, by transferring them in accordance with the provisions of the contract or local legal act (bank charter, etc.).

Variety of risk of property rights in the part of acquisition or termination of property rights, it is advisable to consider the risk of asset quality, which is carried out by acquiring the appropriate legal title (property rights, limited property rights, etc.) appropriate legal title to the bank's balance sheet assets or as enforcement of obligations and control of compliance with permissible limits to the limits of direct or indirect expropriation, effective foreclosure, sale of non-core assets, other "exemption" from doubtful and hopeless assets and liabilities (debts).

Legal risk management of contractual rights should be based on the principles of transferring risk to the debtor or creditor – in cases specified by law, contract or local legal act. In particular, the risk of execution associated with the strategies of banks on outstanding loans (credits), by

using a flexible debt limit on loans, taking into account the nature (legal purpose), the amount of the obligation and the quality of its collateral).

In accordance with subparagraph 39 of paragraph 3 of the Regulation on the organization of risk management system in banks of Ukraine and banking groups, approved by the resolution of the NBU Board 11.06.2018. No. 64, Risk Management System is a set of properly documented and approved risk management policies, techniques and procedures that determine the actions to be taken to systematically identify, measure, monitor, control, report and mitigate all types of risks at all organizational levels[153]. According to the current legislation of Ukraine such a risk management system must be appropriate to the size, business model, scale of operations, types, complexity of the bank's operations in order to be effective, comprehensive and adequate and to provide continuous risk analysis. It should be based on three lines of protection model: 1) at the level of the Bank's business units and the Bank's support units, which are responsible for taking risks, being responsible for them and reporting on the day-to-day management of such risks; 2) at the level of the risk management unit and the compliance control unit (compliance); 3) at the level of the internal audit unit to verify and evaluate the effectiveness of the risk management system.

That is, risk management should take place at the level of the organization where the risk arises, as well as through independent risk assessment and control functions – at the highest levels of management and at the level of the Bank's Board. This approach is consistent with the principle of comprehensive risk management of the bank, which was

[153] **National Bank of Ukraine. On Approval of Regulation on Organization of Risk Management System in Banks of Ukraine and Banking Groups. No. 64. June 11, 2018. *Official Bulletin of Ukraine* 55.**

enshrined in the Methodological Recommendations for the Organization and Functioning of Risk Management Systems in Banks of Ukraine, approved by the Resolution of the Board of the National Bank of Ukraine No. 361 of 02.08.2004[154].

3.2. Stages of risk management in banking

According to the mentioned Methodological Recommendations (paragraph 2.3), the task of the Bank is to create such a comprehensive risk management system that would ensure a reliable process of identification, assessment, control and monitoring of all types of risk at all levels of the organization, including taking into account the mutual impact of different categories of risk, and contributed to the resolution of the task conflict between the need to generate income and minimize risks[155]. Thus, risk management in banking is through the identification, assessment, control and monitoring of risks, and their optimization or minimization.

Let's consider the specified stages more detail.

Risk detection is probably one of the most difficult and at the same time the most important stages of risk management, as the whole process of management depends on timely identification of changes in risk structure, signs of occurrence of a particular risk, forecasting of possible consequences of risk and their severity. Risk detection should occur in the first two stages of the risk life cycle – signaling the possibility of a risk and showing signs of a particular risk.

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[154] National Bank of Ukraine. On Approval of Methodical Recommendations on Organization and Functioning of Risk Management Systems in Banks of Ukraine. No. 361. August 2, 2004. http://zakon2.rada.gov.ua/laws/show/v0361500-04.

[155] National Bank of Ukraine. On Approval of Methodical Recommendations on Organization and Functioning of Risk Management Systems in Banks of Ukraine. No. 361. August 2, 2004. http://zakon2.rada.gov.ua/laws/show/v0361500-04.

The obligation to identify and measure risks timely manner rests either with the bank's business department and the department of support of the bank's activity, or, if these are significant risks, to the risk management department that is a part of the organizational structure of the bank's risk management system. Proper identification of risks involves their identification in interaction and involves the classification and segmentation of risks, both on an individual and consolidated basis[156].

Risk detection can be done through an aggregation procedure, which is provided by the Regulations on the organization of risk management system in banks of Ukraine and banking groups[157] that is a processing of risk data and is based on the principles of accuracy and integrity, completeness of data, timeliness and adaptability. According to Andrea Enria, Chair of the Supervisory Board of the European Central Bank, sound data is a prerequisite for comprehensive risk management and adequate decision-making at banks[158].

Obtaining accurate, complete and timely risk information is possible subject to compliance with the rules on maximum automation of risk detection procedures, implementation of risk detection in all areas of activity of the bank or all participants of the banking group, application

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[156] National Bank of Ukraine. On Approval of Methodical Recommendations on Organization and Functioning of Risk Management Systems in Banks of Ukraine. No. 361. August 2, 2004. http://zakon2.rada.gov.ua/laws/show/v0361500-04.

[157] National Bank of Ukraine. On Approval of Regulation on Organization of Risk Management System in Banks of Ukraine and Banking Groups. No. 64. June 11, 2018. *Official Bulletin of Ukraine* 55.

[158] ECB. Supervisory expectations on risk data aggregation capabilities and risk reporting practices. SSM-2019-0221 https://www.bankingsupervision.europa.eu/press/letterstobanks/shared/pdf/2019/ssm.supervisory_expectations_on_risk_data_aggregation_capabilities_and_risk_reporting_practices_201906.en.pdf?1e870b7800417deacb3cd8c8c9eb937a (accessed March 23, 2020).

on a permanent basis of risk detection procedures, flexibility of risk detection procedures.

Risk detection procedures or markers that signal potential danger for each type of risk should be as automated as possible to avoid errors caused by subjective judgments. However, in situations requiring separate analysis and evaluation, especially when it comes to compliance with the rules of law, it is advisable to use so-called "manual processes" when responsible employees of the bank, including from compliance departments, on the basis of studying changes in the structure specific risk (object, subject and sources of risk) and its attributes, make sound judgments about the occurrence of risk, make an appropriate report and provide recommendations for the further management of such risk. Both automated procedures and manual processes must be properly documented in local bank documents. However, it should be emphasized that automated procedures should dominate.

Risk detection should be carried out in all areas of activity of the bank or all participants of the banking group, since incomplete, incorrect detection or non-detection of risks, improper measurement of them is one of the main causes of future problems. This means that: a) the identification of risks cannot be limited to the major risks or activities of each of the banking group members, as well as the risks that are managed at the individual level for each banking group member; b) for each risk category, it is necessary to identify all sources of such risk, not just the most common and obvious ones[159].

[159] **National Bank of Ukraine. On Approval of Methodical Recommendations on Organization and Functioning of Risk Management Systems in Banks of Ukraine. No. 361. August 2, 2004. http://zakon2.rada.gov.ua/laws/show/v0361500-04.**

Risk identification procedures should be applied on an ongoing basis in order to respond to risks promptly. This, in turn, involves establishing a certain frequency of risk reports. Specific terms are approved by the internal regulations of the bank, although for certain types of risks such periodicity can be enshrined in regulatory acts. Thus, in the Methodological Recommendations on the Organization and Functioning of Risk Management Systems in Banks of Ukraine, Approved by the Resolution of the Board of the National Bank of Ukraine No. 361 of 02.08.2004, in Section V, the National Bank of Ukraine recommends that the responsible person of the banking group assess at least once a year: a) potential requirements of regulatory capital based on the strategy of developing the banking group; b) potential sources for ensuring sufficient regulatory capital (paragraph 2.3). The monitoring of compliance with regulatory capital adequacy principles should be carried out once a quarter by the responsible person of the banking group, paying particular attention to significant deviations from the actual results from the forecasted ones (paragraph 2.4), etc[160]. The risk management subsection must submit risk reports to the Bank's Board, the Risk Management Committee at least once a quarter, to the Bank's Management Board at least once a month, and in case of identifying situations requiring immediate information to the Bank's Board, no later than the next working day (paragraph 37)[161], etc.

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[160] National Bank of Ukraine. On Approval of Methodical Recommendations on Organization and Functioning of Risk Management Systems in Banks of Ukraine. No. 361. August 2, 2004. http://zakon2.rada.gov.ua/laws/show/v0361500-04.

[161] National Bank of Ukraine. On Approval of Regulation on Organization of Risk Management System in Banks of Ukraine and Banking Groups. No. 64. June 11, 2018. *Official Bulletin of Ukraine* 55.

Risk identification procedures should be flexible so that risks can be found and identified promptly, fully and correctly. The ability to make changes to risk identification procedures, modify them, adapt them to the specific situation depending on the needs of users creates the opportunity to properly detail the information, which in turn contributes to setting the context of the risk, that is, the goals of the stakeholders, the criteria for further risk assessment and identifying other key elements. In this way, signs of risk are identified, a list of possible consequences is formed, their severity is established, etc.

All identified risks should be analyzed, that is, the nature of the risk should be clarified, the specific features of its implementation should be identified, the type of risk identified, the identified signs of risk investigated, its relationship with other risks. This allows moving on to the next stage of risk management – assessment. As Hannah Waugh notes, once the risks are identified, they must be examined in terms of probability and impact. It is important to assess the likelihood of risk and the consequences of risk. This will identify which risks are of highest priority and deserve the highest attention[162].

DSTU IEC / ISO 31010: 2013 "Risk Management. General Risk Assessment Methods" defines the purpose of a general risk assessment – to provide an understanding of the risks, their causes, consequences and probabilities. Such an overall assessment helps to obtain baseline data for deciding whether to start an activity, how to maximize opportunities, the need for risk management, choosing among different risk options,

[162] **Waugh, H. 2018. The Key Stages to the Risk Management Lifecycle. https://www.ideagen.com/company/blog/the-key-stages-to-the-risk-management-lifecycle (accessed March 21, 2020).**

prioritizing risk management options, selecting the most appropriate risk management strategies that will reduce adverse risks to an acceptable level (p.4.3.4)[163].

According to Methodical Recommendations the Banking System Risk Inspection, the risk assessment in the risk assessment system should reflect both the actual and potential risk parameters of the bank. This assessment is based on the strategy and actions of the banking supervisor. It also creates a basis for discussing the state of the bank with its executives and members of the bank's supervisory board, and helps to ensure that the banking supervisory service (inspection, off-site supervision, etc.) is more effective. The risk assessment system itself should make it easy to document the conclusions regarding the amount of risk, the quality of risk management, the level of concern over supervision (measured as aggregate risk) and the direction of risk. The risk assessment system should also include a list of assessment factors that will be taken into account by the supervisor when determining the estimates. These factors are the recommended criteria for conducting a risk assessment; supervisors may, if necessary, extend this list by increasing the number of assessment factors[164].

Under this risk assessment system, there are four main components to determining a bank's risk parameters: the amount of risk, the quality of risk management, the aggregate risk and the risk direction. The amount of risk and the quality of risk management should be evaluated independently. No matter how high or low the quality of risk management

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[163] **Risk management. Methods of general risk assessment (IES/ISO 31010:2009, IDT). DSTU IES/ISO 31010:2013. Ministry of Economic Development of Ukraine.**

[164] **National Bank of Ukraine. Methodological Guidelines for the Inspection of Banks "Risks Assessment System". No. 104. March 15, 2004. http://zakon3.rada.gov.ua/laws/show/v0104500 -04.**

is, it should not affect the risk assessment. Instead, a large amount of capital or high financial performance should not be considered as mitigating factors for an inadequate risk management system. For strategic, reputational and legal risks that affect the capital and income of a bank, but they are difficult to quantify accurately. The National Bank of Ukraine has decided that only aggregate risk and risk direction should be assessed under a defined system for assessing each risk category that makes it possible to measure risks consistently and to determine which supervisory procedures should be followed[165].

In general, risk assessment can be performed at two levels: overall and specific. At the overall level, the bank's vulnerability to risks is analyzed (before taking any risk mitigation measures). At the specific - residual risk vulnerability (after applying risk mitigation measures) carried out on a specific date based on current or forecast assumptions.

The National Bank of Ukraine has developed methodical instructions for risk assessment[166], where methods for assessing each type of risk and recommendations for effective models and tools for risk assessment (measurement) are proposed[167]. In general, the rules established by the National Bank of Ukraine are consistent with international practice. Moreover, the National Bank of Ukraine strongly recommends that banks develop and implement a risk management system based on the best

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[165] National Bank of Ukraine. Methodological Guidelines for the Inspection of Banks "Risks Assessment System". No. 104. March 15, 2004. http://zakon3.rada.gov.ua/laws/show/v0104500 -04.

[166] National Bank of Ukraine. Methodological Guidelines for the Inspection of Banks "Risks Assessment System". No. 104. March 15, 2004. http://zakon3.rada.gov.ua/laws/show/v0104500 -04.

[167] National Bank of Ukraine. On Approval of Regulation on Organization of Risk Management System in Banks of Ukraine and Banking Groups. No. 64. June 11, 2018. *Official Bulletin of Ukraine* 55.

global experience, considering the recommendations of the Basel Committee on Banking Supervision and the Principles of Corporate Governance. However, the problem is that Ukrainian banks did not have enough time for this, whereas according to the Schedule of implementation of measures by banks of Ukraine and banking groups measures to implement the requirements of the Regulation on the organization of the risk management system in banks of Ukraine and banking groups[168] obligated credit institutions to implement banking risk management strategies, policies, methods and procedures by March 2020, and to complete the risk management system by September 2020. Accordingly, we have a somewhat formal approach to the introduction of a risk management system in commercial banks of Ukraine. This is also due to the fact that despite the adoption in 2004 by the National Bank of Ukraine of a number of regulatory documents (Methodical recommendations for the organization and operation of risk management systems in banks of Ukraine; Methodical guidelines for inspecting banks ("Risk Assessment System", etc.), there were no documents aimed at creating a risk management system, proper control by the NBU over the implementation of such instructions by banks. As a result, the management of commercial banks did not implement a proper risk management system, accordingly, a culture of risk management was not formed. This, in turn, is reflected in the quality of the risk assessment phase.

Risk control and monitoring is ensured through the risk management system, which should be a component of the bank's risk management. For example, in the Regulation on the organization of the

[168] National Bank of Ukraine. On Approval of Regulation on Organization of Risk Management System in Banks of Ukraine and Banking Groups. No. 64. June 11, 2018. *Official Bulletin of Ukraine* 55.

risk management system in banks of Ukraine and banking groups[169] the control function is performed by risk management and compliance departments (second line of protection) and internal audit units (third line of protection). In the scientific literature, risk-control refers to the prediction and avoidance of risks in order to minimize the risks of business, financial capital, as well as legal risk, that is, the process of loss prevention that may occur[170]. Monitoring is the study of a risk object in order to establish its "quality" that is the presence of contradictions, collisions or other factors that can provoke the occurrence of a risk state, its development or inability to influence it. This helps not only to identify the risks, but also to identify their sources, signs, features of manifestation, etc., which determines the choice of effective methods of influence[171].

According to the Methodical Instructions of Bank Inspection "Risk Assessment System" approved by the Resolution of the Board of the National Bank of Ukraine on March 15, 2004 No. 104, The bank should set restrictions and bring them to the employees by means of regulations, standards and / or procedures that determine the duties and powers of employees. These control limits should be effective management tools that can be refined in the event of a change in conditions or level of risk tolerance. In addition, the bank should determine the sequence of the process of granting authorizations to exclude or change risk limits, if they are justified. The purpose of risk monitoring is to ensure that risk levels

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[169] National Bank of Ukraine. On Approval of Regulation on Organization of Risk Management System in Banks of Ukraine and Banking Groups. No. 64. June 11, 2018. *Official Bulletin of Ukraine* 55.

[170] Contract Review and Risk Management. https://www.hg.org/ article.asp?id=5454 (accessed June 22, 2018).

[171] Velykanova, M. M. 2017. Detection and Identification as a Stage of Risk Management. *Journal of the Kyiv University of Law* 3: 24-27.

and exceptions to certain rules are tracked in time. Monitoring reports should be regular, timely, accurate and informative and they must be provided to appropriate officials to take the necessary steps[172].

Risk monitoring and control should be carried out in relation to both internal and external risk factors. In this case, based on that, much of the external factors are beyond the control of the bank and the bank cannot have full confidence about the results of future events that may affect its operations and the timing of their occurrence, the National Bank of Ukraine obliged banks to take into account the possibility of extreme circumstances (stress-scenario) and develop appropriate emergency measures in the form of a contingency plan. Such action plans are an integral part of the Bank's risk control mechanisms. In order to prevent internal stress, the bank should monitor risks to ensure a reasonable and reliable relationship between its overall risk parameters and capital, financial resources and financial results (revenues) through appropriate control mechanisms[173].

An integral part (stage) of risk management is their optimization and minimization. Risk minimization in the scientific literature refers to a set of various measures aimed at, on the one hand, eliminating and (or) reducing to an acceptable state the impact of adverse circumstances that impede satisfaction of interest, and on the other, the use of favorable circumstances (opportunities) for the most effective and full satisfaction of interest. Minimizing the risks, the stakeholder influences the situation of

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[172] **National Bank of Ukraine. Methodological Guidelines for the Inspection of Banks "Risks Assessment System". No. 104. March 15, 2004. http://zakon3.rada.gov.ua/laws/show/v0104500 -04.**

[173] **National Bank of Ukraine. On Approval of Methodical Recommendations on Organization and Functioning of Risk Management Systems in Banks of Ukraine. No. 361. August 2, 2004. http://zakon2.rada.gov.ua/laws/show/v0361500-04.**

uncertainty of the result in order to obtain the most positive effect both from his behavior and from the behavior of other persons with whom he interacts[174].

In the AS / NZS 4360 standard, this step is seen as identifying possible options for risk exposure, selecting the best ones, developing risk impact plans and implementing them[175]. In DSTU ISO Guide 73: 2013 (ISO Guide 73:2009, IDT) National Standard of Ukraine. Risk Management. The Dictionary of Terms[176] in Section 3.8.1 Risk Management (Impact on Risk) is understood as a risk modification process that may include: 1) risk avoidance by deciding not to start or continue activities that give rise to risk; 2) taking over or increasing the risk to take advantage of the opportunity; 3) eliminating the source of risk; 4) change of credibility; 5) change of consequences; 6) risk sharing with one or more other parties (covering contracts and risk financing); 7) risk retention on the basis of reasonable decision». Handling the risk of adverse effects is sometimes called as "risk mitigation", "risk elimination", "risk prevention" and "risk reduction". Risk optimization of banks involves the following risk-income ratio when profitability is maximized for a given specified level of risk or risk is minimized, adoption of which is necessary to ensure the desired level of profitability. However, for certain types of risk, such as legal risk, optimization is not possible due to the very nature of such risk. This is due to the fact that the risk that

[174] Bushev, A. Ju. 2008. Basics of Risk Management in Law. http://ppt.ru/news/60894 (accessed July 16, 2017).
[175] AS/NZS 4360:2004. Risk Management [issued by Standards Australia]. Australien Handbook, HB 254-2003. http://broadleaf.com.au/old/pdfs/trng_tuts/tut.standard.pdf (accessed July 22, 2017).
[176] Risk management. Dictionary of Terms (ISO Guide 73:2009, IDT). DSTU ISO Guide 73:2013. Ministry of Economic Development of Ukraine.

causes legal consequences is not quantifiable, and therefore it is impossible to calculate it using mathematical formulas. Moreover, as N.I. Maydanyk notes, these risks do not have an upside component and their occurrence will almost always be a loss[177]. In this regard, the management of such risks has its own specificity. Particularly, the use of formal calculation and analytical methods and tools is not only impractical but also impossible. In these cases, they resort to minimization, that is, to reduce such risk to a certain threshold level in order to bear the least cost.

Minimization of risks in banking is possible in the following ways: 1) cancellation – refusal to take a risky measure; 2) loss prevention and control - preventive and further actions caused by the need to prevent negative consequences, to avoid accidents, to control their size, if losses already occur or are imminent; 3) insurance – a waiver of a portion of one's income for risk avoidance; 4) absorption - recognition of the allowable loss and refusal of its insurance (when the amount of damage is small and it can be neglected)[178].

Cancellation (rejection of risk) or avoidance of risk should be understood as a reasonable decision not to participate in or withdraw from an activity in order not to be exposed to a specific risk. Risk avoidance may be based on a risk assessment and / or legal and regulatory requirements. It is in this sense of risk avoidance that the DSTU ISO Guide 73: 2013 (ISO Guide 73: 2009, IDT) National Standard of Ukraine is considered. Risk management. Dictionary of Terms[179]. Loss prevention

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[177] Maydanyk, N. I. 2015. Management of Legal Risks in Entrepreneurial Activity. *The Almanac of Civil Studies: A Collection of Articles* 6: 483–508.

[178] Matveev, P. S. 2014. Aleatory of Investment Contracts as a Characteristic Feature of Innovation Activity (Theoretical and Legal Analysis). *European perspectives* 10: 135–139.

[179] Risk management. Dictionary of Terms (ISO Guide 73:2009, IDT). DSTU ISO Guide 73:2013. Ministry of Economic Development of Ukraine.

and control, the purpose of which is to prevent adverse effects or to control their magnitude when losses are already occurring or imminent, are, by and large, risk financing. This method of minimization is associated with the introduction of concerted measures to provide funds to overcome or modify the financial consequences in the event of their occurrence. Such a standard-based understanding of risk finance is inherently the creation of contingency funds, which, in fact, accumulate the funds needed to minimize the negative financial impact of the risk (e.g., for penalties, compensation payments, etc.)[180]. Insurance is one of the methods of risk sharing whereby agreed risk is shared with other entities. In doing so, there is a transfer of risks to a third party, who accepts them for a fee. Typically, such a fee is feasible for the policyholder, and in the event of an insured event, the amount of insurance payments paid may be much lower than the damage that could be catastrophic for the policyholder. Risk absorption or risk retention involves the acceptance of costs of the losses caused by a specific risk.

Risk retention involves accepting residual risks (those that remain after the risk has been processed). The level of risk retained may depend on the risk criteria, which are, in turn, the baseline requirements against which the importance of the risk is assessed. Such criteria may be set against standards, laws, policies and other requirements[181].

Conclusions

[180] Risk management. Dictionary of Terms (ISO Guide 73:2009, IDT). DSTU ISO Guide 73:2013. Ministry of Economic Development of Ukraine.

[181] Risk management. Dictionary of Terms (ISO Guide 73:2009, IDT). DSTU ISO Guide 73:2013. Ministry of Economic Development of Ukraine.

The analysis of the current legislation of Ukraine and doctrinal provisions allowed us to state that the legal management of banking risks should be understood as defined by legal acts, acts of legislation and legal transactions of procedure, which establish the order of actions aimed at orderly impact on risks in the banking sector, which is a legal manifestation of the normative consolidation of factual (economic, ethical, etc.) relations defined by acts of legislation (laws, bylaws), transactions (contracts, etc.), local legal acts (statutes, regulations of legal entities).

Risk management in banking is a purposeful process of identifying, assessing, controlling and monitoring risks, their optimizing or minimizing in order to respond adequately and effectively to global and internal challenges. A feature of risk management in banking is a sufficiently detailed legal regulation of both the system and the procedure of risk management. The basic principles of risk management in banking, which are fixed by the current legislation, are efficiency, complexity, adequacy and continuity, which are implemented at the stages of risk identification, assessment, control and monitoring, risk optimization or minimization. Each stage has its own tasks and procedure.

Identification of risks involves the establishment of changes in the structure of risk, signs of a particular risk, forecasting the possible consequences of the risk and their severity.

Risk assessment is to find out the nature of the risk, to identify the features of its implementation, research of the revealed signs of risk, establishment of a kind of risk, its interrelation with other risks. The purpose of this phase is to provide an understanding of the risks, their causes, consequences and probabilities. Risk assessment is carried out at general and specific levels and must be historical, current and prospective.

Risk control and monitoring is a response to risk that occurs through the establishment of the "quality" of the risk object, the presence of contradictions, collisions or other factors that can provoke a risk situation, its development or inability to influence it. The purpose of risk control and monitoring is to identify the source of the risk, its characteristics, features of manifestation, etc., which influences the choice of effective methods of impact. As a result, risks are anticipated and avoided.

Optimization and minimization of banks' risks takes place when it is impossible to avoid risks and involves the elimination or reduction of risk to an acceptable state while maximizing profitability for a given level of risk.

Based on what that Ukraine has not developed a culture of risk management, has not developed appropriate risk management tools, lacks an understanding of risk management as a key function of control and decision-making inherent in the European banking system, it is urgent to introduce positive experience in building an effective risk management system. Ukraine has already taken some steps towards the formation of such a system, particularly, adopted a number of regulations that are the legal basis of the risk management system.

However, no less it is important for effective risk management in banking to create an effective management system with clear regulation of the functions and powers of each of its elements. The development of criteria for the construction of such a system, the distribution of functions and the principles of interaction of its structural elements is a subject for further scientific research.

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THE ROLE OF FACT-FINDING COMMITTEES IN GOVERNMENT PERFORMANCE CONTROL IN EGYPT AND JORDAN

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Abstract

Parliamentary investigation is one of the essential means of parliamentary control of government performance through which the parliament is able to discover by itself divergencies, infringements, and

mistakes committed by the government, by one of its ministers, or by any other executive body.

Thus, through such committees, the parliament receives the information necessary to decide on any subject within duties of the government. If mistakes, divergencies, or corruption in government performance, is revealed by the fact-finding committee report, then queries and investigations can be addressed to the minister in charge, or to the premier himself and that might lead to minister ousting or government dissolution. Such things were explicitly stated in the Egyptian constitution in accordance with parliamentary internal regulations, unlike Jordanian constitution which never stated that, despite practicing it in reality. The internal regulations of both Jordanian senate and parliament can create them as ad-hoc committees.

This study highlights the significance of the aforementioned method and urges the Jordanian legislator to explicitly include it in the constitution.

Keywords: Ministerial responsibility; Parliament, Parliamentary investigation committees; Parliamentary control; Parliamentary system.

1.0 Introduction

Parliamentary system is founded on equilibrium and cooperation between the two authorities: legislative and executive, in addition to the mutual control between them. Each authority has its own means of influencing the other for the sake of common interest, general policy, and objectives of the state whose purpose is to serve its citizens.

One of the important means which the legislative authority has to control the work of its executive counterpart is forming fact-finding committees which have the right to practice their role of control.

The goal behind forming such committees is to examine government policy and performance. Through such committees, the parliament can determine its stance towards the results investigation committees come up to. In fact, investigation is one of the rights by which the parliament comes to understand the nature of the problems that need a decision to be taken.

The history of such types of investigation committees, according to books of history, goes back to 1689 when king Edward II of England was the first to form a committee to oversee state bodies. Mismanagement of war with Ireland was the reason behind forming enquiry and investigation committees. France came second when in 1828 it formed an investigatory committee to look into some economic offences.

Such a control method was carried over to parliamentary states like Egypt and Jordan. Each of these two countries adopted a developed parliamentary system in which the head of state practices actual authorities, besides the one the ministry does.

Thus, the role of these committees was not symbolic or honorary like the traditional one prevailing England, the cradle of parliamentary system.

1.1 Significance of the study

The significance of the current study lies in its focus on one of the significant means of control by which the legislative authority confronts the executive one. Through the investigations conducted by fact-finding committees, the parliament can pinpoint the mistakes and divergencies the

executive authority falls in, in preparation for penalizing it to serve individual and state interest.

1.2 Objectives of the study

This study aims to shed light on parliamentary investigation, as a means of parliament control, through determining its nature, principles, procedures, and the result it comes up to, as applied by the political systems of Egypt and Jordan which do not explicitly state that, though they practice it in reality.

1.3 Questions of the study

1. **What does parliamentary investigation mean?**
2. **What are the types of parliamentary investigation?**
3. **What are the foundations of parliamentary investigation?**
4. **What are the procedures for requesting parliamentary investigation?**
5. **What are the results of parliamentary investigation?**

1.4 Problem of the study

Although parliamentary investigation is one of the most important means of parliament control of government work, yet Jordanian constitution besides the internal system of Jordanian parliament of 2013 and that of the senate 2014, never explicitly adopted such a means and never included special regulations regarding fact finding. Such a means has been adopted by both assemblies. The current research attempts to elucidate the significance of the means, its procedures, and the important outcomes ensuing from parliamentary control.

2.0 Study methodology

This part of the study comprises the following:

2.1 First topic: What is the status of parliamentary investigation?

2.1.1 First requisite: meaning of parliamentary investigation

2.1.2 Second requisite foundations of parliamentary investigation

2.2 Second topic: Procedures of parliamentary investigation and its result

2.2.1 First requisite: Procedures for requesting parliamentary investigation

2.2.2 Second requisite: Result of parliamentary investigation

3.0 Results and recommendations

2.1 First topic: the status of parliamentary investigation

Parliamentary investigation is a collective parliamentary control of government performance. It is the means by which the parliament can, by itself, unveil divergencies and infringements committed by the government or by any of its ministers, as presented by investigation committees according to which the parliament takes decisions. (182)

The investigation committee plays a multi-functional role as it doesn't confine itself to queries and enquiries addressed to certain ministers, but involves the government as a whole. Another thing that distinguishes this investigatory method is that it doesn't depend only on the data presented by the ministers, but the parliament itself checks the validity of the data from their sources. Parliamentary investigation is a natural outcome of the parliament practicing its duty which doesn't need any constitutional provision for permission. (183)

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(182) Prelot, M. & Boulouis, J. (2006). Intuitions politiques et droit constitutional. P. 746. Paris: Dalloz.

(183) Shatanawi, Ali. (2013). Political systems and Jordanian constitution and comparison. (1st Vol.) 263. Amman: Dar Wael for publishing.

In article (135) of (2014) Egyptian constitution stipulated that: "the parliament has the right to form a fact-finding committee to investigate a general issue or the activities of a certain general administrative body, or general project bodies to come up with facts and to provide the parliament with the financial, administrative, or economic situation of that body so as to take the necessary measures in this respect.

To perform its duties, the committee needs to collect suitable evidences and to listen to witnesses. All parties involved need to cooperate and to put documents at the disposal of the committee.

Chapter seven of the internal regulation of the Egyptian parliament dealt with that issue in articles (2040-244), concerning fact-finding committees.

As for the Jordanian constitution, it didn't discuss the issue of parliamentary control of the executive authority. In addition, the internal system of 2013 of Jordanian parliament never included any laws pertaining fact-finding committees, but in article (62) of that regulation, it stated that "the parliament can form ad-hoc committees which it deems necessary, determining its duties, responsibilities and members dissolving themselves wherever the job has been done".

The situation is the same with the internal system of 2014 of Jordanian senate in whose article (36) stated that. "The senate can form ad-hoc committees that it deems necessary, specifying their duties and members, dissolving themselves when the job has been done".

The eleventh Jordanian parliament (1993-1989) formed, for the first time, an investigation committee to look into administration and financial corruption in state bodies. That committee comprised a

chairman and seven members and was authorized to investigate all infringements committed by present and past ministers.

The parliament based forming that committee on its natural right to form investigation ones. (184)

Now, the researchers will discuss in detail the requisites stated in the methodology starting with:

2.1.1 FIRST REQUISITE: PARLIAMENTARY INVESTIGATION, MEANING AND TYPES.

The (2014) Egyptian constitution didn't include a definition for parliamentary investigation the same as the case was with the regulations of the Egyptian parliament 2016 that didn't either. Similarly, the Jordanian constitution of 1952 and its amendments didn't include any definition of the term; in origin, it didn't refer to this method as a means of parliamentary control of government work.

Besides, the internal system of both, Jordanian parliament (2013) and senate assembly of (2014), didn't refer to that either.

In the absence of any constitutional or regulatory definition for parliamentary investigations, many jurists attempted to put down a comprehensive definition for the term of which the researchers opted for the following:

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(184) Masaeed, Farhan Nazzal. (2006). Political Control over Executive Authority Work in Jordanian parliamentary system: A comparative study. (Unpublished dissertation) p. 238. Amman Arab University, Jordan.

A French jurist defined it as "An investigation conducted by the parliament or by some of its members who were appointed for a specific errand which might include every issue in the state". (185)

An Arab jurist defined it as: It is a committee formed to shed light on certain works, or it is an ad-hoc committee formed in accordance with a proposition from the legislative council to collect data on a certain issue and to present a final report on its meetings". (186) In other words, "It is a fact-finding process on a certain situation of executive authority bodies practiced by a certain number of legislative council members to detect any offences or political infringements and to propose suggestions to remedy any damage and to avoid certain mistakes and report on that. (187)

There are other jurists who confuse the definition of parliamentary investigation with other means of control such as questioning and enquiry. They provide definitions which do not distinguish this type of control from others. For them it is "a procedure to which the parliament resorts for enlightenment in order to determine the stance accordingly.

The definition that provides a clear picture of parliamentary investigation is that of political encyclopedia which defines it as: "one form of control which the parliament practices on the government through forming an investigatory committee that comprises members elected by the parliament. Its aim is to detect the materialistic and spiritual elements in any case of general interest. This committee has the right to have access

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(185) Piere, E., & Cit par Desandar J. Parliamentaries du enqut et de controlee n droit Francais, NED, no, 1976, P.a.
(186) Sallam, Ihab Zaki. (N.d) political control over works of Executive authority in the parliamentary system. P.119.
(187) Ibid.

to all documents and to summon officials in charge to clarify all cases and circumstance. [188]

Another clear and comprehensive definition of parliamentary investigation is that which considers it to be: "one of the methods of parliamentary control in which the parliament authorizes a committee of its members to investigate a certain issue to detect political, managerial, or financial, if any, to be sure about the facts by itself. The committee has to submit a report to the parliament once the job is over, so as to decide what to do regarding the issue being investigated. [189]

From the preceding constitutional and regulatory statements related to parliamentary investigation and different judicial definitions, one can conclude the following:

First- Investigation committees are investigatory ones formed from members of the parliament as a means of constitutional right to face the executive authority. Such committees are entitled to check various governmental activities in order to come to truth. It is neither logical nor legal that the parliament authorizes the government to check by itself any of its activities because in that case it will be the judge and defendant at the same time and that violates its role of control over the government. [190]

Second – Forming the fact-finding committee is an issue that is subject to parliament approval. The nineth Egyptian people's assembly in

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([188]) Kayyali, Abdul Wahab. (1985). Encyclopedia of Politics, First part, (Vol. 2), p. 699. Beirut Arab Institution for studies and Ideology.

([189]) Mohammed, Sayyed Ibrahim. (2014). Parliamentary Investigation: A Comparative study. (Unpublished Dissertation), p. 22, Ein Shams University.

([190]) Bahri, Hasan Mustafa. (2006). Mutual Control between the two authorities, the legislative and the executive. (Unpublished Dissertation). P. 761. Ein Shams University.

its fourth regular session held on 2/5/2009, the agriculture and irrigation committee, was authorized to make a field visit to the plant quarantine to check the imported wheat shipment to find out whether there was a need for a fact-finding committee to be formed in light of the field visit. (191)

Third-Forming investigation committees has been a natural duty of parliament members which they practice even if it isn't clearly stated in the constitution. (192) For example, 1952 Jordanian constitution with its amendments didn't stipulate that investigation committees are means of parliamentary control over the government. Despite that, the internal system of the two Jordanian assemblies, the parliament and the senate included articles concerning that issue.

Fourth- Investigation committees are in origin ad-hoc ones with a specified deadline to finish the duty for which they were authorized. The significance of the deadline is that it puts an end to any irrelevant discussions which might have made things more difficult, had the issue of investigation not been settled, since that could be of great interest for the public or of supreme interest of the state. (193)

Fifth, parliamentary investigation committees differ from those of legal ones, as they have no relation to investigations conducted by the legislative authority in compliance with separation of powers. It is set that the legislative authority has no right to interfere in the jurisdiction of the

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(191) Muhannadi, Ibrahim. (2012). Parliamentary control over works of the executive authority in Qatar Constitutional system: A comparative study. (Unpublished Dissertation). P. 243.

(192) Prelot, M. & Boulouis, J. p.105.

(193) Mhuannadi, Ibrahim. (2012) Parliamentary control over works of Qatar constitutional system: A Comparative study.

state. It handles the issue within its competence without trespassing theirs. (194)

With regard to the second question: what are the types of parliamentary investigations? The researchers found out that they are of three types which differ in accordance with content. These are: investigatory, legislative, electoral, and political. The researchers attempt to clarify each of them as follows:

1- Legislative investigation: it is the procedure the legislative authority adopts in order to put down certain rules that comply with reality, as it is one of its legislative rights. (195)

This type of investigation is used in Egypt (in the form of exploration and confrontation committees) that look into a certain important issue according to article (245) of internal regulation of the Egyptian parliament 2016 which stated: "the assembly, based on a proposal of the speaker or of (20) members at least, approve of forming an exploratory and confrontation committee to look into an issue of the assembly competence. The speaker of the parliament issues a decree to form a committee of 3-10 members of the parliament taking into consideration specialization and experience relevant to the issue for which the committee was formed. The speaker has also to include members from opponents and independents, the number is less than ten. He also nominates the chairman, assigns duty, and duration of work.

The speaker notifies the assembly, in the next session, of the decision of forming that committee.

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(194) Abdul Sadeq, Sami. (1978). Principles of Parliamentary Practice. 1st. ed, 405. Dar Al-Nahda Al-Arabiya.

(195) Robert, Amitz. (1971). Les Enqutes Parlimentaires, d, ordre, p. 11. Paris.

The general secretariat of the exploratory and confrontation committee is selected from its members or from employees of the assembly general secretariat in accordance with the speaker's suggestion.

Thus, the legislative authority, in its capacity of being independent, can enact binding rules while the executive authority can conduct several investigations into different legal economic, health, and agricultural issues, etc. (196)

The legislative investigation may include all issues submitted to the parliament for draft legislation, prior to parliament approval. The legislative authority must deal with issues of general nature such as financial, management corruption or a political event. How grievous these issues are is left for the legislative authority to assess and decide if it needs parliamentary investigation or not. (197)

2- Electoral investigation: It is the investigation the parliament conducts to unravel the status of members whose membership is appealed against, for the investigation committee detects the legality of their election.

This type of investigation is not functioning in Egypt any more after the court of cassation was authorized to judge the validity of parliament membership as stipulated in article (107) of the Egyptian constitution 2014. It is not functioning in Jordan either after the constitutional amendments of 1/10/2011. In accordance with article (71) of Jordanian constitution, the court of appeal of the electorate, to which the member

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(196) Shatanawi, Nabeel. (2004). The Role of Parliamentary investigation committees over parliament control. An article published in Bahrain Law Journal, (1), 2, P.191.

(197) Tamawi, Suleiman. (1960). Principles of Egyptian Constitutional and Federal Law. 1st edition, (n.d), P.311.

appealed against belongs, can detect the validity of electing that member .[198]

3- Political investigation: It is the work the fact-finding committee or the investigation committee does to check situations inside bodies of the executive authority to unravel any political infringements or divergencies.

Such an investigation does not include ordinary individuals, for the political investigation aims to detect the extent to which the government or its associates apply the rule in a certain circumstance. It is what the fact-finding committee does to detect political infringements. [199]

Some criticized this classification [200]. They see that the legislative investigation is not a control one, but a preparatory type whose aim is to draft legislative parliamentary rules. Such an act helps the parliament to better draft the text that complies with reality, it is not drafted to monitor execution of rules, but a preparatory act for such rules.

In addition, the electoral investigation is neither considered an act of control, nor a legislative one. It is beyond the domain of legislative authority the because it is Judiciary as stated before. Generally, constitutions authorize judiciary to decide on membership in the parliament. As a result, holders of this opinion see that parliamentary investigation is confined to politics only.

([198]) Khatib, Numan Ahmed. (2017). Al-Baseet in the Constitutional system. 2nd edition, p.244. Amman: Dar Al-Thaqafa.

([199]) Abdul Hamid, Husni. (2005). Means of Parliamentary Control Over Executive. Authority and its Practices in the Constitution of Bahrain kingdom: A Comparative Study. First edition, p.24. (N.p).

([200]) Hasabo, Amr. Ahmed. (1994). Parliamentary committee: A comparative study. An article published in spirit of Laws (10), p. 124. Tanta University, Egypt.

Others [201] see that the difference between legal, legislative, and judicial investigations is similar to that between control, legislative, and Jurisprudential acts. Whenever there is an act of control, it will be a political one.

The researchers see that parliamentary investigation is limitless as long as it is within the framework of the government, though the objectives vary. The parliament might aim at investigating financial, management, economic or political default of any of government bodies. It might also check legality of the procedures followed in the process of electing some parliament members. All these types are known as parliamentary investigation, though the last one might be labeled an electoral one. The opinion poll that the parliament conducts to measure the suitability of the status quo or to investigate the need for enacting a new law is also a parliamentary investigation. [202]

Based on that legislative and electoral investigations are parliamentary work control as they are conducted by the parliament in light of the authority it enjoys in accordance with provisions. This means diversification of parliamentary investigation that copes with content and goal. It might be financial, managerial, economic, or political. It might also be a legislative parliamentary investigation. All these types are in fact parliamentary even though that some of them are called legislative or electoral. [203]

([201]) Abdul Baqi, Faris Mohammed. Parliamentary Investigation. P.23.

([202]) Bseiso, Amr. Ahmed. (1994). Parliamentary committee: A comparative study. An article published in spirit of Laws (10), p. 124. Tanta University, Egypt.

([203]) Jadeed, Fadi. (2019). An Indepth study in the parliamentary system, Lectures given to M.A students at the Faculty of Law in Damascus University, p. 58

In summary, parliamentary investigation is a phenomenon of political type which means that every investigation conducted by a political body is politically oriented without taking into consideration any judiciary.

2.1.2 Second requisite: Foundations of parliamentary investigation.

Parliamentary investigations extend to all affairs of the state, especially when there is corruption in any of the state bodies, ministries, or establishments. In such a case, the parliament forms a special committee, called parliamentary committee, to look into the issue for which it was formed. It enjoys all the power the constitution bestows upon it. The committee at the end reports to the parliament what it has come up to so as to take a decision on the issue for which it was formed. (204) The researchers will tackle foundations of parliamentary investigation through the following:

FIRST BRANCH: PARLIAMENTARY INVESTIGATION COMMITTEE

Article (135) of the 2014 Egyptian constitution stipulated that "The parliament has the right to form a special committee or to authorize one of its committees to investigate a public issue or to examine activities of any administrative public bodies or public projects in order to find facts on a special issue and to report to the parliament on the financial,

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(204) Jadeed, Fadi, p. 58.

administrative, and economic conditions of the case investigated so as to take decisions accordingly.

According to article (241) of the Egyptian constitution, the parliamentary or fact-finding committees can be formed from members of the parliament in response to a request from the general committee, any other committees, or in response to a request submitted to the speaker from (20) members at least. The number of the fact-finding committee members should not be less than seven or exceed (25). They are nominated by the assembly speaker whose nomination should take two basic principles into consideration: first, experience and specialization of those selected for the committee. Second, the selection should include the different political attitudes of members of the parliament.

Thus, in forming the committee, all parliamentary bodies, including opponents and independents, should be included whenever the number is less than ten. Anyway, at all circumstances, committee members shouldn't be less than seven or more than twenty-five. The minimal or maximal number is determined by the importance of the issue being investigated. (205)

Chairman of the committee determines formation, field, and work period. The committee chooses its secretariat from its members or from employees of the general secretariat of the assembly in accordance with chairman's proposition.

Article (62) of the internal regulation of 2013 Jordanian parliament stipulated that "the assembly has the right to form ad-hoc committees that it deems necessary determining its duties, number of members, and

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([205]) Saleh, Abdel Malek. (2003). The Constitutional system and political Institutions in Kuwait. 2ns edition, p. 189,
Dar Al-Kutub .

termination period. This is the same with the internal system of the Jordanian senate of 2014 whose article (36) didn't specify special provisions for forming a parliamentary investigation committee or determine its duties and functioning period, but provisions related to committee foundation are governed by internal regulations of both assemblies, parliament and senate. (206)

From the previously discussed issue, it is made clear that in both Jordan and Egypt an investigation committee is formed from members of the parliament. But committee members in Egypt are limited to (7) minimally and (25) maximally, in accordance with the issue being investigated. It also takes into consideration that parliamentary bodies including opponents and independents should be represented. But in Jordan, such things were not tackled. The researchers believe that the Jordanian legislator should take such issues into consideration and explicitly state that to allow such a committee to effectively work to achieve the aspired goals. (207)

SECOND BRANCH: THE ISSUE ON WHICH THE PARLIAMENTARY INVESTIGATION FOCUSES

Because parliamentary investigation is one of parliament control over government performance, and because it is an inevitable right of the parliament to propose rules, the issue on which the investigation focuses is important for the executive body. But this committee shouldn't go beyond

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(206) Yusuf, Medhat Ahmed. Means of parliamentary control over works. P. 292.
(207) Zubi, Jehan Khalid. (2011). The influence of parliamentary Control in consolidating Democracy: A Comparative
Study. (Unpublished Dissertation) P. 97, Amman Arab University, Jordan.

the authority it is given by the legislative council regarding the specified field and time. (208) Thus, the issue of investigation should inevitably be within the competence of parliament, be it legislative, financial, or supervisory. (209)

The parliamentary control, being a self-political one, can extend to overall works of the executive authority whether they were political or administrative, at the stage of preparation, not implemented or implemented. The minister's disclosure of his work being ministerial or not, is of no significance; whether that work was related to internal or external policy, or to security. (210)

Eventually, the issue on which the parliamentary investigation focuses should meet the following conditions:

First, the parliament investigation should be linked to the activity practiced by the executive authority whether that activity was administrative or political, issued by political bodies or public institutions. Activities of past or resigned government are also liable to investigation, whether the practices happened in the era of a past legislative council, other than the one in whose era the investigation happens. (211)

The subject of parliamentary investigation should not necessarily be legal violation. In this respect, it differs from the Judicial one; the parliamentary with the necessary information on the actual financial,

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(208) Fawzi, Salah. Parliament …. P. 151.
(209) Salam, Zaki Ihab. Political supervision over Executive Authority Performance in the Parliamentary System, p. 131.
(210) Ibid.
(211) Mohammed, Sayyed Mohammed. Parliamentary investigation, p. 134.

administrative, or economic situation of any body, public institution, or any executive body. (212)

Parliamentary investigation extends to cover sovereignty and political affairs of the executive authority. (213) An example of that is the investigatory committee formed by the Jordanian parliament for the Dead Sea flood event in 2018 in which twenty school children died. The report of that committee unveiled that the ministers of education, tourism, and antiquities were morally and politically held responsible for the event. (214)

Parliamentary investigation is not confined to what people in charge say within the limits of their powers, but involves control of behavior of executive authority members and their own personal lives because that affects public interest. If any minister does wrong or an offence in person, that will have apolitical reverberation for which he will be subject to parliament investigation.

Jurisdiction assures that the job of parliamentary investigation committees affects all fields of the parliament including legal persons listed on administration of public facilities.

Second: No parliamentary investigation in any issue within the power of judicial authority

This condition is one of the principles of separating powers and Jurisdiction independence. Article (184) of 2014 Egyptian constitution stipulates that "the Judiciary authority is independent and practiced by courts…" Article (27) of the Jordanian constitution and its amendments

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(212) Abu Yunis, Mohammed. Parliamentary Control of Government performance, p.125.
(213) Museilem, Naser Abdullah. (2008). The Efficacy Extent of Parliamentary Control over Government Performance.
(214) Jordanian Parliament Website.

also stipulated that "Judicial authority is independent and practiced by courts…" (215)

All constitutions assign dispute settlements only to the judiciary authority which has a complete control over that; Neither the legislative nor the executive authority can interfere, thus, securing Jurisdiction independence. (216)

There is no provision in the constitution allows the parliament to control Judiciary authority. All jurists agree that the parliament can't embark investigation on any issue of the judiciary competence as that mixes up competencies, contradicts the principle of separation of powers, and encroaches upon individual's freedom and rights. (217)

Parliamentary conventions in both Egypt and Jordan didn't investigate dispute issues presented to courts or arbitration bodies because these are legally considered Judiciary.

Third: The subject of Parliamentary investigation should not have been dealt with before

This does not have to occur because it will be a waste of time unless new evidences or events which the previous committee didn't know about or might influence investigations are revealed, then a new parliamentary investigation is allowable. Despite the significance of such a condition, yet neither the Egyptian system nor the Jordanian tackled it.

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(215) Hasan, Mohammed Qadir. (1984). Premier in contemporary Political Systems. (Unpublished Dissertation)
Cairo University, P. 361.

(216) Sheikha, Ibrahim Abdul Aziz. (2003). Analysis of Egyptian Constitution System, 3rd edition, p.308. Alexandria:
Munshaat AlMaarif.

(217) Azab, Faleh Abdulla. Limits of parliamentary control in Kuwait constitution. P. 161.

THIRD BRANCH: PARLIAMENTARY INVESTIGATION POWERS

Because parliamentary investigation committees are one of the means of parliament control, they are used to detect activities of the executive committee. The parliament investigation committees should be granted the powers by which they could achieve their goals or else such powers will be useless. (218)

Thus, Constitutions and parliaments' internal regulations granted them powers similar to those of the Egyptian legislator. Article (135) of 2014 constitution stipulated that: "The committee, in order to perform its task effectively, can collect the testimonies that it deems necessary and listen to whoever has anything to say; all bodies need to positively respond and provide the documents related to that…"

First: Investigation committee powers pertaining documents

Parliamentary investigation committees have the right to check the documents and unveil the data needed for their job. Due to the significance of the powers the committees enjoy in activating parliamentary investigation, the constitution legislator upgraded it to the level of constitutional right as noted in article (135) of 2014 Egyptian constitution. Article (242) of the internal regulations of 2016 Egyptian parliament stipulated that "The fact-finding committee, in order to do its duties well, can collect whatever evidences it deems necessary, listen to

(218) Omran, Faris Mohammed.P. 122.

anyone who has a anything on the issue under investigation and to make any field visits or enquiries. (219)

If the fact-finding committee failed to submit its report to the parliament in the due time, it has to clarify the obstacles it encountered to the parliament which will bear expenses of field visit the fact-finding committee made.

Item (D), article (69) of the internal system of 2013 Jordanian parliament stipulated that "the committee has the right to ask the minister or any competent person to provide it with the documents and information it asks for. If the minister or the person in charge didn't show up, decline from providing the required, or didn't come for no reason, the committee submits the issue to the speaker of the parliament who, in turn, gives it priority and presents it for discussion in the first coming meeting. The same item was also reiterated in item (D) article (40) of Jordanian senate 2014.

Thus, the system of the two parliaments, the Egyptian and the Jordanian, gave the investigation committee a wide range of authorities to be able to achieve its goals. (220)

Regarding the penalty against the official or minister who doesn't positively meet the needs of parliamentary investigation committees, the Egyptian system was not decisive but left it open. But in Jordan, if such a thing happens, the committee presents the case to the speaker of the

(219) Abu Yunus, Mohammed Bahi. The parliamentary control of Government performance, p. 128.
(220) Jadeed, Fadi. P. 47.

parliament to be presented in the first parliamentary meeting, given priority over all other issues. (221)

Second-Powers of parliamentary investigation committees towards persons

Both systems of the Egyptian and Jordanian parliaments assure that the committee has the right to summon the competent minister or whoever it needs to listen to, but they didn't include any item in which the committee can coerce any witness to attend. They didn't either refer to any penalty in the absence of cooperation from witnesses as that deactivates performance of those committees. (222)

Based on what preceded, the researchers call the Egyptian and Jordanian legislators to explicitly include statements in the constitution provisions that penalize whoever doesn't cooperate with parliamentary investigation committees. They also urge them to include penalty against head or official who doesn't cooperate with the committee because that will grant it with the power needed to achieve its goals.

Third powers of parliamentary investigation committees towards places

With regard to this issue, the committee has the right to move to any geographical area in the country and to make field visits and conduct interviews. Article (242) of the internal regulation of the Egyptian parliament (2016) stipulated that "To carry out its duties, the fact-finding

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(221) Kalthoom, Faisal. (2019). Constitutional Law and Political Systems. Damascus University publications, 4th edition, p. 569.

(222) Hasan, Mohammed Qadir. P. 58.

committee can collect evidences and can listen to whom it ever deems necessary for its mission, make field visits and conduct investigation…"

But the internal regulation of both Jordanian Parliament (2013) and senate (2014) didn't mention anything towards places.

Fourth branch: Confidentiality of parliamentary investigation committees meetings

Confidentiality implies that the committee should perform its duties away from the public and never disclose what it comes up tot from recommendations or instructions to media, press, radio, T.V. or websites, etc. (223)

Despite confidentiality of investigation, yet there are cases in which this confidentiality can be violated, when public interest overweighs disclosing some information. In such a case, the public interest dictates the disclosure of confidential things by which citizens come to know about the wrongdoings and infringements. (224)

In fact, two trends regarding confidentiality of fact-finding committees emerged:

First trend (225): According to this, actions of the committees should be made public to enable control means to achieve their goals by exposing the injustice inflicted upon some by the executive authority. In addition, the disclosure secures an active and constant revision for the actions of that authority.

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(223) Kalthoom, Faisal. P. 572.

(224) Abu Yunes. (n.p).

(225) Sharqawi, Suad & Nasif Abdulla. (1994). Constitutional Law and Egyptian political systems: economy

Liberation and 1971 constitution. Cairo: Dar Al-Nahda Al-Arabiya P. 357.

Second trend [226]: According to this, meetings of the committees should be kept secret so as to ensure and deepen trust between the executive authority, specifically the ministry of concern, and the committee. The disclosure might aggravate public rage and dissatisfaction regarding the case being investigated. In addition, disclosure might influence the decision and recommendations so as to meet the desires of the public who is well informed with details of the investigations.

The researchers believe that adopting confidentiality or disclosure is dictated by the topic being investigated by the committee. Confidentiality is not favored in all situations, neither is disclosure. The former is needed to avoid harming public interest, the latter is needed to assure the public that investigation is conducted to serve public interest and to secure an opportunity for the investigated person to defend himself as parliamentary political investigations are linked to public interests. [227]

The Egyptian legislator adopted a balanced stance between confidentiality and disclosure. Article (57) of the internal regulation of the Egyptian parliament (2016) stated that "sessions of committees are non-public and should be attended only by its members and secretariat employees, chancellors and experts it might need, in compliance with the bylaws. Representatives of both press and media could not attend such meetings without a permission from the chairman. This provision complies with article (244) of Egyptian parliament regulations which stipulated that "excluding specific provisions stated in the regulation, all rules apply to fact-finding committees".

([226]) Omran, Faris Mohammed. P. 227.
([227]) Nasif, Abdulla. Range of Equilibrium between political Authority and Responsibility in Modern State. P. 357.

Confidentiality of activities of the committee doesn't prevent assembly's discussion of its report because in this case confidentiality contradicts with the objective of investigation. Confidentiality means that committee members should not disclose whatever information or discussions they are aware of, with regard to the committee activities. The discussion is a response to the committee's report and to what it came up to as that complies with provisions of article (243) of the Egyptian parliament regulations which stated "The assembly discusses reports of the fact-finding committee in its first session after submission".

As for Jordan, the internal regulation of Jordanian parliament (2013) didn't include any reference to confidentiality or disclosure of committees, but item (A) of article (67) mentioned that "attending meetings of the committee is confined to assembly members and committee secretary of each of them, in addition to experts needed". This item is quite identical with item (A) of article (38) of the senate's internal regulations. The researchers see that the Jordanian legislator left confidentiality or disclosure to the assembly in light of the topic of investigation.

2.2 SECOND TOPIC: PROCEDURES FOR REQUESTING PARLIAMENTARY INVESTIGATION RESULTS

Parliament regulations and bylaws determine some procedures to be followed in parliamentary investigation and in the discussion of committee report besides the result it came up to. The researchers will elucidate that in the following:

First requisite: procedures of requesting parliamentary investigation

Parliamentary investigation passes through stages which should be inevitably followed to enable the committee start its duties. The stages are:

First: submission of a request for parliamentary investigation

The Egyptian constitution of 2014 didn't include any indication to the person or the entity entitled to submit the request. The provision of article (135) stated that "the parliament has the right to form a special committee or authorize one of its committees to investigate a general project, an activity, or public bodies in order to fact find things on a certain topic and report to the parliament the actual financial, administrative or economic situation on that issue, in order to take a convenient decision in that respect…".

The internal regulation of (2016) Egyptian parliament determined who has the right to submit a request for parliamentary investigation. It stated that "excluding provisions or specific things in the regulation, a fact-finding committee can be formed in accordance with a decision from the parliament in response to a request from one of its other committees or upon a request submitted to the speaker of the parliament from at least twenty of its members."

Thus, submitting a request for parliamentary investigation is confined to the general committee as determined in articles from 24-27 of the Egyptian parliament 2016 bylaws. Those also specified the powers they enjoy. Other parliamentary committees have also the right to submit a request for an investigation committee. Those committees were mentioned in article (37) of the bylaws from which the researchers chose some such as: constitutional and legislative affairs committee, economic affairs, foreign affairs, defense and national security, media, culture and

ruins, tourism and civil aviation, health affairs, housing and public facilities, etc.

In addition to the general committee and others, twenty members of the parliament can also submit, in writing, a proposition to the speaker to conduct an investigation.

This reflects how the Egyptian system considers parliamentary investigation a collective means of control. [228] An example of forming an investigation committee upon the request of members was the one formed in the first parliament after the uprising of January 25, 2011 which was formed on January 23, 2012. The committee was headed by people's assembly deputy, Ashraf Thabet, to investigate Port Said events in which (73) persons were killed at the end of a football match between two teams: Al-Ahli and Al-Masri. [229]

One of the jurists indicated that there is nothing to prevent the president or the government to request to form a fact-finding committee. An example of that was that one formed in 1971 upon a request form the president, Anwar El-Sadat, regarding the sectarian strife that occurred in Khanka early 1970s. People's assembly decision to form that committee was issued on 13/11/1972.

Neither the bylaws of Jordanian parliament nor those of the senate, 2013, 2014, respectively, specified the entity that has the right to ask for a parliamentary investigation. In fact, the Jordanian legislator has to explicitly state that parliamentary investigation committees are important means of control over both authorities, the legislative and the executive.

Second requisite: Discussing Parliamentary investigation request

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([228]) Mohammed Sayyed. P. 242.

([229]) Abu Yunus, Mohammed. P. 135.

According to parliamentary traditions in Egypt, the parliament usually refers the investigation request to one of its committees, specialized in parliamentary investigation, which examines it submitting its report to the assembly to be discussed in the first session after submission. Priority will be given to the member who wishes to take part in the discussion and presents that in writing to the speaker prior to the scheduled time in accordance with procedures adopted in the discussion of any general issue. (230)

Bylaws of both Jordan Parliament 2013 and the senate 2014 didn't imply any method of discussing parliamentary investigation request because the legislator didn't refer to any mechanism pertaining that.

2.2.2 PARLIAMENTARY INVESTIGATION RESULT

When the investigation committee is through with its duty, it issues a report about the wrongdoings and divergencies committed by the executive body being investigated. The legislative committee takes the necessary measures accordingly. The researchers explain the procedure as follows:

FIRST PART: REPORT OF THE PARLIAMENTARY COMMITTEE

Parliamentary investigation committees are ad-hoc ones whose period differs from one parliament to another. For example, according to article (244) of Egyptian parliament 2016 bylaws, rules that apply to the qualitative committees apply to the fact-finding counterparts. This ensures

([230]) Azab, Faleh Adulla. P.182.

that the committee has to submit its repot during the period of time specified by the parliament, though this period can be extended in accordance with circumstances.

According to article (62) of the Jordanian parliament 2013 and article (36) of the senate, the parliament has the right to form ad-hoc committees specifying their duties and members.

Article (70) of 2013 parliament bylaws, stipulated that if the assembly or the executive office found out that one of the committees couldn't meet the deadline, it can extend it to enable that committee to achieve its goals. Article (41) of the senate reiterates the same thing.

Thus, the parliament is the authority which sets a deadline that can never be ignored. The Egyptian legislator did well when he mentioned that if the fact-finding committee failed to present its report on the due time, that committee had to prepare a report highlighting obstacles and reasons behind the delay. The researchers call for the Jordanian legislator to follow the steps of the Egyptian counterpart. (231)

Provisions of bylaws of the Egyptian parliament 2016 and those of Jordanian parliament 2013 and the senate 2014 didn't elaborate on how fact-finding committees can prepare their repots. Thus, there was no specific form in which it dumps its report. Therefore, there were committees that processed their reports in six sections, others in five, a third in three, and finally others in one.

For example, in Egypt the fact-finding committee processed its report on frozen meat import issue in five sections and the telephone deal on 30/12/1979, in two sections. (232)

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(231) Mohammed, Sayyed Mohammed. P.398.
(232) Omran, Faris Mohammed. P.377.

The internal regulations of the Egyptian parliament 2016 in article (243) provided some issues that must be mentioned in the report of the committee:

1- **Steps taken by the fact-finding committee on the issue referred to**
2- **What it found out regarding economic, financial, and administrative facts on the body being investigated**
3- **The extent to which the bodies investigated abide by rule domination, general plan, and state general budget**
4- **Suggestions to deal with negatives the committee discovered**

Article (72) of the bylaws of Jordanian parliament (2013) stipulated that the committee chairman submits to the speaker of the parliament a detailed report on every issue the committee was through with and ready to present to the assembly. The speaker has to include that in the minutes of the meeting in accordance with their arrivals giving priority for urgent projects.

Article (43) of the senate bylaws reiterated the same thing. It is clear that the Jordanian legislator did elucidate report specifics, but was satisfied with the report being detailed.

SECOND PART: DISCUSSING THE REPORT OF PARLIAMENTARY INVESTIGATION COMMITTEE

Article (68) of (2016) Egyptian parliament bylaws stipulates that "taking into account what is stated in the bylaws, the committee has to submit its report within one month from the date of reference, unless another date was specified by the assembly. If the set time passed and the report wasn't submitted, then the speaker has the right to ask the committee chairman about reasons behind the delay and to specify the

period needed for the committee to be through. The speaker can present the case to the parliament to decide on that…." [233]

The assembly discusses reports of parliament investigation committees in the first meeting after submission. After the discussion is over, the report can be either sent to the government to take what it deems appropriate, to refer it to public prosecution, or to move to agenda items. [234]

Article (72) of Jordanian (2013) Parliament bylaws and article (43) of senate (2014) bylaws never indicated that fact-finding committee reports need to be discussed, but instead stated that the speaker has to add those reports to the agenda in accordance with arrivals. Priority should be given to urgent projects.

Researchers would like finally to indicate that parliamentary investigations might reveal that the present laws are deficient thus urging the parliament to enact a new law to make for this deficiency.

The investigation might also reveal corruption in a ministry or in an affliated body. In such a case, the minister might be questioned and that could lead to withdraw confidence from the minister or the ministry as a whole.

An example of that is the investigation committee that was formed in 2003 to look into why Egypt failed to get any vote in the ballot for hosting world soccer cup to be held in 2010. The committee didn't get through with its task till November, 2004. The minister of youth was the one held accountable for the failure, but the parliament couldn't

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([233])Saleh, Othman Abdel Malik. Parliamentary Investigation. Kuwait University, (n.d) p. 137.

([234]) Jadeed, Fadi. P. 68.

politically do anything against him because he was no more a minister by then. (235)

It is noteworthy that political responsibility can't be raised against any minister as long as he is no more in office.

An example from Jordan is the report issued by the committee formed by the parliament in 1990 to investigate the prime minister, the minister of public works and finance minister regarding (Azraq-Jafer) road. The committee concluded that the defendants were held accountable as some members of the executive committee abused their power and wasted public money. (236)

3.0 Conclusion and Recommendations

The study provided a detailed discussion of the fact-finding committees as means of control of government performance in both Egypt and Jordan. The researcher highlighted status of parliamentary committees through definition, foundations, investigation procedures and results which it came up with that can be outlined in the following:

1- **Parliamentary investigation is one of the methods by which the parliament can oversee government performance through the committees it forms to detect infringements and wrongdoings of that government.**

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(235) Mohammed, Sayyed Ibrahim. P. 414.

(236) Adayleh, Ameen Salameh. (2010). Parliamentary Investigation Committees in Jordan in the Absence of Constitutional Mechanisms: A Comparative Study. An article published in Jordan Journal of Law and Political Sciences, (2), 4, 236.

2- **The Egyptian constitution explicitly stated that parliamentary committees, are means of control of the government, so it put down bylaws and procedures relevant to the issue.**
3- **Jordanian constitution didn't tackle that explicitly, though it is put into effect practically, as both assemblies, the parliament and the senate, have the right to form ad-hoc committees.**
4- **Parliamentary investigation committees enjoy a wide range of powers which enable them to achieve their objectives of control regarding persons, documents, and places.**
5- **The final report will be the outcome of the work of parliamentary committee in which it put down the facts it came up to presenting them to the parliament without being able to take any measures against the executive authority as that was beyond its powers.**

3.0.1 Recommendations

The researchers would like to recommend the following:

1- **Encourage the Jordanian legislator to explicitly declare that parliamentary investigation is one of the important methods of government control.**
2- **Call both Jordanian assemblies, parliament and senate, to enact rules assuring that this control method to be part of their bylaws.**
3- **Call the nation's assemblies in Jordan (parliament and senate) to adopt this method detect sources of corruption and divergencies of the government, whenever any information about its performance is needed.**

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INTERNATIONAL EXPERIENCE OF ADMINISTRATIVE PROTECTION OF INTELLECTUALPROPERTY RIGHTS IN THE FIELD OF MEDICINE AND BIOTECHNOLOGY

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ABSTRACT

The article is devoted to acquaintance with the international experience of administrative ways of intellectual property rights protection in the field of medicine and biotechnology. The principles of insufficient development and imperfection of the economic system of Ukraine in the prism of medicine and biotechnology are highlighted. The concept of administrative protection in the system of intellectual property is characterized, the ways of protection of intellectual property rights and types of administrative protection measures are defined. The interpretation of the concept of *administrative and legal protection of*

intellectual property rights **is studied. The notion of medicine and its components, the state, the state of development of biotechnological progress, and the results of intellectual (creative) activity, which constitute the right of intellectual property, are singled out. The implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights into national legislation in order to provide citizens with qualified, affordable medicines and devices has been studied. The combination of mechanisms of harmonization of the legislation of the member states of the European Union and introduction of the EU documents protection for various objects of intellectual property is allocated. Emphasis is placed on the introduction and improvement of the strategy of intellectual property development in the national legal system. The international experience of administrative protection of intellectual property rights in the United States, Japan, and China is studied. It is recommended to implement the norms of international law into national legislation by harmonizing the provisions of European Union law. The importance of stopping and restoring violated rights, freedoms and legitimate interests of individuals and legal entities as a result of the creation of intellectual property and the proper establishment of an effective system of intellectual property rights protection in the field of medicine and biotechnology.**

INTRODUCTION

Scientific, practical problems

The intellectual property system is a basic legal system that promotes the economic development of humanity, social progress, scientific and technological innovation and cultural prosperity. Intellectual property rights protection is gaining worldwide notoriety and requires the

application of the latest and the most advanced methods of rights protection in many areas.

However, the field of medicine and biotechnology is important and paramount among many areas, as the main subject is human, the preservation of human lives and the introduction of biotechnology, which has greatly simplified life.

Purpose of the study

The aim of the article is to study the administrative protection of intellectual property rights in the field of medicine and biotechnology and to determine the possibilities of implementing international experience in order to build an effective national legal system.

To achieve this goal, the following tasks were formulated:

1. characterize the concept of *administrative and legal protection* and its measures;

2. establish the place and role of medicine and biotechnology in the formation of national economic development;

3. study the possibilities of implementing effective measures and mechanisms of administrative protection of intellectual property rights in Ukraine on the example of foreign countries.

The object of the research is public relations related to the protection of intellectual property rights in the field of medicine and biotechnology.

The subject of the research is international law and research on the experience of administrative protection of intellectual property rights in the field of medicine and biotechnology.

Some aspects of international and Ukrainian experience of administrative protection of intellectual property rights in the field of

medicine and biotechnology were the subject of research by the following scientists: K.O. Vorontsova, B. Yu. Rebrysh, O.L. Sokolenko, N.V. Trotsyuk, S.V. Yaroshenko and others.

Research Methods

Research methodology consists of structural-systemic, historical-legal, comparative-legal methods, as well as methods of analysis and synthesis.

Theoretical and practical usefulness of the suggested article is determined by the attempt to give directions to implement international experience of administrative protection of intellectual property rights in the field of medicine and biotechnology.

Key words: administrative and legal protection of intellectual property rights, intellectual property rights, international mechanism of administrative protection of intellectual property rights.

RESULTS AND DISCUSSION

THE FIRST TOPIC
CHARACTERISTICS OF THE CONCEPT OF ADMINISTRATIVE AND LEGAL PROTECTION AND ITS MEASURES

Transformation processes have already become almost commonplace in the modern world economy. Such processes are characterized by the development of new technologies, a significant level of intellectual capacity of the state, an accelerating globalization, an openness to cooperation of advanced economically developed countries and the process that directly determines the level of the country (political,

economic, socio-cultural) in the world rankings – international competition and economic potential.

However, despite the presence in Ukraine of a significant stock of natural, human, material resources and potentials, socio-economic and technological development is not sufficiently manifested and is not able to compete with the leading and developed countries of the European Union. This situation is formed over the years, manifested in the lack of modernization processes and underdeveloped levers of influence in the economic sphere, which accumulated during the period of development of independent Ukraine. Accordingly, the issue of innovation and structural changes is currently quite relevant.

The intellectual property system is a basic legal system that promotes the economic development of humanity, social progress, scientific and technological innovation and cultural prosperity. As science and technology develop rapidly around the world and the pace of economic globalization accelerates, the status of the intellectual property system in economic and social life has reached a historic high.

The need for the gradual development of new technologies and areas, the development of new and previously unknown material and technical bases, creates the need to ensure proper protection and security of objects that are the result of certain research. Such research is the result of mental and intellectual work of man, and therefore, have the characteristics of intellectual property and need proper protection and protection. In addition, the person who becomes the developer of such a product needs not only the realization of the right to such an object, but also the proper legal provision of inviolability of rights and restoration in case of violation.

Analysis of the state of combating infringements in the field of intellectual property in Ukraine confirms that although the level of infringements remains high, recently there has been a marked intensification of intellectual property protection processes and improvement of ways to protect intellectual property rights.

According to O. Sokolenko, one of the most accessible and effective forms of protection of citizens' rights is the administrative and legal form.[237]

It is worth to agree with S.V.Yaroshenko on the interpretation of administrative and legal protection of intellectual property rights, which is a system of active administrative measures applied by the competent authorities, aimed at restoring the infringed right, eliminating infringements of intellectual property rights, creating conditions for enforcement to restore the violated right to the violator, as well as bringing him to justice.[238] At the same time, administrative and legal protection is an integral part of the general legal mechanism for the intellectual property rights protection. With regard to the protection of these rights, the court, in accordance with the law, may rule on:

1) application of immediate measures to prevent infringement of intellectual property rights and preservation of relevant evidence;

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[237] **Sokolenko O.L.** ***Protection of citizens' rights as the main function of the rule of law*****. Journal of Kyiv University of Law. 2013. № 2. P. 119– 123.**

[238] **Ярошенко С.В. Адміністративно-правовий захист прав інтелектуальної власності. URL: http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?C21COM=2&I21DBN=UJRN&P21DBN=UJRN&Z21ID=&Image_file_name=PDF%2Fadv_2009_6_8.pdf&IMAGE_FILE_DOWNLOAD=0**

2) suspension of the passage through the customs border of Ukraine of goods, the import or export of which is carried out in violation of intellectual property rights;

3) withdrawal from circulation of goods manufactured or put into circulation in violation of intellectual property rights;

4) withdrawal from circulation of materials, tools that were used mainly for the manufacture of goods in violation of intellectual property rights;

5) application of a one-time monetary penalty instead of compensation for damages for illegal use of the object of intellectual property rights;

6) publication in the media of information on infringement of intellectual property rights and the content of the court decision on such infringement.[239]

In general, administrative protection appears through the prism of the following measures:

1) submission of applications and complaints to public administration bodies and appropriate resolution of cases directly by public administration bodies;

2) measures of administrative termination;

3) administrative liability.

[239] **Yaroshenko S.V. Administrative and legal protection of intellectual property rights. URL: http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?C21COM=2&I21DBN=UJRN&P21DBN=UJRN&Z21ID=&Image_file_name=PDF%2Fadv_2009_0_N_p_8.p**

THE SECOND TOPIC
ESTABLISHING THE PLACE AND ROLE OF MEDICINE AND BIOTECHNOLOGY IN THE FORMATION OF NATIONAL ECONOMIC DEVELOPMENT

Products and methods related to the development, production and use of medicines have a special place among other objects of intellectual property rights. This is primarily due to the fact that medicines belong to the socially important sphere of human life and play a significant role in ensuring the health and quality of life.[240] In this case, the pharmaceutical market is characterized by the following features:

- significant investments in research and development of the latest medical innovative tools;

- a wide range of products;

- high intensity of research and others.

Undoubtedly, the opinion of K.O. Vorontsova deserves attention. That in the field of medicine the subject of intellectual property rights uses the object of legal protection through the use in medical practice of methods, techniques, means of treatment, diagnosis and prevention of diseases, medical devices, medical instruments, medical equipment, disease prediction, research biological environments, modeling of

[240] Ponomareva O. Some aspects of intellectual property rights in the field of medicine in the context of European integration processes. URL: file: /// C: /Users/HP/Downloads/97-103.5.2019.pdf.

pathophysiological processes, drugs, medicines, strains of microorganisms, products of genetic engineering, etc. [241]

An equally important area for attracting own budget funds and foreign investment is the biotechnology industry. Despite the widespread use of agriculture, metallurgy, food and other industries, most research and development should be in the field of medicine, as the result of biotechnological development is the creation of products of genetic and cellular engineering, which are focused on saving lives.

If we consider the administrative and legal protection of intellectual property rights in the field of medicine and biotechnology in a broad sense, as one of the areas of protection of intellectual property rights, it is law enforcement and law enforcement activities of public administration to resolve individual cases. In order to stop and restore violations of the rights, freedoms and legitimate interests of individuals and legal entities, compensation to victims and bring the perpetrators to administrative responsibility.[242]

Highly developed countries with advanced development of the pharmaceutical industry are interested in maximum protection and security of intellectual property rights. Therefore, more and more countries are introducing into national legislation the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter – the TRIPS Agreement) in order to provide citizens with quality, affordable medicines and devices, as well as increase the demand for foreign investment (investors) for medicine and biotechnology.

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[241] Vorontsova K.O. Features of the use of intellectual property rights in the field of health care. URL: http://ndipzir.org.ua/wp-content/uploads/2014/03/Vorontsova.pdf.
[242] Trotsyuk N.V. Administrative and legal protection of copyright. Journal of Kyiv University of Law. 2015. № 1. P. 216−219.

The TRIPS Agreement promotes fair competition and fair trade rules, including in the fields of medicine and biotechnology, and sets minimum standards for the recognition and protection of intellectual property rights.[243] The application of TRIPS standards in developing countries and are not exporters but consumers of medicines and drugs, has the effect of establishing the complete dependence of these countries on transnational pharmaceutical giants.[244]

THE THIRD TOPIC
THE POSSIBILITIES OF IMPLEMENTING EFFECTIVE MEASURES AND MECHANISMS OF ADMINISTRATIVE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN UKRAINE ON THE EXAMPLE OF FOREIGN COUNTRIES.

After the signing of the Association Agreement by Ukraine, an important task arose – to reform the legislation in such a way as to regulate legal relations arising in relation to intellectual property rights, as well as to improve and stimulate inventive activity and more.

It is important to note that the obligations under the TRIPS Agreement can only be fulfilled if there is an effective mechanism for intellectual property rights protection in all areas. At the same time, one of the effective mechanisms of such protection is administrative, which is less expensive than judicial protection, requires less time loss, and is

[243] Agreement on Trade-Related Aspects of Intellectual Property Rights. URL: https://zakon.rada.gov.ua/laws/show/981_018.
[244] Rebrysh B. Yu. Influence of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on access to medicines in Ukraine. Comparative and analytical law. № 2. 2014. P. 129–133.

characterized by a simpler and simplified procedure for dealing with cases.

Considering such a measure of administrative protection of intellectual property rights in the field of medicine and biotechnology as the submission of applications and complaints to public administration and the relevant resolution of cases directly by public administration, it should be noted that it is particularly relevant in the protection of industrial property, however, it is practically not used to protect copyright and related rights in Ukraine.[245]

National legislation, despite the actualization of research over the past 20 years in the field of intellectual property, is not fully adapted to the legislation of international practice. This means that the mechanisms for regulating the procedure for issuing patents and, accordingly, resolving disputes in a pre-trial procedure cannot fully function in the country. Therefore, it needs to borrow international experience in the procedure of administrative protection of intellectual property rights in the field of medicine and biotechnology.

At the same time, it is necessary to focus on developed countries that have developed and implemented an effective regulatory framework, which over the years of regulation has really provided an adequate level of patenting and copyright protection, economic support from the state of biotechnology enterprises, investment in research, and also contributed to the inflow of intellectual potential to the country, etc.

For example, the United States annually analyzes the legislation of foreign countries on the regulation and practice of applying the

[245] Vorontsova K.O. Civil status of subjects of intellectual property rights in the field of health care: author's ref. dis. Cand. jurid. Science: 12.00.03. Kyiv, 2019. 21p.

mechanism of protection of intellectual property rights (under the Generalized System of Preferences). The current mechanism of legal protection and use of the results of intellectual activity of the United States of America aims at the priority of achieving national indicators.[246]

The United States, Japan, and Ukraine use a mechanism to continue the effective commercial use of a patented drug — to extend the validity of a patent that is the subject of a drug. Thus, in Ukraine in accordance with paragraph 4 of Art. 6 of the Law of Ukraine *On protection of rights to inventions and utility models* of 15.12.1993 № 3687-XII, "the term of a patent for an invention, the object of which is a medicinal product, animal protection product, plant protection product, etc., the use of which requires permission of the relevant competent authority may be extended at the request of the owner of this patent for a period equal to the period between the filing date and the date of receipt of such permission, but not more than five years ".[247]

For example, in the United States, the National Institutes of Health (NIH) has established a fund to fund biotechnological research in the field of health care.[248] Also in the specified country activity of various organizational structures involved in development of the bioindustry, public technological companies, venture firms, technoparks, clusters, etc. Is fulfilled. In order to deepen international cooperation, a binational

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[246] Foreign experience in protecting the rights to the results of intellectual activity // Gorelov N.A. Methodology of scientific research:. / NA Gorelov, DV Kruglov. Moscow: Yurayt Publishing House, 2015. URL: http://static.ozone.ru/multimedia/book_file/1011536200.pdf.

[247] Rabotyagova L. Extension of a patent for an invention, the object of which is a medicinal product. URL: http://www.inprojournal.org/wp-content/uploads/2018/6_2018/10.pdf.

[248] Analysis of the current state of the biotechnology industry in the world. URL: http://www.cleandex.ru/subscribe/.

Israeli-American Industrial Research and Development Fund (BIRD Foundation) has been established. One of the important areas of its activity is the cooperation of countries in the field of medicine and biotechnology.[249]

It is worth borrowing the experience of implementing the provisions of the Bolar principle (which has been applicable in US and Canadian law for some time), which is to exclude from among the actions considered infringing the rights of the patent owner, to prepare for state registration of a generic drug before the patent expires. The original drug, which allows generics to enter the market the day after the expiration of the patent. Current legislation allows generics to initiate registration procedures the day after the expiration of the patent.[250]

In the patent law of Japan there is a two-stage examination of patentability, i.e. with the acceptance and presentation of the application, if in the first place there are no obstacles to the grant of a patent. Acceptance of the application creates a temporary ban on the use of the invention by third parties. The latter may file an objection against acceptance within two months, and then the consideration of the objection is carried out with the participation of its applicant and the applicant (second stage of examination). In case of non-receipt or rejection of the objection (in whole or in part) a patent is issued, which enshrines the exclusive right.[251]

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[249] Vorona P.V., Muchnyk A.M. State support of exports as a component of socio-economic development policy (foreign experience). Economy and region. 2010. № 2 (25). Pp. 44–49.

[250] Kashintseva O. On the national patent reform in the field of health care. URL: https://yur-gazeta.com/publications/practice/inshe/pro-nacionalnu-patentnu-reformu-v-galuzi-ohoroni-zdorovya.html.

[251] Yasharova M.M. Features of patent law of industrialized foreign countries and developing countries. Journal of Kyiv University of Law. 2015. № 2. S. 250–254.

China is a leading country in which the entire system of protection of intellectual property rights is largely developed. At the same time, the system aims to balance the interests between the creators of intellectual property, users and the general public. China has focused on improving national law enforcement legislation. Administrative law enforcement has been expanded through a combination of management and oversight, with relevant departments investigating and dealing with major IPR infringement cases, focusing on key areas of trademark, copyright and patent protection, and major import and export links. Goods, as well as in key locations where manufacturers and sellers of counterfeit goods were concentrated.

Thus, China has significantly improved the protection of intellectual property rights, including in the field of medicine. At present, there are still infringements of intellectual property rights in China. However, despite minor regulatory gaps, China has an effective system for building a prosperous society as a whole and developing a harmonious society, working to increase the protection of intellectual property rights and promote the country to a higher level of economic development.

Enhancing the protection of intellectual property rights through two main mechanisms is quite effective: harmonization of the legislation of the European Union member states and the introduction of EU protection documents for various intellectual property objects. The partner states of the European Union, in addition to measures to approximate legislation,

may decide on the signing of agreements on entry into the regional European system of protection of certain intellectual property.[252]

In order to protect intellectual property rights in the CIS countries, governments have developed and approved strategies for the development of intellectual property:

- in the Republic of Belarus – Strategy of the Republic of Belarus in the field of intellectual property for 2012-2020;

- in the Kyrgyz Republic – National Strategy for the Development of Intellectual Property and Innovation in the Kyrgyz Republic);

- in the Republic of Moldova – National Strategy in the field of intellectual property until 2020.[253]

Thus, the study of the international mechanism of administrative protection of intellectual property rights contributes to the introduction into the national legal system of a legal model of protection that will jointly protect national interests – economic development and real competition with developed foreign countries.

CONCLUSIONS

After analyzing the experience of economically developed countries, it is necessary to ensure the creation of an effective mechanism for the use of intellectual property, bring national legislation into line with the requirements of the TRIPS Agreement, adopt China's experience in cooperation between public authorities and management in timely

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[252] Ennan R.E Legal regulation of intellectual property relations in the European Union.: author. dis. cand. jurid. Science: 12.00.03. Odessa, 2010. 22 p.

[253] Bezzub I. National strategy for the development of intellectual property: expert assessments. URL: http://www.nbuviap.gov.ua/index.php?option=com_content&view=article&id=597:intelektua lna-vlasnist-2 & catid = 71 & Itemid = 382.

prevention or elimination of intellectual property in the field of medicine and biotechnology, constantly improve the regulatory and legal support of intellectual property, harmonize national legislation by highlighting the truly effective measures of economically developed countries, increase and disseminate awareness of intellectual property, as well as stimulate the development of highly skilled experts and professionals. And provide adequate financial and labor opportunities for foreign investment in the development of the country's economy.

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PRINCIPLES OF STATE CONTROL OVER COMPLIANCE WITH FOOD SAFETY LEGISLATION IN UKRAINE

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Abstract

The article deals with the peculiarities of legal regulation of state control over compliance with food safety legislation in Ukraine in the context of compliance with international requirements. It is emphasized that the relevance of such legal regulation is linked to societal concerns about food safety and quality. The purpose of the article is to find out the peculiarities of state regulation and quality control and food safety in Ukraine and the world in a comparative context. The most important results and conclusions. The Ukrainian legal regulation of state control in the field of food safety meets European requirements and world practice. The legislation of Ukraine provides for a system of administrative sanctions for

violations in the field of food safety, as well as the possibility of challenging measures of influence in an administrative and/or judicial order.
Keywords: administrative and economic sanctions, administrative and legal framework, food safety, hygiene of foodstuffs, legislative regulation, state control.

INTRODUCTION

Scientific, Practical Problems.

Concerns about the quality of food are felt all over the world. At the same time, population migration and foreign trade do not allow to solve this issue in each individual country, since artificial obstacles to the movement of goods across borders are both impossible and ineffective. States therefore seek to develop uniform approaches to the technological and administrative regulation of food safety and quality control. Among the most well-known regulatory acts should be mentioned Joint FAO/WHO Food Standards Programme (Codex Alimentarius Commission);[254] International standard ISO 22000:2005. «Food safety management systems. Requirements for any organization in the food chain»;[255] the Council Directive 93/43EEC of 14.06.1993 «On the hygiene of foodstuffs»[256] and others.

The problem of food safety has always been acutely urgent, and therefore one of the most discussed in different areas of science and technology, as well as administrative management. Monograph S. Bermouna (2015) provides insights into the regulatory framework of Food Safety Management of some of the world's largest economies: European Union, United States of America and China[257]. Caroline Smith De Waal, Cynthia Roberts, David Plunkett (2013) review the legal framework for food safety in the US and the EU.[258] The adoption of the Food Hygiene I and II principles in 2004 completed the EU food law. Usenko, Iurynets, Pyvovar, Belkin (2019)[259] consider the specific features of food safety management in Ukraine in the context of the international standard ISO 22000: 2005.

In such circumstances, research into food safety legislation is relevant both in the context of understanding the level of legal regulation of this

[254] **Codex Alimentarius Commission.**
[255] **ISO 22000:2005.**
[256] **Council Directivem, No. 93/43EEC.**
[257] **Bermouna, 2015.**
[258] **Smith De Waal, Roberts, Plunkett, 2013.**
[259] **Usenko, Iurynets, Pyvovar, Belkin, 2019, p. 188-190.**

issue in individual countries and in comparative terms.

Purpose of the Paper is to find out the peculiarities of state regulation and quality control and food safety in Ukraine and the world in a comparative context.

Object/subject of study. **Legal relations in the field of food safety control. The study addresses the mechanism of legal regulation of state control over compliance with food safety legislation in Ukraine in the context of compliance with international requirements.**

Research Methods.

The methodology of the study is based on the methods of documentary analysis and synthesis, comparative analysis, objective truth, which made it possible to systematically trace the compliance of legal regulation in Ukraine with European norms, standards and rules. The research methodology is based on the use of a set of interrelated methods of scientific knowledge that provided a systematic approach to solving the tasks of the work, the unity of the legal content and the legal form of the results obtained. Methods of classification, grouping, systematic are used to streamline empirical information and carry out the classification of the studied legal phenomena (system of preventive measures, control measures, measures of administrative influence, measures to respond to deviations from regulatory indicators, etc.). Documentary analysis has made it possible to systematically examine the documentary sources of legal phenomena used in this work (Joint FAO/WHO Food Standards Programme (Codex Alimentarius Commission); International standard ISO 22000:2005; the Council Directive 93/43EEC; the Law of Ukraine «On State Control of Compliance with Food, Feed, Animal By-Products, Animal Health and Welfare» and others). The comparative method was used to compare, on the one hand, the legislation of Ukraine and its compliance with European standards, on the other - the Council of Europe. The objective truth method is implemented by cross-checking the source data from multiple sources, relying on digital (statistical) material.

RESULTS AND DISCUSSION OF THE RESEARCH

THE FIRST TOPIC: LEGAL REGULATION OF FOOD SAFETY CONTROL: UKRAINE IN THE MODERN WORLD

Ukraine aims to become part of a single international and European food market. So, in January-September 2019 exports of agricultural products from Ukraine amounted to $ 15,6 bil., which is 22 % more than in the same period in 2018. Over this period, the share of agricultural products in the structure of total exports of goods from Ukraine amounted to 42,1 %, the share of exports increased from 37,1 % to 42,1 %.

In the commodity structure of exports, deliveries of crop products increased most of all – by 36 % or $ 2,4 bil. (for 9 months compared to the same period in 2018). This was significantly affected by the export of corn, which grew by $ 1,4 bil., or 61 %. Also, the export of finished foods increased by 12 % or $ 241 mil. In particular, export of sunflower meal increased (by 23 % or $ 134,3 mil.).

The export of Ukrainian agricultural products to the EU countries in January-July 2019 increased by 34.3 % compared to the same period in 2018 – up to $ 4,1 bil. Basically, they exported grain – $ 1,8 bil., butter – $ 921,9 mil., oilseeds – $ 385,4 mil., oilcake and other food industry waste – $ 345,5 mil., poultry – $ 117,3 mil., fruits, nuts, zest – $ 78.6 mil.[260]

So the topic and content of this article is not only of internal interest to Ukraine but also of international interest.

The problem of food safety has always been acutely urgent, and therefore one of the most discussed in different areas of science and technology, as well as administrative management (Kobrin, Postnova, Vinnikova, 2012;[261] Odarchenko, Sokolova, Maximov, 2013;[262] Galkina, 2017;[263] Usenko, Iurynets, Pyvovar, Belkin, 2019[264] and others). Monograph «An Insight into the Regulatory Framework of Food Safety Management. A comparative approach to food safety incident response in EU, US, China» (2015) provides insights into the regulatory framework of Food Safety Management of some of the world's largest economies: European Union, United States of America and China.[265] The study has provided interesting results towards understanding discrepancies in food safety incident response from mainly a legal angle including some socio-

[260] N.a., Delo.ua, 2019.
[261] Kobrin, Postnova, Vinnikova, 2012, p. 158-162.
[262] Odarchenko, Sokolova, Maximov, 2013, p. 105-109.
[263] Galkina, 2017.
[264] Usenko, Iurynets, Pyvovar, Belkin, 2019, p. 188-190.
[265] Bermouna, 2015.

legal aspects. The results have provided answers on how discrepancies in food safety incident response amongst different legal systems can be identified, sustained by an in- depth analysis of the applicable regulatory framework. Caroline Smith De Waal, Cynthia Roberts, David Plunkett (2013) review the legal framework for food safety in the US and the EU.[266] In particular, they note that the earliest food laws in the United States, dating from the 1600s to 1800s, were designed to combat economic deception and to protect American exports. The meat industry is regulated largely by the 1906 Federal Meat Inspection Act. European food law has been influenced by the formation of the European Economic Community and later the European Union. Food safety laws in the latter half of the twentieth century focused on developing a common market, but with the introduction of the General Food Law in 2002, the focus shifted to assuring high levels of food safety. The adoption of the Food Hygiene I and II principles in 2004 completed the EU food law. Grimak A.V., Velichko O.V., 2012;[267] Holostova A.M., 2015;[268] Vodyanka L.D., Kutarenko N.Ya., 2013;[269]. Vlasenko I.G., 2013;[270] Lapin O.V., Fridrif V.P., 2014;[271] Karas O., Kostyuchenko L., 2016;[272] Sliva Yu.V., Shtonda O.A., Semenyuk K.M., 2018;[273] Oschipok M., 2019;[274] Usenko A., 2019[275] explore various aspects of the HACCP[276] as a food safety tool.

To date, the following regulations are in force in the world in the field of food safety control: Joint FAO/WHO Food Standards Programme (Codex Alimentarius Commission); International standard ISO 22000:2005. «Food safety management systems. Requirements for any organization in the food chain»; the Council Directive 93/43EEC «On the hygiene of foodstuffs» and others.

In item 1 of Art. 59 of the EU-Ukraine Association Agreement provides for the approximation of the laws of Ukraine to those of the EU in the field of sanitary and phytosanitary measures. The general regulation of this

[266] Smith De Waal, Roberts, Plunkett, 2013.
[267] Grimak, Velichko, 2012.
[268] Holostova, 2015.
[269] Vodyanka, Kutarenko, 2013.
[270] Vlasenko, 2013.
[271] Lapin, Fridrif, 2014.
[272] Karas, Kostyuchenko, 2016.
[273] Sliva, Shtonda, Semenyuk, 2018.
[274] Oschipok, 2019.
[275] Usenko, 2019.
[276] Food Standard Agency, 2017.

issue is implemented in the Council Directive 93/43EEC «On the hygiene of foodstuffs».

In Ukraine, the principles of the system of controls and sanctions in the field of food safety are defined by the Law of Ukraine «On State Control of Compliance with Food, Feed, Animal By-Products, Animal Health and Welfare».

THE SECOND TOPIC: FOOD SAFETY PRINCIPLES UNDER COUNCIL DIRECTIVE 93/43EEC «ON THE HYGIENE OF FOODSTUFFS»

The Directive, in particular, presupposes that, in order to protect human health, the general rules on food hygiene that are to be observed as soon as possible during the preparation, processing, manufacture, packaging, storage, transport, distribution, handling and sale or supply at the disposal of the consumer.

This Directive lays down general rules for the hygiene of foodstuffs, as well as methods of verifying compliance with those rules.

The systematic analysis of the requirements of the Directive shows that its key requirements for the food safety system are the following:

– preparation, processing, manufacture, packaging, storage, transport, distribution, handling or sale or disposal of foodstuffs be carried out in such a way as to comply with hygiene rules. Food business operators identify any aspect of their business that is essential to food safety, and ensure that proper safety procedures are established, implemented, followed and updated based on principles including those used to develop the HACCP system (hazard analysis and critical control points): analyze the potential food hazards of operations carried out within the food industry; identify the points of operations where food hazards may occur; identify which of the identified points are critical to food security («critical points»); identify and implement effective control and monitoring procedures at these critical points; review periodically and every change in technological operations the analysis of food hazards, critical control points and monitoring procedures (Art. 3);

– Member States shall facilitate the development of good hygiene practices which may be voluntarily adhered to by food business operators and which may be governed by them in accordance with the provisions of Article 3 (Art. 5);

– the competent authorities shall initiate controls in accordance with Directive 89/397/EEC to ensure that food business operators comply with the provisions of Article 3 of this Directive and, where appropriate, any provision established in accordance with Article 4 of this Directive. In

doing so, they shall take due account of the good hygiene practices referred to in Article 5 of this Directive, in accordance with the scope of such guidelines. The inspection carried out by the competent authorities includes a general assessment of the potential food safety hazards associated with the activities of the enterprise. Particular attention shall be paid by the competent authorities to the critical control points previously shown to the food industry to determine whether the monitoring and verification work is being carried out as it should be. Member States shall ensure that all premises used for the purpose of food production are inspected at intervals related to the risks associated with those premises (Art. 8);

– if, during the controls referred to in Article 8, the competent authorities find that non-compliance with the provisions of Article 3 or, if any, the provisions laid down in Article 4, may adversely affect the safety or safety of foodstuffs for human health, they take adequate measures (for example, the removal and / or destruction of a food product, the closure of the whole or part of the establishment for an appropriate period of time). In order to determine the risk to the health or safety of foodstuffs for human health, the nature of the foodstuff, the way it is handled or packaged, and any other operations to which the foodstuff is subjected to its delivery to the consumer should be taken into account. influence and/or storage. Member States shall take the necessary measures to ensure that any natural or legal person they control is entitled to challenge the sanctions applied by the competent authority on the results of the controls (Art. 9);

– Member States are to designate the competent authorities which are responsible for the official control of hygiene (Art. 12).

Since, as stated above, the analyzed Directive establishes general food hygiene rules and methods of verifying compliance with these rules, it is necessary to trace and compare to what extent the requirements of this Directive comply with the legislation of Ukraine.

THE THIRD TOPIC: PRINCIPLES OF STATE REGULATION AND CONTROL OF FOOD SAFETY IN UKRAINE IN ACCORDANCE WITH THE LAW OF UKRAINE «ON STATE CONTROL OF COMPLIANCE WITH FOOD, FEED, ANIMAL BY-PRODUCTS, ANIMAL HEALTH AND WELFARE»

The principles of state regulation and control of food safety in Ukraine are determined by the Law of Ukraine «On State Control of Compliance with Food, Feed, Animal By-Products, Animal Health and Welfare».

This Law applies to relations related to the exercise of state control over the activities of market operators engaged in the production and/or circulation of food, other objects of sanitary measures and/or feed, including importation (forwarding) to customs. the territory of Ukraine of food and/or feed, in order to verify this activity for compliance with the legislation on food and feed, animal health and welfare. This Law shall also apply to relations related to the state control of animal by-products imported (shipped) into the customs territory of Ukraine, in order to check their compliance with the legislation on animal by-products. The effect of this Law also extends to related to the state control over the activities of market operators engaged in organic production and/or circulation of organic products, including import (shipment) to the customs territory of Ukraine, in order to verify this activity on compliance with legislation on food and feed, animal health and welfare, as well as legislation in the field of organic production, circulation and labeling of organic products.

According to Part 1 of Art. 3 of this Law, the effect of this Law extends to relations related to the exercise of state control over the activities of market operators engaged in the production and / or circulation of foodstuffs, other objects of sanitary measures and/or feed, including importation (forwarding) to the customs territory of Ukraine of food and/or feed, in order to verify this activity for compliance with the legislation on food and feed, animal health and welfare. This Law also applies to relations related to the state control of animal by-products imported (shipped) into the customs territory of Ukraine, in order to verify their compliance with the legislation on animal by-products. This Law shall also apply to relations related to the exercise of state control over the activities of market operators engaged in organic production and/or circulation of organic products, including importation (shipment) to the customs territory of Ukraine, in order to verify this activity for compliance legislation on food and feed, animal health and welfare, as well

as legislation on organic production, circulation and labeling of organic products.

In the context of Article 12 of Directive 93/43EEC, the competent authorities in the field of state control are defined, the system and powers of which in the field of state control are defined in Article 7 of the Law. In particular, the competent authority in the field of state control: 1) organizes and exercises state control, including at the state border of Ukraine; 2) develops and implements a long-term plan for state control, which reports annually to the Government on the state of its implementation; 3) develop and implement a contingency plan for food and / or feed; 4) approve the annual plan of state control and the annual plan of state monitoring; 5) ensure pre-slaughter and post-mortem inspection of animals at the appropriate facilities, as well as post-mortem inspection of animals killed in hunting; 6) exercise state control over the implementation of permanent procedures based on HACCP principles; 7) gives the persons, defined by this Law, the powers to carry out certain measures of state control, controls the legality and efficiency of their activity, deprives such authorities of the presence of the grounds specified by the legislation; 8) ensure the legitimacy and effectiveness of the activities of its structural units, territorial bodies and their officials; 9) establish in the annual plan of state control the periodicity of inspection, audit, sampling and laboratory tests (tests) for each capacity for production and/or circulation of food and / or feed; 10) approve, in accordance with the procedure established by the legislation, the periodicity of documentary checks, conformity checks, physical checks, laboratory examinations (tests) of goods imported (shipped) to the customs territory of Ukraine; 11) involve law enforcement bodies within the limits of their powers, if necessary, to exercise state control; 12) take within its powers measures to eliminate violations of this Law, legislation on foodstuffs, feeds, animal by-products, animal health and welfare, as well as to bring those responsible to justice under the law; 13) exercise other powers provided for by this Law.

Article 17 of the Law defines the principles of state control, among which are defined: 1) the priority of safety in matters of life and human health over any other interests and goals in the sphere of economic activity; 2) equality of rights and legitimate interests of all market operators; 3) guaranteeing the rights and legitimate interests of each market operator; 4) objectivity and impartiality of state control; 5) legality; 6) open, transparent, planned and systematic state control; 7)

inadmissibility of duplication of state control measures; 8) presumption of lawfulness of the activity of the market operator, if the norm of law or other normative legal act issued on the basis of the law, or if the norms of different laws or different normative legal acts, or norms of one normative legal act allow ambiguous (multiple) interpretation the rights and responsibilities of the market operator and / or the powers of the competent authority, other persons exercising state control; 9) orientation of state control on prevention of violation of legislation; 10) preventing the setting of targets or any other planning for holding market operators accountable or forcing enforcement; 11) risk and feasibility assessment; 12) observance of conditions of international treaties of Ukraine.

Article 18 of the Law sets out the requirements for state control measures. The state control shall be exercised by the competent authority, except in cases established by this Law. State control shall be exercised at a period sufficient to achieve the purposes of this Law. State control measures are implemented without warning (notification) by the market operator, except for audits and other cases where such warning is a necessary condition for ensuring the effectiveness of state control. An audit of ongoing procedures based on the HACCP principles shall be conducted subject to notification by the market operator no later than three working days prior to such an event. The notification shall be sent by registered mail at the location (place of residence) of the market operator specified in the Unified State Register of Legal Entities, Individuals – Entrepreneurs and Public Formations, and / or by sending an e-mail to the relevant address of the market operator indicated in the Unified State Register of Legal Entities. Individuals – entrepreneurs and public entities, or submitted personally for the receipt of the head or representative of the market operator. State control is exercised at any stage of production and circulation of food and feed. The frequency of implementation of the planned measures of state control of each capacity shall be determined on the basis of a risk-oriented approach and shall take into account: 1) identified risks associated with animals, food, feed, market operators, use of food or feed, processes, materials, substances, carrying out activities or operations that may adversely affect the safety of food and/or feed, animal health and welfare; 2) results of implementation of previous state control measures; 3) the effectiveness of the procedures applied by the market operator to comply with food and feed law, animal health and welfare; 4) information that may indicate a discrepancy.

State control in the forms of inspection and audit is carried out using state control acts. The state control act should include a comprehensive list

of issues to check for compliance by the market operator with food and feed, animal health and welfare legislation. Each such question should include a reference to the requirement of a legal act (article, part, paragraph, subparagraph, paragraph, etc.), which is subject to compliance by the market operator. If the results of inspection or audit reveal a discrepancy, the act of state control shall provide a detailed description of the relevant violations of the law. The act of state control is drawn up in two copies, one of which is handed over to the market operator within three working days from the date of its drawing up. During inspection and audit, it is forbidden to check the issues that are: absent in the act of state control; do not contain references to the requirement of the legislation of Ukraine (including the relevant article, its part, paragraph, subparagraph, paragraph, etc.), which is subject to compliance by the market operator. Inspection and audit without the use of the act of state control, and sampling without the use of the act of sampling is prohibited. State inspectors, state veterinary inspectors, other persons carrying out state control measures, as well as market operators have the right to record the process of state control by means of audio and video equipment, without interfering with the implementation of appropriate measures.

Article 19 of the Law defines the measures of state control that can be carried out: in the form of audit, inspection, pre-slaughter and post-mortem inspection, sampling, laboratory examination (test), documentary verification, conformity check, physical inspection. Within the framework of state control measures, state monitoring is carried out.

The state monitoring is conducted by the competent authority in order to: 1) identify priority directions of the state policy in the field of food and feed, animal health and welfare; 2) development of measures to prevent the circulation of dangerous food and feed; 3) determination of the general level of contamination of food and feed by pesticide residues and veterinary preparations, other contaminants.

State monitoring involves the collection, systematic analysis and evaluation of: information on food and feed safety, animal health and welfare, including the identification of residues of veterinary drugs, pesticides and contaminants in food and feed, and the establishment of appropriate databases; complaints from individuals and legal entities about violations of the legislation on food and feed, animal health and welfare; other necessary information.

The annual state monitoring plan should be based on a risk-oriented

approach and determine the number of samples of different types of food and feed and their laboratory tests (tests) according to the determined indicators in accordance with the methods established by the long-term state control plan.

Audit of ongoing HACCP-based procedures and ongoing procedures developed by the market operator to comply with hygiene requirements should include verification of the continuity and effectiveness of their application, including: 1) documentation; 2) record keeping; 3) processes affecting the safety of food and / or feed; 4) systems of internal control of the market operator; 5) corrective actions taken by the market operator as a result of the analysis of discrepancies detected; 6) staff qualifications.

The results of the audit must be taken into account in determining the degree of risk of the operator's activity (capacity) and the frequency of implementation of planned state control measures.

The same person may not audit twice at the same capacity.

The inspection involves checking the compliance of market operators with the legislation on food and feed, animal health and welfare and compliance with their requirements to: 1) hygiene; 2) a plan of corrective actions developed and implemented by the market operator following preliminary inspections; 3) food and / or feed safety incidents.

Inspection may include verification of facilities, surrounding area, premises, equipment and supplies, vehicles, and food and feed; raw materials, ingredients, processing aids used for the preparation and production of food and feed, semi-finished products; objects and materials in contact with food; cleaning and care facilities and processes, as well as pesticides; marking, appearance and advertising.

The person conducting the inspection or audit is entitled to carry out simple investigations (tests) in the event of a reasonable suspicion of non-compliance or if such investigations are provided for in the annual plan of state control.

In the context of the requirements of Directive 93/43EEC, a planned system of controls is foreseen. In particular, there is a long-term plan of state control and an annual plan of state control. The long-term plan of state control should contain general information on the structure and organization of the system of state control, in particular: 1) the strategic goals of such plan and a description of how they are taken into account in determining the priorities of state control and the allocation of resources for its implementation; 2) the general organization and management of state control at the central and other levels, including the exercise of state control of individual categories of capacity; 3) control systems applied in

different fields and coordination of activities of structural subdivisions of the competent authority, its territorial bodies and subordinate state institutions, enterprises and organizations responsible for exercising state control, as well as other bodies of executive power in cases established by law; 4) implementation of state control measures by authorized persons; 5) training of state control personnel; 6) the methodology for determining the parameters by which laboratory tests (tests) are carried out in the case of routine and unplanned sampling, the method of determining the number of planned samples of different types of food and feed and their laboratory tests (tests), as well as other procedures necessary for implementation state control; 7) organization and implementation of measures in case of emergencies related to animal diseases, food poisoning or contamination of food and/or feed, as well as other risks to human health; 8) organization of interaction between the competent authority, its territorial bodies, authorized persons and other persons, who are empowered to carry out state control measures; 9) ways of ensuring compliance with all the requirements of Article 8 of the Law.

The long-term state control plan is implemented through the implementation of a set of annual state control plans. Planned state control measures are carried out in accordance with the annual state control plan. The annual plan of state control for the next year shall be developed and approved by the competent authority by December 1 of the current year. The annual state control plan should be consistent with the long-term state control plan, based on a risk-oriented approach and determine the number of samples of different types of food and feed and their laboratory tests (tests) according to certain indicators. An annual state control plan may include an annual state monitoring plan. The annual plan of state control is revised at the same time as the long-term plan of state control, taking into account the provisions of Article 24 of the Law.

In the context of Article 9 of Directive 93/43EEC, Art. 65 of the Law of Ukraine «On State Control of Compliance with Food, Feed, Animal By-Products, Animal Health and Welfare» provides for measures for liability for violations in the field of food safety, in particular for the following violations: 1) violation of the hygienic requirements for the production and/or circulation of food or feed, if it poses a threat to the life and/or health of humans or animals; 2) production and/or circulation of food or feed using unregistered capacity, if the obligation of its state registration is established by law; 3) production, storage of foodstuffs or feedstuffs

without obtaining the operating permit for the respective capacity, if the obligation to obtain it is prescribed by law; 4) failure to comply with the statutory obligation to implement, at the facilities of a permanent procedure, based on the principles of the System of Hazardous Factors Analysis and Critical Control Point (HACCP); 5) the sale of non-compliant food or feed where it poses a threat to the life and/or health of humans or animals; 6) violations of the traceability requirements of food and feed law; 7) failure to comply with the obligation to recall or remove dangerous food or feed from circulation; 8) use, sale of unregistered objects of sanitary measures or feed additives, if the obligation of their state registration is established by law; 9) offering for sale or sale of unsuitable food or feed; 10) offering for sale or sale of food or feed that is harmful to human or animal health; 11) offering for sale or sale of perishable foodstuffs or feedstuffs whose shelf life has expired if, as a result, the foodstuffs or feedstuffs have not become harmful to human or animal health; 12) offering for sale or sale of non-perishable food or feed, the minimum shelf-life of which has expired if the food or feed does not, as a result, become harmful to human or animal health; 13) violation of the safety parameters of the objects of sanitary measures or feedstuffs established by the legislation on food and feed; 14) failure to comply with a decision by an official of the competent authority, his or her territorial authority on the destruction of dangerous food products, processing aids, dangerous feeds or feed additives; 15) sale of products imported (sent) to the customs territory of Ukraine as trade (exhibition) samples or objects of scientific research in accordance with paragraph 5 of part eight of Article 41 of this Law, violation of requirements for their destruction or export (forwarding) outside Ukraine or other legal rules governing them; 16) failure to provide, untimely provision, provision of false information at the request of an official of the competent authority or its territorial authority; 17) refusal to allow an official of a competent authority or its territorial authority to exercise state control on grounds not provided for by law, or otherwise obstruct its lawful activity; 18) non-compliance, untimely implementation of the decision of the Chief State Inspector (Chief State Veterinary Inspector) on the temporary cessation of production and/or circulation of food and/or feed; 19) non-compliance, untimely fulfillment of the legal requirements (prescriptions) of the official of the competent body, its territorial body regarding elimination of violations of this Law, legislation on food and feed; 20) violation of the requirements of the legislation to provide information to consumers about food products, to provide inaccurate, unreliable and unclear to consumers

information about food; 21) change in the food market operator information accompanying a food product in the case provided for in Article 5 of the Law of Ukraine «On Consumer Information on Food»; 22) the sale of non-compliant food or feed where it does not pose a threat to the life and / or health of humans or animals; 23) failure to provide information to the consumer on substances and foodstuffs that cause allergic reactions or intolerance.

In the context of Article 9 of Directive 93/43EEC on guaranteeing the right of controlled entities to challenge sanctions applied by the competent authority on the results of controls, Article 15 of the Law provides for the right of controlled persons to appeal against decisions of control bodies and compensation for damages in case of recognition of the actions of such bodies wrongful. In particular, the market operator, during the implementation of state control measures, has the right to: 1) require from state inspectors, state veterinary inspectors, other persons who carry out measures of state control, compliance with this Law, legislation on food, feed, animal by-products, animal health and welfare; 2) check the presence of state inspectors, state veterinary inspectors, other persons carrying out state control measures, an official certificate (identification document); 3) receive copies of the direction for inspection or audit; 4) not allow state inspectors and state veterinary inspectors to carry out inspection and audit if: a) the inspection or audit is carried out in violation of the requirements for the periodicity of inspection and audit, established by the annual plan of state control, and in the absence of grounds for carrying out extraordinary measures of state control; b) the state inspector or the state veterinary inspector has failed to provide copies of the documents stipulated by this Law or if the provided documents do not meet the requirements of this Law; c) the state inspector or the state veterinary inspector has not entered a record of the implementation of the appropriate state control measure in the log of state surveillance (control) measures (in the case of providing such a log by the market operator); 5) be present during the implementation of state control measures, involve legal and natural persons in the implementation of such measures, provided that such persons do not interfere with the implementation of appropriate measures; 6) require the non-disclosure of restricted information belonging to the market operator; 7) receive and get acquainted with the acts of state control, the acts of sampling, orders, orders, decisions; 8) submit in writing their explanations, remarks or objections to the acts of state control, to the acts of sampling within five

working days from the date of receipt of such acts by the market operator; 9) to receive additional samples during the sampling for alternative laboratory testing (testing); 10) keep a log of the registration of state surveillance (control) measures and require the state inspectors and state veterinary inspectors to submit to it records on the performance of inspection and audit prior to their beginning; 11) to challenge in accordance with the procedure established by law the unlawful decisions, actions and omissions of officials of the competent authority and other persons carrying out the measures of state control; 12) for compensation in accordance with the procedure established by the Civil Code of Ukraine, damage (damages) caused (caused) by unlawful decisions, actions or omissions of officials of the competent authority and other persons who carry out state control measures.

CONCLUSIONS

The Ukrainian legal regulation of state control in the field of food safety meets European requirements and world practice.

Comparison of the system of legal regulation of state control in the field of food safety is made on the basis of the Law of Ukraine «On State Control of Compliance with Food, Feed, Animal By-Products, Animal Health and Welfare» and the system of requirements put forward to the system of legal regulation of state control in the field of food safety based on Council Directive 93/43EEC «On the hygiene of foodstuffs». Both documents provide for guidance on food safety based on HACCP. Both documents provide for systematic inspection by the competent authorities, including an overall assessment of the potential food safety hazards associated with the activities of the enterprise. Particular attention shall be paid by the competent authorities to the critical control points previously shown to the food industry to determine whether the monitoring and verification work is being carried out as it should be. The legislation of Ukraine provides for a system of administrative sanctions for violations in the field of food safety, in particular for the following violations: violations of hygienic requirements for the production and / or circulation of food or feed if they pose a threat to the life and/or health of humans or animals; production and/or circulation of food or feed using unregistered containers, if the obligation of its state registration is established by law; failure to comply with the legal obligation to implement on-site procedures based on the principles of the Hazardous Factor Analysis and Critical Control Point (HACCP) system; others, as well as the possibility of challenging administrative and/or judicial action. Against this

background, it is recommended that further studies and generalizations be made in the field of practical application of food safety guidelines, law enforcement practices and the system of protection of producers and consumers.

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MOST GRACIOUS, MOST MERCIFUL CROSSING THELEGITIMATE DEFENSE LINE

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Abstract

This Research aims at identifying the importance of Criminal Law subjects. It discusses crossing the legitimate defense line and its legal basis and the theories that considered the crossing of legitimate defense line as a prevention of responsibility. The Research further discusses the theories that considered the crossing of legitimate defense line as a reason for legalization and the considerations taken by Jordanian legislators with respect thereto. The Research then goes on to handle the legitimate defense conditions, effects, crossing punishments and the jurisdiction of the concerned court. The Research concluded a number of outputs and recommendations, especially: the legitimate defense is not an absolute right, there are rather some restrictions on this right, given that the Jordanian Legislators did not consider defining the right to legitimate

defense in the Criminal Law. They rather considered particular conditions to be met in order for an act to be deemed a legitimate defense.

The main set of such recommendations stem upon referring to Article 89 of the Criminal Law based on which Article 60/3 is made. The states that the committer is relieved of punishment in case the defense conditions are met in equivalence to the attack. The Article does not mention the crossing of the legitimate defense lines, which makes it clear that the Jordanian Legislator made a mistake therein.

Key words: Legitimate defense, punishment, responsibility preventions, line crossing, necessity.

Introduction:

Legitimate defense is among the significant matters about which the society cares much. This issue has been increasingly drawing attention from jurisprudents and law interpreters. All Islamic sect jurisprudents agreed that honor defense is a duty that must be respected by defenders. However, there is a kind of disagreement with respect to whether it is required or just permitted in relation to self-defense and property defense. It is more likely that self-defense is required, while property defense is just permitted but not required.

In seeking fairness feeling, all parties must be equal before the law and judiciary to respect basic human rights andsource of personal responsibility of the criminal or partner in crime when a criminal has the will to commit a crime, so he must be punished to feel justice. Sometimes, we find justifications forthe commitment of acts that can be righteous in certain situations, while they can be criminalized; however, the Jordanian Legislators relived the criminal responsibility thereof justifying the same as it is in line with the principle of justice feeling.

The Jordanian Legislator solely categorized them among specific cases in Articles 59, 61 and 341. Because this subject is theoretically and practically important, there should be a research in the extent of Jordanian Legislators' compliance with setting accurate controls, conditions and criteria to specify the case of crossing the line in use of legitimate defense.

We can see that legitimate defense does not aim to authorize the victim to punish the attacker and retaliate; it rather aims to just prevent a crime or going too far with it, which is a public right realized by populace against all.In return, people respect this right.

In reference to some Articles of Penal Code of Jordan, we can find that legitimate defense is a right, but it is not a financial personal right of a creditor and debtor. It is rather a public right against all who must resect it. The right to defense is a principle known in and recognized by all religions and legal legislations and regulations because sometimes the fear of punishment does not prevent a crime, or otherwise a punishment does not make some criminals stop. Therefore, criminal laws aim to consider self-defense and property defense against any threat as a normal matter and a reason preventing punishment because it is a legal ground, as a man's self-defense is a defense of all and involves a community interest.

Study's problem

This Research will be limited to the right to legitimate defense, which is among the rights Legislators took into consideration together with other related provisions to regulate the exercise of this right as a reason for justification. The Legislators did not leave this right at all; instead, they

restricted it with provisions and conditions that limit the abuse of this right in order to establish justice for the entire society.

The Study's problem can be found in a good question:

Have Jordan's legislations established specific provisions of crossing the legitimate defense lines? Have any controls been established for punishment escalation in case of crossing a legitimate defense line?

In reference to Article 89 of the Penal Code of Jordan, based on which Article 60/3 is made, we can find that it provides for relieving the committer of punishment in case of meeting the conditions of legitimate defense, which shall be in line with the attack. The Article does not mention crossing the legitimate defense lines, and there seems to be a mixing mistake made by the Jordanian Legislators.

Research elements:

From Research's main question and problem, sub-questions emerge as follows:

What is the definition of legitimate defense in Jordan's Legislations?

What is the consequence of crossing legitimate defense lines?

To which extent Jordan's Legislators goes along with the establishment of rules and controls regulating the limits of legitimate defense use?

Have the legal provisions accurately dealt with the legitimate defense line crossing?

Consequently, the Research with be handled through a couple of topics:

The first one will take on the legitimate defense itself and its legal basis.

The other one will deal with the conditions of legitimate defense line crossing.

Research structure:

Based on the existing academic methodology and the analytical descriptive methodology, the subject of this Research will be handled through a couple of topics as follows:

1. **The legitimate defense itself and its legal basis.**
2. **The conditions of legitimate defense line crossing.**

Topic I

The legitimate defense itself and its legal basis

In this Topic, I will discuss the legitimate defense itself and its basis through two requirements:

1. **To define legitimate defense.**
2. **Legitimate defense's legal basis.**

FIRST REQUIREMENT:

DEFINITION OF LEGITIMATE DEFENSE:

Since ever legitimate defense has been a reason for justification albeit some changes are amendments were made thereto in the past. In the Roman Law, it was considered a natural law sourced from nature.[277] In Jordan Law, it is among the human public rights protected by laws and regulations as a social objective. Based on the criminalization provisions of the Penal Code, it is clear that such provisions are not conclusive. Instead, they are subject to restrictions. However, the Jordanian Legislators did not establish in the Penal Code a precise and specific definition, but they rather made some conditions to be met.[278] The Islamic Sharia approves legitimate defense and names it "attacker repelling", as Quran says: "So

[277]NajmSubhi, Mohammad, 2000, Penal Code, Amnesty, General Theory, Dar Al Thaqafa, Amman, P158.

[278]Husni, Mahmoud Najeeb, 1989, Penal Code Interpretation, General Section, Edition 6, Dar Alnahda, Cairo, Egypt, P188.

whoever has assaulted you, then assault him in the same way that he has assaulted you."[279]Furthermore, Abu Huraira quoted Prophet Mohammad who said: "If someone unrightfully attacked you and you throw a stone at him and damaged his eye, you would not be blamed."[280]Therefore, legitimate defense can be defined as a use of the force necessary to confront a threat of an unrightful attack threatening to cause a damage to a right protected by law if the victim could not avoid such attack or threat but through killing, injuring or harming the attacker. This definition is derived from Article 341 of the Penal Code of Jordan.[281]

Legislators do not bind a person who is under threat to bear such threat then report it to police to punish the attacker. Instead, they allow the victim to defend himself and repel such threat by any act as may be necessary and suitable therefor. Threat repelling occurs when a potential victim prevents an attacker from committing his attack. Dr, Al Qalali defined legitimate defense as "to allow the prevention of a crime by crime or repelling a force by force."[282]

SECOND REQUIREMENT:

LEGITIMATE DEFENSE'S LEGAL BASIS:

- **Theories that consider legitimate defense as a responsibility prevention.**

Criminological opinions did not agree on a legitimate defense basis. Some criminologists would attribute it to the concept of natural rights, but this

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[279]***Al Baqarah*** **Chapter, Versus 194.**
[280]**Abu Huraira's Narrated *Hadith*, 1971, Sheikh Mohammad Abu Zahra, Crime & Punishment in Islamic Law, Dar Al Fikr Al Arabi, Cairo, Egypt, P505.**
[281]**NajmSubhi, Mohammad, 185, previous reference.**
[282]**Al Qalali, Mahmoud Mustafa, 1989, Criminal Responsibility, Dar Alnahda, Cairo, P312.**

idea would have been fine in case of defending one's life, honor and property, not in case of defending rights of someone else.

Other criminologists do not only consider legitimate defense as a right, but they see it as a duty at the same time. Duty here does not mean as in a legal one and punishable in case of omission; it rather means a social one imposed by the care to maintain rights with social significance for victims when they react to attacks. They do not only defend there are rights, but they defend the entire society.[283]

Some criminologists perceive legitimate defense basis as a moral force concept. It is a theory that means a victim develops a reaction to attack under a moral force leading him to lose control over his mental ability and self-control and forcing him to push the potential threat off by resorting to his right to legitimate self-defense due to survival instinct.[284]

According to a number of criminologists, legitimate defense right basis is the absolute justice, as attack is an act of evil and it is fair to confront evil with evil.[285]

In our opinion, the closest thought to righteousness is to say the legitimate defense is based on the concept of conflicted interests of individuals and on favoring an interest that deserve more care and protection over another interest in realization of public interest.

In explanation of the above concept, the victim right emerges from the attacker's right; i.e. the attack caused the Legislators to sacrifice the

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[283]**Herina:** ***lalutte pout k droit, P32, P109 et.***

[284]**Husni, Mahmoud Najeeb, previous reference, P193.**

[285]**Dr. Ali Abdul QaderMakhsous – Penal Code, previous reference.**

attacker's right, threaten the attacker and maintain and respect the victim's right.[286]

As for Jordan's Legislators, based on the legal formulation, it appears that the Legislators consider legitimate defense as an exercise of a right in accordance with Article 60 of the Penal Code of Jordan: "Any act based on a financial necessity to repel an unrightful and unprovoked attack against one's self or property, or otherwise against someone else's self or property shall be an exercise of right."

- **Theories that consider legitimate defense as a reason for permission**

- **Natural Right Theory**

The supporters of this theory believe that the right to legitimate defense is a natural right and that the defensive person uses the force necessary to repel an attack, but I criticize this opinion because if it is valid to justify one's self-defense and property defense, it is not valid to justify defending others.[287]

- **Social Contract Relief Theory**

This theory perceives the right to legitimate defense as a social contract based in which all individuals shall have all rights. However, and in accordance with the social contract, they waive a part of such rights to the state, which in return, undertakes to protect and defend them; and in case an individual became under an attack or threat and could not manage to resort to the state to defend him, he shall be entitled to respond to such attack by himself against the attacker.

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[286]**Dr. Mahmoud Mustafa, previous reference, 237. Dr. Mohammad Zaki Abu Amer, Penal Code of Lebanon, previous reference, 245.**

[287]**Homid, Abdul Wahhab, 1983, Al Waseet in Kuwaiti Penal Code Explanation, General Section, Edition 3, Kuwait, Kuwait University Press, P233.**

I criticized this theory because it is delusional, as an individual is born and finds himself an integral part of a society that he cannot escape, and the theory did not give justifications to the legitimacy of the defensive person's act.[288]

- **Authority's Impairment & Individuals' Empowerment Theory**

This theory is based on the idea that legitimate defense is an authority's impairment although it has the right to defend and protect individuals and it should grant individuals their right to protect themselves by themselves and to protect others.[289]

I criticized this theory because the authority is not impaired, but the individual is unable to be protected by it. In addition, if an individual defends himself, he would be doing it as a policeman would, especially that a defensive person may refrain from defending with no responsibility to be borne by him; on the other hand, a policeman is ordered to carry out such a duty and may not refrain therefrom.[290]

- **Conflict of Interest Theory**

This theory was established by the German Philosopher Georg Wilhelm Friedrich Hegel who believed that the right to life is among the highest priorities and that there is no right above this right. Any attack committed against this right would cause a severe damage to the victim.[291]

The Jordanian Legislators, however, considered the right to legitimate defense as a reason for justification and a prevention of criminal responsibility in accordance with the provisions of Articles 59 and 60 of

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[288]**Homid, Abdul Wahhab, previous reference, P233.**
[289]**Al Attar, Al Dawood, 1982, Legitimate Defense Abuse, Comparative Study, Cairo, P24.**
[290]**Al DuwaikMoussa, 1984, Basis & Conditions of the Right to Legitimate Defense in Sharia & Law. Al Khaleel, Dar Al Hassan for Publication & Documentation, P25.**
[291]**Rashid, Ali, 1974, Criminal Law, Cairo, Dar Alnahda, P521.**

the Penal Code of Jordan, which states: "A committed act in exercise of a right with no abuse shall not be a crime."

The Jordanian Legislators adopted the thought that the right to legitimate defense prevents responsibility. Upon searching any such a theory adopted by the Jordanian Legislators or Judiciary with respect to responsibility prevention, we can find that the Jordanian Legislators did not clearly and explicitly make such an adoption.

TOPIC II

THE CONDITIONS OF LEGITIMATE DEFENSE LINE CROSSING

Article 60/1 of the Penal Code states:

"Any act that was situationally necessary to be committed to repel an unrightfully and unprovoked attack against one's self or property, or otherwise against someone else's self or property shall be deemed as an exercise of a right."

Clause 2 of that Article states:

"A natural person and a legal person shall be equal in protection."

Based on this provision, legitimate defense is a reason for justification that relieve an act of its criminal image in a way that allows repelling of any criminal attack without its occurrence or continuation as may be necessary and suitable even if it was a criminal act itself.

Before we study the conditions required to be met by legitimate defense, we would like to clarify the meaning of "attack" stated in Article 60 mentioned above.[292]

Does a legitimate defense act mean a repulsion of a threat to which a victim is exposed, or otherwise mean a repulsion of the attack act itself?

In fact, the legitimate defense act is an actual case in which a person finds himself or someone else exposed to a threat, which is situational and unrightful, and it is not provoked against one's self or property. Such person does not have a way to repel this kind of threat but by committing a crime.

Legitimate defense as a reason for justification is set forth in the Code and gives a person the right to kill if such a kill is necessary and inevitable; otherwise, that person would be a victim. It also lets a person to strike or else he would be stricken… etc.

A legitimate defense act is meant to stop a threat prior to its occurrence; hence, the social goal to prevent a threat prior to its occurrence is successfully achieved and actual attack and damage are prevented.[293]

As for attack act, its purpose is to commit an act that could not be prevented or repelled. Furthermore, the victim does not have the right to retaliate by himself and take revenge from the committer if the attack had already occurred to him and ended.

Therefore, a defensive person is in a legitimate defense situation if particular conditions are met in relation to his exposure to an attack.

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[292]Najem, Mohammad Subhi, 2000, General Theory, General Section, Amman, Dar Al Thaqafa, P161.

[293]Najem, Mohammad Subhi, 2000, General Theory, General Section, Amman, Dar Al Thaqafa, P161.

Based on the above said provisions, legitimate defense consists of two elements, attack and defense.

In this Topic, we will discus two requirements. The first one is the required conditions of exposure to attack; and the other one is the consequence of crossing legitimate defense lines.

FIRST REQUIREMENT:

EXPOSURE:

Exposure means any threat of exposure to attack that occurs or continues to occur as shown by an attacker.

First condition: existence of exposure

Exposure is the threat of attack or threat of continuation of an attack. If the attack threat did not actually occur, the legitimate defense will be invalid. However, if such threat had actually occurred and ended, the legitimate defense status would cease to exist.[294]

If it is found that a victim could have avoided an attack by leaving the incident place after someone caught and prevented the attacker from committing his crime, and the victim still stabbed the attacker, no legitimate defense is met in such an event due to lack of conditions; it is rather a crime punishable by the Code.[295]

It is also stated that "if a sound defender could strip the attacker of his gun and shot him in a situation that made him in control, and he still shot the attacker again to death, it would no longer be a legitimate defense situation since he had already survived the threat."[296]

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[294]Najem, Mohammad Subhi, 2000, General Theory, General Section, Amman, Dar Al Thaqafa, P126.

[295]Court of Cassation, No. 8/59, Bar Association Magazine, 1958, 89.

[296]Court of Cassation's Decision No. 859/2003, Fivefold Panel, dated 09.10.2003.

Exposure is illegitimate in positive and negative cases such as if a mother refuses to breastfeed her infant in a manner that threatens the infant's life, it shall be allowed to force her to breastfeed in defense of the infant, NezamTawfiq, 2005, Penal Code Explanation, General Section, General Theory on Crime & Criminal Responsibility, Dar Al Thaqafa, P169.[297]

SECOND CONDITION:

EXPOSURE IS UNRIGHTFUL:

Exposure is unrightful if it is illegitimate, i.e. threatens to cause a certain criminal to occur or continue to exist by defense to repel a threat prior to its occurrence. Here is the social contract purpose, i.e. to prevent a threat from becoming a damage or an actual attack if it was not repelled.[298]

A threat is a potential attack, i.e. it has yet to occur, but it is about to do if no action is taken to prevent its occurrence.

The difference between threat and damage is that a threat is a thing that could happen and cause a harm, unlike the damage.

In other words, it is an occurrence that happens in the outer world, i.e. a threat that becomes a damage; and the Code states that only a threat, not damage, is required for a defense to be legitimate.[299]

If a father abuses his right to discipline by severely hitting his child causing him to die or to suffer severe injuries, the child has the right in this case to violently defend himself to repel such attack, provided that the

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[297]Al Majali, NezamTawfiq, 2005, Penal Code Explanation, General Section, General Theory.

[298]Najem, Mohammad Subhi, 2000, General Theory, Amman, Dar Al Thaqafa, P163.

[299]AhamdFathiAl Sorour, Al Waseet in Penal Code, General Section, previous reference, P355.

extent of violence the child uses is only appropriate to repel the attack and in line with the extent of such abuse.[300]

THIRD CONDITION:

EXPOSURE IS NOT PROVOKED

It is set forth in Article 60 of the Penal Code of Jordan.

This condition means a legitimate defense case is only valid if the threat's source is the attacker himself, i.e. the defender shall not say words or do actions that cause the attacker to use violence.[301]

Unprovoked exposure is an act committed by an attacker while a defender has nothing to do with it. It can be spontaneously committed by the attacker himself or as a result of an incitement or irritation made by a third party. A person who creates a situation in which someone else is threated to be attacked may not argue that he is in a legitimate defense status if such third part does not contribute to the threat by committing acts that threaten such person because he put himself in such a dangerous situation and because it is an unnecessary defense if he could have avoided the threat in the first place by not attacking another person.[302]

For example, if someone tries to assault a female in the street, either by words or actions, but a relative of that girl tries to prevent that person from doing so, that third party is in a legitimate defense situation for he defends his relative's honor. In this case, the person who assaults a female has no right to argue that he has a legitimate defense status against the female's relative because he put himself in such a situation and under such

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[300]Al Saed, Kamel, 1981, General Provisions of Crime in Penal Code of Jordan, Analytical Comparative Sturdy, Amman, P112-113.

[301]Najem, Mohammad Subhi, 2000, General Theory, Amman, Dar Al Thaqafa, P168.

[302]Dr. Mohammad Zaki Abu Amer, Penal Code of Lebanon, previous reference, P249.

a threat. Therefore, a judge would not accept his argument of legitimate defense because such acceptance isan excuse of assault against other people's rights. In such a case, we can see a benefit of the restrictions of this right. So legitimate defense must not be provoked by the defender.[303]

Consequently, there is no legitimate defense case if the attack arising between the two parties just emergesat a moment. If either partyattempted to act but the other one shot him first, this situation gives none of them an argument of legitimate defense because each one of them attempted to attack the other and makes both of them attackers. It is a matter of mutual attack concluded by the court from the circumstances of such a mutual assault emergence, especially in brawls that involve more than one person.[304]

FOURTH CONDITION:
THREAT EXISTENCE

In order for a legitimate defense requirement to be met, there has to be a threat as set forth in Article 60 and Article 341 of the Penal Code of Jordan as follows:

"Any act that was situationally necessary to be committed to repel an unrightful and unprovoked attack against one's self or property, or otherwise against someone else's self or property shall be deemed as an exercise of a right."

This condition requires a situational necessity and a defense of a threatened right, provided that the threat is not provoked, delayed and

[303] Al Saed, Kamel, previous reference, P117.
[304] Al Majali, NezamTawfiq, previous reference, P182.

expected to occur because the real point of legitimate defense is to prevent and eliminate a threat.

If a threat is not situational or if it is expected to occur in future, there will ne no legitimate defense case.

A threat is situational in two cases:

1. **A threat has not actually started, but it is about to occur with some acts serving as a sign of its imminence and making it expected to occur. The Legislators does not ask the defender to just stay still and do nothing about until such threat actually starts; they rather allow the defender to defend himself before the occurrence if he is about to be under an imminent threat from an attacker.**

If someone takes his gun out to attack another person, the latter who are under threat starts to be in a legitimate defense situation although the attack has not actually started, but the threat is there. This criterium was considered by the Court of Cassation of Jordan when it said that if the victim was not holding a gun when the accused shot him during their brawl, and the other victim was returning home when the other accused shot him, this would mean that either one of the accused persons would not have been under a real threat and no legitimate defense conditions would have been met.

Court of Cassation's Verdict 787, Fivefold Panel, Adala Center's publications.[305]

2. **An attack has started but has not ended yet, i.e. it still exists and is going on. In this case, we assume that an attack has actually started but has not come to an end and the attacker has began to execute his act against the victim and hit him once and was going to do it again or**

[305] **Court of Cassation's Decision, 787,Fivefold Panel, Adala Center's Publications.**

tool away a part of the victim's belongings and was going to take the remaining ones. In this event, the victim's right to legitimate defense is valid.

The victim should prevent the attack from occurring again or prevent the appropriation of the remaining belongings.

Jordan's Court of Cassation said that if a right to legitimate defense is generated by meeting its conditions, but it had ended immediately because the attack had ceased to exist before the attacked person started to defend himself, the latter shall have no right to defense if violence is used after the end of attack and the cease of threat because the case would then be an abuse of such a right with a bad intent.[306]

FIFTH CONDITION:

An attack has to be occurring to one's self or property. Crimes of attacking people such as murders, injuries and harms, as well as crimes against property such theft and loot accompanied by violence and theft leading to a severe damage justify legitimate defense as set out in Article 341 of the Penal Code of Jordan, which states that "A legitimate defense case is met in all forms of murders, all physical assault crimes and all rape crimes."[307]

In accordance with Article 341 of Penal Code of Jordan, legitimate defenseis allowed against a threat of an attack made against one's property or other's property kept with the attacked person as a trust.

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[306]Najem, Mohammad Subhi, 2000, General Section, General Theory, Amman, Dar Al Thaqafa, P194.

[307]Al Halabi, Mohammad Ayyad, 2006, Penal Code Explanation, General Section, Edition 2, Amman, Dar Al Thaqafa.

However, the Code does not allow legitimate defense against all crimes occurring to properties; it rather limited the same to looting and theft accompanied by violence, provided that a defender is only able to repel such attack with defense. If the defender could resort to police, he would not be considered in a case of legitimate defense.

SECOND REQUIREMENT:

CONSEQUENCE OF CROSSING LEGITIMATE DEFENSE LINES:

when none of the legitimate defense conditions are met in relation to a threat or attack, simply there willbe no legitimate defense. In addition, the attack-defense equivalence condition is not met when there is an abuse of the defense limits. If the conditions are met but the defense exceeded the attack, i.e. there is a lack of equivalence between defense and attack, it is a case of abuse because it is not valid to say we have a case of abuse unless the right is abused. The Jordanian Legislators limited all cases in which we have a case of legitimate defense, and all its conditions must be met; otherwise, the act committed by the person who claim to have been in a case of legitimate defense is criminalized and punishable by the Law of Jordan, as it is not among the allowed acts, so the committer thereof will be held responsible.[308]

The question here:

What is the consequence of crossing a legitimate defense line?

Article 60/3 of the Penal Code of Jordan answers this question. It states that "In case of an abuse of defense, the criminal may be relieved of the punishment as set forth in the conditions mentioned in Article 89." The

[308]**Najem, Mohammad Subhi, 2000, General Section, General Theory, Amman, Dar Al Thaqafa, P194.**

conditions required to be met is limited to necessity. This means that when an attack is committed, a defender will have the right to legitimate defense; however, if such defender goes beyond the defense limits, he becomes a criminal and punishable by the Code in accordance with the provisions of Article 60/3 of the Penal Code of Jordan.

A part of jurisprudence suggested that there should be a differentiation between the two types of abuse, which are the unintentional or intentional error. In case of an unintentional error, the abuse would be considered to be committed in a good faith; however, if the legitimate defense lines are intentionally crossed, such abuse will not be considered as committed in a good faith.[309]

This would push us to identify punishable and unpunishable cases of legitimate defense abuse. In accordance with the general rules, if a defender's crossing of a legitimate defense line is intentionally committed, i.e. to harm the attacker on purpose, the person who claims to have used his right to legitimate defense shall be criminally responsible for his intentional act; and if his act cause the attacker to die, he will be held responsible for a murder or a crime of hitting that led to a death, as the case may be.[310]

If a defender's crossing of a legitimate defense line is a result of an unintentional error such as an error in estimating the severity of a threat to which he is exposed or an error in estimating his defensive act and the damage or harm that may be caused thereby to the attacker, he shall be

[309]Husin Mahmoud Najeeb, 1962, Reasons for Permission in Arab Legislations, P236.
[310]Court of Cassation, 77/20, P559, 1977.

held responsible for such an unintentional act as decided by Jordan's Court of Cassation:

1. **There shall be a severe threat of one's self and property.**
2. **The defender shall not be involved in the threat occurrence.**
3. **The threat could not have been avoided through anact less severe than the one that was actually committed.**
4. **The act shall be committed in a good faith and must be mentioned in the provisions of the Code.**

As in a defender's case of unconsciousness, disorder and loss of control over his defense that crossed the legitimate defense lines, in such an event and due to lack of criminal intention, the defender shall not be criminally responsible for his defense. However, the consequence of his abuse will be considered in accordance with the general rules of the criminal responsibility.

The Jordanian Legislators regulated one case of legitimate defense abuse in the provisions of Article 60/3 and Article 98, which is the case of no equivalence of the defense act and the threat severity while all legitimate defense conditions are met. The Jordanian Legislators added another case upon regulating the legal excuses that relieve of or reduce a punishment in accordance with Article 98 of the Penal Code, which states that "A criminal who commits his crime under the influence of a severe rage resulting from an unrightful and somehow dangerous act made by a victim shall benefit from the reducing excuse." However, if the abuse of a legitimate defense is committed in a good faith, the committer may be relived of punishment.

Conclusion:

This Research has discussed the crossing of legitimate defense lines, as we learnt about the legitimate defense definition and legal basis. Furthermore, the theories that considered the legitimate defense a prevention of responsibility and a reason for permission were discussed together with the adoptions made the Jordanian Legislators in this respect. Legitimate defense conditions have been taken on as well. Finally, we dealt with the consequence of crossing the lines of a legitimate defense. The Research concluded a set of outcomes and recommendations as follows:

Outcomes:

1. **Legitimate defense is a legal reason for permission, as it is valid in all crimes committed in defense against a threat even if they are not meant to result in a kill, injury and hit.**
2. **Legitimate defense is not an absolute right; it is rather subject to some restrictions.**
3. **The Jordanian Legislators did not specifically and precisely discuss the definition of the right to legitimate defense in the Penal Code; they rather required certain conditions to be met in the act in order to be considered a legitimate defense.**
4. **The Jordanian Legislators adopted the theory of necessity, which means a defender found himself in a situation where he can only defend himself or others against damage in that way.**
5. **The court has the jurisdiction to determine whether legitimate defense requirements are or are not met.**

6. **Crossing of legitimate defense lines can be defined as the lack of equivalence between the legitimate defense severity and the threat to which a defender is exposed.**

Recommendations:

1. **There is an extent of lack of legislations, which leads to a punishment of a person who committed an inevitable act; however, he excessively used his right, so he should be punished accordingly.**
2. **In Articles 61 and 341 of the Penal Code, I hope the Legislators would consider the situation and social position of the person, which is for some people more important than any property.The only things one has the right to defend using the right to legitimate defense are self and property.**
3. **The Penal Code should be reviewed and amended by adding provisions that include a gradual escalation of punishment against the abused person due to use of legitimate defense to the extent of abuse.**
4. **In case of a legitimate defense abuse, I suggest a committer is punished as follows:**
    a. **If the abuser acts in a good faith, he should be punished with a 6^{th} to 4^{th} the punishment.**
    b. **If the abuser acts in no good faith, he should be punished with a 3^{rd} to half the punishment.**

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ESTABLISHMENT OF THE INSTITUTE OF ADMINISTRATIVE RESPONSIBILITY IN THE LEGAL SYSTEM OF UKRAINE

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Abstract

The purpose of the article is to investigate the relations of the institute of administrative responsibility, which covers the definition of the concept of

administrative responsibility, its content, functional purpose and role in law enforcement activities of the state, the genesis of its formation and development, as well as features of its current legislative regulation and practical application. Taking into account the provisions of the current administrative and delictual legislation of Ukraine and the analysis of existing doctrinal conceptions, are expressed own positions concerning the issues regarding the concept of administrative responsibility, its features and normative and legal regulation, as well as the substantive and procedural features of its practical application. Discussions: involves positioning one's own points of view concerning the essence of administrative responsibility, defining its concept and content, and contemporary interpretation of certain provisions of this administrative and legal institute regarding its legislative regulation and practical enforcement.

Keywords: institute of administrative responsibility, administrative delict, administrative penalties, subjects of administrative responsibility, administrative and delictual legislation.

INTRODUCTION

Scientific, Practical Problems

The European integration course of Ukraine, deepening the democratization of our society, asserting the priority of human rights and freedoms in relations with the subjects of state-governmental powers require the further development of state-legal institutions of civil society, reforming the legal system, introducing reliable guarantees of observance of rights and freedoms of citizens, improvement of the mechanisms of

administrative and coercive influence on the subjects of law in order to ensure the proper law and order in the state. Particularly relevant in this regard is the implementation of administrative law reform, which serves as a legal instrument for the exercise of citizens' rights, freedoms and interests in the sphere of public administration, as well as an effective means of governmental influence of the state on various social processes. This includes administrative and delictual law, which is an integral part of administrative law. The latter has accumulated many problems related to both the proper performance of law enforcement tasks and the protection of the rights and freedoms of citizens and other subjects of law from unlawfully bringing them to such legal liability as administrative one. Together with other types of legal responsibility, administrative responsibility can be considered as a universal means of protecting the social relations governed by different areas of law. In other words, administrative responsibility is a kind of arsenal of effective legal sanctions that are used to influence the social relations of a great part of the industrial legal framework. This determines the importance of administrative responsibility not only as an administrative and legal institute, but also as a component of the whole domestic law enforcement system. Topical problems of this legal institute include, first of all, issues of clearer understanding of the concept, principles and essential characteristics of administrative responsibility, legal and factual grounds of its occurrence, as well as peculiarities of its practical application.

Analysis of recent research and publications. In due time a lot of attention was paid to the issues of administrative responsibility in publications of the Soviet scholars, who examined administrative law, including such as Bakhrakh D.M., Veremeienko L.V., Yeropkin M.I.,

Kliushnichenko A.P., Koval L.V., Lazarev B.M., Lunov O.Ye., Yakuba O.M., etc. Among modern domestic scientists, such issues were investigated in works of the following scholars, who examined administrative law as Averianov V.B., Bytiak Yu.P., Holosnichenko I.P., Dodin Ye.V., Kolomoiets T.O., Kolpakov V.K., Komziuk A.T., Kuzmenko O.V., Lukianets D.M., Mykolenko O.I., Mironiuk R.V., Shkarupa V.K., etc. These scientists have recently and thoroughly investigated the issues of development and establishment of the Institute of Administrative Responsibility, the current state of interpretation of its basic provisions and the problems of further improvement of its legal regulation and law enforcement practice.

Purpose of the Study.

The purpose of the article is to investigate the relations of the institute of administrative responsibility, which covers the definition of the concept of administrative responsibility, its content, functional purpose and role in law enforcement activities of the state, the genesis of its formation and development, as well as features of its current legislative regulation and practical application.

Research Methods.

In the process of preparing the article various research methods were used, in particular cognitive and semantic (to determine the etymology of certain concepts and terminological meanings of administrative responsibility), historical and legal (to disclos the genesis issues and development of the institute of administrative responsibility), logical and conceptual (to clarify the issues of legal regulation and peculiarities of practical application of administrative responsibility), etc.

RESULTS AND DISCUSSION

THE FIRST TOPIC: GENESIS OF ADMINISTRATIVE RESPONSIBILITY ORIGIN AND DEVELOPMENT WITHIN THE TERRITORY OF UKRAINE

Legal responsibility as a legal phenomenon in the theory of law is mostly understood as a kind of social retrospective liability, which is reflected in the negative reaction of the state, through its competent authorities to certain unlawful manifestations, which causes provided for by the law an obligation of the offenders to be accountable for their wrongful acts and to be punished in the form of separate adverse effects for them. In such an interpretation legal responsibility is considered, first of all, as one of the effective means of state coercion,[311] as the reaction to certain offenses provided by the sanctions of the legal rules and combined with the application of the corresponding sanctions. The application of legal liability measures entails for the offender the aggravating circumstances of property, moral, personal or other nature which he is obliged to endure. Thus, the offender "faces the music" for his misconduct.

Administrative responsibility is a special type of legal liability, characterized by the above-mentioned general features of the latter.

Concerning the social purpose of administrative responsibility, it has two essential features. On the one hand, this responsibility, as an important type of legal responsibility, one of the main types of state coercion, should ensure the proper performance of the tasks and functions

[311] **Skakun, 2000, p. 466.**

of the state, the reliable protection of relevant social relations. On the other hand, the implementation of its measures should be based on the strictest adherence to the principles of humanism, transparency, social justice and lawfulness.

Before considering the concept, content and features of this legal institute, let us touch upon the genesis of its origin and development within the territory of our country.

Features of legal responsibility, common for administrative responsibility, take origin from Roman law. Even in Roman times, such administrative sanctions as seizure, arrest, and fine were applied. Such types of administrative coercion could be applied both by the court and by individual public officials.

Legislative regulation of administrative and delictual relations within the territory of the Russian Empire began in the second half of the XIX century. Thus, by the Statute of Criminal Procedure (1861), for the commission of minor crimes and offences, magistrates could, among other sanctions, impose pecuniary penalties, admonitions, reprimands and warnings, as well as arrests up to three months or imprisonment in a workhouse. Governors and mayors were also empowered to file administrative cases on breaches of their binding orders.

During the Soviet Union, the process of forming administrative influence as response to minor offenses intensified. Initially, the All-Ukrainian Central Executive Committee and the Council of People's Commissars of the USSR issued the Resolution "On granting administrative bodies the right to take measures of administrative influence for "minor violations of law" (1927), which empowered the

administrative department of district executive committees and the district executive committees with the right to apply separate measures of administrative influence to offenders. In the same year, with some improvement, these provisions were included into the Administrative Code of the USSR. Therein, the legislator, along with judicial responsibility, for the first time used the term "administrative responsibility". Later, this term is repeatedly used in some legal acts, which provided for administrative liability for certain offenses, in particular for violation of fire safety regulations, traffic rules, etc. In such cases, administrative liability (mostly in the form of a fine) was understood as liability that arises in administrative (extrajudicial one) proceedings.

An important role in further improving the distinguished Union-Republic legislation on the application of administrative responsibility was played to some extent by the unified Decree of the Presidium of the Supreme Soviet of the USSR "On further limitation of the use of fines imposed in administrative order" of June 21, 1961, which was the basis of the republican decree of the Presidium of the Supreme Soviet of the USSR, adopted with the same name of December 15, 1961. Herein after in appropriate regulatory and legal acts of soviet and republican importance was adopted by a legislative bodies, executive and administrative bodies and local councils of MPs have increasingly used the term "administrative responsibility". In particular, in the Decree of the Presidium of the Supreme Soviet of the USSR "On Strengthening Responsibility for Hooliganism" of July 26, 1966 was stated that the use of fine, arrest and corrective labor for petty hooliganism is a measure of administrative influence, does not entail criminal convictions, and is not a ground for dismissal from work and does not terminate his/her length of service. At

the same time, the need to adopt a unified legislative act on the procedure for applying administrative coercive measures was urgent at that time. At that time, more than 500 regulatiry acts of both Union and Republican importance were in operation USSR-wide. As a result of previous efforts by state and governmental authorities to develop such a unified legislative act, the Supreme Soviet of the USSR adopted the Fundamentals Legislation of the Union of Soviet Socialist Republics and Union Republics on administrative offenses of October 23, 1980. On the basis of these Fundamentals, Republican codes of administrative offenses were adopted in the Union Republics. In particular, the Code of Ukraine on Administrative Offenses (hereinafter referred to as the CUAO) was adopted on December 7, 1984 and entered into force on June 1, 1985. It is still in force with significant changes and additions.[312]

For the first time in the Union Fundamentals, and then in the Code of Administrative Offenses, the definition of an administrative offense was made, which was identified with an administrative misconduct and by which was meant unlawful, guilty (intentional or negligent) action or non-enforcement that encroaches on public order, socialist property, rights and freedoms of citizens, the established management procedure and for which the legislation provides administrative responsibility. Until now, there was only a doctrinal definition of the concept of an administrative offense, which, incidentally, was interpreted arbitrarily by each author. Later, the word combination "socialist" property was removed from this definition, as well as the term "legislation" was replaced by the term "law". This could be explained in the first case by the fact that the forms

[312] **VRUSSR, 1984.**

of property protected by administrative penalties changed and expanded, and in the second one by the fact that administrative responsibility now could be established only by the Verkhovna Rada of Ukraine as a law (until this time with such powers were vested duly constituted authorities of The USSR and the Union Republics, the Union Government and the Governments of the Union Republics, as well as local councils and even their executive committees).

For the first time in the new Code of Ukraine on Administrative Offenses, the process and procedure rules regarding procedural support for the use of administrative responsibility also were clearly and thoroughly unified. Two of five sections of the Code had procedural purpose. They regulated the proceedings in cases of administrative offenses, as well as the procedure for executing resolutions on imposing separate administrative penalties. In fact, unlike similar codes of civil and criminal justice, where substantive and procedural rules were contained in different codes, the Code of Ukraine of Administrative Offenses was designed as a substantive and procedural codified law. It defined the basic principles and tasks of this administrative proceeding, the legal status of the participants of the proceedings, its general procedure and separate procedural terms, the list and content of the main procedural documents of such proceedings and the requirements for them, etc.

Therefore, with the adoption of the CUAO, there was a further improvement of the Institute of Administrative Responsibility. The range of administrative penalties in the process of its implementation, the totality of various social relations protected by administrative and legal sanctions, as well as the number of persons empowered to apply administrative responsibility measures in parallel with the courts was expanded.

Thus, if as a measure of administrative responsibility firstly were used fines, confiscation, warnings, corrective work, and often arrest, then in addition to the mentioned administrative penalties the CUAO in 1985 provided also usage of the paid withdrawal of the item, which became the object or administrative tool and money; deprivation of the special right granted to a given citizen (in particular, the right to drive a vehicle, the right to hunt); administrative expulsion of foreign nationals outside the USSR.

Administrative penalties from various violations began to protect a wide range of social relations, which were formed primarily by the rules of substantive administrative law, as well as rules and other branches of law (financial, collective, labor, etc.). In the adopted Code of Ukraine on Administrative Offenses different types of administrative offenses were concentrated in eleven chapters according to the object and branch principle, that is, depending on the object of encroachment or branch (sphere) of committing an administrative offense.

The range of bodies and their officials thatr were empowered to hear cases over administrative offenses and to apply administrative penalties to the perpetrators was also expanded. In addition to local courts, such powers were vested specially created administrative commissions in the executive committees of village and district councils of MPs'; executive committees of village councils where no administrative commissions were created; law enforcement agencies (police); fire control bodies; bodies of certain types of transport, sanitary and epidemiological service, state inspections and other control and supervisory bodies. Their system and accountability to them of administrative jurisdiction cases are defined in a

separate section of the Code of Ukraine on Administrative Offenses. At that time, the highest number of administrative offenses, both in qualitative terms (by types of administrative offenses) and in quantitative terms (these are the millionth indicators) were considered by law enforcement agencies (police).

The current administrative and delictual legislation of Ukraine today differs significantly from the penal legislation of the countries of Western Europe, where there is no clear differentiation between separate categories of offenses and types of criminal responsibility for them, in fact, between measures of punishment for different offenses depending on their legal nature. In domestic law, such a difference is fundamentally noticeable. At its core, in our opinion, there are a number of factors.

Firstly, as before, even now the legislator is aimed at distinguishing minor, insignificant in their negative consequences offenses, which are recognized as administrative misconducts, from more dangerous social acts that are recognized as crimes.

Secondly, it is natural that criminal offenses should be subjected to criminal responsibility, which is implemented through the application of more severe penalties. According to the humanistic principles administrative offenses should be limited by less severe sanctions.

Thirdly, the vast majority of administrative offenses are committed mostly in the public-administrative sphere, in the process of exercising administrative (executive) power, they have, so to speak, administrative origin. However, crimes relate to encroachment on a much broader set of social relations.

Fourthly, the last but not least is the prompt response to certain unlawful acts (in particular, minor ones), the economic component and the

simplified procedure of applying administrative responsibility in comparison with criminal ones.

Fifthly, the legislator clearly wish to discharge the judicial system from dealing with a large number of minor offenses by diverting this burden to administrative (governmental) bodies and their officials. The latter, in addition to the performance of their basic functional responsibilities in the field of public administration, is advisable to empower with certain administrative and jurisdictional powers to respond promptly to certain minor offenses in the field of their governmental activities, including the use of guilty measures of administrative influence.

Notwithstanding the aforementioned distinguishing, administrative and criminal responsibility have been continuously interacting throughout their historical formation and development. This can be demonstrated by the following examples.

Often, the boundary between individual administrative offenses and crimes is unclear: for some time, some unlawful acts were classified as administrative offenses, which were later reclassified into crimes and vice versa. For example, for a long time, insulting a police officer in the Code of Ukraine on Administrative Offenses has been classified as an administrative offense, and later this unlawful act became a criminal offense. Bootlegging made for sale was initially regarded as a crime, and further was classified as an administrative offense.

And to date, legal theory has been debating whether administrative offenses should be attributed to a socially dangerous act, or only a socially harmful one. Some scientists believe that only crimes are socially dangerous (and this is legally defined in Article 11 of the Criminal Code of

Ukraine) and that administrative misconducts are only socially harmful.[313] Others believe that the characteristic of administrative misconducts as well as crimes is social danger, only to a lesser extent.[314] When defining the concept of an administrative offense in the Code of Ukraine on Administrative Offenses, the legislator did not indicate this characteristic at all.

Until the end of the last century, domestic legislation provided criminal responsibility for so-called offenses with administrative preclusion. That is, the same unlawful act, if it was committed for the first time, could only provide for administrative liability, but when it was repeated again within a year after the administrative punishment was applied to the offender, criminal responsibility had already arisen. As an example, one can name responsibility for petty hooliganism.

Since 1977, for almost twenty years, the institution of substitution of criminal responsibility for administrative one for minor crimes has been functioning under domestic criminal legislation. Taking into account the nature of the offense, the offender, aggravating or mitigating circumstances, at the discretion of the investigative and prosecutorial agencies or court against the person for committing a minor offense, administrative responsibility in the form of a fine, corrective labor or administrative arrest could be used instead of criminal responsibility. Unfortunately, for various reasons, this institute was not able to effectively use it in law enforcement practice, and the legislator subsequently rejected it. In our view, this was a rather flexible and humane way of educational punitive influence on the guilty person, which could be a viable alternative

[313] **Klyushnichenko, 1975, p. 201.**
[314] **Bahrach, 1969, p. 127.**

for the future introduction of the Code of criminal offenses in our legislation.

A closeness of the types of punishment provided by these types of responsibility affirms the closeness of tasks and functions of administrative and criminal responsibility. Thus, of the twelve types of criminal punishment, six coincide with similar types of administrative penalties, namely: fine, deprivation of the right to occupy certain positions or to be engaged in certain activities, community services, correctional work, confiscation. To this day it is possible to attach arrest with detention in a guardhouse. Naturally, in the criminal law dimension these penalties are more severe.

Other examples of the closeness of administrative and criminal responsibility can be given. At the same time, there are a number of fundamental criteria for distinguishing these types of punitive responsibility. Such criteria, first of all, in addition to the severity of the nature of punishment measures, in our view, include the socio-legal consequences of bringing them to one or another type of responsibility. As you know, bringing to administrative responsibility unlike criminal one does not entail criminal convictions.

One can draw a line between mentioned types of responsibilities and the entities that are authorized to apply them. If only a court can bring to criminal responsibility, then more than fifty different bodies and officials are empowered with similar powers to apply administrative liability. These are courts, bodies of the National Police, administrative commissions, executive committees of village, settlement and city councils, bodies of the State Emergency Service, bodies of various types of

transport, military commissariats, separate state inspections, etc. Among them, the broadest administrative jurisdiction is vested in the courts. Only the courts can impose the most severe administrative penalties on the perpetrators, including, for example, confiscation, paid seize of items, deprivation of special rights, correctional work, community service, community service, administrative arrest and detention in a guardhouse.

As a separate factor characterizing administrative responsibility can also be called a fairly simplified procedure for its application, in which the most of cases does not require a large number of participants in the proceedings, procedural documents, obtaining evidences within the shortened time limits and the implementation of decisions, etc. Some scholars even argue that the key to distinguishing different types of legal responsibility is the procedure, the arrangement for applying the appropriate penalties.[315]

THE SECOND TOPIC: CURRENT VIEWS ON THE DEFINITION OF THE CONCEPT, MAIN FEATURES AND FCHARACTERISTICS OF THE APPLICATION OF ADMINISTRATIVE RESPONSIBILITY

Taking into account the provisions of the current legislation and the existing theoretical concepts, one analyzes the current views on the definition of the concept, main features and fcharacteristics of the application of administrative responsibility.

It should be noted that there is currently no legislative definition of administrative responsibility. In administrative law theory, a lot of scientific works have been devoted to defining the concept and essence of administrative responsibility at different times, including the Soviet period and up to now. Their analysis shows that the definitions of this concept in

[315] **Lukyanets, 2001, p. 24.**

the specialized literature differs somewhat in content and approaches. It is necessary to take into account the specificity of certain periods of development of domestic administrative and delictual legislation. Thus, during the period when we used the institution of substitution of criminal responsibility for administrative one, concerning individuals, who committed so-called minor crimes, not only administrative offenses but also offenses carrying features of minor crimes were the actual reason for the occurrence of administrative responsibility. And this could not be ignored in defining the concept and essence of the administrative responsibility.

Here are some examples of definitions of administrative responsibility available in the specialist literature.

Thus, I.P. Holosnichenko states that administrative responsibility is "a kind of legal responsibility, which is a set of administrative legal relations that arise in connection with the administrative penalties enforcement, stipulated by the norms of administrative law, to the individuals, who have committed an administrative offense by the authorized bodies (officials)".[316]

L.V. Koval notes that administrative responsibility is the application of mandatory rules, which operate in the sphere of governce and other areas of administrative penalties to the violators.[317]

Yu.P. Bitiak and V.V. Zyi believe that administrative responsibility should be understood as the "imposition on the offenders of compulsory rules that are applied in public administration, administrative penalties

[316] **Holosnichenko, 1991, p. 23.**
[317] **Koval, 1979, p. 186.**

that entail for them a grave consequences of a material or moral nature".[318] S.S. Hladun has the same point of view, noting that, as a rule, authorized bodies of the executive power (their officials) directly bring to responsibility and only in some cases – the courts.[319]

V.K. Kolpakov notes that administrative responsibility is "a compulsory, in accordance with the established procedure, enforcement by the legal entity provided by the legislation for committing an administrative offense of the influence measures, which are accomplished by the offender."[320]

D.M. Lukyanets understands under administrative responsibility "relations arising between executive bodies and natural or legal persons (under the conditions of absence of official subordination relations between them) concerning the commitment of the unlawful acts by the latter, envisaged by the legislation, and are applied to them penalties in administrative procedure provided by law".[321]

Similar views on the definition of the concept of administrative responsibility are expressed by some foreign scholars, who examined administrative law. Thus, Professor Popov L.L. writes that such responsibility is "the implementation of administrative and legal sanctions, the use of administrative penalties by the authorized body or official against citizens and legal entities that have committed the offenses".[322]

Thus, in most existing definitions, the concept of administrative responsibility is associated with the application of administrative penalties to those who have committed administrative offenses. Administrative

[318] Bitiak, & Zyi, 2014, p. 337.
[319] Hladun, 2004, p. 123.
[320] Kolpakov, 2008, p. 76.
[321] Lukyanets, 2001, p. 34.
[322] Popov, & Sergin, 1975, p. 39.

misconduct and administrative penalty are the two starting legal categories for determining administrative responsibility. These are its cornerstones, the "supporting structures". The actual basis for the occurrence of administrative liability today is only the commitment of an administrative offense as a special type of offense, the responsibility for which, as a rule, involves the Code of Ukraine on Administrative Offenses. The materialized form of realization of administrative responsibility can be only administrative penalties and no other, even administrative and legal sanctions. As is indicated in Art. 23 of the CUAO, administrative punishment is a measure of responsibility for an administrative offense. And if other measures of legal influence (such as disciplinary punishments against military personnel, measures of influence under Article 24-1 of the CUAO, etc.) are applied to a person, who has committed an administrative offense, then such persons are considered as those, who were not brought to administrative responsibility. Relevant and legal consequences of the application of such sanctions (it cannot be a circumstance that burdens the responsibility under Article 35 of the CUAO; it should not be a qualifying constructive feature in determining the repetition of certain types of offenses, etc.).

It is generally accepted that the legislative definitions of particular legal concepts should not be cumbersome, overloaded in content and in different categories, difficult to understand and burdensome, especially for law enforcement entities. In our view, for example, there is no need to specifically state in our case that administrative responsibility is a type (structural part) of administrative coercion, which in turn is a kind of state coercion as a whole.

It seems that such a definition should not emphasize the possibility of applying administrative penalties only by executive authorities (their officials), because today judicial administrative and jurisdictional powers have expanded significantly.

It is illogical, in our view, when defining the concept of administrative responsibility, to consider it only retrospectively as the final result of its implementation, because it has a promising (positive) meaning as an abstract category (in general, it is functioning impersonally). Especially to combine its definition with the obligatory implementation of measures of its influence (according to V. Kolpakov and O. Kuzmenko).[323] In law enforcement practice, there is a steady tendency of non-compliance with regulations for the imposition of administrative penalties in 20-25% of cases due to various reasons. It is at least illogical to consider that, in such cases, the offenders were not brought to administrative responsibility. Besides, this problem is not only theoretical one and it also has an important legal enforcement value.

One is imposed by the definition of administrative responsibility as a specific form of reaction of the state represented by its competent authorities on commitment of administrative offenses, according to which persons, who have committed these offenses should face the consequences for their illegal actions ncur administrative penalties in the statutory forms and order.[324] However, this definition of administrative responsibility is somewhat cumbersome.

Therefore, administrative responsibility is mostly understood as the application to persons, who have committed administrative misconduct,

[323] Kolpakov, & Kuzmenko, 2003, p. 252.
[324] Goncharuk, & Sopilko, 2015, p. 7.

administrative penalties, which entail for them aggravated consequences of property, moral, personal or other nature and are imposed by authorized bodies or officials on the grounds and according to the procerure, norms of administrative law.

Without claiming to be unquestionable and completeness of the made statements, the following definition can be used as a basis for defining this concept: administrative responsibility is a type of legal responsibility that forseees the enforcement of administrative penalties by administrative bodies (their officials) against persons who have committed administrative misconducts.[325]

Taking into consideration the provisions of the current legislation, let us distinguish the basic features of administrative responsibility.

1. First of all, it is one of the independent types of legal responsibility (along with criminal, disciplinary, civil ones, etc.), which serves as an important means of public order in the state. Today, administrative responsibility is the most common type of legal responsibility. Each year, about one million offenders are punished by administrative penalties in Ukraine.

2. As a specific form of legal response by the state, represented by its competent authorities, to such unlawful manifestations as administrative misconducts, administrative responsibility is one of the components of administrative coercion, which is realized by applying administrative penalties to guilty people. Its sanctions provide protection against violations not only of administrative and legal norms, but also of many other branches of law.

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[325] ***Ibid.***

3. The legal basis for the occurrence of administrative responsibility is the current legislation on administrative offenses, first of all, the Code of Ukraine on Administrative Offenses, the Customs Code of Ukraine and some other legislative acts. Therefore, administrative responsibility is legislatively defined and is legally enforceable.

4. The commitment of an administrative offense (misconduct) is a actual ground for the occurrence of administrative responsibility.

5. In essence, administrative responsibility implies the legal obligation of the offender to answer to the competent state body (officials) for his misconduct and to incur certain punishment for this in the form of separate aggravating consequences for him. This is a negative consequence of the person's unlawful activity.

6. Practical means of exercising administrative responsibility are autonomous repressive legal coercive measures – administrative penalties as a measure of this responsibility. They are multifaceted in content and may have a moral, material or physical impact on the offender.

7. In the process of applying administrative responsibility, specific legal relations between the authorities (officials) who apply it and the offenders are formed; and in such legal relationships, as a rule, there are no elements of official obedience.

8. Administrative responsibility shall be exercised in the forms and procedures established by law, which are clearly defined by administrative procedural norms. These norms, as was noted, are contained in sections IV and V of the CUAO.

9. The subjects of administrative responsibility are first and foremost natural sane persons who are sixteen years of age. At the same time, in some cases such entities may be legal persons (for example, while violation

of certain traffic rules, fire safety rules, legislation on association of citizens, etc.). However, the CUAO is primarily focused on individuals only.

10. The Verkhovna Rada of Ukraine is empowered to establish administrative responsibility (adopts the Code of Ukraine on Administrative Offenses, other legislative acts on the establishment and application of administrative responsibility, amends and updates them, etc.). In the cases defined by Art. 5 of the Code of Ukraine on Administrative Offenses, local authorities are also empowered to make decisions on the management of natural disasters and epidemics, which imply administrative responsibility for their violation.

11. The powers to apply administrative responsibility (the right to impose administrative penalties) are vested in a considerable number of subjects (they are specified in Section III of the Code of Ukraine on Administrative Offenses), which was already mentioned above. Despite the fact that in many cases administrative penalties are applied by the district (city) courts, administrative responsibility is mostly enforced out of court.

Administrative responsibility can be examined in two aspects: perspective (positive) as a constraining factor, responsibility "in general", existing abstractively, regardless of the committing a specific offense by a person, and retrospectively – as a result of committing a specific offense by a person, which arises as a certain administrative penalty.

CONCLUSIONS

Administrative responsibility is an important and effective means to combat with the most serious offenses, such as administrative

misconducts. Its sanctions protect a large scope of public relations that are formed by the rules of administrative and many other branches of law in the most socially-saturated sphere, which is the sphere of public administration. This responsibility is multifunctional. Among its functions we can distinguish such social functions as: educational, prophylactic (preventive), encouraging, informative, communicative functions, as well as special ones (legal), including: – regulatory, law enforcement, punitive (repressive), compensatory (restoring) and other functions.

Modern domestic administrative and delictual legislation, which regulates relations of administrative responsibility, today is far from the needs of legal theory and law enforcement practice. The process of radically updating the basic codified law in the area of administrative responsibility has been delayed for decades. In other republics of the former Soviet Union, new codes of administrative offenses were adopted decades ago. In Ukraine, however, only the amendments and additions to the Code of Ukraine on Administrative Offenses have been introduced since 1984. The National Code needs a foundation and fundamental reform of both the fundamental, principal provisions of substantive and legal substance and its accompanying procedural support, which covers the regulation of proceedings in administrative offenses and enforcement proceedings for the implementation of imposed charges.

To the issues that became imminent should be referred fundamentally new, systemic changes of modern administrative and delictual legislation related to, in particular, establishing the administrative responsibility of legal entities, determining the system of administrative penalties that may be applied to such persons, and procedural peculiarities of their application; with improvement of procedural features of the occurrence of

administrative responsibility within the commitment of repeated offenses; with the possibility of adopting the Code of Criminal Misconducts, which undoubtedly will include extends the most socially dangerous administrative misconducs, etc.

Thus, the urgency of the existence of administrative responsibility of legal entities today is caused by the need to increase the effectiveness of the application of administrative and compulsory measures in various social spheres, in particular in architectural and construction, urban planning, sanitary and hygienic, ecological, financial and credit spheres, in the fields of public services and amenities, protection of labour housing maintenance and utilities board, business activities, antitrust activities, advertising activities, land relations, distribution of narcotic drugs and psychotropic drugs, weapons, fire safety, road safety, etc. For committing administrative offenses in such spheres, administrative responsibility should be provided by law, along with citizens and officials, as well as legal entities, regardless of ownership.

At the same time, today it is equally important to improve the current edition of the current Code of Ukraine on Administrative Offenses. It is necessary to clarify certain concepts, terms, revision of the provisions of certain articles of this Code, both substantive and procedural content. This also applies to the removal of individual acts from the category of administrative-punitive offenses (the so-called "dead" articles), the prediction of the peculiarities of the occurrence of administrative responsibility of the so-called special subjects, in particular, members of Parliament and members of local councils, judges; clarification of certain procedural time limits, etc.

This demonstrates the urgent need to adopt a fundamentally new Code of Ukraine on Administrative Offenses.

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THE PROBATION PERIOD FOR THE PRIVATE SECTOR EMPLOYEES IN JORDAN: RIGHTS AND RESTRICTIONS

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Abstract

The legislation that regulated the labor rules in Jordan are based on a probation period applicable to private sector employees in order to ascertain the employees' competences and good conduct that qualifies them to carry out their duties. During this period, the employers are granted the right to evaluate the employee in accordance to controls specified by the law, and the employee is also fully entitled to his/her financial rights set by the law.

The Jordanian Labour Law has mentioned to the probation period in an unclear provision such matter may raise many issues between the private sector employees and employers since the duties and rights of each party

are debatable. This article therefore aims to examine the concept of probation period and provide some recommendations for all the related legal issues.

Keywords: Probation Period, Employee, Private Sector.

1-Introduction

The labor legislation in Jordan has gone through several stages, starting with the Ottoman Era where the Law of Associations and the Law of Political Parties were issued, and the employment contracts concluded between the related parties remained subject to the Majalah,[326] until the Labor Law was established to regulate the work relations to protect the working class and achieve social justice as its main goal.

The realism is one of the most important features of the Labor Law, where its provisions were varied to regulate each case aside. As the Labor Law addresses a large segment of the society, the legislator was keen to provide the necessary protection for the employees at all stages of their work, therefore, article 4 of the Jordanian Labor Law No. 8 of the year 1996 and its amendments is considered a safety clause where it nullifies any clause in the employment contract that abates any of the employee rights that are provided in the law, since those rights are considered the minimum rights imposed in favor of the employee. However, it allowed the agreement on any conditions that increase the rights of the employee in the employment contracts.

Since the main link between the employee and the employer is the contract, and given that there is a consensus that the employee is the weakest party in this contractual relationship, the need to research the

[326] Majalah was the Civil Law of Ottoman State and it was also the first codification of Shari'a/ Islamic law.

probation period appeared. The author believes that the probation period is one of the most serious stages in the professional life of the employee, as it has a wide space to take advantage of the employee and abuse his/her rights.

The probation period is considered a period of preparation and experiment between the employee and the employer in order to achieve certain objectives for both parties. The legislator devoted a special provision for this period, namely article 35 of the Labor Law and its amendments No. 8 of the year 1996, stating that "The employer may recruit any employee under probation to verify his/her qualifications and capabilities to carry out the required work,,,"

Due to the importance and particularity of this period in the labor law, and as the legislator aims to protect the employee in this contractual relationship, the probation period was organized with an explicit text. However, examining the text introduces many questions that this article will try to answer such as: whether the probation period is exclusive to the unlimited period employment contracts? Is it possible to agree on the probation period in contravention to what is stipulated in the law? Does the agreement explicitly require a probation period or is it a provision of the law? Is the probation period applicable to the employee who is appointed more than once by the same employer? Is the right to terminate the employment contract during the probation period exclusive to the employer?

Accordingly, this article is divided into four main sections in which all the legal rules of the probation period topic will be discussed including: The concept of probation period; The legal nature of the employment contract

under the probation period; The conditions that must be satisfied during the probation period for the employee, and the implications of the probation period on the employee and its termination.

1. THE CONCEPT OF PROBATION PERIOD

The legislator has set a period of time for the employee to go through legally, where employer can verify the efficiency of the employee and his potential to carry out the required work, as well as for the employee to verify the working conditions and the suitability of the wage for the effort exerted. If the probation period passes without either party using the right to terminate the contract, it indicates a successful probation and a confirmation of employment fixation.[327]

It is necessary to illustrate the concept of probation period and the legal status of contract during that period in the following sections:

2.1 The Definition of Employment Contract under Probation Period

The employment contract under probation is an employment contract in the proper sense, which is held as soon as an offer and acceptance are legally compatible and includes all elements of work, wages, and subordination. The employee in this contract is an employee within the meaning of article 2 of the Labor Law No. 8 of the year 1996 and its amendments[328], which defines him/her as " Every, male or female, who performs a job against wages and is a subordinate to the employer and at his service. This covers the juveniles and those under probation or rehabilitation. "

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[327] **Abu Shanab, Ahmad (1998), Explanation of the new Jordanian Labor Law, Dar al-Thaqafa Publishing, Amman, First Edition, p. 124.**

[328] **Jordanian Labor Law No. 8 of the year 1996 and its amendments, published in the Official Newspaper P. 1173 No. 4113.**

The legislator has organized the provisions of this type of work in article [35] of the Labor Law No.8 of the year 1996 and its amendments, which stated as follows: "

a) **The employer may recruit any employee under probation to verify his/her qualifications and capabilities to carry out the required work provided that the probation period shall not exceed in any case three months and the wage of the employee under probation shall not be less than the minimum limit decided for wages.**
b) **The employer may terminate the employment of the employee under probation without a notification or remuneration during the probation period.**
c) **If the employee has continued working after the expiry period of the probation, the contract shall be considered as unlimited period work contract, and the probation period shall be considered within the period of service. "**

It's found from the above text that the Jordanian legislator did not state a comprehensive definition for the employment contract under probation period, leaving it to the jurisprudence which defined it as: "An agreement between the employee and the employer under which the employee undertakes work for the employer under a probation period for a certain time to ascertain his/her suitability for the work required.[329]

Also, the text may imply that the probation period only serves the interest of the employer, but in reality the probation period serves the interest of the employee too, by enabling him/her to identify the working conditions,

[329] **Ramadan, Sayed (2016), Explaining the Labor Law, Dar Al Thaqafa For Publishing & Distributing, p. 201.**

the suitability of the wage for the effort exerted, and the employer's attitude and manner.

It's also noted that the legislator set the probation period to three months, which guarantees that the employer will not abuse the employee during this period, nor take advantage of this right in a manner contrary to its purpose. It also stated that this period is the maximum that can be agreed upon, in order to safeguard the interests of the employee, considering it as an obligatory clause related to public order. However, it may be agreed to reduce the period, as it doesn't contradict with above[330]. In anyway, the probation period section in the employment contract should include an explicit time limit; otherwise, the contract would be nullified for not stating the period, and would be considered free of it[331].

Finally, it should be noted that paragraph (c) of Article 35 has many drawbacks where it stated that "If the employee has continued working after the expiry of the probation period, the contract shall be considered as unlimited period work contract, and the probation period shall be considered within the period of service."

It seems at the first glance that the employment contract under probation is not a contract in the legal sense, but rather an initial contract, where it would have been better if it wasn't stated as " the contract shall be considered as unlimited period work contract " and merely as"... the contract would be considered unlimited ...". Hence, it's questionable whether it's possible to set the probation period condition in a fixed term contract?

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[330] Al-Atoum, Mansour (2016) Explanation of the Jordanian Labor Law, First Edition, p. 27.

[331] Zaki, Mahmood (1982), Employment Contract in the Egyptian Law, Second Edition, p. 680.

Until 2005, the decisions of Cassation Court were issued where a legal principle is used: "The existence of the probation requirement in the fixed-term contract does not derogate it the contract from its legal status, as the probation requirement applies to the fixed-term employment contract and the unlimited period work contract. However, if the contract was a fixed-term employment contract and the probation period imposed in the contract passed, the contract remains as a fixed-term because the probation period has been determined due to an agreement of the parties; where the contract is considered the law of the contractors ... ".[332]

Based on the above, it could be said that the condition of probation period is permissible in fixed-term and unlimited period employment contracts, as the purpose of the period is to enable the contracting parties to verify their interest in concluding the employment contract. The probation period is a period of preparation and examination that aims to adapt the employee for tasks he/she has been a candidate to perform, and reveal his/her abilities and competencies.

Since the employment contract under probation tests the employee after his/her employment, it then differs from the exams and personal interviews conducted by the employer, as the latter does not entail any obligations on the parties. The employment contract under probation also differs from the training contract; where the purpose of the probation is to verify the efficiency of the employee and his/her potential to carry out the required work, as well as for the employee to verify the working conditions and the suitability of the wage for the effort exerted. This purpose can only be achieved if the employee is experienced, whereas the

[332] **Award of Cassation Court No. 3688/2005.**

purpose of the training contract is to teach the employee about the profession or occupation, and to train him/her to qualify for work after completing the training. This purpose can only be achieved if the employee lacks experience and needs training to do some work.[333]

2.2 THE LEGAL NATURE OF THE EMPLOYMENT CONTRACT UNDER PROBATION

The nature of the relationship between the employee and the employer is a contractual relationship regulated by the private law. However, it was found that the jurisprudence opinions have differed in identifying the proper legal description of the employment contract under probation. Under this section, the most important jurisprudential opinions in that matter will be discussed, and which is predominant from our point of view.

- **The employment contract under probation is a temporary preliminary contract**

According to this view, the employment contract under probation is a paving tool for the conclusion of the final contract, and is temporary in terms of period; where it's considered an indefinite contract for the purpose of assessing and testing the employee's ability and the work suitability during the probation period. Therefore, if the employee succeeds during the probation period, the employment contract shall be held, whereas if he fails in the probation, the preliminary contract will

[333] **Zahran, Hammam (2017), Labor Law - Individual Employment Contract, Dar al - Maarifa al - Jameeya, Margin No. 2, p. 129.**

expire without concluding a new contract. And this contract (under probation) is subject to the general rules of the contract.[334]

Some critics of this opinion are that it assumes that two contracts are concluded, of which one is preliminary and one is final and this contradicts the reality where there is only one employment contract that the contracting parties abide to its terms from the beginning. Moreover, the contract under probation period does not differ in its nature and implications from the final employment contract[335].

Since the employer and the employee agree that the employment contract concluded between them may include a probation period, this opinion is contrary to the intention of contractors and the provisions of the law that organized this issue.

- **The employment contract under probation is not a binding contract**

The proponents of this view argued that the employment contract under probation is an unbinding contract that may be waived, as the condition of the probation is optional. If the probation period ends without the employer exercising the right to terminate it, it will be considered as a final binding contract[336].

According to the Civil Code, the contract is not binding to one or both of the contractors despite its validity, if the contract can be terminated

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[334] Al Maqabla, Wafiq (1994), The Contract is the Law of The Contractors Principle and Its Exceptions, comparative study, unpublished master thesis, University of Jordan, p. 75.

[335] Al-Tahrawy, Hani (2010), Termination of the Judge During probation period, An Analytical Study of the Position of the Jordanian Legislator and Administrative Judiciary, published research, Yarmouk Research Journal, Humanities, Volume 26, No. 4.

[336] Diab, Salah (2006), The provisions of Labor Law and Social Insurance in the Kingdom of Bahrain, University of Bahrain, First Edition, p. 92.

without agreement or suing option. The problem with this view is that, unbinding contracts such as the agency and the unpaid deposit contracts are not conditional by nature and are revocable without having this condition. The Jordanian legislator limited the option of conditions to the binding contracts, and since the condition of probation gives the employer the right to terminate the contract within a maximum period of three months, this indicates that a conditional employment contract can't be legally unbinding, rather it's a binding contract since its conclusion, but it's conditional on the probation period option.[337]

- **The employment contract under probation is affixed to a pending condition**

Supporters of this opinion consider the employment contract under probation as a contract affixed to a pending condition[338], where the condition was defined in the Jordanian Civil Code no. 43 of the year 1976 in article 393 as "a future obligation which satisfaction depends on the existence or deprivation of a condition", comparing the employment contract to the sale contract subject to testing. However, the condition that is pending in the employment contract is the worthiness and the success of the employee in performing the required tasks. Therefore, if the condition is fulfilled, the contract becomes final as of the date of conclusion, and the

[337] **Bin Tarif, Mohammad (2016), The Role of Disciplinary Responsibility of the Public Employee in Anti-Corruption in the Public Service under Jordanian Law, Comparative Study, PhD Thesis, Ain Shams University, p. 117.**

[338] **Pending condition: is the condition that results in inducing an obligation if it's fulfilled in the contract. For details, see: Karam, Abdul Wahid (1998), The Terms of Sharia and Law, Second Edition, Amman, p. 248.**

contract in this case is affixed to a pending condition; that is, the contractor agreement to it after the probation[339].

The jurisprudence has criticized this description of the nature of the employment contract under probation for its inaccuracy, claiming that the contract does not produce its implications as long as the condition has not been fulfilled. However, this doesn't apply to the employment contract under probation as it produces all its implications as a final contract since its conclusion. The reason for this is that the contract is a time contract (continuous) where its termination does not result in neglecting the past contract implications[340].

Therefore, we can argue that this view is in line with the instant contracts, in which time is not an essential element. However, a contract that is affixed to a pending condition means that no obligations or rights are induced to any of the contracting parties, unless the condition is fulfilled, therefore, this view is not applicable to employment contracts under probation since employment contracts are on-going contracts.

- **The employment contracts under probation is an employment contract affixed to a revocable condition**

The majority of jurists support this opinion considering employment contracts under probation as employment contracts affixed to a revocable condition; that is the lack of worthiness and ability of the employee to

[339] Durand et Vitu, Traité de droit du travail,T.I,Paris,Dalloz,1950,P288,Note2; Quoting Hasan Kira, Hasan (1979), Origins of the Labor Law - Employment Contract, Monchaat Al Maaref, Alexandria, 3rd Edition., p. 280

[340] Al-Masarwa, Haitham (2018), The Chosen in Explaining Labor Law, Dar Al-Hamed for Publishing and Distribution, First Edition, Amman, p. 128.

perform the required tasks, and the dissatisfaction with the probation period. Therefore, if the revocable condition was fulfilled during the probation period, the employer may terminate the contract without retroactive implications, meaning that the termination shall not have an effect on the fulfilled obligations of the contracting parties, given that the employment contract is time contract (continuous) in which time is an essential element and is excluded from the retroactive principle. Therefore, if the revocable condition was fulfilled (if the employee didn't prove his/her worthiness) the employment contract will be suspended retroactively[341].

The suspension of the employment contract under probation is effective from the date when the revocable condition was fulfilled, however, if the condition is not fulfilled (the employee has proved his/her worthiness to perform the required tasks), the contract will be fixed and becomes final.

Based on the above, it could be said that the employment contract under the probation condition is an affixed contract to a revocable condition (namely, the employee's unworthiness to work and the dissatisfaction with the probation), where the employee puts his/her performance under the monitoring and the supervision of the employer. Therefore, it doesn't differ from the final employment contract except that the employer has the right to terminate it during the probation period.

[341]**Abdel Sabour, Fathi (1985), The Mediator in the Labor Law, Dar al-Hana for Printing, 1985, p. 386.**

2. The Conditions that Must Be Satisfied During the Probation Period for the Employment Contract

The employment contract shall be considered an "employment contract under probation" if a set of conditions that can be derived from the law text and the jurisprudence are satisfied, as follows:

First: The agreement on the probation condition in the contract.

Some have argued that explicit provisions should state the probation condition, where it may not be agreed upon implicitly, or otherwise the contract is treated as final. However, it's necessary to verify in an unequivocal manner the administration intention of concluding an employment contract conditional to the probation, without the need of explicitly stating it in the contract. The nature of the contract is derived by the judge from adopting the terms of the contract and deducing the intentions of the contractors without committing to what the two contractors call a contract between them. Therefore, if explicit text did not include the condition of probation, it does not mean that the agreement on this condition doesn't exist. The French judiciary has deduced the common intention to conclude a final employment contract even though it includes a probation condition of six months, where it assumed that the purpose of this condition is to circumvent the law[342].

It's noted that the Jordanian legislator did not require an explicit text or agreement on the probation period in article 35 of the Labor Law No. 8 of the year 1996. However, referring to the decisions of The Honorable Court of Cassation, in its capacity as a quasi-judicial body, it's found that it has

[342] **Nael, Eid (2019), The Mediator in explaining the Work and the Social Security Systems in the Kingdom of Saudi Arabia, King Saud University Press, p. 78.**

ruled in many of its decisions[343] on the principle that: "the probation condition should be stated explicitly between the employee and the employer, and if it's not included in the contract, the employee shall have all the rights provided for in law, and shall not be said that the employee is under probation by virtue of the law.

SECOND: THE DURATION OF THE PROBATION SHOULD BE SPECIFIC.

Article (35) of the Labor Law No. 8 of the year 1996 determined the maximum period for the probation by three months. As mentioned above, this period is applicable to fixed-term and unlimited period employment contracts, where the purpose of determining the time of this period is to protect the employee from any abuse from the employer by exercising the right to terminate the contract during that period without a notice or a reward, which can cause damages to the employee.

Moreover, the contract may not increase this period, otherwise it will be considered invalid, as per article 4 of the Labor Law. However, nothing prevents the contractors from reducing this period, and if so, the contract will still be valid as it provides better rights to the employee. The best right was provided for in article 4 of the Labor Law, which grants the employee any additional rights not stipulated in the law, the contract or the decisions, and shall not derogate from the employee rights that are provided in the labor legislations.

Third: The wage of the employee during the probation period shall not be less than the national minimum wage.

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[343] The Honorable Court of Cassation, in its capacity as a quasi-judicial body, has ruled in many of its decisions (Decision No. 2509/2002 of 4 November 2002, Decision No. 142/1999 of 16 August 1999 and Decision 1470/2000 of 31 July 2000).

The legislator did not only provide for the employee under probation right to be paid, rather stipulated that the wage should not be less than the national minimum wage. Therefore it's not permitted to agree to give the employee under probation less than the national minimum wage, as this would be considered a direct violation of article 35 of the Labor Law.[344]

It's noted that the employee during the probation period enjoys all the rights of any other employee since he/she is a defined as an employee according to Article 2 of the Labor Law.[345]

Fourth: Appointing an employee under probation for more than once with the same employer is not permitted.

Although this condition is not provided for in the text of article 35 of the Labor Law, and the jurisprudence of the Court of Cassation is free from this condition, it is apparent that this condition is applied as a sort of guarantee and protection to the employee from the abuse of the employer.

Referring to some of the explanations of the comparative laws, it's found that the Egyptian Law has referred to this condition, which stipulates that the employee may not be appointed on probation more than once with one employer[346].

The purpose of this condition is to protect the employee from the employer in case of abusing the granted right to terminate the contract. Although article 35 of the Labor Law No. 8 of the year 1996 didn't provide for this as a restriction, an obligation, or even as a condition to consider the contract as an "employment contract under probation", it's found that the

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[344] Ramadan, Sayed, Explaining the Labor Law, P. 203.

[345] Minimum wage for employees decision for the year 2011, page 5616, Official Newspaper No. 5134 on 31/12/2011

[346] Shatanaoui, Ali (2009), Jordanian Administrative Law, Second Book, First Edition, Dar Wael, Amman, p. 178.

condition is stated in the Jordanian law in another point (referring to The Arab Convention on Levels of Work No. 1 of the year 1966, approved by the Hashemite Kingdom of Jordan[347]) which stipulated in article 22: "A employee may not go under probation more than once with the same employer."

And since this agreement is approved, it has become part of the national legislation; meaning that this condition is applicable in Jordan. The intended purpose of this condition, as discussed earlier, is to avoid the employer manipulation by terminating the contract during the probation period and concluding a new one that is also under probation in an attempt to evade the provisions of the law.

3. The Implications of the Probation Period on the Employee and its Termination

The rights and obligations of the private sector employee who is subject to the private law are various depending on the nature of rights, duties, and provisions for each case. It is important in the following sections to examine the implications of the probation period on the employee, and termination of private sector employee contract during the probation period.

4.1 The Implications of the Probation Period on the Private Sector Employee

This part answers many questions that come to mind, such as: are the rights of the contracting parties under probation different from those in

[347] **Publication on page 465 issue 2082 of the Official Newspaper dated on 20/3/1968, where a Royal Decree approving it was published in the same issue.**

the final employment contract? Do both contracts have the same rights and obligations?

As for the rights and obligations of both parties in the contract under probation, and as mentioned earlier, the employment contract under probation is an employment contract in the full sense that is concluded as soon as the affirmation is linked to an acceptance. Therefore, all the elements and factors of the employment contract exist such as: the tasks, wages and subordination. The employee under probation is covered in the Labor Law definition for the employee in article 2: "Every, male or female, who performs a job against wages and is a subordinate to the employer and at his service. This covers the juveniles and those under probation or rehabilitation."

As a result, the employee under probation enjoys all the rights included in the Labor Law such as the right to earn a wage that is not less than the minimum wage, the right to use the determined leaves, and other rights provided by law. The only exception to this is the right granted to the employer to terminate the contract under probation without giving notice or compensation, and with no need to base the termination on the cases provided for in article 28 of the Labor Law.

As for the rights of the employer, they mirror the obligations of the employee under probation, and are similar to what is provided for in the Labor Law, such as the right to have the required tasks carried out to the fullest by the employee himself under the supervision of the employer, in addition to the obligations that are derived from the original obligation; keeping the secrets of the employer and not competing against him[348].

[348] **Dr. Mansour Ibrahim Al-Atoum, p. 64.**

It should be noted that what was previously mentioned as conditions for the contract to be considered an "employment contract under probation", in terms of the salary payment and not going under probation more than once with the same employer, are treated as obligations to the employer and rights for the employee in return.

It's found that the rights and obligations of the parties who conclude the employment contract under probation are not different from those in the final employment contract. The only exception, as mentioned above, is the possibility of terminating the contract by the employer during the probation period. According to a consensus in the jurisprudence, it could be argued that the employee can also terminate the contract during the probation period, given that the purpose of the probation is set to benefit both parties.

4.2 Termination of Private Sector Employee Contract during the Probation Period

Based on the above, this section will discuss how the employment contract is terminated. The legislator has given the employer the right to end or terminate the employment contract under probation without notice or reward during the probation period, which was explicitly provided for under article 35/b "The employer may terminate the employment of the employee under probation without a notification or remuneration during the probation period."

In this regard, we see that the legislator limited the right to the employer alone, which is understood by the legislator's vision and intent in the case that the condition of probation is decided solely for the employer benefit. However, if it was decided for both, the employee and the employer, it's

correct to argue that the employee is also given this right without prior notice.

Although this is not stated, the use of the termination right by the employee is rare.[349] And as mentioned above, if the contract does not specify who benefits from the probation condition, we shall return to the origin, which stipulates that it's decided for both contracting parties as agreed upon by the jurisprudence and practical aspects. Reference to the jurisprudence of the Honorable Court of Cassation[350] which arrived to the principle that this right - referring to the right of the employer to terminate the contract without notice during the probation period - is a discretionary privilege for both the employer and the employee and is not limited to the employer.

Based on the above, it can be said that this right is accessible to both parties, but the employee's use of this right is rare, therefore, this right be considered by the employer as it's the most frequent situation that threatens the employee's fate in his/her work. Thus, it's important to answer question whether the employer is entitled to use the right of termination without a control?

Accordingly, we shall examine the controls that govern this right, which is determined by the text of the law in favour of the employer.

The first control is to be terminated during the period of the probation, i.e. within a maximum period of three months, otherwise the employment relationship is settled and the contract becomes final and its termination

[349] **Kira, Hassan, Origins of Labor Law, p. 402**
[350] **Cassation Court No. 1258/2013 dated 1/4/2013.**

becomes subject to the general rules in the Labor Law, depending on whether the contract is fixed-term or indefinite period.

The second control is that the decision to terminate the contract has to be justified, and this restriction shows that the Jordanian legislator has a purpose from the probation; that is to verify the competency of the employee and his/her ability to carry out the required work. The legislator here identified the motives of the decision to terminate the contract by the incompetency or the lack of abilities of the employee during the probation.

Therefore, we believe that the employer may not terminate the contract unless it is proved to him that the employee is incompetent or lacks the ability required to carry out the agreed work. The termination of the contract for a different reason contrary to the legislator's purpose of granting this right would be considered abusive dismissal. Therefore, we believe that the employer's decision to end or terminate the contract should be justified by one of these cases, whether the employee is incompetent or lacks the ability to perform the required work, or other reasons. This is a legal matter subject to the control of the Honorable Court of Cassation[351].

And the purpose of the above is that the employer shall not be forced to keep an inefficient or unproductive employee, who showed a certain weakness in his/her work or lacks of abilities during the probation period; the thing that may not match with the nature of the work required, resulting in damages to the interests of the employer.

On the other hand, the Honorable Court of Cassation has affirmed that the decision must be justified. "Employment under the current probation, with the consent and agreement of the contracting parties, shall allow the

[351] **Abu Shanab, Ahmad, Explanation of Labor Law, pp. 126-127.**

employer to terminate the employment of the employee during this period, with justification„„„". if the contract included for a probation period of three months, then the employer shall have the right to terminate the employee's service during the probation period if he/she finds that the employee is incompetent to work. In this case, the employer is not liable for any harm or damage because he/she did not violate the contract and did not abuse his/her right.

Accordingly, the jurisprudence of the Jordanian law of the necessity to explain the decision of termination is very important, as the use of the termination right by the employer without restriction might be manipulated by the employer where he/she can evade the obligations imposed by the labour law; by terminating the employment contracts under probation when the period is near ending, and replacing them with new employees under new employment contracts subject to probation.

4. Conclusion

This study discussed the legal status of the private employees during the probation period in the Jordanian legislation by dividing it into four main topics in which we discussed all the legal provisions related to this subject. Finally, we reached a set of conclusions and recommendations as follows:

First: Results

- **The aim of the probation period for the private employees is to enable the employer to evaluate employees and to ensure their competency and ability to carry out their work.**
- **During the probation period, the private sector employees shall be entitled to full remuneration and salary without a decrease, since**

they also deserve most of their non-financial rights during the probation period.

- **The contracting parties may not agree on a probation period exceeding three months, otherwise their agreement will be considered null and void, but a shorter period may be agreed upon.**
- **If the employee continues to work for the employer after the end of the probation period, the employment contract between them becomes fixed and final, and the two contracting parties do not conclude a new contract. The probation period is considered then as an actual service for the employee**
- **The employer's right to terminate the contract is not absolute; rather, it is governed by controls; the termination must be made during the probation period and should be justified.**
- **The probation period is considered an exception to the general principle that the contract of employment shall be final once it is concluded. It is also possible to agree on the condition of probation in the fixed-term contracts and in the indefinite contracts. The employment contract under probation is a work contract in the proper legal sense, which includes all elements of work (duties, wages, and subordination). Also, the employee under probation falls within the meaning of an employee under the law, and has all the rights are guaranteed by the law except for the right of the employer to terminate his/her service without notice or reward during the probation period.**
- **The employment contract under probation is a contract affixed to a pending condition, namely, the employee's incompetency or lack of ability to perform the required tasks, especially since it is**

considered a contractual condition to be agreed upon under the employment contract between the contracting parties, in writing or orally.

Second: Recommendations

In the course of this research, and trying to cover the provisions and controls that govern the probation period for the private sector employees, we have a number of recommendations that we believe are necessary to complete the provisions relating to the probation period in the Jordanian legislation, as follows:

- **The Jordanian legislator should have explicitly stipulated the right of the employee under probation to terminate the employment contract without notice and without being obligated for harm and damage, equally as the employer, in order to prevent different opinions and jurisprudence regarding that right.**
- **The legislator could have restricted the right of the employer to terminate the contract within the probation period, provided that the use of the right is not abused in accordance with the provisions of article [66] of the Civil Code, where the right of termination is void of the intent to infringe, otherwise the employer should be bound by a guarantee.**
- **The Jordanian legislator should add to the Labor Law a text that prohibits appointing an employee under probation period more than once for the same employer.**

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GENESIS OF THE DEVELOPMENT OF UKRAINIAN LICENSING IN THE CONTEXT OF GUARANTEES OF LICENSEES' RIGHTS

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Abstract

The article deals with the peculiarities of legal regulation of licensing of economic activity in Ukraine are considered in the article. It is emphasized that the relevance of such legislative regulation is related to the public's concern about the security of certain types of economic activity, but this should not violate the principle of freedom of economic activity. The purpose of the article is to find out peculiarities of legal regulation of

licensing of economic activity in Ukraine. The most important results and conclusions. Ukrainian legal regulation of economic activity has evolved by consistently limiting the pressure of the licensing authority on economic entities, finding the means to effectively protect the rights of the latter, on the one hand, and by the constant implementation by licensing authorities of their lobbying abilities to restore their previously limited rights. At present, the highest level of protection of the rights of economic entities has been reached by the adoption of the Law of Ukraine No. 139-IX on improving the procedure for licensing of economic activities.

Keywords: appeal in court, expert appellate council, license, license revocation, licensee, licensing authority.

INTRODUCTION

Scientific, Practical Problems.

The licensing problem is a complex theoretical and practical problem, as evidenced by the history of licensing and current experience in legal regulation. On the one hand, the technical and legal restriction of business activity through licensing is linked to public concern about the safety of certain types of business activity, but on the other hand, such restriction is an interference with the freedom to conduct business.

E. Bekirova[352], a Ukrainian researcher (2004), states that two extreme estimates of licensing have been approved in the world: a) licensing is extremely bureaucratic, contrary to market relations and must therefore be abolished; b) licensing is compatible with market relations and should be exercised by the authorities, but within clear limits, without causing damage to the development of constructive entrepreneurship. In the

[352] **Bekirova, 2004.**

context of licensing issues, S. Selimanova[353] (2016) emphasizes that in jurisprudence and law enforcement for a long time comparative jurisprudence has been effectively used to study good international experience in order to improve national law.

Thus, this paper proposes the following hypothesis: licensing experience in such a powerful country as Ukraine may be useful for solving similar problems in other countries, on the other hand, analysis of Ukrainian problems in the context of world experience will help to improve the relevant processes in Ukraine. In particular, S. Selimanova[354] (2016) recognizes the usefulness of studying licensing experience in Ukraine.

Purpose of the Paper is to find out the peculiarities of legal regulation of licensing of economic activity in Ukraine. *Object/subject of study.* Legal relations in the field of licensing of economic activity. The study examines the mechanism of legal regulation of licensing of economic activity in Ukraine in the historical context and in the context of compliance with international requirements.

Research Methods.

The research methodology is based on the historical method, the methods of documentary analysis and synthesis, comparative analysis, objective truth, which made it possible to systematically trace the genesis of the right regulation of licensing in Ukraine in the historical and international context. Classification, grouping, systematic methods are used to streamline empirical information and to classify the studied legal phenomena (licensed activities, specific activities). Documentary analysis

[353] **Selimanova, 2016.**
[354] ***Ibid.*, p. 10.**

made it possible to systematically examine the documentary sources of legal phenomena used in this work. The comparative method was used to compare the legislation of Ukraine with the legislation of other countries. The objective truth method is implemented by cross-checking the source data from multiple sources, relying on digital (statistical) material. The historical method has allowed us to trace licensing trends in Ukraine and in the world.

RESULTS AND DISCUSSION OF THE RESEARCH

THE FIRST TOPIC: HISTORY AND PRINCIPLES OF LICENSING IN THE WORLD AND UKRAINE

The licensing problem is a complex theoretical and practical problem, as evidenced by the history of licensing and current experience in legal regulation. On the one hand, the technical and legal restriction of business activity through licensing is linked to public concern about the safety of certain types of business activity, but on the other hand, such restriction is an interference with the freedom to conduct business.

E. Bekirova[355], a Ukrainian researcher (2004), states that two extreme estimates of licensing have been approved in the world: a) licensing is extremely bureaucratic, contrary to market relations and must therefore be abolished; b) licensing is compatible with market relations and should be exercised by the authorities, but within clear limits, without causing damage to the development of constructive entrepreneurship.

A reflection of this contradiction is the change in the ideology of licensing from 1991 to 2000-2015. Yes, in Art. 4 of the Law of the

[355] **Bekirova, 2004.**

Ukrainian SSR No. 698-XII the license is defined as a special permit issued by the Council of Ministers of the Ukrainian SSR or its authorized body. However, in the legislation of 2000-2015, the license is already defined as the right to certain activities. Yes, in Art. 1 of the Law of Ukraine No. 1775-III «On Licensing of Certain Types of Economic Activities» a license is defined as a document of the state model, which certifies the licensee's right to carry out the type of economic activity specified therein for a specified period in case of its establishment by the Cabinet of Ministers of Ukraine subject to fulfillment of the license conditions. In Art. 1 of the Law of Ukraine No. 222-VIII «On Licensing of Types of Economic Activities» a license is defined as the right of an economic entity to pursue a type of economic activity or part of the economic activity to be licensed. That is, the Law of 2015 suspended, in particular, the issuance of a license for a certain period, the license became indefinite.

Licensing history was considered by O. Yatsenko[356] (2013), O. Kashpersky[357] (2011), E. Bekirova[358] (2006), P. Palchuk[359] (2008) and others. For example, O. Yatsenko (2013) points out that the licensing institute has deep historical roots. In addition, it has developed and expanded in many countries around the world, although the terms «license» and «licensing» in the legal vocabulary of different historical periods either do not occur at all or have a non-economic meaning.

English law of the XIX – early XX centuries limited to the request of the founder of the industrial establishment to apply to the local

[356] **Yatsenko, 2013.**
[357] **Kashperskiy, 2011.**
[358] **Bekirova, 2006.**
[359] **Palchuk, 2008.**

magistrate. Each such establishment could then be inspected in accordance with the instructions drawn up for the inspectors. There were no special craft police in the Great Britain at that time. However, this was offset by the ability of individuals to file business complaints directly with the magistrate.

French law already in 1810 provided for special rules on the basis of which, without the knowledge of the prefect, manufactories could not be opened, which represent a danger to the health of the inhabitants. Such manufactories were divided into three categories: some were not allowed at all in populated areas, others could be allowed, but with the implementation of orders providing danger prevention; others could be admitted, but not otherwise, under constant police supervision. Similar instructions were given to the prefect in 1823 for manufactories that made powder and fire-resistant substances, then for manufactories that had high-pressure machine equipment.

Prussian law since 1810 has abandoned the prevailing previously detailed regulation, adopting the factories in their own way of conducting industrial activities «Gewerbeordnung», which is a simple enough application by the founder of an industrial establishment (par. 14-15). This provision was adopted and developed for various industrial establishments in the new manufactory charter of the North German Union (Gewerbe-Ordnung fur Norddeutschen Bund 1869). But this general rule is set among others: prior authorization was required from local authorities to set up industrial establishments that were recognized by the statute as dangerous in their technical design and which were considered to be dangerous to public morality or to achieve general police objectives.

The same principles were recognized in the Austrian law of 1859, which distinguished industrial establishments on the free, which did not require special permission, and those which could be admitted only with the special permission of certain state bodies.

Describing the current state of affairs in Germany, S. Selimanova[360] (2016) points out that the general rule of licensing in Germany is a priority of the application, not of the permit. The only exceptions are activities for which entrepreneurs need special qualifications (medicine, insurance), or the production of equipment that requires systematic special control, that is, equipment that is dangerous for employees of the enterprise and/or for others.

American law in the early twentieth century, in much similarity to English, was much more forthright in protecting the interests of private capital. Yes, a person could use his property or do his own business with some damage to others. She could keep a factory that, with its noise and smoke, disturbed others as long as it was kept within reason. The world needs factories, smelters, oil refineries, high-profile machines and explosions, even at the cost of inconvenience to others, and a disgruntled citizen may be required to agree to some reasonable inconvenience for the common good[361]. But if the entrepreneur's behavior is unreasonable, in terms of the usefulness of production and the harm from it, it is recognized as a disturber of peace and order.

[360] **Selimanova, 2016.**

[361] **Prosser, 1955, p. 398.**

In the context of licensing issues, S. Selimanova[362] (2016) emphasizes that in jurisprudence and law enforcement for a long time comparative jurisprudence has been effectively used to study good international experience in order to improve national law. This allows us to study more deeply the status and nature of processes and phenomena occurring in public relations, to understand the scope and nature of mutual legal influence, the possibilities, breadth and methods of using the experience of foreign countries.

Summarizing the results of the analysis of legal regulation in the EU and the US, S. S. Selimanova[363] (2016) highlights the main features of licensing in countries where this area is successfully developing:

1. Licensing of commercial activity as a discretionary act of public administration, which restricts constitutional rights and freedoms, necessarily requires legislative consolidation.

2. The amount of the license fee shall be fixed by a statute or a by-law issued on the basis of the statutes.

3. The introduction of licensing in most cases is due to the need in the public interest to limit the number of persons engaged in certain activities, protection of health and safety of people, preservation of local attractions, etc. In relatively rare cases, licensing is set up to generate revenue.

4. The amount of licensing fees in the budget of executive bodies is small, and only in the budget of local authorities does the licensing fee contribute, albeit less, to taxation or government subsidies.

5. The licensing process in some countries is sometimes replaced by an equivalent patent application or local taxation.

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[362] **Selimanova, 2016, p. 4.**

[363] ***Ibid.*, p. 20.**

6. The role of licensing in modern, developed countries as a regulator of the economy is much inferior to the methods of state incentives.

As O. Kashpersky (2011) notes on the genesis of Ukrainian licensing, since the emergence and development of Kievan Rus and the adoption of "Russian Truth", the licensing institute has just begun to emerge, but the imperfect tax and customs systems that existed at the time led to the waiver of licensing. After that, the licensing institute in Ukraine adapted to the European and Russian norms of law. Later, during the NEP period, this institute holds an important place, although it is under state control. Since 1991, licensing at the level of competence of public authorities has begun to be more actively implemented in all spheres of economy and trade and to adapt to the realities of today. At this historical stage of development of Ukrainian society, licensing is of particular importance, since the realities of modern life and the economic situation that has arisen in the world have required a more complete and meaningful consideration of this problem and the introduction of norms that would be able to regulate relations in this sphere of public administration, fixing them. at the legislative level, in the issue of a special right to engage in a special activity that has all the characteristics inherent in the concept of licensed activity. The implementation of economic reforms in Ukraine aimed at introducing market principles for regulating economic activity was the result of the introduction in the legal practice of the legal institutions inherent in a market economy, which imposed additional requirements (restrictions) on entrepreneurs in carrying out their business activities, in particular the licensing institute.

THE SECOND TOPIC: FORMATION OF LICENSING SYSTEM IN INDEPENDENT UKRAINE (1991-2000)

Since Ukraine gained independence, economic reforms in Ukraine aimed at introducing market principles for regulating the economy have resulted in the development of an administrative-legal institution for licensing economic activity (A. Bazhenova[364], 2017).

The development of the licensing system in Ukraine was investigated by the authors: O. Yatsenko[365] (2013), A. Shpomer[366] (2006), O. Kashpersky[367] (2011), E. Bekirova[368] (2006), P. Palchuk[369] (2008), E. Aver'yanova[370] (2018)), L. Belkin[371] (2010, 2011, 2012, 2014, 2019), I. Medvid, T. Dolishnia[372] (2019), and others. At the same time, the authors who researched the period 1991-2000 come to the unanimous conclusion that during this period the legislation in the sphere of licensing was formed chaotically and haphazardly, regulated mainly by by-laws. contained numerous contradictions between individual acts, more than 400 legal documents of various levels were operating in the field of licensing (E. Bekirova, 2006; A. Bazhenova, 2017; E. Aver'yanova, 2018). Most likely, this path was inevitable for the young Ukrainian state, but the Ukrainian licensing system at that time was an illustration of how no licensing should be organized.

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[364] Bazhenova, 2017, p. 104-108.
[365] Yatsenko, 2013.
[366] Shpomer, 2006.
[367] Kashperskiy, 2011.
[368] Bekirova, 2006.
[369] Palchuk, 2008.
[370] Aver'yanova, 2018.
[371] Belkin, 2010, p. 10; Belkin, 2011; Belkin, 2012; Belkin, 2014; Belkin, 2019.
[372] Medvid, Dolishnia, 2019.

As noted above, Ukrainian licensing at that time was based on the norms of Art. 4 of the Law of the Ukrainian SSR (hereinafter – Ukraine) No. 698-XII "On Entrepreneurship". In this article, a license is defined as a special permit issued by the Government or a body authorized by it. It was assumed that the following activities (11 types in total) could not be carried out without obtaining such a permit: prospecting and exploitation of mineral deposits; repair of sporting, hunting or other weapons; production and sale of medicines and chemicals; production of beer and wine; production of vodka, liquor and cognac products; production of tobacco products; medical practice; veterinary practice; legal practice; creation and maintenance of gambling establishments, organization of gambling; trade in alcoholic beverages.

The permit (license) for conducting business activities shall be issued by the Government or its authorized body within a period not exceeding 30 days from the date of receipt of the application. The denial of the permit (license) is issued at the same time and is a written act. Refusal to grant a permit (license) is considered by a court or arbitration.

The law did not provide for any more regulation. This created opportunities for the arbitrariness of the licensing authorities.

On 1992 adopted the Law of Ukraine No. 2697-XII «On Amendments to the Law of the Ukrainian SSR[373] "On Entrepreneurship"». By this Law, Article 4 of the original Law No. 698-XII was supplemented by another 23 activities which are impossible without a license, namely: domestic and international transportation of passengers and goods by air, river, sea, rail and road; the agency and chartering of the merchant marine fleet;

[373] **Law of Ukraine, No. 2697-XII.**

production of securities, banknotes and postage; mediation activities with privatization papers; etc.

A total of 34 licensed activities are foreseen.

Instead, Art. 4, as amended by Law No. 698-XII, as of 1997, already contained 60 licensed activities[374]. At the same time, as of 2000 the number of such activities decreased and amounted to 46 items[375]. At the same time, as E.Averyanova (2018)[376], correctly points out, the types of activities subject to licensing constituted a significant segment of domestic entrepreneurship, since almost every name in the list included several types of works and / or services. In addition, the Entrepreneurship Act was not the only legal act that established the activities for which a license was required.

It is worth noting that by Resolution No. 1164 the Cabinet of Ministers (Government) of Ukraine approved the Concept of development of the state system of licensing of business activity by its types»[377].

The Concept, in particular, emphasizes that the main task of licensing is to protect the economic and other interests of the state, its citizens through the establishment by the state of certain conditions and rules for the implementation of certain types of business activities. Business licensing is defined as an integral part of state regulation of entrepreneurship in Ukraine.

At the same time, the Concept contains the correct provisions on democratic principles of licensing: protection of human and citizen's constitutional rights and freedoms, legitimate interests, public health and

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[374] **Law of Ukraine, No. 698-XII.**
[375] ***Ibid.***
[376] **Aver'yanova, 2018, p. 55.**
[377] **Resolution, No. 1164.**

state security; equality of rights of all business entities irrespective of their organizational and ownership forms; publicity and openness of the licensing process. Only those types of entrepreneurial activity that directly affect human health, the environment, and the security of the state should be regulated.

It was stated that the right to engage in certain types of business activities that are licensed is regulated only by law.

In order to regulate the relations that arise during the licensing of certain types of entrepreneurial activity, it is recognized as necessary to develop and adopt a special Law on Business Licensing.

The Concept recognizes the need to provide for regulation in the field of licensing only by law. However, the procedure for obtaining a license for a long time was regulated by the by-laws.

Thus, by the Resolution No. 99, the Cabinet of Ministers of Ukraine approved the «Regulations on the Procedure of Issuing Special Permits (Licenses) to Entities of Entrepreneurial Activities for Performing Certain Activities»[378]. The Regulation states that the license is issued at the request of the business entity. The following shall be attached to the application: entrepreneur – legal entity – copies of the founding documents; citizen entrepreneur - copies of documents certifying the level of education and qualification required to carry out the relevant type of activity (except in individual cases). The decision to issue a license or refuse to issue a license shall be made within 30 days from the date of receipt of the application and the necessary documents. The decision to refuse the license must state the reasons for the refusal.

[378] **Resolution, No. 99.**

The licensing authority determines the need to coordinate the issue of its issuance with the public authorities, whose function is to oversee compliance with the established rules when carrying out the respective activities. Licensing authorities (except in individual cases) approve, with the agreement of the business protection authority, instructions on the conditions and rules for carrying out certain activities and monitoring their compliance.

It is the very last paragraph that has created opportunities for authorities to obstruct licensing.

May 17, 1994, instead of Resolution No. 99 of April 15, 1991, the Cabinet of Ministers of Ukraine approved Resolution No. 316 of the same name[379]. In principle, this Regulation was not very different from the previous one, but a new body – the Licensing Chamber – was introduced into the licensing system. It was noted that the Licensing Chamber, upon the submission of the ministries and agencies issuing licenses, approves the instructions on the conditions and rules for carrying out certain activities and monitoring their compliance. However, the Licensing Chamber itself was introduced not by the Law, but by a by-law – Decree of the President of Ukraine No. 264/95 «On the Licensed Chamber of the Ministry of Economy of Ukraine»[380].

It is worth noting that Art. 4 of the Law of Ukraine (formerly the Ukrainian SSR) No. 698-XII «On Entrepreneurship» for the first time on 1998 introduces for the first time legislative regulation of repressive measures against licensees[381]. Yes, it is determined that the licensing authority has the right to suspend the license for a definite period in case

[379] Resolution, No. 316.
[380] Decree of the President of Ukraine, No. 264/95.
[381] Law of Ukraine, No. 698-XII.

of violation of the license conditions by the business entity; failure of a business entity to comply with the requirements for compliance with the licensing conditions of a body specifically authorized by the Cabinet of Ministers of Ukraine or a body that issued a license within a specified period. In case of elimination of the infringements that led to the suspension of the license, the issuing authority shall decide to renew its license.

The procedure for suspension and renewal of a license shall be determined by a body specifically authorized by the Cabinet of Ministers of Ukraine or by a body that issued the license.

The license may be revoked if any false information is found in the license application or in the documents attached thereto; transfer of a business entity's license to another person; repeated or gross violation of the license conditions by the business entity.

The license shall be deemed to have been revoked from the date of the decision to revoke the license or from the date of revocation of state registration of the business entity.

The reasoned decision to suspend or revoke a license shall be communicated to the business entity within five days.

The decision to suspend or revoke a license may be challenged by a legal entity.

However, it must be acknowledged that the vagueness of the wording of the grounds for revocation of the license (for example, the ambiguity of the concept of «gross» infringement) significantly reduced the effectiveness of the appeal.

On July 3, 1998, in place of Resolution No. 316 of May 17, 1994, the

Cabinet of Ministers of Ukraine, by Resolution No. 1020, approved a new Regulation on the procedure for licensing entrepreneurial activity[382]. This Regulation was mainly aimed at the implementation of the above new provisions of Law No. 698-XII, as of January 29, 1998.

Thus, it should be noted that the trend of development of Ukrainian licensing in 1991-2000 was an increase in the types of activities subject to licensing; lack of stability of the regulatory framework, which hindered business entities to plan their activities and respond in advance to possible changes; dominance of sectoral instructions and other by-laws in the field of licensing, overriding by-laws over the law; lack of a unified approach to the licensing system in various areas of business and subjectivity of licensing officials.

THE THIRD TOPIC: FORMATION OF LICENSING SYSTEM IN INDEPENDENT UKRAINE (2000-2015)

The beginning of a new stage of development of the licensing system in Ukraine is related to the adoption on 2000 of the Law of Ukraine No. 1775-III, – i.e. a special law in the field of licensing. Adoption of this Law was a certain embodiment of the Concept of 1996 on the development of the state system of licensing of business activity by its types. As noted above, this Concept envisaged the adoption of such a special law.

In Art. 2 of this Law it was declared that the effect of this Law applies to all business entities. At the same time, at the moment of adoption of the Law, it was established that the licensing of banking, foreign economic activity, licensing of broadcasting channels, licensing in the field of electricity and nuclear energy, licensing in the field of intellectual property is carried out in accordance with the laws governing relations in these

[382] **Resolution, No. 1020.**

areas.

That is, already at the moment of adoption of this Law there was a deviation from the declared aim of unity of approaches to licensing.

Art. 3 of this Law stated the following basic principles of state licensing policy: ensuring equality of rights, legitimate interests of all economic entities; protection of rights, legitimate interests, life and health of citizens, environmental protection and security of the state; establishment of a single procedure for licensing of economic activities in the territory of Ukraine; establishment of a unified list of economic activities subject to licensing.

However, as noted above, at the time of the adoption of this Law, the principle of establishing a single order was not adhered to, since licensing in certain areas was allowed under separate laws.

To ensure a unified state licensing policy and create the conditions for overcoming sectoral lobbying, a Specialized Licensing Authority was introduced (Art. 5). According to the Law, this body: develops the main directions of development of licensing; develops draft regulatory acts on licensing issues and coordinates such projects that are developed and adopted by the executive authorities; approve jointly with the licensing authorities the license conditions and the procedure for monitoring their compliance; forms expert-appellate council; issues orders for elimination of breaches of license conditions, as well as orders for elimination of breaches of legislation in the field of licensing, etc. It was assumed that the functioning of such a body would provide a unified methodology for establishing the procedure for obtaining a license, monitoring the compliance of business entities with established requirements; license

revocation.

Thus, in accordance with Art. 10 of the Law, an economic entity that intends to carry out a certain type of licensed economic activity, either individually or through an authorized body or person, applies to the relevant licensing authority with the application of the established model for the issuance of a license. The application must contain the minimum information about the business entity (name, location, bank details, identification code, type of business activity for which the applicant intends to obtain a license).

It should be especially emphasized that the Law also includes the documents for the licensing application, an exhaustive list of which is established by the Cabinet of Ministers of Ukraine upon submission by a specially authorized licensing body. The licensing authority is prohibited from requiring economic entities other documents not specified in this Law.

It should be noted that this approach combines the flexibility of the activities with the stability of the requirements and the avoidance of arbitrariness of the licensing authorities in this area, since the licensing authorities set the requirements for documents not in their bureaucratic discretion, but in agreement with the competent authorities.

Pursuant to Art. 11 of the Law, the licensing authority shall take a decision to grant or refuse to issue a license no later than ten working days from the date of receipt of the license application and the documents attached to the application, which, incidentally, is less than under Law No. 698-XII (30 days), but unless a special law regulating relations in certain spheres of economic activity does not provide for another term of issuing a license for certain activities.

For the objective control of the activity of licensees, the concept of "licensing conditions" is introduced - this is an exhaustive list of organizational, qualification and other special requirements, which are obligatory to be fulfilled when conducting the types of economic activities subject to licensing. The license conditions and the procedure for monitoring their observance shall be approved by joint order of the specially authorized licensing and licensing authority.

Therefore, the license terms are also approved not with the bureaucratic discretion of the licensing authority, but in agreement with the specifically licensed licensing authority.

Art. 9 of the Law provides a comprehensive list of economic activities subject to licensing. The list includes 60 titles. Formally, this is more than in Art. 4 of Law No. 698-XII as 2000. However, in practice, this was due to the fragmentation of certain types of economic activity. Thus, Law No. 698-XII provides for the type of licensed activity as domestic and international transportation of passengers and goods by air, river, sea, rail and road, and in Law No. 1775-III this activity was broken down into 4 types, namely provision of services in transportation of passengers, cargo, separately, by air; separately, by river, by sea; separately, by car; separately, by rail.

When Law No. 1775-III was adopted, it was assumed that the Law would establish a single list of grounds for revocation of a license for all activities (Art. 21 of the Law). This provided not only a judicial but also an extra-judicial way of appealing the decision of annulment. The Law stipulates that the decision on revocation of a license enters into force ten days after its adoption. If, within that time, the licensee files a complaint

with the Board of Appeal, the decision of the licensing authority shall be suspended until the relevant decision of the specially authorized licensing body has been taken.

That is, the advantage of such a method of protecting the right to retain a license is that, during the period of appeal, the license remains valid. This approach to alternative dispute resolution is consistent with international legal principles. In particular, In particular, Recommendation Rec (2001) 9 of the Committee of Ministers to Member States[383] states that, in practice, litigation is not always the most appropriate way of resolving an administrative dispute.

However, the problem is that, in contrast to the court, the Specialized Licensing Authority, even in the opinion of the panel of experts in favor of the complainant, cannot independently reverse the unlawful decision of the licensing authority. The authority can only require such cancellation from the licensing authority. However, if the latter ignores such a requirement, the issue of the validity of the license is a conflict.

At the same time, it should be borne in mind that, contrary to the original plan, practically from the first days of the existence of Law No. 1775-III, the only licensing system was destroyed. Yes, according to para. 4 Art. 3 of Law No. 1775-III in its original version, one of the basic principles of state policy in the sphere of licensing is the establishment of a uniform procedure for licensing of types of economic activity in the territory of Ukraine. However, this provision was later supplemented by the provision «...and the definition of its peculiarities for certain types of economic activity ... in the laws governing relations in the relevant field...». This has legalized the stretching of licensing rules by law, and sometimes

[383] **Recommendation Rec, 2001.**

by-laws. The history of the destruction of the single licensing system in the period 2000-2015 is shown in Table 1.

Table 1. ***History of the destruction of the single licensing system (2000-2015) (Introduction of «special» activities licensed under «other» laws)***

Date of acceptance «other» of the Law	*An activity that is recognized as special*
01.06.2000	**Banking, Broadcasting Licensing, Electricity Licensing, and Nuclear Energy Use (Immediately upon Adoption of Law No. 1775-III)**
11.01.2001	**production and sale of alcohol by ethyl, cognac and fruit, alcoholic beverages and tobacco**
12.07.2001	**financial services activities**
17.01.2002	**activities in the field of education**
18.11.2003	**activities in the field of telecommunications**
06.09.2005	**professional activity in the securities market**
12.01.2006	**licensing of television and radio broadcasting activities**
16.05.2007	**activity in the field of construction**
19.05.2011	**rendering of services in transportation of passengers, cargo by air transport**
20.12.2011	**trafficking of narcotic drugs, psychotropic**

	substances and precursors, production of medicines, wholesale and retail trade in medicines
22.03.2012	**import of medicines (except import of active pharmaceutical ingredients)**
04.07.2012	**security activities**

Source: Authors.

However, it is impossible to logically justify licensing under the special rules of each specific activity. A. Shpomer[384] (2006) tried to formulate the general principles of such allocation: socio-economic role, a wide range of service contingents, ensuring the economic security of the state, vital role for society, maintaining at the proper level of the intellectual potential of society, ensuring social stability of the state. At the same time, medical practice (socio-economic role, broad range of services), and land trade (ensuring the economic security of the state, vital role for society) and providing cryptographic information security services (support to adequate level of intellectual potential of the society), etc. In practice, the decision to remove licensing rules from the profile law depends on the lobbying abilities of the authors of the relevant laws.

The «privatization» of the licensing rules by agencies leads to the following negative consequences: fragmentation of activities for which separate licenses must be obtained; the establishment of these activities by-laws (the record holder for the establishment of such activities - the Ministry of Regional Development and Construction of Ukraine – 150 elements, of which thousands of subspecies are composed); significant prolongation of the term of consideration of the application for a license in

[384] **Shpomer, 2006.**

comparison with the basic Law No. 1775-III (record holder for terms - National Securities and Stock Market Commission - 3 months); uncontrolled complication of the package of documents that must be submitted to the licensing authority to obtain a license (for example, see Table 2 – increase in the number of documents from 7 to 29); impossibility to appeal against the decision of the licensing authority to the expert-appellate board by a «special» licensee; introduction of additional grounds for refusal or revocation of a license; mass cancellation of licenses and the like. The destruction of the single licensing system leads to the arbitrariness of the licensing authorities to approve the terms of licensing, issuance and revocation of licenses, hinders the development of entrepreneurship and creates a basis for corruption. In fact, licensing problems are hidden in the so-called special laws and by-laws, so there are very few changes to Law No. 1775-III without restoring its universal nature.

Table 2. ***Dynamics of increase in the number of documents to receive licenses for the right to carry out activities on the issue and circulation of securities***

Period, date	Number of documents
According to the resolution of the Cabinet of Ministers of Ukraine during the period when obtaining a license for this type of activity was regulated by General Law No. 1775-III	7

According to the Order of May 26, 2006, that is, after the withdrawal of this activity from the scope of Law No. 1775-III	**17**
Following order of 14.05.2013	**29**

Source: Authors.

For example, the Law of Ukraine No. 2800-IV «On Amendments to Certain Laws of Ukraine on Licensing of Professional Activity in the Securities Market» in the Law of Ukraine No. 448/96-VR «On State Regulation of the Securities Market in Ukraine», a special paragraph was inserted as follows: «Licensing of professional activity in the securities market is carried out by the State Commission on Securities and Stock Market in accordance with the laws of Ukraine governing the securities market, regulatory acts adopted in accordance with these konamy and with the requirements of Articles 13 and 19 of the Law of Ukraine "On licensing certain types of activities"». At the same time, these articles only regulate the design of license forms and licensing cases. And this means that this type of activity is completely withdrawn from the licensing law. At the same time Law No. 448/96-VR itself includes 11 independent activities that are subject to licensing.

I. Medvid, T. Dolishnia[385] (2019) also emphasize that the licensing conditions in individual industries are governed by a large number of special legal acts that set out the general principles and rules for obtaining permits and licenses. Such a large number of legal acts complicates the process of obtaining licensing documents.

THE FOURTH TOPIC: BECOMING A LICENSING SYSTEM IN

[385] **Medvid, Dolishnia, 2019, p. 60.**

INDEPENDENT UKRAINE (AFTER 2015)

The next stage in the formation of the Ukrainian licensing system was the adoption of the Law No. 222-VIII. This adoption should address the shortcomings identified in the previous period. A comprehensive explanation of such deficiencies is contained in the official explanatory note to the draft law[386].

The main reason for the need for the adoption of the Law is recognized the need for systematic improvement and updating of the order, all stages and procedures of licensing of economic activities through their simplification, as well as a significant reduction of the list of certain types of economic activities.

Almost fourteen years of experience in applying Law No. 1775-III has highlighted the need for further streamlining of licensing of economic activities, maximum simplification of all stages and procedures for obtaining licenses, avoiding unjustified burdens or unnecessary administrative procedures for economic entities, introduction of information technology, and legislation principles of licensing of economic activities.

The protection of the intending or licensed business entity against the actions of licensing officials must be strengthened, procedures for reviewing licensing activities reduced, the unlimited period of license validity for all types of economic activities subject to licensing, and the possibility of transfer licenses inherited.

It is also necessary to clearly, transparently and rigidly establish the exclusive and minimum list of grounds for revocation of the license,

[386] **Adoption of the Law, No. 222-VIII.**

simplify the pre-trial consideration of cases of revocation of the license (improvement of the powers of the Expert-Appellate Board on licensing), introduce the need for attestation of officials of officials.

It is necessary to reduce not only the number of economic activities subject to licensing, which do not pose a threat to human health, the environment and the security of the state, the introduction of which has not yielded positive results in any sphere of public relations or has corruption signs, but also the types of works of licensed types business activity.

At the end of Law No. 1775-III, 57 types of economic activity and more than 200 types of work were subject to licensing.

This situation is hampering the development of domestic business due to direct and indirect losses of both entrepreneurs (in particular, the waste of time and money through bribery) and the state (the cost of maintaining an over-staffed government, shadow economy, low positions in international investment ratings attractiveness.

At the same time, the original version of Law No. 1775-III practically did not resolve the issues raised.

First, the number of licensed activities was not significantly reduced. As of the time of the adoption of the Law, such activities were 30. As of 03/01/2020 - 33. Part of the reduction was achieved through formal integration of activities, such as: transportation of passengers, dangerous goods and hazardous wastes by river, sea, road, rail and air transport, the international carriage of passengers and goods by road, that is, the unification of all modes of transport into one type of activity, although as noted above, when passing Law No. 1775-III, these activities would be whether separated

Secondly, the issue of the conflicting situation regarding the validity of the license has not been resolved when the expert-appellate council decides in favor of the licensee-complainant, but the licensing authority does not comply with it.

Third, the regulation of licensing in different fields by different laws has not been overcome. On the one hand, already at the adoption of Law No. 222-VIII in Part 2 of Art. 2 of this Law stipulates that the effect of this Law does not apply to the procedure of issuing, re-issuing and revocation of licenses for the following types of economic activity: 1) banking activities (Law No. 2473-VIII expanded as «financial services activities and other activities licensed by the National Bank of Ukraine in accordance with the law»; 2) television and radio broadcasting activities, 3) production and sale of alcohol by ethyl, cognac and fruit, alcoholic beverages and tobacco (Law No. 2628-VIII of 2018 expanded as «production and trade in alcohol with ethyl, cognac and fruit and grain distillate, bioethanol, alcoholic beverages and tobacco and fuel, fuel storage»).

In addition, the Law No. 394-IX to the number of such licensed activities to which the licensing law does not apply, includes activity in the field of electricity, natural gas market, centralized water supply and centralized drainage, heat production, heat transport energy through backbone and local (distribution) thermal networks, heat supply and other activities licensed by the National Commission for State Regulation in the Energy Sectors law and utilities, as required by law, and exercising control in these areas.

Of course, these types of activities are not covered by the possibility of

filing complaints with the Expert Appeal Board.

On the other hand, the concept of regulating the licensing of certain activities by separate laws is replaced by the concept of regulating «with features». The list of such activities as of March 1, 2020 is given in Table 3.

Table 3. ***History of the introduction of licensing «features» in Law No. 222-VIII***

Date of acceptance «other» of the Law	**An activity that is recognized as special**
March 2, 2015	**Professional activity in the securities market; activity in the field of electricity; activities in the field of telecommunications; construction of objects of IV and V categories of complexity; manufacture of medicines, wholesale and retail trade of medicines, import of medicines (except active pharmaceutical ingredients) (immediately upon adoption of Law No. 1775-III)**
December 8, 2015	**production of especially hazardous chemicals, the list of which is determined by the Cabinet of Ministers of Ukraine, hazardous waste management**
Septembe	**activities in the natural gas market**

r22, 2016	
January 17, 2017 October 17, 2019	**construction of objects that by the class of consequences (responsibility) belong to the objects with medium (CC2) and significant (CC3) consequences, according to the list of types of work, determined by the Cabinet of Ministers of Ukraine**

Source: Authors.

As the scope of possible "features" is not specifically limited, such "features" are, in practice, the result of lobbying efforts and the departmental fantasies of licensing authorities, when, for example, in the securities market, grounds for suspending or revoking licenses were determined by-laws regulatory acts, even if they were against the law. At the same time, the hope for judicial protection remains extremely low, since, subject to the inclination of administrative courts that resolve disputes with the authorities, at the least possible decision in favor of the authorities, and in the presence of conflict of law, the court with a high degree of probability will decide in favor of the public authority. And this «tradition» is also inherent not only in Ukraine. Thus, in the case of «Janezevik v. Sweden and "Västberga Taxi Aktiebolag" and Vulic v. Sweden», the European Court of Human Rights noted that «in such cases, when dealing with the question of the proper balance of interests, the Court tends to the side of the state» (Pyvovar Y., Belkin L., Belkin M., & Iurynets J.[387]).

In such circumstances, it is necessary to emphasize the great positive

[387] **Pyvovar, Belkin, Belkin, Iurynets, 2019, doi: 10.15823/mts.2019.01**

importance for the protection of licensees' rights by adopting by the team of the newly elected President of Ukraine V.A. Zelensky the Law of Ukraine dated October 2, 2019 No. 139-IX «On Amendments to Some Legislative Acts of Ukraine on Improving the Procedure of Licensing of Business Activities» (hereinafter referred to as Law No. 139-IX).

First, Law No. 139-IX excluded from the so-called «features» the possibility of regulating licensing bylaws. Thus, in accordance with the newly introduced par. 2 of Art. 7 of Law No. 222-VIII, licensing of economic activities licensed in accordance with this Article in accordance with the features defined by the laws in the respective fields is carried out in compliance with the requirements of Art. 3 of this Law. And according to the newly introduced provision of Art. 3 of this Law, only the law determines the grounds for issuing a license, leaving an application for a license without consideration, refusing a license, renewing the license, expanding and narrowing a licensee's business activity, suspending, renewing the license in full or renewing the license in part, revocation of the license in whole or in part, and the terms of acceptance and entry into force of the decisions of the licensing authorities.

Secondly, clearer conditions for the adoption of Law No. 139-IX are spelled out as to the consequences of consideration of complaints by business entities to the Board of Appeal. Thus, according to par. 8 of Art. 5 (revised) of Law No. 222-VIII, in case of adoption by the Expert-Appellate Council on licensing of the decision on satisfaction of the licensee's complaint against the decision of the licensing authority to cancel or suspend the license in whole or in part… *such license remains valid* and the subject management remains a licensee in accordance with this Law. That is, the conflict of non-compliance by the licensing authority

with the decision made in favor of the licensee is resolved in favor of the latter.

CONCLUSIONS

According to the results of this study, the authors conclude.

1. Licensing in developed democracies (USA, EU countries) went a long way in recognizing the priority of the freedom to do business over the expediency of restrictions, except in particular dangerous situations for human life and health. The principle of the right to engage in entrepreneurial activity was recognized on application, unless the activity was particularly dangerous. Recognized the concept that the world needs in factories, smelting plants, oil refineries, loud cars and explosions, even at the cost of inconvenience to others, and from a disgruntled citizen may be required to agree to some reasonable inconvenience for the common good.

2. At the level of ideology, Ukrainian legal regulation recognized this approach, but on the way of its implementation, it constantly faced the desire of industry lobbyists to create maximum difficulties for obtaining licenses, which also had some corruption orientation. Therefore, Ukrainian legal regulation of economic activity has evolved controversially: on the one hand, with the desire to permanently limit the pressure of the licensing authority on economic entities, to seek means of effectively protecting the rights of the latter, and on the other, with the need to constantly overcome the ability of industry lobbyists to restore their previously restricted rights.

3. There are three stages in the history of Ukrainian licensing:

1991-2000 – the absence of a specific licensing law when there was a tendency for an increase in the activities to be licensed; lack of stability of the regulatory framework; dominance of sectoral instructions and other by-laws in the field of licensing, overriding by-laws over the law; lack of a unified approach to the licensing system in different areas of business and subjectivity of licensing officials;

2000-2015 – introduction of licensing by a special Law on licensing and laying the foundations for overcoming lobbying aspirations of sectoral officials, although this has not been fully achieved;

After 2015 – further streamlining of licensing of economic activities, maximum simplification of all stages and procedures for obtaining licenses, avoiding unreasonable burdens or unnecessary administrative procedures for economic entities; legislative establishment of uniform state principles of licensing of economic activities; strict control over the legality of suspension or revocation of a license. At present, the highest level of protection of the rights of economic entities has been reached by the adoption of the Law of Ukraine of October 2, 2019 No. 139-IX on improving the procedure for licensing of economic activities.

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REGIONAL STATE AID IN THE EU COUNTRIES FOR DEPRESSED REGIONS AS THE BASIS FOR THE DEVELOPMENT OF THE ECONOMY OF THE DONBAS REGION IN UKRAINE

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Abstract

The objective of the article is to determine the ways of solving the problems of the depressed regions of the EU Member States, which take

into account the principles of regional state aid of the EU and need implementation to ensure the development of the economy of the Donbas region of Ukraine. The expediency of finding a balance between investor incentives and adherence to the EU principles of regional state aid has been noted. The authors have offered to take into account the positive experience in Ukraine: of Germany in combining local traditions and global development tendencies; of Poland on the mechanism of providing incentives to investors; of the Czech Republic on the system of creation and support of regional clusters; of Italy on investment incentive system; of Portugal on the application of the special tax regime.

Keywords: depressed regions, Donbas region of Ukraine, investment attractiveness, EU regional state aid, sustainable development, incentives.

INTRODUCTION

Scientific, Practical Problems.

Regions with socio-economic problems are considered to be depressed and present in different EU countries. A similar situation occurs in Ukraine, where regions differ in socio-economic terms, and therefore the investment attractiveness of a particular region of Ukraine is also different. At present, a very negative socio-economic and political situation has developed in the Donbas region of Ukraine (Donetsk and Luhansk regions), which is caused by prolonged armed conflict and changes in the industry's structure in the region. At the same time, it should be noted that sustainable socio-economic development of the region is the key to the economic growth of the country in the whole. Support of economic development at a progressive level requires adequate financial support, which is directly dependent on the comprehensive formation and effective

implementation of the state investment policy[388]. In order to solve the problems of the Donbas region of Ukraine, it is necessary to attract investment into its economy. This is not possible without state aid, which should become an instrument of investment attractiveness and stimulate the implementation of investment projects in the region. It is worth noting that the state aid in order to be effective must be oriented on situations, where it can lead to significant improvements that the market cannot provide on its own[389].

Purpose of the Study.

The objective of the article is to determine the measures to address the problems of the depressed regions of the EU Member States, which take into account the principles of regional state aid of the EU and require implementation to ensure the development of the economy of the Donbas region of Ukraine. To achieve this objective it is necessary to solve the following tasks: to determine the problems that hinder the development of the economy of the Donbas region of Ukraine; to evaluate the experience of the EU Member States in using regional state aid to address the problems of depressed regions; to determine the legal mechanism of taking into account the experience of the EU Member States in terms of the Donbas region of Ukraine for solving the problems of depressed regions.

The object **of the research is public relations in the sphere of the application of measures to resolve the problems of depressed regions of the EU Member States, taking into account the principles of regional state aid of the EU in terms of the Donbas region of Ukraine.** ***The subject*** **matter of**

[388] **Maidanevych, et al., 2018.**
[389] **Friederiszick, Massimo, 2015.**

the research is the legal mechanism for applying the EU Member States' measures to address the problems of depressed regions, taking into account the principles of the EU regional state aid in terms of the Donbas region of Ukraine.

Research Methods.

Research methods have been selected to identify the measures in the EU Member States that are used to address the problems of depressed regions and take into account the principles of the EU regional state aid; and therefore, it is appropriate to implement them for the development of the economy of the Donbas region of Ukraine. The method of comparative analysis has facilitated to study the experience of the EU Member States in addressing the problems of depressed regions, taking into account the principles of the EU regional state aid, in order to identify the measures that can be applied to solve the problems of the Donbas region of Ukraine. The dialectical method of scientific cognition has assisted to analyze the state of scientific research on the aspects of using regional state aid to address the problems of depressed regions of the EU Member States, in particular the harmonization of the incentive system for investors and the principles of regional state aid. The analysis and synthesis method helped to define the main criteria for control over the state aid of the EU and the requirements of the guidelines on regional state aid from 2014 to 2020. The modeling method helped to gain a comprehensive understanding of the mechanisms for combining local traditions and global tendencies in the development of regions, the system of creation and support of regional clusters, the application of a special tax regime.

RESULTS AND DISCUSSION OF THE RESEARCH

Ukraine has obligations to implement the European rules on state aid set out in the EU-Ukraine Association Agreement, thus major reforms in this area will take place in the light of the European experience. Implementation of the EU legislation will be carried out through the preparation of eligibility criteria for different types of state aid[390].

There are restrictions in the EU on the provision of direct economic assistance to businesses by the EU Member States. State aid is granted on the basis of rules laid down by the EU legal instruments, the execution of which is strictly controlled by the EU institutions. It should be noted that the main purpose of the control over the EU state aid is to limit the possible negative effects of national state aid on the European market integration[391].

THE FIRST TOPIC: LEGAL BASIS FOR CONTROL OVER THE EU STATE AID

Currently the legal basis for control over the EU state aid is the Art. 107 (ex Article 87) of the Consolidated version of the Treaty on the Functioning of the EU (hereinafter – TFEU)[392], which provides that aid granted in any form by the States or by public resources, which distorts or threatens to distort competition by creating benefits for certain enterprises or industries, is not compatible with the internal market to the extent that it affects trade between the Member States other than the exceptions provided in the Treaty.

[390] **Bulana, 2017.**
[391] **Ganoulis & Martin, 2001.**
[392] **EU, 2012.**

Such exemptions concerning the regions are: aid designed to promote the economic development of regions, where the standard of living is abnormally low or where there is serious underemployment, and the regions referred to in the Article 349, taking into account their structural, economic and social situation (par. 3 (a) of the Art. 107 of the TFEU); assistance designed to promote the development of particular economic activities or particular economic regions, where it does not alter trading conditions to an extent contrary to the common interest (par. 3 (c) of the Art. 107 of the TFEU).

The analysis of the guidelines on regional state aid from 2014 to 2020[393] makes it possible to highlight several points.

First of all. The main objective of regional state aid is to reduce the development gap between the different regions of the European Union. The aid intensity is assumed to be higher for the regions covered by paragraph 3 (a) of the Art. 107 of the TFEU, i.e. regions with GDP per capita below 75% out of the EU average. Unlike the regions covered by paragraph 3 (c) of the Art. 107 of the TFEU, where GDP per capita is over 75% out of the EU average, and geographical coverage and aid intensity are more limited.

Secondly. Considerable attention is paid to the compatibility of regional state aid. In order to assess whether an approved measure can be considered incompatible with the internal market, the European Commission (hereinafter referred to as the Commission) usually analyzes whether the structured ensures the measures in providing the aid that the positive impact of the aid to achieve common interests outweighs its potential negative effects on trade and competition. The Commission shall

[393] **European Commission, 2013.**

consider the measure of aid only if it satisfies each of the following principles: (a) the measure of regional state aid must be oriented on achieving the objective of common interest; (b) the measure of state regional aid should target a situation, where the aid can lead to a significant improvement that the market cannot achieve, for example, by eliminating market failure or addressing equity or cohesion; (c) appropriateness of measures on providing the aid: the suggested measure on providing the aid should be the appropriate policy instrument to achieve the objective of common interest; (d) incentive effect: the aid must change the behavior of the relevant enterprise(s) concerned in such a way that it must participate in additional activities that it would not undertake without assistance or in a limited manner, or in another city; (e) aid proportionality (minimum aid): the amount of aid should be limited to the minimum necessary to stimulate additional investment or activity in the region concerned; (f) avoid unjustified adverse effects on competition and trade between the Member States: the negative effects of the aid must be sufficiently limited to make the overall balance of measures positive; (g) aid transparency: the Member States, the Commission, entities of economic activity and the public should have free access to all relevant acts and relevant information on assistance provided.

Thirdly. The Member State must ensure that assistance is provided in a form, which can lead to the least distortion of trade and competition. In this regard, if the assistance is provided in forms that provide a direct corporeal advantage (e.g. direct grants, tax exemptions or reductions, social security or other compulsory charges, or the provision of land, goods or services at favorable prices, etc.), the State Member should

demonstrate why other potentially less distorted by forms of assistance, advances that are repaid, or forms of assistance based on debt or equity instruments (e.g., low interest loans or interest discounts, government guarantees, the acquisition of a shareholding or an alternative provision of capital on favorable terms) are not appropriate.

Fourth. There are two types of aid: (a) investment aid provided for investment projects and its maximum level (aid intensity) varies depending on the size of the applicant company. Regional aid to large enterprises is mostly provided for initial investments that are made in new economic activity in the areas indicated on the regional aid map or for diversification of existing enterprises to produce new products or carry out new innovation processes. The aid intensity is increased by 10% for medium-sized enterprises and by 20% for small enterprises relative to aid for large enterprises; (b) operational aid provided in addition to investment aid aimed at reducing the running costs of small and medium-sized enterprises in particularly disadvantaged regions. Operational aid includes the following cost categories: personnel costs, materials, contracting services, communications, energy, maintenance, rent, administration, etc., but does not include depreciation and financing costs, if they were included into eligible costs while providing regional investment assistance.

Fifth. Regional investment aid is not the only policy instrument available to the Member States to support investment and job creation in disadvantaged regions. The Member States may take other measures such as infrastructure development, improving the quality of education and training or improving the business environment.

According to the Art. 267 of the Association Agreement between Ukraine and the EU[394], the whole territory of Ukraine by the end of 2020, will be considered as falling under paragraph 3 (a) of the Art. 107 of the TFEU and, therefore, the most intensive aid can be provided throughout Ukraine. It is likely that after 2020 it will be possible to provide the most intensive aid to the Donbas region of Ukraine, because the problems of this region require complex efforts for their positive solution.

The task of defining a set of incentive measures is currently urgent in order to attract investors to the Donbas region of Ukraine who will take into account the EU principles of state regional aid. Several EU Member States have successful experience in attracting investment to address the problems of depressed territories, including using state regional aid. This experience requires further research and can be used to solve the problems of the Donbas region of Ukraine.

THE SECOND TOPIC: EXPERIENCE OF THE EU MEMBER STATES IN ADDRESSING THE PROBLEMS OF DEPRESSED REGIONS

At the end of the XX century, the problem for further economic development of a number of European countries became separate regions, which for various reasons differed in the negative value of socio-economic indicators in comparison with other regions of the state. The depressing nature of the development of certain regions in a number of European countries has been associated with problems of different nature. Birch K. et al note that the main concern is of those regions that are at the forefront of early industrialization in the European economy, focused on the exploitation of coal and other raw materials. These are the worst economic

[394] **VRU, 2014.**

"black spots" in Western Europe during 1980s and 1990s, which include the Ruhr and Saar regions of Germany, the region of Northeast France, the Basque region of Spain and British coal deposits[395].

It is advisable to emphasize the fact that coal and other types of industry have provided prosperity to these industrial regions for decades. However, at some stage there was a reorientation of further goals and ways of developing the economy, and environmental issues became a priority. Everything of the above mentioned necessitated a change in economic policy in those regions.

The general objective of the policy for those regions was to find ways to divert them from traditional sectors in decline and to install new drivers for economic growth[396]. In order to improve the situation in those regions, it was necessary to provide the conditions for new technological development, but the regions had lack of resources. However, it should be borne in mind that not all regions have the same level of development, opportunities for attracting investment, creating the necessary infrastructure, and providing skilled labor. Therefore, it was necessary to find a special approach that would create the conditions for diversification of production, solving the issue of employment of the population and many others. In this situation, regional aid became the driving lever that provided the opportunity to create the conditions for solving regional problems in the industrial regions of Germany, France, and the United Kingdom.

It should be noted that old industrial regions such as the Ruhr, the North East of France, the North East of England and Wales typically

[395] Birch, et al., 2010.
[396] European Commission, 2004.

received a significant share of regional aid in the 1970s and 1980s focused on industrial conversion, retraining, attracting new investments, upgrading the environment and regenerating cities. However, the UK in the 1980s significantly reduced regional spending, while other European countries such as Germany and France doubled it[397]. Analysis of the situation in the old industrial regions shows that each of these countries has found its own approach to solve the problems. The process of transformation and adaptation of the regional economy, as well as the peculiarities of the new projected trajectory of development of the old industrial regions, is the result of a mutual combination of long-standing local traditions and general global tendencies in the development of territorial units. The success of the transformation process is possible if you find and apply the right combination of traditions and tendencies, which, according to the experience of particular regions (in particular, Manchester and the Ruhr region), seems to be the best[398]. The Ruhr situation shows, first of all, that regional restructuring is a long-running process that has been going on for decades. Secondly, neo-industrialization approaches based on the assets of the region will make more sense than simple, rootless re-industrialization strategies. Thirdly, economic diversification can disrupt the industrial monostructure and at the same time increase the region's absorbing capacity for new economic changes[399]. The British old industrial regions operate better in terms of GDP growth and employment of services, and their continental partners better retain employment. This reflects the contrast between the more interventionist

[397] **Birch, et al., 2010.**
[398] **Koutský, et al., 2011.**
[399] **Hospers, 2004.**

policy adopted in France and Germany and the more market-oriented approach of the United Kingdom, combined with a focus on regional diversification and modernization in the former cases and transplantation through attracting internal investment into the latter[400].

After the enlargement of the EU, the economic downturn of large agglomerations is being observed in some parts of the new EU Member States, namely: in Central European countries and their industrial regions in the Eastern part of Germany, the Czech Republic and Poland[401].

For example, low-income regions in Poland indicate about such socio-economic problems as unemployment and industrial monostructure[402]. In 1994, in order to encourage investment in the least developed regions of Poland, fourteen special economic zones (hereinafter referred to as SEZs) were created. According to the Special Economic Zones Law[403], the purpose of these SEZs was to enhance the social, economic development and competitiveness of regions that suffered from industrial restructuring at the beginning of the political and economic transformations of the 1990s. In particular, the zones have been designed to develop new technologies, create new jobs, develop exports, and utilize and improve existing infrastructure in an "uninhabited" area of a particular region. To achieve these lofty goals, potential investors were offered special state aid and income tax benefits to attract them to these new areas. By presenting a major economic policy instrument for regional development, the SEZs

[400] Martin & Sunley, 2006.
[401] Skokan, 2009.
[402] Nazarczuk & Umiński, 2019.
[403] Ustawa, No. 123.

remain the cornerstone of regional economic policy in Poland for the past 20 years[404].

Poland officially began the process of accession to the EU in 1994, therefore the Polish legislation on SEZs for investors was provided in such a way as to take into account the EU principles of eligibility for state aid[405,406].

The intensity of regional state aid provided to entrepreneurs in SEZs had a positive effect on the social and economic development of the poorest and sometimes less developed poviats in Poland, whereas the more developed poviats with SEZs did not have better or much better results compared to poviats without SEZ[407].

According to the new map, areas with GDP per capita below 75% of the EU average – covering 86.3% of Poland's population – will continue to be eligible for regional investment aid with a maximum aid intensity of 25% to 50% of eligible costs of investment projects. The maximum aid intensity is applied to large enterprises' investment. It can be increased by 10% for medium-sized enterprises and by 20% for small companies[408].

Significant political, economic, and social changes in the Czech Republic began after 1989. In May 2004, the Czech Republic became a member of the European Union, which accelerated economic growth and exacerbated regional differences in the country.

The main reasons behind the uneven development of regions in the Czech Republic and the emergence of regional differences are: 1)

[404] Ambroziak & Hartwell, 2018.
[405] European Commission, 1998.
[406] European Commission, 2006.
[407] Ambroziak, 2016.
[408] European Commission, 2014a.

economic structure and its diversity – a significant reduction in production and employment in heavy industry and mining, located mainly in two regions – Moravian-Silesian and the North-West; 2) constantly unsatisfactory environmental situation, again in Moravian-Silesian and the North-West, as well as in major cities – Prague, Brno and other cities; 3) uneven coverage of the territory by technical and transport infrastructure; 4) quality of human resources (level of education, entrepreneurial tradition) and local self-government (insufficient administrative capacities in small municipalities); 5) low interregional labor mobility. Differences in the geographical location of the regions within the Czech Republic and in the EU context also play a significant role[409].

Moravian-Silesian region is located in the North-East of the Czech Republic. Moravian-Silesian was a nationwide center for coal mining, coke production, metallurgy, heavy engineering, and electricity generation and distribution. In the 1990s of the XX century, a rapid process of restructuring and de-industrialization took place in the region during the transition from a centralized planned economy to a market economy[410]. This has led to closing down of many inefficient coal mines, coke plants and industrial plants, which had significant consequences, in particular high unemployment and many brownfield sites in the region. Since 1990, the there was a significant improvement in the environment in the Moravian-Silesian region as a result of reduced production, the use of greener technologies and significant investment into environmental

[409] Skokan, 2009.
[410] Rumpel & Waack, 2004.

events[411]. Since 2001, the region has undertaken intensive restructuring efforts by attracting international investment and supporting the diversification of the regional economy into new industries, as well as promoting cluster activity[412].

From 2004 until the onset of the global economic crisis in 2008, the Moravian-Silesian region was one of the most dynamic regions outside the Czech capital – Prague, as evidenced by a decrease in unemployment and GDP growth. The investment structure is changed. Thus, the Moravian-Silesian is attracting higher-level investments that are key factors to future development and regional competitiveness. This development was a consequence of the specific regional policy of the Moravian-Silesian regional government, which aimed at creating industrial zones, attracting foreign investors and supporting cluster initiatives[413]. Experience has demonstrated that the restructuring of the old industrial region can be based on the renewal of clusters within three directions: innovative adjustment of old clusters, new clusters in developed industries and new high-tech and knowledge-consumptive clusters[414].

Moravian-Silesian is entitled to the EU structural funds, which play an important role in developing regional and innovation policies and in adopting the European approach to regional development[415]. The regional cluster thrives on the basis of traditional inter-company relations and is

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[411] **The Ministry of Regional Development of Czech Republic, 2007.**
[412] **Skokan, 2009.**
[413] ***Ibid.***
[414] **Trippl & Tödtling, 2008.**
[415] **Blažek & Uhlíř, 2007.**

strengthened by new domestic investors and regional and governmental policies supported through the EU structural funds[416].

In addition to the above countries, depressed regions are characteristic for such countries as: Bulgaria, Hungary, Romania, Italy, Greece, Portugal and others.

The experience of Italy is interesting, where the depressed region is the agrarian South, where 40% of the population of the country lives, with the production of more than 25% of the total GDP[417].

In order to stimulate investment activity in the depressed regions of Italy, the Law on Economic Development of the South of Italy was adopted in 2017[418], and in February 2018, the Decree of the Head of the Council of Ministers No. 12 dated from January 25, 2018 on the establishment of Special Economic Zones (SEZs) was put into effect, defining the general goals of the development of SEZs; conditions of the creation of SEZs, their duration; criteria for determining and delimiting the territory of the SEZs; the criteria governing access to companies[419].

The law norms stipulate that SEZs can be created in the following forms: industrial park (IP); eco-industrial park (EIP); technology park (TP); free trade areas (FTAs); innovation district (ID).

The legislation provides three types of benefits for companies located in SEZs: 1) a tax credit for companies that start their business or invest in special areas consisting of harbors, airports and surrounding areas, logistics platforms and marinas. A tax credit equals 20% of investment (limited to a maximum of € 50 million) for small businesses, 15% for

[416] Skokan, 2006.
[417] Travaglini, 2012.
[418] Decree-Law, No. 91.
[419] Council of Ministers of Italy, 2018.

medium-sized businesses and 10% for large companies, unless different rates are applied in certain areas. A tax credit can only be offset by other tax responsibilities; 2) accelerated procedures and deadlines for issuing permits; 3) reduced administrative fees.

To obtain tax benefits and simplified procedures, you must maintain a business established in SEZ for at least seven years after the completion of the subsidized investment and no liquidation or dissolution is permitted[420].

Analysis of the European Commission documents[421] shows that the maximum level of aid that can be given to investment projects carried out by large enterprises in ancillary areas of Italy (regions of GDP per capita below 75% of the EU average) ranges from 10% to 25% of the total investment costs, depending on the region. They can be increased by 10% for medium-sized and 20% for small businesses. Under the new map of Italy, five regions (Basilicata, Calabria, Campania, Puglia and Sicilia) will be eligible for regional investment aid with a maximum aid intensity of 25% for large enterprises. Another 25 areas, covering 5.03% of the Italian population, are eligible for regional investment aid, within the category of regions with GDP per capita, over 75% of the EU average, with a maximum aid intensity of 10% for large enterprises.

Considering that simplified procedures will be applied in the SEZs of Italy and tax exemptions will be granted to businesses, this requires the fulfillment of the EU state aid requirements. Coordination between local, regional and national institutions is required to ensure the fulfillment of the EU state aid requirements. It is not simple to implement in practice,

[420] **Dialti, 2018.**
[421] **European Commission, 2014b.**

but it is necessary in order to prevent distortions of competition and ensure full compliance with the EU state aid legislation.

The experience of Portugal is of interest. Considering the particular geographical situation of Madeira and the specific characteristics of its economy, the Portuguese Government established free trade zones in the Autonomous Region of Madeira, according to the Decree-Law No. 500/80 dated from October 20, 1980.

According to the Decree-Law nr. 165/86, of the 26th of June 1986, with a view to facilitating and attracting investment in the Madeira Free Trade Area, tax and financial benefits may be granted for the following purposes: (a) to facilitate the creation of new investment projects; (b) production involvement and protection; (c) support for the start-up and stabilization of registered companies. The incentives provided to encourage and attract investment in the Madeira Free Trade Area are determined by the regional government, taking into account, inter alia, the contribution to the economic and social development of the region and the resources available to the regional government[422].

For decades, tax incentives for investors have been extended. Currently, according to the Art. 36-A of the Statute of Tax Benefits[423], companies that are licensed to operate within the Madeira Free Trade Area from January 1, 2015 to December 31, 2020, are granted the following tax benefits until December 31, 2027: 1) the corporate income tax rate is 5%; 2) the exemption regime applicable internationally for dividends, reserves, capital gains and loss of capital; 3) exemption from income tax in the distribution of dividends between shareholders; 4) absence of tax on

[422] **Decree-Law, No. 165/86.**
[423] **Law, No. 64/2015.**

interest and other forms of payment of shareholder loans, capital surcharges or advance payments made by shareholders of the company; 5) exemption from the obligation to withhold royalties, services or interest paid to third parties; 6) tax credit for international double taxation, both legal and economic; 7) exemption from capital gains tax on the sale of shares of Madeira companies; 8) exemption from capital gains tax on sale of subsidiaries under conditions of exemption from participation; 9) tax exemption on dividends, interest and royalties received from associated companies from the EU, subject to the requirements of the parent and subsidiary directives or the interest and royalties directive; 10) reduction by 80% of rates of stamp duty, real estate transfer tax, municipal property tax, regional and municipal fees, notorial and registration fees; 11) reduction of special advance tax payments and autonomous taxation in proportion to the applied corporate tax rate (in this case a decrease of 76.2%).

Entities wishing to take advantage of this special regime must commence their activity within six months, except for industrial, maritime and aeronautical activities, which must commence their activity within one year, from the date of issuing the license, and in compliance with one of the following requirements: (a) creation from one to five jobs in the first six months of operation and a minimum investment of EUR 75,000 in the acquisition of tangible or intangible fixed assets during the first two years of operation; (b) the creation of six or more jobs in the first six months of operation.

One of the following maximum annual restrictions is applied to special tax benefits: (a) 20.1% of annual gross value added, or (b) 30.1% of annual labor cost, or (c) 15.1% of annual turnover.

Entities benefiting from the preferential treatment will also be subject to restrictions on benefits through the application of thresholds for taxable income, under the following conditions: (a) EUR 2.73 million for the creation from 1 to 2 jobs; (b) EUR 3.55 million for the creation from 3 to 5 jobs; (c) EUR 21.87 million for the creation from 6 to 30 jobs; (d) EUR 35.54 million for the creation from 31 to 50 jobs; (e) EUR 54.68 million for the creation from 51 to 100 jobs; (f) EUR 205.5 million for the creation of more than 100 jobs.

If the tax base exceeds the limit, then the excess is taxed at the rate of 20% (general Madeira regime).

Consequently, the preferential treatment has a number of restrictions that are necessary to ensure that the preferential treatment complies with the EU in regard to the state aid requirements. According to a new map, regions that account for 69.01% of Portugal's population will continue to be eligible for regional investment aid with maximum aid intensity for large enterprises, starting with 25% of projected costs of relevant investment projects in mainland Portugal and above 35% on Madeira, up to 45% in the Azores. The aid intensity inside enterprises, for investments, may be increased by 10% and by 20% for small enterprises[424].

Portugal's overall tax system is very attractive in itself, and Madeira's special free trade zone tax system is even more attractive. Madeira Free Trade Area was created in the 1980s and offered one of the most competitive tax systems in Europe, with great benefits for companies

[424] **European Commission, 2014c.**

looking to start their business in a variety of areas. Madeira's Free Trade Area is not a tax haven since its tax system complies with state aid rules and has been endorsed by the EU and is characterized by transparency and compliance with international exchange of information legislation. For this reason, it has advantage over many other jurisdictions[425].

THE THIRD TOPIC: DIRECTIONS OF SOLVING PROBLEMS OF THE DONBAS REGION OF UKRAINE

The socio-economic and political situation of the Donbas region of Ukraine is caused by four blocks of problems[426]. The first block includes the problems associated with prolonged armed conflict and proximity to the collision line, resulting in the destruction of infrastructure and housing. The second block includes the problems associated with the need to provide housing and work for internally displaced persons. The minimum state social benefits provided by the legislator for internally displaced persons do not allow renting or buying housing, even in small settlements, not mentioning regional centers. Therefore, to be able to rent a home, you need to find a job. However, finding a job in a strange city is not easy, and if the problem of housing is not solved, it is almost impossible. The third block includes the problems related to the disconnection of traditional relations of economic entities, the need to provide new markets for the purchase of raw materials, the sale of finished products, as well as the objective expediency of reconstruction of the means of production that do not meet the current economic conditions. It should be noted that the erosion of a technologically outdated economy

[425] Santos & Reis, 2016.
[426] Zeldina, 2018.

and the disruption of traditional relations with the temporarily occupied territories require not only the formation of a fundamentally new economic complex, but also the initiation of the search for new sources of supply of raw materials and components, and requires the search for new markets for manufactured products[427]. The fourth block includes the problems associated with changing the structure of industry in the region. Thus, a large number of industrial enterprises providing employment to the local population are located in territories temporarily outside the control of Ukraine or those enterprises suspended their economic activity for a number of reasons. At the same time, it should be noted that before the military conflict, the coal, coke-chemical and machine-building industries were concentrated in the Donbas region of Ukraine, where a large number of highly skilled employees worked. Favorable geographical location, proximity of raw materials and markets, developed network of transport communications, high population density, distinguished the Donbas among other economic regions of Ukraine[428].

Therefore, some of the mentioned problems took place before the escalation of the armed conflict in Ukraine, and now they have only intensified; another part of the problems is directly related to negative consequences of armed conflict. It is also worth noting that a number of problems of the Donbas region of Ukraine is identical to those of the old industrial region and other depressed regions of the EU countries. We talk about: changing the structure of industry in the region; reconstruction of production facilities that do not meet the current conditions of management; solving the problem of employment; providing the region

[427] Libanova, 2015.
[428] Yefremenko & Gavrysh, 2017.

with modern infrastructure, etc. However, all of those problems require immediate resolution, and the following tasks are required to be accomplished: to restore the infrastructure; to construct and rebuild residential buildings; to create new jobs; to reconstruct, modernize existing production complexes; to build new production facilities; to develop small and medium-size business; to create environmentally safe conditions for the development of the region; to provide security of economy management.

In order to accomplish these tasks, the involvement of human and financial potential is required. We talk about high quality specialists and billions of US dollars. Scholars and practitioners sound different numbers because it is impossible to calculate clearly the required amount of money. The budget of Ukraine does not have sufficient material resources to fulfill these tasks. In this regard, in order to solve the existing problems of the Donbas region of Ukraine, it is necessary to attract investment funds, national and foreign investors, as well as international institutions. However, investors are not in a hurry to invest in the economic recovery of the Donbas region of Ukraine. The negative factors that occur in the Donbas region of Ukraine make investors think about the feasibility of investing, so creating attractive conditions by the state should compensate investors for the negative factors that characterize the situation in the region.

It should also be borne in mind that the overall purpose is to create conditions that will ensure the sustainable development of the Donbas region of Ukraine. Thus, the investment attractiveness of the Donbas

region of Ukraine should contribute to creating the necessary conditions for the sustainable development of the region.

To create investment attractiveness of the Donbas region of Ukraine and ensure its sustainable development, various measures have been offered by the state authorities. However, the mechanisms provided by the legislation of Ukraine to attract investors in order to solve the problems of the Donbas region of Ukraine are not effective.

The conducted analysis of the EU Member States' experience in dealing with the problems of depressed territories, taking into account the principles of the EU to regional state aid, indicates the feasibility of borrowing those positive measures that can be used to solve the problems of the Donbas region of Ukraine. Examples of such measures are provided in Table 1.

Table 1. ***Measures envisaged by the legislation of the EU Member States to address the problems of depressed territories that should be borrowed***

The EU countries	Measures to solve problems of depressed territories that are worth borrowing
Germany	1. Combining long-standing local traditions and global tendencies in territorial units' development; 2. Diversification of the economy of the depressed region to destroy the industrial monostructure and to increase the region's capacity for new economic changes.
Poland	1. Establishment of free economic zone,

	where to provide the mechanism to harmonize incentives for investors and the EU principles on the eligibility of state aid.
Czech Republic	**1. Establishment of industrial zones taking into account local features;** **2. Creation and support of regional clusters on the basis of traditional and new inter-company relations;** **3. Use of the EU structural funds for the development and implementation of regional innovation policy.**
Italy	**1. Creation of the incentive system for free economic zone's investment activity, which provides: tax credit for companies investing in depressed regions; expedited licensing procedures and terms for issuing permits; reduction of administrative fees.**
Portugal	**1. Legislative enshrinement of a special tax regime for entities that create jobs and make a minimum investment of EUR 75,000 in the acquisition of tangible or intangible fixed assets during the first two years of operation.**

Source: authors' development

CONCLUSIONS

The analysis of socio-economic problems that occur in the Donbas region of Ukraine and the problems of depressed regions of the EU Member States allows us to make the following conclusions:

1. The current regional policy of Ukraine does not allow to attract investment to solve socio-economic problems and ensure the development of the economy of the Donbas region of Ukraine. The research demonstrates that we need a comprehensive approach that will offer investors attractive measures to undertake investment projects that are needed for the region.

2. The experience of the EU Member States demonstrates that finding a balance between the need to provide incentives to attract investors to depressed regions of the country and the importance of adhering to the EU principles of regional state aid helps to solve the problems of depressed regions in a positive way.

3. The European experience in solving the problems of depressed regions with the help of state regional aid has to be implemented. Therefore, it is necessary to take into account the positive measures provided by the legislation of different EU Member States in the legislation of Ukraine, which can provide the solution of socio-economic problems of the Donbas region of Ukraine.

4. In order to form an effective regional policy of the state aimed at solving the problems of the Donbas region of Ukraine and to comply with the EU principles on state regional aid, it is advisable to borrow: from Germany – the policy of combining long-standing local traditions and global tendencies in the development of territorial units, ways to diversify the economy of the depressed region, oriented on the destruction of the industrial monostructure and the increase of the region's capacity for new

economic changes; from Poland – the mechanism for the creation of free economic zone providing for harmonization of incentives for investors and the EU principles on the eligibility of state aid; from the Czech Republic – specific features of the creation of industrial zones, the system of creation and support of regional clusters on the basis of traditional and new inter-company relations, the mechanism of using the EU structural funds for the development and implementation of regional innovation policy; from Italy – the system of stimulating investment activity into free economic zone, which provides: tax credit for companies investing in depressed regions, accelerated procedures and terms of issuing permits, reducing administrative fees; from Portugal – the procedure for applying a special tax regime for the entities that create jobs and make investment.

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(14)

VALIDITY OF PROBATION REQUIREMENT IN A FIXED-TERM EMPLOYMENT CONTRACT UNDER THE JORDANIAN LABOR LAW

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Abstract

The trial condition in the individual work contract is one of the problems of the contractual relationship between the worker and the employer, especially when the employer has the right only to terminate the worker's services during the trial period if it becomes clear to him that the worker is incompetent without being obligated to direct notice or reward.

An important problem arises about this condition, especially if it is found in a fixed-term employment contract, We have found that the Jordanian legislator has codified the provisions of this condition in Article 35 of the Jordanian Labor Law No. 8 of 1996 and its amendments.

It has become evident to us that this condition needs to reorganize the provisions of this condition in general and in particular in a fixed-term

employment contract that it is not permissible to include any contract with a fixed term for such a condition.

The researcher reached several recommendations, the most important of which is the amendment of Article 35 of the Labor Law, stipulating the need to expressly stipulate the limitation of the trial requirement in the work contract for an indefinite period and restrict the right of the employer upon termination of the worker's services during the trial period with controls that protect the worker from abuse by the employer.

Key words: Probation Requirement , Labor Law , the employer.

Introduction:

The employer-employee relationship is a major focus of various laws, especially labor laws. Such laws aim to make a balance in the contractual relationship between employer and employee based on a somewhat historical basis that tends to provide legal protection for an employee as he is, in most cases, the weaker party to such relationship.

This relationship involves some problematic issues that the legislator has endeavored to address and regulate and not leave it to the principle of pacta sunt Servando. These include the probation period contained in an employment contract, where an employer has the right, in most cases, to terminate an employment contract without notice if he finds that an employee is unsuitable or incompetent for the required job.

This paper seeks to identify an important problematic issue with this requirement, especially if a fixed-term employment contract includes the probation requirement. Article 35 of the Jordanian Labor Law[429] provides

[429] The Jordanian Labor Law No. 8 of 1996, as amended, published in the Official Gazette, page (2879), issue (5573), dated 16.5.2019.

for the probation period. However, the said Article does not explain whether the probation requirement can be included in all types of employment contracts, which results in practical and judicial problems.

This paper seeks to raise these questions and problems in order to answer and address them and resolve the dispute over the legality of including the probation requirement in fixed-term employment contracts. It also seeks to identify whether such probation period should be confined to indefinite employment contracts. This is based on legal analysis and conclusion in light of Article 35 of the Jordanian Labor Law.

Additionally, this study analyses the provisions of Article 35 and links them to remaining articles of the Law to identify why the probation requirement is provided for and restricted to indefinite contracts. The descriptive analytics method is used in this study and reference is made to the decisions issued by the Jordanian Court of Cassation in order to identify its attitude towards this issue. Further, this paper suggests that Article 35 be amended to remove the ambiguity when applying such Article. This is since the said Article deals with an important matter, namely termination of an employment contract without notice and without payment of any compensation to an employee by an employer.

1.GENERAL PROVISIONS ON PROBATION REQUIREMENT

Some employment contracts might require that a party to a contract has the right to delay the final engagement with the other party to a certain period for probation purposes. This means that the final employment contract can only be made after lapse of such period.

The provisions on this requirement are specifically provided in Article 35 of the Jordanian Labor Law. Article 35 contains the provisions concerning this requirement in terms of the period, the party who benefits from this requirement and consequences of its existence.

1.1 Nature of Probation Requirement

The laws regulating an employment contract and jurisprudence provide several names to this Requirement, including the probation requirement or probation period[430] or employment on probation[431]. The probation employment contract is defined as "an agreement between an employer and an employee under which the latter undertakes to work for the former under probation for a certain period of time to prove that he is suitable for the required job"[432]. During the probation period, an employer has the right to verify that an employee is suitable for the job, and an employee has the right to verify the working conditions and whether the wage paid for the required job is adequate.[433]

Thus, it is noticed that the probation requirement indicates to the right of a party to a contract to verify whether the other party is qualified for the job in order to enter into an employment contract. This depends on the rule of mutual consent[434] of both parties as an element of a contract so that both parties agree on the material matters contained in the contract, including the probation requirement.

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[430] Article 35 of the Labor Law provides that "An employer may employ any worker on a trial basis"

[431] Abd Al-Wahed Karam, (1998), Labor Law, Dar Thaqafa for Publication and Distribution, Amman, 1st edition, p.73.

[432] Sayed Mahmoud Ramadan, (2010), Al-Waseet in Explanation of the Labor Law and the Social Security Law (a comparative study), Dar Thaqafa, Amman, 1st edition, p.201.

[433] Hammam Zahran,(1998), Labor Law Individual Employment Contract, University Publications House, Alexandria, p.163.

[434] Abd Al-Razeq Sanhori, Al-Waseet in Explanation of the New Civil Law, Dar Nahda Arabia, 1st part, p.1072.

This requirement can be defined as "the requirement contained in an employment contract under which both parties or either of them can terminate the employment contract without notice or compensation during a certain period set out in a contract if an employer finds that an employee is not suitable for the required job, or an employee finds that the job is not suitable".

The decisions of the Jordanian Court of Cassation confirmed employment under probation upon agreement and consent of both parties in accordance with the provisions of Article 35/b of the Labor Law No. 8 of 1998[435] . In order to define the probation requirement, the conditions for validity of probation requirement and the consequences of existence of probation requirement will be discussed.

1.1.1. Conditions for Validity of Probation Requirement

Article 35 of the Jordanian Labor Law provides that "The Employer may employ any Employee under probation to ascertain his capability and potentials to carry out the required work, provided that the probation period does not exceed, in any case, three months and that the wage of Employee under probation should not be below the established minimum wage".

According to the Article 35 , The conditions of the probation requirement to be valid, should be the following :

A. **The probation period does not exceed three months.**

   Article 35 provides for 3-month-probation period. If it is agreed on a longer period, such longer period shall be deemed to be three

[435] **Court of Cassation, (civil), No. 1882/2005, general bench, Adalah Center Publications.**

months[436]. The purpose of this limitation is to protect an employee from an employer[437]. Accordingly, if it is agreed between an employee and an employer that the probation period is less than three months, such agreement is valid in accordance with Article 4/a of the Jordanian Labor Law[438]. The following question arises here about Para (a) of Article 35: If an employer dismisses an employee during the probation period, does an employer have the right to subjugate the same employee to another probation period?

By reference to Article 35, there is no explicit provision on this question. However, some jurists argue[439] that an employee under probation may not be employed more than once since this constitutes circumvention of the provisions of the law. Hence, the legislator is required to make it clear that probation cannot be made more than once for the same employee in order to protect an employee from an employer's exploitation by using his right to probation requirement[440]. The Arab Convention on Levels of Employment ratified by the Hashemite Kingdom of Jordan emphasizes that the legislator is required to make such amendment to Article 35. The said Convention explicitly provides that an

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[436] Jaafar Mahmoud Mughrabi, (2020),Explanation of the Provisions of the Labor Law based on the Latest Amendments and Jurisprudence of the Court of Cassation, Dar Thaqafa, Amman, 3rd edition, , p.116.

[437] Ramadan, ibid, p.220.

[438] "The provisions of this law shall not affect any of the rights granted to the Employee by any other law, work contract, employment agreement or decision if any of them gives the Employee better rights than those established to him pursuant to the provisions of this law"

[439] Mughrabi, ibid, p.117.

[440] Mansour Ibrahim Utoom, (1999), Explanation of the Jordanian Labor Law No. 8 of 1996, a comparative study, Amman, p.80.

employer is not allowed to subjugate the same employee to probation for more than once[441].

B. The wage of an employee under probation is not lower than the established minimum wage

Since the legislator grants an employer the right to subjugate an employee to the probation, an employee's wage should be guaranteed during the probation period. An employee is considered an employee within the meaning of Article 2 of the Labor Law, where an employee is defined as "Every person, male or female, who performs a job for a wage and be a subordinate to the Employer and at his service. This covers juveniles and those who are under probation or rehabilitation". Thus, an employment contract that contains the probation requirement is considered an actual employment contract that provides for obligations and rights of both parties. This paper does not agree with the opinion[442] that an employment contract during the probation period is conditional upon successful probation. This is since an employment contract is considered legal once it is made and throughout the probation period, where the Jordanian legislator requires a wage during the probation period.

1.1.2. Consequences of existence of probation requirement

[441] This Convention was published in issue 2082 of the Official Gazette, dated 20.30.1968, page 465.

[442] Ghaleb Ali Daoudi,(2015), Explanation of Labor Law, a comparative study, Dar Thaqafa, Amman, 2nd edition, p.87.

Having explained conditions for validity of probation requirement under Article 35 of the Labor Law, consequences of probation requirement are explained below. Accordingly, exercise of the right to termination by an employer during the probation period, and expiration of the probation period without termination of the employment contract by an employer will be explained.

A. Exercise of the right to termination of contract by an employer during the probation period

Article (b) of Article 35 provides that "The Employer may terminate the services of the Employee under probation without notice or remuneration during the probationary period". This means that an employer is not required to fulfill obligations of termination of an employment contract in accordance with the rules contained in the Labor Law including service of notice and payment of end-of-service benefits.

However, most of jurists[443] argue that such right is not absolute contrary to Para (b) of Article 35. This is since the general rules in the Jordanian Civil Law[444] require exercise of such right on a legal basis, where termination of a contract during the probation period without justification or cause does not conform to the general rules that require exercise of the right without arbitrariness[445].

Based on the foregoing, though an employer has the right to dismiss an employee during the probation period contained in a contract for lack of experience or qualification, such termination

[443] See: Karam, ibid, p.74, and Daoudi, ibid, p.87.
[444] Jordanian Civil Law No. 43 of 1976, published in the Official Gazette, issue 2645, dated 1.8.1976.
[445] Article 66 of the Jordanian Civil Law.

should be justified and reasoned so that an employee is aware of the grounds and the court is able to verify validity of such decision. Though the law grants an employer the right to termination without notice or remuneration, an employer cannot arbitrarily terminate the employment contract without legal justification.

Additionally, some jurists argue that termination or avoidance of the contract in this case is considered an arbitrary dismissal unless an employer's decision is legally justified[446].

In all cases, this paper argues that this matter needs legislative intervention by requiring reasoning of the termination decision made during the probation period.

B. Expiration of the probation period without termination of the employment contract

Para (c) of Article 35 provides that "If an employee continues to work after the end of his probation period, his employment contract shall be indefinite and the probation period shall be considered part of the period of service for the employer". The said Article shows that if the probation period expires and an employer does not exercise his right to termination, then the employment contract is considered indefinite and the probation period is considered part of an employee's service.

If the probation period expires and the employer does not terminate the employment contract, this means that the employer finds that the employee is suitable for the job and that the employer does not want to terminate the employment contract. Accordingly,

[446] **Ramadan, ibid, p.204.**

if the employment contract is not terminated during the probation period, such contract becomes indefinite and the probation period is considered part of actual service as explicitly provided in Article 35.

Along with some jurists[447], this study argues that the Jordanian legislator erred in Para (c) of Article 35 when he required that continuation of work after expiration of the probation period makes the contract an employment contract, where such contract is basically an employment contract and there is no need to provide for it in the said Para. Further, the provisions of Para (c) do not conform to the definition of *employee* contained in Article 2 of the labor Law, where a person under probation is deemed to be an employee.

1.2. Evaluation of the Jordanian Legislator's Position on Regulation of the Probation Requirement

Having reviewed conditions for validity of probation requirement in an individual employment contract, some observations on the Jordanian legislator's regulation of the provisions of this requirement are provided below:

A. The right to use of the probation requirement is restricted to an employer, where Para (a) of Article 35 provides that "The Employer may employ any Employee under probation". This means that this right is only granted to the employer to verify experience and competence of an employee.

[447] **Mughrabi, ibid, p.117.**

Though some jurists[448] argue that an employee has also the right to terminate a contract without notice during the probation period, this paper suggests that the legislator is required to amend Para (a) of Article 35 by granting both parties the right to terminate an employment contract during the probation period.

B. The Labor Law does not explicitly provide for including the probation requirement in a contract. Accordingly, if a contract does not contain the probation requirement, the employer's right to terminate a contract without notice under the pretext of probation constitutes a problem if such probation is not explicitly mentioned in the contract. Given the private nature of the Labor Law in terms of interpretation of its rules in order to serve interest of an employee and protect him from an employer's arbitrary decisions, the probation requirement must be explicitly mentioned in a contract[449]. Moreover, some jurists argue that the Labor Law should be interpreted in favor of an employee if its respective articles are open to interpretation[450]. In all cases, the legislator should require a mutual agreement of both parties to include the probation requirement in an employment contract to prevent this problem.

C. It is noticed that the Labor Law provides for payment of not less than the minimum wage to an employee during the probation period, though in some jobs the wages are high compared to the minimum

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[448] Daoudi, ibid, p.88.

[449] Sayed Ramadan,(2004), Al-Waseet in Explanation of Labor Law, Dar Thaqafa for Publication and Distribution, Amman, 1st edition, p.53.

[450] Ahmad Abd Al-Karim Abu Shanab,(2001), Explanation of Labor Law, Dar Thaqafa, Amman, 1st edition, p.24.

wage. The minimum wage applicable in Jordan[451] is not commensurate to all types of jobs. Hence, Article 35 should be amended so that the wage during the probation period is not less than equal pay for equal work or than the customarily accepted wage for similar work.

D. Article 35 of the Labor Law does not define whether the probation period is required in a certain type of individual employment contracts (indefinite employer contracts) or in all types of contracts including fixed-term contracts. This will be discussed in the Topic 2 of this Study. Existence of probation requirement in fixed-term contract is deemed to be problematic from a practical and judicial point of view.

2. PERMISSIBILITY OF INCLUDING THE PROBATION REQUIREMENT IN A FIXED-TERM EMPLOYMENT CONTRACT

Having clarified the general provisions on the probation requirement in accordance with the provisions of the Jordanian Labor Law, this topic discusses permissibility of including the probation requirement in a fixed-term employment contract. According to the probation requirement, an employer has the right to terminate an employment contract during the probation period without being responsible for consequences of such termination. Having reviewed the provisions of Article 35 of the Jordanian

[451] **In accordance with Article 52, the Council of Ministers form a tripartite committee in order to determine the minimum wage. In 2017, the Council of Ministers decided that the minimum wage is 220 JOD. On 25.2.2020, the Minister of Labor announced that the minimum wage for a Jordanian worker has been raised to (260) JOD and for a migrant worker (230) JOD, see: www.almamlakatv.com, visited on 1.7.2020.**

Labor Law, it is noticed that such provisions do not define type of the employment contract that contains the probation requirement. This means that it is permissible to include such requirement in all types of individual employment contracts.

However, reflecting on the provisions of Article 35 shows that the Jordanian legislator restricts the probation requirement to indefinite contracts. In all cases, this matter needs analysis and amendment. In this context, the Jordanian Court of Cassation, in some of its decisions, confirmed validity of the probation requirement in fixed-term contracts. However, the same court determined in other cases that the probation requirement is illegal in the fixed-term contracts.

2.1. Permissibility of probation requirement in fixed-term contracts

In Article 2 of the Jordanian Labor Law, an employment contract is defined as "an agreement, verbal or written, explicit or implicit, whereby a worker undertakes to work for an employer, under his supervision or direction, in return for remuneration; contracts of employment may be for a specified period or of indefinite duration, or for specified or unspecified work". It is noticed that an employment contract is either a fixed-term contract for no more than five years[452] or an indefinite contract, where either party has the right to terminate the contract upon notification of the other party.

Consequences of each type of employment contracts differ in terms of permissibility of termination, amount of compensation in cases of

[452] **Article 806 of the Jordanian Civil Law.**

illegal termination or automatic renewal[453]. Validity of probation requirement in a fixed-term contract is an important legal point. Para (a) of Article 35 gives an employer the right to terminate a contract during the probation period if conditions for validity of such requirement are fulfilled without defining type of such contract in terms of the duration. According to the general rule *general provisions remain as such unless restricted by a special provision*, the probation requirement can be included in both fixed-term and indefinite contracts.

In practice, an employer might include in an employment contract a requirement that an employee is subject to probation for three months though such employee is recruited under a 10-month-contract, which makes the probationary period a relatively long period compared to the whole contract period[454]. Hence, if an employer terminates a fixed-term employment contract, then such termination is valid and an employer is not required to pay the payable wages for the remaining period of contract in line with the principle of pacta sunt servanda and the rule of mutual consent.

In accordance with Article 26 of the Labor Law, an employee has the right to claim the payable wages until the end of the remaining period of the contract in case of illegal termination. The Jordanian Court of Cassation confirmed this matter where it ruled that "if an employer terminates a fixed-term contract before expiration of its term, an employee has the right to receive all rights and benefits under the

[453] **Mughrabi, ibid, 115.**
[454] **Utoom, ibid, p.24.**

employment contract in addition to the wages of the remaining period of the contract pursuant to Article 26 of the Jordanian Labor Law"[455].

In several decisions, the Court of Cassations confirmed that even if the probation requirement gives the employer the right to terminate a contract during the probation period without notice or remuneration, such termination must be justified as in the case an employee is unable to perform the required job[456]. In this context, the Court of Cassation ruled that "….. The court that issued the contested decision erred since Article (35/b) gives the employer the right to dismiss an employer under probation…… inclusion of the probation requirement in the fixed-term contract is invalid and suspends both parties' will…… where Article 35/b is explicit and general provisions remain as such unless restricted by a special provision, accordingly, termination of the contract during the probation period is legal"[457]. Additionally, the Court of Cassation confirmed this trend in many of its old or recent decisions[458].

Some jurists argue that it is permissible to include a probation requirement in the employment contract regardless of the contract term as long as such period is set out in the contract. This trend is confirmed in Para (a) of Article 35 where it gives an employer the right to terminate the contract regardless of the duration of contract.

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[455] **Decision No. 99/1956, Adalah Center Publications.**
[456] **Decision No. 2005/3688, Adalah Center Publications.**
[457] **Decision No. 2016/1133, and decision No. 2019/8111, Adalah Center Publications.**
[458] **See: Hesham Refaat Hashem, (1990) , Explanation of the Jordanian Labor Law, Muhtasib Library, Amman, 1st edition, p.100, and Abd Al-Wahed, ibid, p.79.**

2.2. Impermissibility of probation requirement in fixed-term contacts

Some jurists argue that the probation requirement can only be included in definite contracts. The said opinion depends on the provisions of Article 35 when it is entirely read in conjunction with the remaining provisions contained in the Jordanian Labor Law that organize the provisions on indefinite employment contract in terms of termination or compensation for illegal termination of a contract.

Some evidence on restricting the probation requirement to indefinite contracts and some decisions of the Jordanian Court of Cassations are provided below:

A. **Para (b) of Article 35 provides that an employer has the right to dismiss an employee under probation without notice or remuneration during the probation period. It is noticed that the term *notice* is used here, though such notice is only used in indefinite contracts in accordance with the provisions of Article 23/a[459]. This confirms the intent of the legislator in Article 35 by restricting the probation requirement to an indefinite contract.**

B. **Para (b) of Article 35 permits dismissal of an employee under probation without compensation. However, Article 32 of the Labor Law provides that an employee who is not subject to the provisions of the Social Security Law, and his employment is terminated for any reason whatsoever, is entitled to receive his end-of-service**

[459] **Article 23/a provides that "If one of the two parties to an indefinite employment contract wishes to terminate it, such party shall give the other party written notice to that effect at least one month in advance. Notice can then only be withdrawn with the approval of both parties".**

benefits at the rate of one month's remuneration for every year of effective service.

Before amended[460], the said Article gave an employee the right to receive end-of-service benefits only under an indefinite employment contract. This is consistent with Article 35 contained in the Labor Law of 1996 when the provisions are read in conjunction with each other, where the legislator intended to restrict the probation requirement to indefinite contracts. This is proved in Article 32 before amendment.

C. **Para (c) of Article 35[461] confirms this trend. Para (c) provides that if an employee continues to perform his job after expiration of the probation period and an employer has not dismissed such employee, then the employment contract will continue for indefinite period. This confirms that the contract has been indefinite from the beginning, but it has contained the probation requirement. It is inconceivable that the contract was of a fixed-term and then it transformed into an indefinite contract once the probation completed, which does not agree with the contracting parties' purpose.**

D. **Article 15/c[462] provides that a fixed-term contract automatically terminates upon expiration of its duration, where such duration is**

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[460] **Amendment No. 14 of 2019.**

[461] **"If an employee continues to work after the end of his probation period, his employment contract shall be indefinite and the probation period shall be considered part of the period of service for the employer"**

[462] **"Where the contract of employment is for a specified period, it is automatically terminated at the end of that period. If both parties to the contract continue implementing it after that period has expired, the contract shall be considered to have**

agreed upon by both parties. If a probation requirement that gives an employer the right to terminate a contract during the probation period is included in a fixed-term contract, this violates the rule of termination by agreement of both parties, since termination is made by one party, to whom the right to probation requirement is granted, without consent of the other party. This contradicts their agreement on duration.

E. Article 21 explains the cases of termination of an employment contract in general[463]. Para (b) of Article 21 provides that a contract terminates when its duration expires. This means that the parties' wills are the basis for determination of the contract term. Hence, including the probation requirement in such types of contracts enables one of the parties (employer) to dismiss the other party (employee) without his consent.

F. The general rules contained in the Jordanian Civil Law[464] provide that either party can only amend or terminate a contract upon agreement or litigation. Thus, an employer cannot use the probation requirement nor can he unilaterally terminate the contract, since this violates the general rules regulating the contract.

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been renewed as a contract for an indefinite duration, and shall be deemed as such from its commencement"

[463] "An employment contract terminates if:

(a) both parties agree to terminate it;
(b) the duration of the contract has expired or the work itself has been completed;
(c) the worker dies or is no longer capable of working due to a disease or disability certified by the medical authority.
(d) an employee fulfills the conditions of old-age pension stipulated in the Social Security Law, unless otherwise agreed by the parties"

[464] Article 241.

G. **Article 4/b of the Labor Law provides for nullity of any condition contrary to the provisions of the Law. Accordingly, the probation requirement in fixed-term contracts explicitly violates the Labor Law, which provides that a fixed-term contract terminates when its term expires. Neither party may make an agreement contrary to the provisions of the Labor Law. Additionally, including the probation requirement in a fixed-term contract prejudices an employee's rights and such requirement is, therefore, invalid in accordance with the provisions of Article 4/b[465].**

H. **In some of its decisions[466], the Jordanian Court of Cassation ruled that the probation requirement contained in fixed-term contracts is invalid. This supports the opinion that the probation requirement is invalid if it is included in a fixed-term contract.**

Conclusion

This paper concludes that the Jordanian legislator has organized the probation requirement in Article 35 of the Jordanian Labor Law No. 8 of 1996, as amended. However, such regulation has been unclear and has not included various provisions on such requirement. This study explains the provisions on the probation requirement and its validity if it is included in an individual fixed-term employment contract.

This paper concludes that:

[465] **"Any condition contained in any contract or agreement made before or after the entry into force of this Law, whereby an employee relinquishes any right conferred on him by this Law, shall be deemed null and void"**

[466] **Decision No. 2013/2707, Adalah Center Publications.**

1. **Article 35 grants right to the probation requirement to an employer exclusively.**
2. **Article 35 does not contain provisions to deal with an employment contract that does not contain an explicit probation requirement, and it does not provide for any practical requirement without being explicitly included in the contract.**
3. **Article 35 does not provide for the case in which an employer subjugates the same employee to the probation requirement for more than once and for the same job.**
4. **Article 35 does not require an employer to justify termination of a contract during the probation period.**
5. **Article 35 does not define validity or permissibility of including the probation requirement in a fixed-term employment contract. This paper concludes that the probation requirement contained in a fixed-term contract is invalid.**
6. **Article 35 requires that the wage of an employee under probation is not lower than the applicable minimum wage. Some comments were provided on this provision.**

Recommendations

Some recommendations on amending the provisions of Article 35 of the Jordanian Labor Law are provided below:

A. **Parties to a contract have the right include the probation requirement in an employment contract. It is suggested that the beginning of Para (a) of Article 35 be amended to become "Either party to an employment contract may require the probation**

requirement to verify the working conditions and competence of the other party".

B. It is suggested that an agreement on the probation requirement should be reached, where the following provision should be added "the probation period shall not exceed three months".

C. It is suggested that a paragraph that prohibits subjugating the same employee to probation for more than once for the same job is added to Article 35.

D. It is suggested that a paragraph that provides that an employer has the right to dismiss an employee under probation if it is proven that such worker lacks competence without any notice or compensation during the probation period is added.

E. It is suggested that the following sentence " provided that the wage of an employee under probation is not less than wage of co-employees who perform the same job, and in all cases not less than the minimum wage" be added to Para (a) of Article 35.

F. It is suggested that the following paragraph "either party to an indefinite employment contract may require the probation requirement" be added to Article 53 so that the probation requirement is restricted to an individual indefinite employment contract to be consistent with the remaining provisions.

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JUDICIAL REVIEW OF THE EXERCISE OF DISCRETIONARY POWERS: CASE-LAW OF EUROPEAN COURT OF HUMAN RIGHTS AND EXPERIENCE FROM UKRAINE

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Abstract

Administrative courts of Member States of the Council of Europe are consistently holding to the notion that discretionary powers of administrative authorities limit the jurisdiction of administrative courts, even though this limitation entails restriction of a right to a court. The

article aims to determine due effect of discretionary powers on the jurisdiction of administrative courts for better access to justice. The article relies extensively on primary legal sources, including identification, collection and systematic analysis from ensuring 'right to a court' standpoint and comparative research of principles European Court of Human Rights laid down in its case-law and those ones reflected in national law of Ukraine. It is substantiated that it is counter to the purpose of administrative justice not to allow it to assess the exercise of discretionary powers.

Keywords: administrative litigation, discretionary powers of administrative authorities, jurisdiction of administrative court, right to a court, scope of judicial review.

INTRODUCTION

Scientific, Practical Problems

Administrative courts of member States of the Council of Europe are consistently holding to the notion that discretionary powers of administrative authorities limit the jurisdiction of administrative courts, even though this limitation entails restriction of a right to a court. The dominant view is that the administrative justice in cases concerning decisions, commissions and omissions of administrative authorities coming within their margin of appreciation stipulated by law is not to substitute its own assessment or opinion for that of the administrative authorities and not to order administrative authorities to act in specific manner, since that amounts to inappropriate interference with exercise of discretionary powers and performance of executive functions of administrative authorities. However, it has become imperative that the right to a court is

supposed to not be theoretical or illusory, but to be practical and effective instrument designed to restore violated rights, which is particularly important in context of administrative proceedings, since its purpose is to protect rights and interests of private natural and legal persons from violations of administrative authorities. Complete non-intervention of courts with the exercise of discretionary powers, withdrawal of judicial review of the exercise of discretionary powers from purview of administrative courts makes it impossible to file administrative-law appeals regarding abuse of discretionary powers and thus gross arbitrariness of administrative authorities could go unpunished, administrative justice is considerably hindered and the right to a court is not respected.

Literature Review.

The general consensus in the literature is that the issue of binding and freedom of administration, since there is a fine line between, on the one hand, inappropriate judicial interference with exercise of discretionary powers and performance of executive functions of administrative authorities and, on the other hand, granting effective and efficient legal remedies against unlawful decisions, commissions and omissions of administrative authorities through compelling them to full restoration of rights and interests of legal persons and individuals in domain of public administration.

On a basis of a profound research of judicial review of administrative discretion in the administrative state, dealing with standards of judicial review of the European Court of Justice as well as with these in Dutch administrative law and that ones used at the UK's Specialist Competition

Appeal Tribunal, Poorter, Ballin & Lavrijssen (2019) concluded that one of the rationales behind administrative discretion is what we would call "discretion as policy". This form of administrative discretion arises precisely because the legislature, in adopting the statute, cannot foresee the characteristics of every single case. Therefore, it leaves leeway to the administration to balance interests and take a decision that suits best the particular situation. Here, judicial review is traditionally hampered by the dichotomy that exists between law and policy. Traditionally, courts were supposed to limit their review to matters regarded as judicial (or, subsequently, quasi-judicial) in nature. This meant that the review of arbitrary action in areas formally defined as nonjudicial was understood to be beyond the presumed parameters of legitimate judicial action. This lack of judicial oversight meant that the administrative bodies came to enjoy, in some corners of their work, an effectively rule-free environment. From perspective of the cited authors, normatively, this raises the question whether the traditional distinction between law and policy is still adequate in the context of the administrative state. Poorter et al. have firm conviction that courts cannot take responsibility for the policy choices made by the administration, but they can assess whether the decision-making process used by the administration has been reasonable in the light of the principles of subsidiarity, proportionality, transparency, and precaution, along with human rights.[467]

Lingyun (2009, pp. 77-78), having carried out an investigation into Chinese Administrative Litigation Law, indicated that there is a serious misunderstanding that some courts even mistakenly think that the free discretion is complete self-governance by the administrative authority, and

[467] **Poorter, Ballin, & Lavrijssen, 2019.**

it is totally up to the administrative authority to "have the final say", and the court cannot interfere. The consequence is that, on the one hand, a great number of cases of abuse of power "slip away" right before the eyes of the judge, seriously damaging the effectiveness of the administrative judicial control and drastically reducing the number of cases of "abuse of power" objectively. Such a situation is most worrisome and depressing; the change of the status must depend on the further improvement of the judge's quality, and clearer judicial policy and legislative provisions. According to the author even if we still want to keep judicial interference means like "change of judgment", "defining time limit for new specific administrative behavior" and "requesting the defending administrative authority to take relevant remedy measures", it is still necessary and beneficial to further detail their specific application conditions.[468] For instance, Zhang (2018), endorses the use and further development of manifest unfairness and manifest unjustness as the criteria for judicial review, giving due weight as well to principles of both reasonableness and proportionality.[469]

In addition to the above-mentioned legal scholars Parchomiuk (2018) as well propounds the view that despite the declining practical significance, the concept of abuse of powers (in comparison to principle of proportionality or the concept of manifest error in assessment) remains an *ultima ratio* means to challenge administrative acts that are unacceptable from the point of view of the axiology of the legal system, the "ultimate weapon" of an administrative court judge. The value of this concept is also

[468] Lingyun, 2009.
[469] Zhang, 2018.

expressed in emphasizing the importance of the competence norms. Without denying the need for a restrictive interpretation of competence provisions, it must be recognized that each power of an administrative body has its own specific purpose. The use of powers for purposes other than that for which they were originally intended leads to an unacceptable restriction of the rights of the individual. A reference to the search for the purpose of the powers, characteristic of the concept of abuse of powers, does not blur the limits of interference, but on the contrary: allows them to be given a rational sense.[470]

Bearing in mind the foregoing considerations and recognizing them as being of a tremendous significance, however, it could be a valuable contribution to the discussion of the optimal depth and limits of judicial review of discretionary powers to determine due effect of discretionary powers on the jurisdiction of administrative courts for better access to justice, making reference to principles and guidelines on this matter European Court of Human Rights laid down in its case-law and those ones reflected in national law of Ukraine.

Purpose of the Study.

In the context of all the foregoing, in this research paper we intend to determine the scope of judicial review of the exercise of discretionary powers by administrative authorities, having regard to national law of Ukraine as an example of member State of the Council of Europe manifesting the afore-mentioned tendency as well as paying due attention to principles governing ensuring a right to a court, enshrined in European Court of Human Rights (ECHR) case-law, which constitutes the purpose of the article.

[470] **Parchomiuk, 2018, p. 478.**

The *object* of the article is the administrative proceedings, while the *subject* matter of the article is the scope of judicial review of the exercise of discretionary powers by administrative authorities.

Research Methods.

The article relies extensively on primary legal sources, identifying and conducting systematic analysis as well as a comparative research of principles governing determination of the scope of judicial review of the exercise of discretionary powers of administrative authorities laid down in the case-law of the ECHR and those ones reflected in Ukrainian statutory provisions and the case-law of the Supreme Court of Ukraine. As a result of conducting these operations, dialectic reflecting on purpose of administrative justice and discretionary powers as a mean for independent fulfillment of executive functions of administrative authorities and having critically evaluated the afore-mentioned and some other relevant legal materials, the authors elaborate theoretical concepts and practical solutions regarding the matter of whether or not and to which extent the jurisdiction of administrative courts must be restricted because administrative authorities are vested with margin of appreciation, which indicates acceptable degree of the effectiveness and efficiency of the methods the authors opted to use.

RESULTS AND DISCUSSION

THE FIRST TOPIC: RIGHT TO A COURT IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS APPLICABILITY IN ADMINISTRATIVE PROCEEDINGS

As stated in the Report of the Venice Commission on the rule of law one of the intrinsic elements of the rule of law is access to justice before independent and impartial courts, including judicial review of administrative acts. The document asserts that everyone should be able to challenge governmental actions and decisions adverse to their rights or interests. Prohibitions of such challenge violate the rule of law. It is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact, and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretative methodology[471]. Hence, the requirement of access to justice before independent and impartial courts, including judicial review of administrative acts gives rise to obligation of a government to respect the right to a court providing proper legal and institutional framework for its exercise, including making it possible to appeal against decisions, commissions and omissions of administrative authorities through granting the courts sufficient scope of judicial review and power to provide effective remedies to protect rights and interests of private natural and legal persons from violations of administrative authorities.

The most substantial source of standards relating to fair trial for member States of the Council of Europe is art. 6 of Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) in conjunction with ECHR's case-law revealing principles of its interpretation and application. Pursuant to the article in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a

[471] **European Commission, 2011.**

reasonable time by an independent and impartial tribunal established by law. Additionally, everyone charged with a criminal offence has the following minimum rights: 1) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; 2) to have adequate time and facilities for the preparation of his defense; 3) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; 4) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; 5) to have the free assistance of an interpreter if he cannot understand or speak the language used in court[472].

Even though the above-mentioned guarantees of fair trial cover determination of his civil rights and obligations and of any criminal charge, it is common knowledge stemming from long-standing case-law of ECHR that under particular circumstances administrative-law appeals come under the concept of 'determination of his civil rights and obligations and of any criminal charge' in line with Convention terminology.

The foundation of this viewpoint was laid in the case-law of ECHR dating back to the middle of the 20th century. As was explained in the Court's Ringeisen v. Austria judgment, for Article 6, paragraph (1) (art. 6-1), to be applicable to a case ("contestation") it is not necessary that both parties to the proceedings should be private persons. The character of the legislation which governs how the matter is to be determined

[472] **UN, 1950.**

(administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (administrative body, etc.) are therefore of little consequence[473]. For instance, issue concerning withdrawal of the licence, which has adverse effects on the goodwill and the value of the restaurant business and maintenance of which was one of the principal conditions for carrying on business activities, despite having features of public law is not excluded from the category of "civil rights" within the meaning of art. 6-1[474]. Additional examples of administrative-law cases in which Article 6 was considered applicable are the following (with reference to Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)):

granting building permission, revocation of a firearms licence (where the applicants had been listed in a database containing information on individuals deemed to represent a potential danger to society);

social-security benefits, even on a non-contributory basis, and also proceedings concerning compulsory social-security contributions;

the right of access to administrative documents;

revoking a permit for a factory on environmental grounds;

an action for cancellation of an administrative decision harming the applicant's rights;

recruitment or appointment, career or promotion, transfers, termination of service and disciplinary proceedings relating to civil service, unless there is justification for the exclusion of civil servants from the guarantees of Article 6 on the basis of the special nature of

[473] Ringeisen v. Austria, No. 2614/65, § 94.
[474] Traktörer Aktiebolag v. Sweden, No. 10873/84, § 43.

the relationship between the particular civil servant and the state in question.[475]

What is more, it is to be noted for correct determination of the scope of application of fair trial guarantees that cases arising from administrative offences punished with punitive administrative measures of criminal nature may fall within the ambit of the criminal head of Article 6. Nevertheless, because number of such administrative-law cases is not substantial, it seems to be a reasonable step to focus on 'civil' procedural guarantees of fair trial that are to be adhered to in administrative proceedings.

THE SECOND TOPIC: CASE-LAW OF EUROPEAN COURT OF HUMAN RIGHTS CONCERNING JUDICIAL REVIEW OF THE EXERCISE OF DISCRETIONARY POWERS OF ADMINISTRATIVE AUTHORITIES

The case-law of ECHR concerning judicial review of the exercise of discretionary powers of administrative authorities appears to suggest that this international institution holds to a view that the Convention for the Protection of Human Rights and Fundamental Freedoms provides ample support for the assertion that it is perfectly acceptable to restrict to a certain extent the jurisdiction of administrative courts with margin of appreciation of administrative authorities.

First of all, ECHR is of the opinion that the "right to a court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls

[475] **ECHR, 2019, p. 12-16.**

for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired.[476]

The basic premise of the principles regarding determining the scope of judicial review of exercise of discretionary powers by administrative authorities set forth by the case-law of ECHR is that for the determination of civil rights and obligations by a "tribunal" to satisfy Article 6 § 1 of the Convention, the "tribunal" in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it. The Court have acknowledged in their case-law that the requirement that a court or tribunal should have "full jurisdiction" will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it. In adopting this approach the Convention organs have had regard to the fact that it is often the case in relation to administrative-law appeals in the member States of the Council of Europe that the extent of judicial review over the facts of a case is limited, and that it is characteristic of review proceedings that the competent authorities review the previous proceedings rather than taking factual decisions. It can be derived from the relevant case-law that it is not the role of Article 6, in principle, to guarantee access to a court which can substitute its own assessment or opinion for that of the administrative authorities. In this regard, the Court has placed particular emphasis on the respect which must be accorded to decisions taken by the

[476] **Ivanova and Ivashova v. Russia, Nos. 797/14 and 67755/14, § 42.**

administrative authorities on grounds of expediency and which often involve specialised areas of law.[477]

In assessing whether, in a given case, the extent of the review carried out by the domestic courts was sufficient, the Court has held that it must have regard to the powers of the judicial body in question and to such factors as:

(a) the subject-matter of the decision appealed against, and in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and, if so, to what extent;

(b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the administrative body; and

(c) the content of the dispute, including the desired and actual grounds of appeal.[478]

Summarising the considerations laid down in the case-law of ECHR on due judicial review of decisions, commissions and omissions of administrative authorities, it is to be noted that a positive conclusion on this issue may be reached on condition that it was determined whether or not:

decision had been made by reference to irrelevant factors or without regard to relevant factors;

evidence relied on was not capable of supporting a finding of fact;

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[477] **Ramos Nunes de Carvalho e Sá v. Portugal, Nos. 55391/13, 57728/13 and 74041/13, § 176-179.**

[478] ***Ibid.***

the decision was based on an inference from facts which was perverse or irrational in the sense that no civil servant properly directing himself would have drawn such an inference.[479]

In considering whether the legislative scheme, taken as a whole, provided a due enquiry into the facts, the Court takes account of the nature and purpose of that scheme. In relation to administrative-law appeals, the question whether the scope of judicial review afforded was "sufficient" may depend not only on the discretionary or technical nature of the subject-matter of the decision appealed against and the particular issue that the applicant wishes to ventilate before the courts as being the central issue for him or her, but also, more generally, on the nature of the "civil rights and obligations" at stake and the nature of the policy objective pursued by the underlying domestic law.[480]

Furthermore, not less important for protection of human rights and fundamental freedoms in context of activities of administrative authorities is to adhere to the view that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body.[481]

The conclusions of the preceding analysis can be summarised as follows. The opinion of the ECHR on the issue of scope of the judicial review of exercise of discretionary powers by administrative authorities is that in line with Article 6 of the Convention requirements there is no obligation to empower a court to substitute its own assessment or opinion for that of the

[479] **Bryan v. the United Kingdom, No. 19178/91, § 44.**
[480] **Fazia Ali v. the United Kingdom, No. 40378/10, § 84.**
[481] **Kingsley v. the United Kingdom, No. 35605/97, § 32.**

administrative authorities and overrule them taking decisions on merits of the case or determining the specific course of action for administrative authorities. Justification for this approach includes, among other features, grounds of expediency, involvement of specialised areas of law, discretionary or technical nature of the subject matter of the decision appealed against. However, it is expected that court exercises sufficient jurisdiction or provided sufficient review in the proceedings before it, which includes determining whether or not decision had been made by reference to irrelevant factors or without regard to relevant factors, evidence relied on was not capable of supporting a finding of fact, the decision was based on an inference from facts which was perverse or irrational in the sense that no civil servant properly directing himself would have drawn such an inference. In addition to that, question whether the scope of judicial review afforded was "sufficient" depends on issue at stake and the subject-matter of the decision appealed against.

THE THIRD TOPIC: UKRAINIAN LAW ON THE ISSUE OF JUDICIAL REVIEW OF THE EXERCISE OF DISCRETIONARY POWERS OF ADMINISTRATIVE AUTHORITIES: STATUTORY PROVISIONS AND THE CASE LAW OF THE SUPREME COURT OF UKRAINE

Administrative justice in Ukraine, as provided by the Code of Administrative Court Proceedings of Ukraine, irrespective of whether an administrative authority has the discretionary powers, is to verify whether the decisions, commissions or omissions of public authorities are: lawful; made/committed using power for the purpose for which it was granted; justified, that is, taking into account all the circumstances that are

relevant to the decision (action); undertaken independently, impartially and in good faith, respecting the principle of equality before the law, preventing all forms of discrimination; prudent; proportionate, in particular, with respect to the necessary balance between any adverse effects on the rights, freedoms and interests of the person and the goals to which this decision (action) is directed, etc.

Nevertheless, there is overwhelming evidence in the case-law of the most authoritative domestic court that administrative justice in cases concerning lawfulness of decisions, commissions and omissions of administrative authorities coming within their margin of appreciation stipulated by law court is not to assess ways of exercise of discretionary powers of administrative authorities and cannot quash the impugned decision and make decision bypassing competent administrative authorities or bind them with directives as to what decision is expected to be for it to restore violated rights or interests of private person. Opting to act in that manner, a court, as it is currently believed, interferes with exercise of discretionary powers and performance of executive functions of administrative authorities.

In particular, it is considered to be an interference with exercise of discretionary powers of a competent administrative authority to absolutely discharge an offender in administrative offences proceedings on grounds that administrative offence committed is negligible, in disregard of which police officers imposed an administrative penalty. The rationale for this statement was that determining whether a person is guilty and whether administrative penalty is to be imposed comes within exclusive purview of National police of Ukraine, whereas an administrative court is not supposed to interfere with exclusive domain of competence (margin of

appreciation) of public authorities, since the objective of administrative proceeding is not to contribute to efficiency of public administration, but to ensure respect of rights and interests and obedience of the law, or else the division of power principle is disregarded.[482] Likewise, it is argued that the court cannot interfere with the exercise of executive powers of administrative authority, in particular, of competence of High Qualifications Commission of Judges of Ukraine to appraise judge candidates in context of competition for a vacant position of judge.[483]

As a reason for restriction of judicial review of activities of administrative authorities, exclusive purview is often complemented by involvement of special knowledge in decision-making of administrative authorities. This could be perfectly exemplified in proceedings related to verification the existence of circumstances for determination of market dominance of economic entities. With respect to the latter the supreme court institution of Ukraine stated that determination of circumstances indicating dominant position of economic entity in a particular product market falls outside the competence of courts; this matter could be handled solely as a result of special investigation carried out by Antimonopoly Committee of *Ukraine, implementing statutory provisions on economic competition protection.*[484] *Similar argumentation* the Supreme Court of Ukraine produced in the case regarding suspension of a special subsoil permit. The court pointed out that courts are not competent anthropogenic security institution (special knowledge required, due

[482] **Name v. Regional Police Subdivision in Mariupol of Department of Patrol Police, No. 266/3228/16-a.**
[483] **Name v. High Qualifications Commission of Judges of Ukraine, No. 800/327/17.**
[484] **Private Stock Company Ukraine International Airlines v. Ministry of Infrastructure of Ukraine, No. 910/12018/17.**

qualifications and professional level have governmental mining supervisors) and therefore has no latitude to assess the potential environmental consequences of the suspension of a special subsoil permit. The expediency of decisions of administrative authorities is not subject to judicial review; a court cannot substitute itself for the competent administrative authority.[485]

Political autonomy in matters within a political context of governmental authorities and local self-government underlie another opinion of supreme domestic court institution as for restrictions of judicial control, including, for instance, expressing no confidence in the chairman of the district state administration. In this regard the Supreme Court of Ukraine noted that a right to express no confidence in the chairman of the district state administration is of discretionary nature and for this reason a court is in no position to interfere with internal competence of local self-government bodies and evaluate rationale for decision of district council on this matter. The court is of the view that this decision could be reviewed by court only for compliance with the procedure without attempting to independently evaluate the work of the chairman of the district state administration regarding the fulfillment or non-fulfillment of his duties and without expressing opinion on strength of foundation of the position of deputies on this issue.[486]

As shown above, there is a case-law indicating that under no circumstances could the scope of judicial review encompass decisions, commissions and omissions of administrative authorities coming within their margin of appreciation stipulated by law: if they relate to a group of

[485] Navigator Complect LLC v. the State Service of Geology and Subsoil of Ukraine, No. 826/14951/18.

[486] Name v. Shepetivka District Council of Khmelnytskyi Region, No. 688/3487/16-a.

issues covered by the exclusive competence of administrative authorities, are of political nature or require special knowledge, qualifications and professional level. According to this viewpoint administrative justice is not supposed to directly contribute to efficiency of public administration through assessing expediency of activities of administrative authorities.

In contrast, one can observe a clear tendency that the increasing support in domestic administrative courts has the view that the requirement for access to justice and effective judicial protection of violated rights in public relations dictate the need, save for exceptional circumstances, to determine, having considered an administrative-law appeal, the obligations of administrative authorities related to relevant private persons in direct and specific manner.

First of all, of paramount importance is to ascertain whether it is the case that the administrative authority enjoys a margin of appreciation in a situation at hand. In this regard it is asserted that powers of administrative authorities are not of discretionary nature if there is a sole lawful course of action. This means that on condition that there is a set of circumstances established by law and prescriptive guidelines and regulations obligating an administrative authority to act in a specific manner under these circumstances and suppose an administrative authority fails to do it, it is perfectly acceptable to force an administrative authority onto it.[487] Furthermore, it is acknowledged that discretionary powers are not to be used arbitrarily and the court must be authorized to review outcomes of exercise of discretionary powers, which is a safeguard

[487] **Name v. Main Department of State Service of Ukraine for Geodesy, Cartography and Cadastre in Poltava Oblast, No. 1640/2594/18.**

against abuse and arbitrariness in context of substantial degree of latitude of administrative authorities. In addition to that it considerably contributes to good administration and prevention of misuse of power. At the same time, it is thought to be acceptable that the protection of the infringed rights may be confined to compelling to re-consider an application of private person and make a reasonable decision on the merits of the application.[488] What is more, the optimal way to resolve administrative dispute over value added tax refund was determined to be direct recovery of the sum of value-added tax refund from state budget, regardless of the fact that several years before delivery of the judgment reflecting and affirming this opinion, it was a consistent approach to protect the rights of taxpayers associated with value added tax refund through mere placing tax authorities under obligation to: a) re-examine an application for the value-added tax refund from state budget; or b) give an opinion on the confirmation of the amount of value-added tax refund; or 3) enter the application in the register of applications for the value-added tax refund. However, in the case of *Ascop-Ukraine Ltd v. State Tax Inspectorate in Dnipro district of Head Dept. of State Fiscal Service of Ukraine in Kyiv and Head Dept. of State Treasury Service of Ukraine in Kyiv* (2019) the Supreme Court of Ukraine held that an effective remedy ensures restoration of the violated right, being adequate to the circumstances, leading to the desired outcomes, giving the greatest effect. Given that such remedies as compelling tax authorities to give an opinion on the confirmation of the amount of value-added tax refund or to enter the application in the register of applications for the value-added tax refund – do not lead to an effective restoration of rights of the taxpayer,

[488] **LLC Firm Cranberry *v. Antimonopoly Committee of Ukraine, No.* 910/23375/17.**

the Supreme Court of Ukraine concluded that an effective remedy in these circumstances is direct recovery of the sum of value-added tax refund, as well as of the complementary default interest from state budget through state treasury.[489] Likewise, having determined the rejection of the State Migration Service of Ukraine to issue a passport of a citizen of Ukraine in the form of a booklet to be unlawful, the Supreme Court of Ukraine with a view to effectively protecting the violated rights of the applicant has ordered the home office, immigration and nationality bodies to issue a passport of a citizen of Ukraine in the form of a booklet.[490]

Additionally, the idea about next to unlimited judicial review of exercise of discretionary powers by administrative authorities and determination of their duties in direct and specific manner following consideration of an administrative-law appeal is reinforced by some other case-law of domestic courts, represented in analytic review of Sasevych (2019). In particular, a reference was made to judgments compelling administrative authorities to:

a) accept and register a tax invoice and calculation adjustment in the unified register of tax invoices;

b) write off a bad tax debt, considering that 'the defendant's refusal to write off the tax debt is unlawful and the possibility of the defendant making an alternative decision is not established by law, and therefore the obligation of the defendant to write off the bad debt is an effective way to protect the violated rights of the plaintiff's in the manner which

[489] Ascop-Ukraine Ltd v. State Tax Inspectorate in Dnipro district of Head Dept. of State Fiscal Service of Ukraine in Kyiv and Head Dept. of State Treasury Service of Ukraine in Kyiv, No. 826/7380/15.

[490] Name v. Korosten District Department of the State Migration Service of Ukraine, No. 806/3265/17.

doesn't necessitate further appeal to the court for the protection of the same violated rights;

c) approve the decision of the specialised scientific council on awarding the scientific degree of doctor of laws

d) to institute enforcement proceedings for the execution of the executive document;

e) grant permission for the production of a land development project for the allocation of land for personal farming.[491]

CONCLUSIONS AND FUTURE STUDY

The above considerations concerning the scope of judicial review of the exercise of discretionary powers by administrative authorities in the national law of Ukraine and in to principles governing ensuring a right to a court, reflected in ECHR case-law, are sufficient to conclude this research with the following statements.

1. The ECHR holds to the opinion that in line with Article 6 of the Convention requirements there is no obligation to empower a court to substitute its own assessment or opinion for that of the administrative authorities and overrule them taking decisions on merits of the case or determining the specific course of action for administrative authorities. However, it is expected that court exercises sufficient jurisdiction or provided sufficient review in the proceedings before it, which includes examination of relevance and merit of facts underlying activities of administrative authority at hand and whether the interpretation of facts which was perverse or irrational in the sense that no civil servant properly directing himself would have drawn such an inference. In addition to that,

[491] **Sasevych, 2019.**

question whether the scope of judicial review afforded was "sufficient" depends on issue at stake and the subject-matter of the decision appealed against.

2. The Ukrainian statutory provisions on administrative justice prescribe that administrative courts shall examine whether decisions, commissions or omissions of public authorities are: a) lawful; b) made/committed using power for the purpose for which it was granted; c) justified, that is, taking into account all the relevant circumstances; d) undertaken independently, impartially and in good faith, respecting the principle of equality before the law, preventing all forms of discrimination; e) prudent; f) proportionate, in particular, with respect to the necessary balance between any adverse effects on the rights and interests of the person and the goals to which this decision (action) is directed, etc. These provisions have no reservation for that activities of administrative authorities, which relate to a group of issues covered by the exclusive competence of administrative authorities, are of political nature or require special knowledge, qualifications and professional level or in other way related to exercise of discretionary powers of administrative authorities.

3. In the case-law of the highest court in the domestic judiciary of Ukraine it appears to be a consensus view that that powers of administrative authorities are not of discretionary nature if there is a sole lawful course of action. This means that on condition that there is a set of circumstances established by law and prescriptive guidelines and regulations obligating an administrative authority to act in a specific manner under these circumstances and suppose an administrative

authority fails to do it, it is perfectly acceptable to force an administrative authority onto it.

4. Nevertheless, there is a difference of opinion on the matter of whether or not the jurisdiction of administrative courts must be restricted because administrative authorities are vested with margin of appreciation and to which extent. According to one of these opinions under no circumstances could the scope of judicial review encompass activities of administrative authorities if they relate to a group of issues covered by the exclusive competence of administrative authorities, are of political nature or require special knowledge, qualifications and professional level. Another opinion is based on the premise that the requirement for access to justice and effective judicial protection of violated rights in public relations dictate the need, save for exceptional circumstances, to determine, having considered an administrative-law appeal, the obligations of administrative authorities related to relevant private persons in direct and specific manner.

Having regard to the foregoing observations and considerations the optimal solution seems to be the one that is reflected in the Ukrainian statutory provisions on administrative litigation, which requires examination of activities of administrative authorities, irrespective of whether an administrative authority is vested with discretionary powers, with reference to the set of criteria enshrined in that provisions. This approach perfectly aligns with the case-law principles regarding determining the scope of judicial review of exercise of discretionary powers by administrative authorities set forth by the case-law of ECHR. However, it is a subject matter for further research to crystallise those exceptional circumstances under which a judicial interference with

exercise of discretionary powers and performance of executive functions of administrative authorities is inappropriate (matters of political expediency, equally lawful alternative courses of action corresponding with afore-mentioned assessment criteria, etc.).

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PRINCIPLES AND MODELS OF MEDIATION IN DEVELOPED COUNTRIES

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Abstract

The article explores the foreign experience of implementing the mediation procedure as one of the alternative means of resolving conflicts in the legal field, and provides a list of reasons for identifying different models of mediation. Using the method of legal modeling, a model of mediation in Ukraine was developed and the possibility of implementation into civil procedure legislation was envisaged. The Mediation models reflect their particularities through the constituent characteristics of the reconciliation process. The basic rules for mediation and the use of mediation technology are based on certain identified models. Each model is effective in resolving different categories of disputes. Also, the rules of conduct can be combined

depending on the specifics of the legal process and its participants in the mediation.

Keywords: alternative dispute resolution, mediator, mediation, models of mediation, principles of mediation.

INTRODUCTION

Scientific, Practical Problems.

In today's world, the Mediation Institute is developing very dynamically. This is due to the significant advantages of this institution over the traditional court case. First of all, it is the speed of conflict resolution, the high percentage of successful mediation procedures, the reduction of the burden on the judicial system. It is through mediation that one can bypass the courts and reach a consensus of the conflicting parties on a particular issue. Principles and models of mediation have been the subject of research by many world scientists, among which are the works of: J. Thomas, L. Fuller, S. Silby, and domestic scientists, in particular, G. Eremenko, I. Yasinovsky, Y. Prytyka, T. Podkovenko, etc. For example, J. Thomas identifies four models of mediation: the model of the savior, the mediator, the organizer and the model where the mediator can use any means and methods. Lon Lewis Fuller laid down 8 principles that constitute the "internal morality of law." Susan Silby has done research on legal culture issues. Galina Eremenko researches theoretical and applied technologies of alternative ways of dispute resolution. Y. Prytyka examined the content and classified the principles of mediation. T. Podkovenko studied the Institute of Mediation, analyzed foreign experience and Ukrainian perspectives. I. Yasinovskyy carried out a theoretical and legal analysis of the implementation of the mediation

procedure in Ukrainian legislation. In foreign countries, the practice of dispute resolution using alternative methods, including mediation, has long been established. Therefore, it should be noted that the study of models of mediation in developed countries is a very relevant area of scientific search. The legislation of Ukraine does not provide the possibility of bringing the mediator to administrative responsibility, there is no single international list of models based on the principles of mediation.

The purpose of the article.

The purpose of the article is to carry out theoretical and legal analysis of models and principles of mediation in different countries, to identify advantages and disadvantages, to be able to borrow foreign experience in order to improve the legislation of Ukraine. The following tasks have been set to achieve this: to characterize the theoretical and legal aspects of mediation; determine the principles of mediation; explore models of mediation; to analyze foreign experience regarding the characterization and structure of mediation principles and models; to propose ways of solving structural problems that arise during the formation of principles and models of mediation in Ukraine.

Object and Subject of the Research.

***The object* of the study is public relations in the sphere of mediation procedure formation. *The subject* of the study is the theoretical and legal foundations of the formation of principles and models of mediation in the modern world.**

Research Methods.

The following methods of research are applied in the article: structural (the individual elements of models of mediation were investigated);

functional (the effectiveness of using the principles of mediation was investigated); formally legal (the relationship of mediation principles was investigated); statistical (the statistical data of efficiency of application of mediation procedure were investigated); modeling (the most effective model of mediation was formed).

RESULTS AND DISCUSSION

THE FIRST TOPIC: CHARACTERISTICS OF THE BASIC PRINCIPLES OF MEDIATION

Today, legal science is characterized by finding new effective ways of influencing social processes, human behavior, resolving disputes and conflicts in the legal field. Most scholars believe that mediation is a specific approach to conflict resolution, where a neutral third party is responsible for structuring the process in order to help all parties of a conflict reach a single, mutually acceptable solution to the issue at hand.

In jurisprudence, mediation should include the legal nature of the settlement of the conflict. However, in the case of mediation, the legal positions of the parties are not the only and sufficient basis for resolving the disputed situation. Unlike litigation, where the settlement of a dispute is based on specific legal rules.

In our opinion, the effectiveness of the mediation process depends very much on the personal potential of the parties of the conflict. The purpose of any conflict in the mediation process is not a victory, but a joint movement into the future. The parties of the mediation process agree to work on the outcome and through joint negotiations.

The main purpose of mediation is to reconcile the interests of the

parties with their voluntary consent. The lack of coercion in making a decision indicates the fair foundations of this procedure.

Each of the parties of the conflict makes certain mutual concessions in order to make a decision that will satisfy all sides of the process, will be mutually acceptable. As a result, there will be no "winner" and "loser" as a result. The validity of the decision is seen in the bilateral agreement of the parties, in which the mediator doesn't making any decisions. Unlike litigation or arbitration, in the mediation process, the parties agree.

As a general rule, mediation is generally not the final stage in the exercise of the right to a fair trial, since the parties, after the mediation process, may seek judicial settlement of the dispute.

According to most scholars, the mediation process eliminates any possibility of a corruption component, since the mediator, as a neutral party, is interested in the parties to resolve their dispute to the greatest advantage for both of them. The decision must be consistent and fair for both parties a priori.

The mediation, as an alternative way of resolving legal conflicts, is very effective. The obvious advantages of this method are: short terms of dispute resolution; effective implementation of the agreement reached through the mediator.

Much earlier from Ukraine, the above advantages have been noticed in Europe and the USA, where the Institute of Mediation today has some history and successful experience. Mediation, as an independent process of out-of-court dispute resolution, emerged in the United States in the 1960s as an alternative to lengthy litigation. Labor and family conflicts were the first and successful spheres of mediation. Later, business also began to use

mediation as a way of resolving commercial disputes. The geographical boundaries of the use of mediation have expanded quite rapidly due to the effectiveness of this method. A little later, mediation also began to be used in Australia and Canada, and in the 1980s. began to be applied in the UK, and then - in other countries of continental Europe. As of today, mediation is the most common non-judicial method of conflict resolution in the world. The success of this procedure is extremely high: on average 75-80% of all mediation disputes in the world end in effective agreement.

Some authors also refer to the benefits of mediation as a way of resolving disputes:

1) control that the parties have over both the mediation process and its outcome;

2) direct involvement of the parties in the negotiations; the speed of mediation and its voluntariness; simplicity and flexibility, efficiency and economy;

3) ensuring effective interaction between the parties, improving or restoring relations between the parties;

4) privacy;

5) mutual benefits from mediation;[492]

A very important advantage of mediation is the fact that in this process there is no need to enforce the decision, because in the process of reconciliation, the parties themselves make the decision that satisfies them, and therefore they are interested in its implementation. Attention should also be paid to a quick resolution of the conflict.

The analysis of different positions and approaches to the study of the positive and negative aspects of mediation allows us to characterize the

[492] **Kozlovsky, 2002.**

main disadvantages:

1) In the mediation process, it is difficult to be sure of the professionalism of the mediator than the judge in the classical court process;

2) The "stronger" parties of the conflict have the opportunity to impose their point of view, since mediation, through its informality, provides far less procedural guarantees than a court hearing;

3) The considerable uncertainty of the possibility of bringing mediators to justice for the unintentional and intentional harm caused as a result of their activity. Mediation, which focuses on conflicts between private parties, hides from the public some significant disputes that already have or may have socially significant consequences.

The study of the principles of the mediation process is important for the following reasons: First, the principles are the basis of the whole process, since they are both the foundation and the framework for building a specific rule of law or institution, branch of law or legal system; second, mediation doesn't have a clearly established procedure or step-by-step process that fits in with specific process, time, or organizational settings. That is why the principles are the main factor in regulating the mediation procedure.

Each country sets its own principles of mediation. However, at the international level, they are regulated in the European Code of Conduct for Mediators, adopted in Brussels. It enshrines the basic principles such as: equality, voluntariness, impartiality, confidentiality, independence and neutrality of the mediator, competence of the mediator, fairness of the mediation process. However, this list contains similar concepts. The main

content is not focused on mediation as the process, as the legal status of the mediator. That is why there is a scientific need to define and interpret the basic principles of mediation.

Voluntary mediation means an opportunity for the parties to terminate or suspend the mediation process at any time. In the event that the parties have chosen this method of dispute settlement, the final result depends directly on their internal will, as there is no binding nature of the execution of the agreement. In this case, the parties invest personal and/or financial resource in reaching a compromise result.

A distinctive feature of the alternative dispute resolution process is their voluntariness.

Privacy in mediation procedures can also be important for conflicting parties in resolving disputes, especially if such disputes have arisen in family or business matters. If an agreement is reached, the parties may decide on their own whether they wish to keep it confidential or not. In special and exceptional cases, the mediator may be obliged to disclose information disclosed by the parties in the mediation process: when confidential negotiations force the mediator to believe that anyone may be at risk of harm, or if it has been or will be done any criminal offense. Information about the finances provided during the mediation procedure in family disputes may also be disclosed in a subsequent lawsuit.

The Law on Mediation in Latvia stipulates that confidentiality of information does not apply in cases where its disclosure is required for the protection of state policy, in particular, protection of the rights and interests of the child, as well as for the prevention of threats to life, health, freedom, or in the case of the existence of sexual risks.[493]

[493] **Campbell & Fell vs. The United Kingdom, 1984.**

The voluntary nature of mediation means that the parties of the mediation procedure have the discretion to choose whether or not the proposed conflict resolution solution meets their internal interests. If the parties cannot agree, there will be no consequences for them.

Mediation generally does not imply any restriction on the rights of the participants, which means that what is said in the course of this procedure cannot be used as evidence in subsequent litigation. This feature allows participants in the procedure to freely discuss all possible options for a future agreement. The parties have the right to propose new ways of reaching an agreement, without depriving themselves of the opportunity to apply to a judicial authority later, in case the mediation agreement is not signed. As a general rule, the mediation procedure results in the signing of an agreement, which is often drawn up in a binding document that completes the legal resolution of the dispute. In this case, the parties are no longer able to go to court to resolve this dispute, even if the other party fails to comply with the agreement.

There are numerous collections of mediation ethics principles for mediators.

Most scholars have different principles in their content, but all of them are really used in the mediation process.

There are also principles that are well established in the understanding of mediation and are generally contained in various collections and codes:

1) the principle of inadmissibility of conflict of interest. This principle means that mediators are required to avoid engaging in dispute resolution processes in which they have a direct personal, financial or professional interest in any particular outcome;

2) mediators need to know the limits of their capabilities in order not to initiate dispute resolution processes, which they don't have the ability to resolve, and to freely communicate to the parties of the conflict their knowledge and experience;

3) the principle of voluntariness. It means that the parties of the conflict must be involved in the process voluntarily and make efforts to agree on its resolution;

4) the principle of confidentiality. First, mediators must ensure that the procedure is confidential to third parties; secondly, when the mediator meets with each party individually, it must also ensure the confidentiality of what they have said in such private discussions;

5) the principle of independence. Supporting and assisting the parties of the conflict in making their own settlement decisions, rather than mediating their opinions;

6) honesty of mediators, which implies honest disclosure of their qualifications and experience.[494]

Some scholars divide the principles of mediation according to their functional purposes into organizational principles (neutrality and voluntariness) and procedural (confidentiality, equality, independence of the parties and their cooperation).

We believe that the following are the mandatory principles of mediation:

1) Impartiality - the mediator must do his work honestly and objectively. He is obliged to mediate solely those matters in which he may remain fair and impartial. In fact, the idea of impartiality is central to the mediation process. Where a mediator is appointed by either a court or

[494] **Koval, 2006, pp. 129-132.**

other institution, that organization should also make every effort to ensure that the mediator is impartial.

2) Privacy - The mediator has no right to disclose the progress and results of the mediation process, unless all parties gave their permission, or if it's required by law.

3) Voluntariness - the mediation procedure is exclusively voluntary. No one can force the parties of the conflict to use mediation. It is a voluntary process based on the parties' desire to reach a settlement. In addition, voluntariness means that parties of the mediation procedure by their own free will may terminate it at any time. Mediator services are accepted voluntarily throughout the procedure by both parties; consent to the results of the mediation process is also purely voluntary; the parties control the course and results of mediation themselves.

However, all of the above principles are not absolute and inviolable. The cases of their violation are not uncommon. For constructive negotiations, the mediator seeks to change the balance of power to a more balanced one. Most often this is done by giving the "weaker" side some small advantages: they are approached first, less time-limited, they are given the first word and so on. In international negotiations, mediators may apply some pressure to the non-negotiable party (threat of political, diplomatic and economic sanctions).

THE SECOND TOPIC: FEATURES OF CLASSIFICATION OF MEDIATION MODELS

Many studies cite a large number of classifications based on different criteria. Let's look at some of them. The classification of mediation models can be done depending on: integration in the litigation and the direct role

of the mediator and the subject of the conflict.

In view of integration into the judicial system, countries have identified judicial and extrajudicial mediation models.

Judicial mediation (court-connected, court-related, court-annexed mediation) is a fully stand-alone model that is integrated into the country's judicial system. Depending on the judge's role, there are several approaches of understanding judicial mediation. According to the first approach, the judge must conduct the mediation procedure under certain conditions provided by national procedural law. Judicial mediation also includes those procedures which are carried out in accordance with the rulings or recommendations of a judge after adopting a particular case, and through the prescriptions of the law as a mandatory pre-trial procedure. In other words, it is sufficient for the judge to initiate mediation, and his direct involvement in the process is optional.

Today, there are several ways in which international mediation is carried out in the world, which are conditioned by the various purposes of reconciliation procedures, in particular mediation into the national legal space. We can distinguish the following approaches:

1) involvement of specialized organizations or private practitioners in the mediation process;

2) mediation in the court facilities directly by court staff, including judges;

3) direct implementation of the mediation procedure directly by the judge hearing the case (integration of mediation technology into the trial).

Extrajudicial mediation is a model of dispute settlement between the parties, conducted by a third party, an independent party (external mediator), which helps the parties to reach a settlement in the pre-trial

order.

The negotiation model of extra-judicial mediation also gives the parties a high chance of a favorable resolution of the conflict, in addition to maintaining a considerable amount of their powers. Mediators in the process of extrajudicial mediation are persons who have been trained in the basics of mediation and as a result have received an appropriate certificate of eligibility for mediation. For example, in Australia, in judicial mediation processes, conciliation procedures are conducted by private mediators, who are selected by the parties independently from specially prepared lists established in the courts. In the Netherlands, similar lists are made up by the Netherlands Mediation Institute, in Austria by the Ministry of Justice. In the conduct of their activities, external mediators are guided only by some of the recommendations established by the Council of Europe on the implementation of the mediation procedure. External mediators are not regulated under national law. The parties of the process grant the mediator a specific set of procedural powers. It is the responsibility of the mediator to carry out the activities impartially and to avoid the least possible influence on the participants of the procedure. He has the right to collect and reproduce information, to make notes, to divide and summarize it, to define prospects and to create an appropriate atmosphere, but he has no right to influence the process itself through his own perceptions of a particular situation. An important condition is the independent agreement of the parties of the legal conflict. In such a case, the parties of the conflict retain a high degree of autonomy in the mediation process. The problem-solving process is confronted with them as a result of their own collaboration, not as an

external bond. This leads to a high level of confidence in the accuracy and fairness of the results of such negotiations. If the parties have reached an agreement in a legal conflict with the help of a neutral mediator, a mediation agreement is signed. It should be noted that the mediation agreement is formal in nature and not binding, unlike mediation in a court case in which the mediator approves a settlement agreement or closes the proceedings in the case of refusal of the plaintiff's claim or recognition lawsuit. Thus, the contract establishes the legal relations of the parties within the framework of extrajudicial mediation, while in the procedural legal form there is a consolidation of legal relations in the court instance.

A quite simple and practical approach to the consideration of mediation models was proposed by L. Boulle and M. Nesic. They distinguish four models of mediation: 1) classical mediation facilitating dispute settlement; 2) therapeutic mediation; 3) evaluation mediation; 4) regulatory mediation.[495]

The basic rules of the mediation procedure and the use of mediation technology are built. Each of the above models is effective in resolving the respective categories of disputes. The rules of mediation can also be combined depending on the characteristics of the disputed relationship and their participants.

Shamir Yona identifies the following models of mediation procedure: 1) single mediator; 2) commission of mediators;3) joint mediation.[496]

In general, mediation is a very difficult process, and joint mediation has many benefits if all mediators know how to work together as they complement each other, divide tasks together, work out a dispute

[495] **Boulle & Nesic, 2016.**
[496] **Shamir, 2003.**

resolution strategy, compare their perception of the information provided parties of the conflict. Generally, a single mediator model is much more efficient than a joint mediation model when mediators are not familiar with each other. This mediation model is the most popular. The commission model is usually used in extremely difficult cases.

Anil Xavier outlines the following three methods: 1) evaluation method; 2) method of facilitating the solution of the problem; 3) the method of converting the problem.[497]

When applying the evaluation method, the mediator is giving an assessment of the situation quicker. The mediator's opinion is the instrument of dispute settlement.

The problem solving method is a classic one. In this case, the mediator does not provide legal advice, but merely seeks to help the parties find a common and acceptable solution of the problem. The mediator creates a supportive atmosphere in which the parties of the conflict work together to achieve results together.

It is expedient to identify seven main models of mediation.

Negotiation – this model of mediation assumes that the goal is to reach a settlement. The mediator seeks to find the facts, narrow issues of conflict, and directly controls the negotiation process between the parties. This negotiated mediation procedure is structured, meetings with the parties are frequent, and direct interaction between the parties is somewhat less frequent than other models. The peculiarity of the therapeutic model is the professional assistance in reaching mutual understanding between the parties, and conflicts are seen as problems in such mutual understanding.

[497] **Xavier, 2009, pp.363–378.**

The parties of the process openly express their thoughts and feelings. The problem-solving model is characterized by the fact that disputes are regarded as problems that arise because of the conflicting needs of the parties. The mediation procedure is aimed at reaching an agreement between the parties. The transformation model assumes that disputes and problems can be seen as opportunities for moral growth and transformation. The model of problem settlement is characterized by the fact that the mediator plays an active role, seeks to reveal the elements of conflict. The communicative model of mediation is aimed at promoting the parties' awareness and understanding of the conflict, and the settlement of the conflict is secondary to its understanding. The mediation assessment approach entails the need to persuade the parties to settle the conflict and also to predict the outcome of the court proceedings and the consequences in case the dispute cannot be resolved through the mediation procedure.

Some scientists believe that there are two main approaches:

1) An approach that facilitates conflict resolution;

2) evaluation (guiding) approach.

The approach to conflict resolution is characterized by the fact that the mediator helps the parties identify specific needs, identify and highlight the areas in which the parties agree. The mediator does not evaluate or question their position both weaknesses and strengths. In this particular model of mediation, the mediator acts solely as a mediator.

An evaluative approach is an approach that helps solve the problem of identifying the parties' own needs for their understanding and reaching a mutually acceptable solution. However, in applying the valuation approach, the mediator helps the parties of the conflict to assess the strengths and weaknesses of their positions, the likely outcomes and risks

of different options for resolving the conflict.

According to Thoren Hansen, approach to mediation has copied the traditions of narrative family therapy and constitutes the therapeutic style of the mediation process. In the process of applying this method, the conflicting parties go through three non-discrete stages: interaction, deep understanding of the conflict and its history, construction of an alternative model of further interaction. Since these steps are not discrete, it is not obligatory - to pass them in a clear sequence, in addition, the parties can return to any stages over and over again.[498]

It should also be noted that Cheryl A. Picard, in the process of studying mediation approaches, also identifies an approach that involves a thorough understanding of the conflict. A key and special aspect of this approach is the understanding of mediation as an interpretative process through which conflict can change. By using this approach, mediators believe that conflicts are most effectively resolved when helping to master new skills becomes their primary goal in completing this procedure. The concept of conflict in a particular model is slightly different from the understanding of conflict in other models of mediation.[499]

This approach views conflict as an interaction between the parties, whereby mediators pay attention to the relationship between the parties, and in particular how the parties defend their points of view. Mediators provide the parties with different types of interaction that will allow them to extend the types of dialogues and, as a result, change the conflict for the better.

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[498] Hansen, 2003.
[499] Cheryl A, 2016, p. 189).

The method by which the legal problem is altered - focuses on the relationship of the parties; the mediator seeks to help move forward in resolving the conflict by deepening understanding and empathy between the parties.

Many scientific sources also provide many other approaches to the classification of models of mediation, from which we can conclude that such models, above all, should be classified by the criterion of mediator subjectivity by which we can distinguish:

1) Jurisdiction mediation carried out either directly by a judicial authority or at its request, or by a specialized administrative complaint body, a public and private notary, a specialized mediation unit or a special state body:

a) the jurisdiction of procedural mediation;

b) jurisdiction of beyond procedural mediation.

2) Non-jurisdictional mediation procedure, which should include one performed by a private direct mediation organization or by any private mediator or other organization providing mediation services, lawyers, private arbitration, etc.:

a) procedural non-jurisdictional mediation;

b) non-procedural non-jurisdictional mediation;

Depending on the purpose of mediation - it is advisable to divide the mediation procedure into the following types:

The first is mediation aimed at the full resolution or settlement of a conflict, the complete abandonment of a judicial review of a conflict or dispute, or the termination of such consideration that has already commenced.;

Mediation aimed at editing / partially resolving the conflict, eliminating

determinants and / or reducing the volume of requirements; mediation aimed at auditing a dispute / conflict and evaluating the prospects for its resolution or settlement.

As of today, the issue of identifying the possibilities and ways of introducing mediation into the national system of ensuring and protection of the rights and freedoms of the individual, as well as determining the interconnection with civil and criminal processes, has become quite crucial. There are two dominative concepts to introduce mediation into the national defense mechanism. The first is the concept of judicial mediation, according to which the latter should become a necessary part of this procedural procedure. The second one – mediation should be a completely autonomous way of resolving legal disputes and, like arbitration, have to function in parallel with the trial.

Despite the absence of specific legislation, Ukraine already has experience in applying the mediation procedure, which confirms the institution's sufficiently high efficiency in conflict resolution processes. There are several regional mediation groups in the territory of Ukraine, which have joined the Association of Mediation Groups of Ukraine and the so-called Ukrainian Center of Understanding, which is quite active in the implementation of programs of reconciliation of victims and offenders, as well as in the educational activities in this field.

Chapter IV of the Code of Civil Procedure of Ukraine provides for a dispute settlement procedure with the participation of a judge prior to the commencement of the case. Article 49 of the Code of Civil Procedure of Ukraine provides for the possibility of concluding a settlement agreement at any stage of judicial proceedings. Pursuant to Article 197 of the Code of

Civil Procedure of Ukraine, the Court, at the stage of preliminary proceedings, clarifies whether the parties wish to conclude a settlement agreement.[500]

CONCLUSIONS

Summarizing the above, it is advisable to conclude that the analyzed review of mediation models will facilitate the more effective implementation of mediation in Ukraine, as it forms a holistic concept of mediation as a social and legal phenomenon, a mechanism for settling a legal dispute. The research conducted is useful for mediators, as the characteristics of mediation models will help to shape their own approach to the mediation procedure and to form ways to further improve their professional skills. In addition, it will allow participants in this procedure to form their own views on the mediation process.

The main advantages of mediation as a way of resolving legal conflicts are: fairness; direct control of the procedure by the parties; confidentiality; voluntary procedure; speed of mediation; direct involvement of the parties in the negotiations; economy; efficiency; flexibility; simplicity; effective interaction between the parties.

The main disadvantages are: inability to check the professionalism of the mediator; the ability to impose one's point of view on the "weak" party; uncertainty over whether mediators are held liable for unprofessionalism or abuse of power.

The basic principles of mediation are increased: equality, neutrality of the mediator, confidentiality, honesty of mediators, voluntary participation, direct control over the mediation procedure, inadmissibility

[500] **Code of Civil Procedure of Ukraine, Articles 49, 197.**

of conflict of interests, certain limits of competence of the mediator, impartiality of mediators, damages.

After conducting a detailed analysis of the theoretical and methodological principles of the study of the experience of foreign countries on the application of the mediation procedure, it should be noted that the division of mediation into models has great practical and theoretical importance. The models of mediation described in the articles are the basis for forming prospects for the implementation of the mediation procedure in Ukraine, creating a comprehensive understanding of the mediation procedure as a social and legal phenomenon, and borrowing the potential as an effective way to resolve the conflict.

Based on the study of mediation models, it can be classified - depending on the integration into the judicial system and depending on the role of the mediator and the subject matter of the dispute.

Depending on their integration into the judiciary, most countries identify judicial and extrajudicial models of mediation. Judicial mediation (court-connected, court-related, court-annexed mediation) is a fully stand-alone model that is integrated into the country's judicial system. While out-of-court mediation is a model of dispute settlement between the parties, conducted by a third, independent party (external mediator), which helps the parties to reach a settlement in a pre-trial.

Based on the research, the number of main models of mediation was increased: negotiation; therapeutic; model of problem solving; model of legal conflict resolution; model of transformation; communicative model; model of problem solving; evaluation model.

In our opinion, it is advisable to propose ways of solving structural

problems by fixing in the Rules of Ethics of Mediators the principles of activity, the relations of the mediator and the parties, the relations between mediators and the like.

It is advisable to propose the creation of a separate structure - the National Association of Mediators of Ukraine. With exclusive competence in the certification of mediators, maintaining a unified register of mediators, reviewing complaints about the actions of mediators and passing a competent opinion to law enforcement agencies to bring mediators to administrative responsibility, etc.

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ETHICAL AND LEGAL ESSENCE OF ACADEMIC INTEGRITY IN UKRAINE

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Abstract

The article is focused on revealing the essence of academic integrity in Ukraine. Academic integrity is considered as an ethical and legal phenomenon without taking into account other kinds of impact on society. It has been emphasized that academic integrity in Ukraine is the system of

rules for protecting the copyright law, quality standards of education, presentation of reliable information. It has been proved that the rules of academic integrity for Ukrainian education as the systemic legal formation is a new phenomenon. Correlation of ethical and legal rules of integrity has been made. It has been established that the violation of academic integrity can be carried out by a student, a scientific supervisor of student or dissertation papers, a scholar. The authors have offered the classification of violations of academic integrity: violation of the rules of the copyright law protection's standards; violation of the rules on quality standards of education; violation of the rules of reliable information's standards.

Keywords: academic integrity, violation of the rules of academic Integrity, liability for the violation of academic integrity, literary piracy, text recycling.

INTRODUCTION

Scientific, Practical Problems.

Academic integrity is one of the main notions in the educational process of Ukraine. It was an element of moral and ethical norms up to 2017, which regulated the activities of educators, and was used as a basis for the verification of dissertations. The concept of academic integrity in Ukraine arose due to the Srtengthening Academic Integrity in Ukraine Project, implemented by the American Councils for International Education with the assistance of the Ministry of Education and Science of Ukraine and supported by the US Embassy in Ukraine[501]. Since 2017, the norm on academic integrity has been enshrined in the Law of Ukraine "On

[501] **SAIUP, 2017.**

Education"[502]. This provided an opportunity for the scientific community to get new standards of scientific works, to make Ukrainian science transparent and sound. These standards in Ukraine became the subject matter of theoretical comprehension. For this purpose, scientific results on this issue can be divided into two groups: 1) research in the field of copyright law, allowing to identify the degree of originality of a scientific work, the right of authorship or focused on the protection of non-property and property trademark rights (It is referred to scientific works of H.O. Androshchiuk, V.S. Drobiazko, O.D. Sviatotskyi, V.I. Serebrovskyi, E.A. Fleishyts, R.B. Shyshka et al.); 2) studying literary piracy as an independant category (doctoral dissertation G.S. Ulianova «Methodological problems of civil legal protection of intellectual property against plagiarism» (2015), doctoral dissertation O.M. Ryzhko «Plagiarism in the social and communicative dimension of the beginning of the XXI century: the nature of the phenomenon and the history of fight» (2018). The achievements of these scholars have been used to better understanding of the issues raised in this article. In particular, the authors have studied the concepts and content of academic integrity, types of violations of academic integrity, liability for committing these offenses, etc., taking into account these achievements. Analysis of international literature indicates on a small scientific interest to general theoretical problems of academic integrity. Foreign scholars mainly focus on implementing the policy of academic integrity among high school students[503] the formulation of practical guidance on academic integrity to

[502] VRU, 2017.
[503] Richards, Saddiqui, White, McGuigan & Homewood, 2016.

University students[504], the understanding of various aspects of academic injustice and clarifying the reasons of its violations by students and lecturers[505]. A great part of the works is also focused on explaining the nature of plagiarism to University students, its varieties and the liability for its use[506]. Such attention to this issue is explained by the need of forming the negative attitude to any manifestations of academic dishonesty by University students. Indeed the consequences of plagiarism for students may be devastating, because their failure to learn and apply appropriate study skills will affect both their university experience and their subsequent career[507]. Despite the nod toward a significant contribution of these and other scholars who researched this issue, it should be noted that nowadays there are no developments of many theoretical provisions in the field of violation of the rules and standards of academic integrity in Ukraine.

Purpose of the Study.

The objective of this article is to accomplish theoretical and legal research of the essence of academic integrity in Ukraine, to identify organizational and legal problems that arise within the activity of educational institutions, in the work of pedagogical, scientific and pedagogical, scientific employees of these institutions and degree-seeking students in the researched field on the basis of comprehensive analysis of theoretical works of scholars, the current national legislation and the practice of its application, as well as to formulate scientifically substantiated propositions and recommendations aimed at and

[504] Brown & Janssen, 2017
[505] Kwong, Ng, Mark & Wong, 2010.
[506] Barrón-Cedeño, Vila, Martí & Rosso, 2013; Comas-Forgas, Sureda-Negre & Salva-Mut, 2010; Roig, 2010; Sarlauskiene & Stabingis, 2014
[507] Dawson & Overfield, 2006

overcoming them. To achieve the objective, the authors of the article consider it necessary to solve the following main tasks: to reveal the content of academic integrity in Ukraine as a social and legal phenomenon, to analyze the national legislation and practice of its application in this area, to consider cases of violations of the rules of academic integrity and to suggest their classification, to characterize different types of liability that may occur for the violation of academic integrity.

The object **of the research is public relations that arise in the field of academic integrity, their legal regulation and ethical content.** ***The subject*** **matter of the research is ethical and legal content of academic integrity in Ukraine.**

Research Methods.

Scientific publications within this problem were the material for the article, the authors of the article considered the current regulatory basis on this issue, in particular the provisions on academic integrity of some educational institutions. Existing judicial practice on the matters of applying various types of liability for the use of literary piracy and text recycling was also the material for understanding the essence of academic integrity. Some of our deductions are based on the analysis of the materials of specific cases recently considered by the courts of various jurisdictions in Ukraine. In this regard the authors of the article used information from open access sources, in particular from the website http://reyestr.court.gov.ua/. The combination of theoretical achievements of domestic and international scholars related to academic integrity, provisions of educational legislation and judicial practice in this area

made it possible to form the understanding of the academic integrity, existing types of its violation and kinds of liability for its violation.

The formulated the objective, tasks and features of the subject matter of the research led to the use of such methods of scientific cognition. The essence of academic integrity, classification of its violations, types of liability for violations of academic integrity have been determined by applying the method of analysis and synthesis in relation to the norms of the Law of Ukraine "On Education", the provisions on the academic integrity of certain educational institutions, as well as judicial practice. The system analysis and documents' analysis have been used while studying codes of ethics of educational institutions. The statistical method has provided an opportunity to establish the state of violations of academic integrity in Ukraine.

RESULTS OF THE RESEARCH AND DISCUSSION

Results

The provisions of normative and legal acts regulating the issues of academic integrity in Ukraine just start to be applied in the practice of educational institutions, in the work of pedagogical, scientific and pedagogical, scientific employees of educational institutions, as well as degree-seeking students. Academic integrity can be defined as the system of rules for the protection of copyright law, quality standards of education, presentation of reliable information. These rules are enshrined in national educational legislation and regulations of educational institutions. The level of academic integrity, liability for its violation are determined independently by educational institutions. Taking into account the understanding of the notion of academic integrity, contained in the Art. 42

of the Law of Ukraine "On Education", it is studied as an ethical (set of ethical principles) and legal (as rules defined by the law) phenomenon. The direction of academic integrity is the formation of trust for learning outcomes and/or scientific (creative) achievements. Subjects of implementation – are participants in the educational process. Legislation of Ukraine defines the notion of academic integrity, types of academic integrity offenses, liability for the commission of these offenses. However, the content, significance and consequences of the application of text recycling, as well as clarification of the nature and features of detailed liability for violations of academic integrity need to be additionally characterized. It is believed that the study of these issues is a perspective area for further scientific research. The authors have paid attention that the term "additional and/or detailed liability for the violation of academic integrity" is not clearly defined in the current Ukrainian legislation, and therefore the authors have suggested to distinguish two types of liability: broad liability for the violation of academic integrity, which provides the simultaneous application of several types of liability, in particular the main, additional and detailed (administrative or criminal) liability; narrow detailed liability, which involves bringing the perpetrator exclusively to civil and legal, administrative or criminal liability.

Discussion

THE FIRST TOPIC: ETHICAL AND LEGAL BASIC PRINCIPLES OF ACADEMIC INTEGRITY IN UKRAINE

Academic integrity is based on ethical and legal standards. "Honesty, trust, fairness, respect, and responsibility is the backbone and foundation

of academic integrity"[508]. If we consider academic integrity as a set of ethical principles, then there is a need to identify the fundamental principles of academic integrity from the point of view of ethics both of a scholar, educator, and a degree-seeking student. The ethical principles of education are not allocated and are not characterized in the Law of Ukraine "On Education". These principles are offered both at the level of scientific reflection, in particular, the teaching staff must have the system of moral and ethical values such as honesty, humanity, responsibility for the performance of official duties, integrity, impartiality, and political neutrality[509], and at the level of educational and scientific institutions in the form of Codes of Ethics. The National Academy of Sciences of Ukraine adopted the Code of Ethics of Ukrainian Scholars, which established requirements for a scholar as a researcher, author, tutor, teacher, consultant/expert, citizen. Thus, this Code defines: a scholar should ensure impeccable honesty and transparency at all stages of scientific research and consider the acts of fraud as unacceptable, including fabrication and falsification of data, piracy and literary piracy (clause 2.3); only a real creative contribution to the scientific work can serve as a criterion of authorship; it is inadmissible to submit authorship to a scientific work to another person, to accept authorship or co-authorship and, in particular, to demand it (clause 3.3); a scholar should not repeat own scientific publications in order to increase their number (clause 3.4)[510]. Certain higher educational institutions have also adopted ethical codes. An example is the Code of Ethics of the State Higher Educational Institution "Kyiv National Economic University named after Vadym Hetman", which

[508] UTC Walker Teaching Resource Center, 2006.
[509] Nazarova, 2011.
[510] OESI, 2011.

characterizes the following key values of the University: academic freedom, institutional autonomy, quality and integrity of scientific and educational activities, respect for social and cultural diversity, balanced development. The basis of the mentioned Code is the following ethical principles: trust and cooperation; decency and justice; academic integrity; critical analysis and respect for sound thoughts; readiness for changes and the desire for constant improvement; legality, accountability and transparency; joint and individual responsibility for the results of activities[511]. It is possible to determine from the above that the ethical principles laid down in the content of academic integrity are the principles of the attitude of participants of educational process to their activities, developed on their own knowledge, personal values, experience and responsibility to society.

The transformation of the ethical norm of integrity into the legal one was due to the introduction of the notion of academic integrity and its tangible links into the educational legislation of Ukraine (the Laws of Ukraine "On Education", "On Higher Education", "On Scientific, Scientific and Technical Activities"). Numerous cases of the use of literary piracy in the educational environment of Ukraine have become the basis for the consolidation of the rules of academic integrity at the legislative level. For example, according to the survey conducted in 2016 by the East Ukrainian Social Research Foundation among students of higher educational institutions (a total number of people is 1,298), 90% of respondents confirmed that they resorted to any kind of literary piracy[512].

[511] **KNEU, 2017.**
[512] **Unplag, 2016.**

Anyone involved with science has heard about at least one major scandal related to the "wrongful appropriation of somebody else's work". But the reality we face may go far beyond this basic concept[513]. Among the latest high-profile examples of the application of literary piracy we can provide the case of the monograph "The Multiplicity of Reality in the English Post Postmodernist Novel (Philosophical Problems, Genres, Narrative Strategies)"[514] written by D. I. Drozdovskyi, which he submitted for the defense of his doctoral dissertation. On September 26, 2018 the group of literary critics published a conclusion, where they stated that there was literary piracy in the monograph of D. I. Drozdovskyi (see the comparative table on the literary piracy facts in the monograph of D.I. Drozdovskyi) (2018). On September 10, 2018 a special commission was created in Shevchenko Institute of Literature of the National Academy of Sciences of Ukraine in order to study the text of the monograph, which on November 13, 2018 published the conclusion on its website about the presence of 64% of literary piracy in the monograph of D.I. Drozdovskyi (2018). Apparently, one of the major focuses of academic integrity is to prevent plagiarism so as to ensure that one's work is their own, and that the work they did is also understood[515].

To combat literary piracy educational institutions began to use special software. Thus, the rector of Ternopil National Economic University A.I. Krysovatyi and the director of the company "Antiplahiat" A. I. Sidliarenko signed on September 25, 2018 the Memorandum on the free provision of access to the Unicheck online service in order to verify dissertations for the features of literary piracy, which has already being

[513] Soares, 2015.
[514] Kyiv: Pulsary, 2018.
[515] Kwong, Ng, Mark & Wong, 2010.

successfully used by more than 90 Ukrainian and 350 foreign educational institutions[516]. Unfortunately, not all institutions nowadays use services to verify scientific works on literary piracy. In particular, representatives from 60 out of 90 national higher educational institutions have declared that they use software to detect literary piracy, furthermore 82% of them apply disciplinary penalties for such an academic fraud[517]. "Though there are many computer tools to detect plagiarism, it is dangerous to rely solely on those computer tools because they only detect matched text that can be located elsewhere electronically[518], and they are not completely reliable especially when using in non-English speaking countries"[519]. It is also of concern that nowadays there is no any single system and base in Ukraine at the level of central executive authorities in the field of education and science for the verification of texts for borrowings without reference to the source and the use of synonymy[520]. Regarding research, the scholars themselves complain on the manifestation of scientific ignorance, which is the distortion of scientific information, scientific impropriety and attributing authorship and the position to the provision of positive law, distorting the author's statements, etc.[521]. The above indicates on the existence of an urgent practical problem for the protection of the quality of education and science. Overcoming this situation is possible only through the definition of the content of academic integrity in the educational process of Ukraine, since it is the content that points to the

[516] TNEU, 2018.
[517] Burnyi, 2018.
[518] Mann & Frew, 2006.
[519] Kwong, Ng, Mark & Wong, 2010.
[520] Kremenovska, 2018.
[521] Shyshka, 2016.

essence and principles of the relevant phenomenon.

One of the factors of spreading literary piracy was the fact that academic integrity for many years had been an ethical rule, and the ethics of the profession was not based on coercion or external observation, grounded on internal concept of moral obligations related to activities[522]. In contrast, the rules of academic integrity are defined in the current legislation. In particular, the Art. 42 of the Law of Ukraine "On Education" refers to the observance of academic integrity by pedagogical, scientific and pedagogical, scientific employees of educational institutions (includes: references to sources of information in case of the use of ideas, developments, statements, information; compliance with the norms of legislation on copyright law and related rights; providing reliable information on the methodology and results of research, the sources of used information and own pedagogical (scientific and pedagogical, creative) activities; control over the observance of academic integrity; objective assessment of educational outcomes) and degree-seeking students (includes: independent performance of training tasks, tasks of the current and final control of learning outcomes (for people with special educational needs this requirement is applied taking into account their individual needs and abilities); reference to sources of information in case of the use of ideas, developments, statements, information; compliance with the norms of copyright law and related rights; providing reliable information about the results of own educational (scientific, creative) activities, used research methodologies and sources of information)"[523].

THE SECOND TOPIC: VIOLATION OF THE RULES OF ACADEMIC

[522] **OAJ, 2018.**
[523] **VRU, 2017.**

INTEGRITY

"Breaches in academic integrity are a pervasive and enduring international concern to the overall quality of higher education"[524]. Analyzing the above provisions of the Law of Ukraine "On Education" it should be noted that the rules of academic integrity are divided into the following groups:

1) rules for the standards of protecting copyright law (establishing the level of originality of a scientific work, references to sources of information in case of the use of ideas, developments, statements, information; compliance with the rules of copyright law and related rights);

2) rules on educational standards (control over the observance of academic integrity by degree-seeking students; objective assessment of learning outcomes; independent performance of educational tasks, tasks of the current and final control of learning outcomes);

3) rules on reliable information standards (providing reliable information on the methodology and results of the research, sources of used information and own pedagogical (scientific and pedagogical, creative) activities).

The fact of academic integrity offense may be established in case of the violation of the above rules in the form of: academic literary piracy (copyright infringement, appropriation of authorship); text recycling (reduplication of own works in order to increase their number without proper references to previously published works); fabrication (artificial creation of data within the educational process); falsifications; cribbing; fraud (academic literary piracy, text recycling, fabrication, falsification

[524] **Richards, Saddiqui, White, McGuigan & Homewood, 2016**

and cribbing); bribery; biased assessment. The following violations can be classified depending on the type of violations of the rules of academic integrity: 1) violations of the rules for the standards of protecting copyright law (academic literary piracy, falsification); 2) violations of the rules on quality standards of education (cribbing, fraud, bribery, biased assessment); 3) violations of the rules of reliable information standards (text recycling, fabrication).

Violations of academic integrity can be carried out by a student, a lecturer, a scientific supervisor of a student or a dissertation, a scholar. Here is an example from the court practice. Thus, on January 19, 2018, the Supreme Court, consisting of the panel of judges of the Second Court Chamber of the Cassational Civil Court, dismissed the cassation appeal of the plaintiff – the vice-rector on scientific and pedagogical work to the defendant – Kyiv National University of Technologies and Design about the cancellation of the Order dated from March 18, 2016 No. 99 on personnel about disciplinary penalty in the form of admonition. Studying the materials of the case, the Court found out that the plaintiff being a scientific supervisor of a student's thesis, allowed it to be presented without a certificate of verification for literary piracy. The plaintiff violated clause 13.3 of the Provisions on the organization of educational process at Kyiv National University of Technologies and Design, approved by the Order dated from February 19, 2015, No. 35 (items 40-42, Vol.1), according to which the objects of verification for the availability of literary piracy features are mandatory graduation theses. At the same time, the plaintiff argued that he as a scientific supervisor was not obliged to send the thesis for the verification of literary piracy and to obtain an appropriate certificate. Besides, he as a scientific supervisor is not entitled

in his election not to allow the graduate thesis to be presented according to these grounds. The decision on admitting or not admitting the thesis to be presented is taken by the graduating department and is collegial. Subsequently, on March 18, 2016, the student received a certificate about the verification of the graduation thesis for literary piracy, there were no features of literary piracy, so formal requirements were fulfilled[525].

This example of the court practice demonstrates that one of the problematic issues while detecting literary piracy in the student's scientific work is the matter of the presence of the offense both by the student and his scientific supervisor. We believe that in order to overcome this situation, it is necessary to clearly define the division of liability between degree-seeking students, pedagogical (scientific and pedagogical, scientific) employees and educational institutions in the provisions on the academic integrity of educational institutions. The problem of this example is also that the scientific supervisor is a hired employee of the University, who is subject to the norms of labor legislation. According to the Art. 141 of the Labor Code of Ukraine: "The owner or his authorized agency must properly organize the work of employees, create conditions for the growth of labor productivity, provide labor and production discipline, strictly observe labor laws and labor protection regulations, and carefully address the needs and demands of employees, improve their working and living conditions" (2003). Interpretation of this norm gives grounds to assert that educational institutions are obliged to provide scientific supervisors of student works with appropriate software for the verification of scientific works for literary piracy. Unfortunately, not all national educational

[525] **USRJ, 2018.**

institutions apply this rule today. Similar results based on the conducted research of the surveyed faculty members and University students of Hong Kong were achieved by Chinese scholars[526]. Therefore, we believe that a scientific supervisor of a student's work, who is not equipped with special equipment or software for detecting literary piracy, should not be brought to liability.

THE THIRD TOPIC: LIABILITY FOR THE VIOLATION OF ACADEMIC INTEGRITY

While detecting the violations of the rules of academic integrity, it is necessary to determine its form, since the liability depends on this and the degree of the committed offense. The Art. 42 of the Law of Ukraine "On Education", establishes the type of liability depending on the status of the offender: 1) pedagogical, scientific and pedagogical, scientific employees of educational institutions are brought to the following academic liability: refusal to award a scientific degree or a scientific rank; deprivation of the awarded scientific (educational and creative) degree or the academic title; refusal to award or deprive the awarded pedagogical degree, qualification category; deprivation of the right to participate in the work of the agencies stipulated by the law or to occupy the positions determined by the law; 2) degree-seeking students may be brought to the following academic liability: re-passing of the assessment (control work, exam, credit, etc.); repeated passing of the educational component of the curriculum document; expulsion from the educational institution (except for those, who acquire general secondary education); deprivation of academic scholarship; deprivation of privelleges on tuition fees provided by the

[526] **Kwong, Ng, Mark & Wong, 2010.**

educational institution[527]. Besides, depending on the type of violations of academic integrity, the offender may be brought to civil and legal (may be determined by the educational institution in the form of a fine, reimbursement of damage inflicted to higher educational institution, etc.), administrative or criminal liability. It is the so-called additional and/or detailed liability (paragraph 7 of the Art. 42 of the Law of Ukraine "On Education"). It follows from the foregoing that liability for violating academic integrity can be divided into main, additional and / or detailed.

The main liability is defined in the Art. 42 of the Law of Ukraine "On Education" and consists in the application of coercive measures of negative influence on the offender in the form of deprivation of scientific ranks, achievements, participation in the work of scientific, pedagogical councils, privileges, etc. This type of liability is necessarily applied to the offender. That is, this type of liability leads to the negative consequences for the offender in the scientific and educational spheres, which deprives or partially deprives him of his possibility to work in this area, officially recognized as a scholar, lecturer, or a degree-seeking student. To bring to this type of liability, it is necessary to establish corpus delicti of the offense of academic integrity: 1) the presence of the subject of the offense (a scholar, a lecturer or a degree-seeking student); 2) the presence of guilt (intent or carelessness); 3) the presence of an action or omission of the subject, which led to the violation of academic integrity; 4) the presence of negative consequences or the threat of such consequences.

The main liability can be applied, in particular, in case of detecting text recycling both of pedagogical, scientific and pedagogical or scientific

[527] **VRU, 2017.**

employees of educational institutions, and degree-seeking students. Text recycling does not give an opportunity to have a new result within the scientific or educational activities, and also has negative consequences for the scientific or educational process. It may arise if there are duplicate publications, in particular when the author presents the same text of conference theses, articles for two different journals[528]. This can include the publication of articles from the materials of defended dissertation or the re-use of previously published or used in any form of work for teaching another discipline or other institution[529]. "The reality is that for many working scientists, the number of published papers authored continues to be one of the primary means by which research productivity is measured"[530]. The publication of research in the form of small scientific works to increase the number of own publications reduces the statistics of pedagogical, scientific and pedagogical, scientific staff of educational institutions, as well as degree-seeking students.

Insufficient attention in Ukraine is paid to the problem of text recycling, because there is no unity in understanding the essence, significance and, most importantly, the consequences of violations of academic integrity by the educational community. This state of affairs is explained, in particular, by the fact that the clause 12 of the Procedure for awarding scientific degrees, approved by the Resolution of the Cabinet of Ministers of Ukraine dated from July 24, 2013 No. 567 (hereinafter – the Resolution No. 567) determined that "the published works that reflect the main scientific results of the dissertation, in the corresponding branch of science include: monographs; manuals (for dissertations on pedagogical

[528] Schneider, 2018.
[529] JCU, 2018.
[530] Roig, 2010, p. 295.

sciences); articles in scientific, in particular electronic, professional editions of Ukraine; articles in scientific periodicals of other countries in the area of the dissertation" (paragraph 1). In addition, "the completeness of the presentation of the dissertation materials in the published works of the applicant is determined by the Specialized Academic Council" (paragraph 4)[531]. Proceeding from the above, any dissertation is a text recycling of the articles or a monograph, if they reflect the main scientific results of the dissertation in accordance with the requirements of the Resolution No. 567. At the same time, the author of the dissertation must publish his scientific works, which reveal the main scientific results of the dissertation. We would like to note that according to paragraph 2, clause 14 of the Resolution No. 567, the dissertation is removed from consideration regardless of the stage of passage without the right to defend it again only in case of revealing text borrowings, the use of ideas, scientific results and materials of other authors without reference to the source[532]. We believe that this situation needs to be solved by the Ministry of Education and Science of Ukraine, namely: issuing an order with the approval of the relevant Instructions or providing methodological recommendations explaining the raised issues. At the same time, the Ministry of Education and Science of Ukraine should develop and submit propositions to the consideration of the Cabinet of Ministers of Ukraine for improving the provisions of the Resolution No. 567 that regulates these issues, or to develop own draft of amendments and additions to the said Resolution, with their simultaneous submission to the Cabinet of Ministers

[531] VRU, 2013.
[532] VRU, 2013.

of Ukraine.

Additional liability for violating academic integrity is a form of liability that may be additionally applied to an offender who is brought to the main liability in order to encumber the main type of liability. The content of additional liability is that the person has already suffered negative consequences for the committed offense, but additional liability, namely disciplinary one, is applied to a person. The use of additional liability is appropriate for offenses that encroaches not only on academic integrity (as the personal value of a pedagogical, scientific employee or a degree-seeking student), but significantly affects the activity of an educational institution, infringes on its scientific and business reputation, spoils the image, etc. For example, according to the letter of the Ministry of Education and Science of Ukraine dated from October 24, 2017 No. 1 / 9-565 "On the provision of academic integrity in higher educational institutions": if a dissertation (scientific report), which contains academic literary piracy, was defended in a permanently operating Specialized Academic Council then a higher educational institution (a scientific institution) is deprived the accreditation of the corresponding permanent Specialized Academic Council and the right to create one-time specialized Scientific Councils for a term of one year[533]. It follows from the foregoing that the educational institution also has negative consequences for its own activities and image, therefore, it has an interest in preventing the violation of academic integrity, and may impose additional liability on a perpetrator. Additional liability may be in the form of a fine imposed by the educational institution, prevention, reimbursement of the damage (calculated on the basis of losses incurred as a result of non-receipt of

[533] **VRU, 2017.**

profits, if the educational institution establishes the fee for educational services) and non-material damage in the form of violating the business reputation of the educational institution. Therefore, it is advisable to apply this type of liability in case of detecting academic literary piracy.

The Art. 42 of the Law of Ukraine "On Education" has the term "additional and / or detailed"), which makes it possible to distinguish two types of liability for violating academic integrity: 1) broad liability, which provides the opportunity of simultaneous application of several types of liability, in particular the main, additional and detailed (administrative or criminal) liability; 2) narrow detailed liability, which involves bringing the perpetrator exclusively to civil and legal, administrative or criminal liability. It should be emphasized that it would be advisable to distinguish between additional and detailed liability for violating academic integrity in the provisions of educational institutions regarding academic integrity.

Administrative liability for the violation of academic integrity is not established in the Code of Ukraine on Administrative Offenses, but the Art. 512 provides liability for the violation of the rights to the object of intellectual property rights. It concerns the illegal use of the object of intellectual property rights, the appropriation of authorship on such an object or other intentional violation of the rights to the object of intellectual property rights, which is protected by the law[534]. Consequently, this norm can be applied to such types of academic integrity as academic literary piracy, falsification and cribbing.

Criminal liability for violating academic integrity is not also defined. However, the Criminal Code of Ukraine contains Articles that can be

[534] **VRU, 1984.**

applied to perpetrators in the violation of academic integrity. Thus, the Art. 176 of the Criminal Code of Ukraine establishes liability for the violation of copyright and related rights, containing the following actions: illegal reproduction, distribution of works of science, literature or other intentional violation of copyright and related rights, as well as financing such actions, if it caused severe material damage[535]. This Article covers such violations as academic literary piracy, falsification and cribbing. In regard to bribery, the Art. 368 of the Criminal Code of Ukraine establishes liability for accepting a proposition, a promise or obtaining an unlawful benefit by an official[536].

CONCLUSIONS

Based on the conducted research of the essence of academic integrity in Ukraine we can offer the following conclusions. The rules of academic integrity in Ukraine just begin to be formed and implemented, then national educational institutions must take into account and apply the best practices of foreign Universities in this area. This concerns the definition of the sufficient level of originality of scientific works, the development of citation rules, the formation of skills of independent study of the scientific material for degree-seeking students, etc. The authors have offered to divide the rules of academic integrity into: the rules for the standards on protecting copyright law, the rules for the education standards, the rules for reliable information standards. Violations of academic integrity are classified depending on the type of violations of these rules: violation of the rules for the standards on protecting copyright law; violation of the rules

[535] **VRU, 2001.**
[536] ***Ibid.***

on quality standards of education; violation of the rules for reliable information standards. Liability for violating academic integrity is divided into the following types: main, additional and / or detailed (2015, April 21).

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