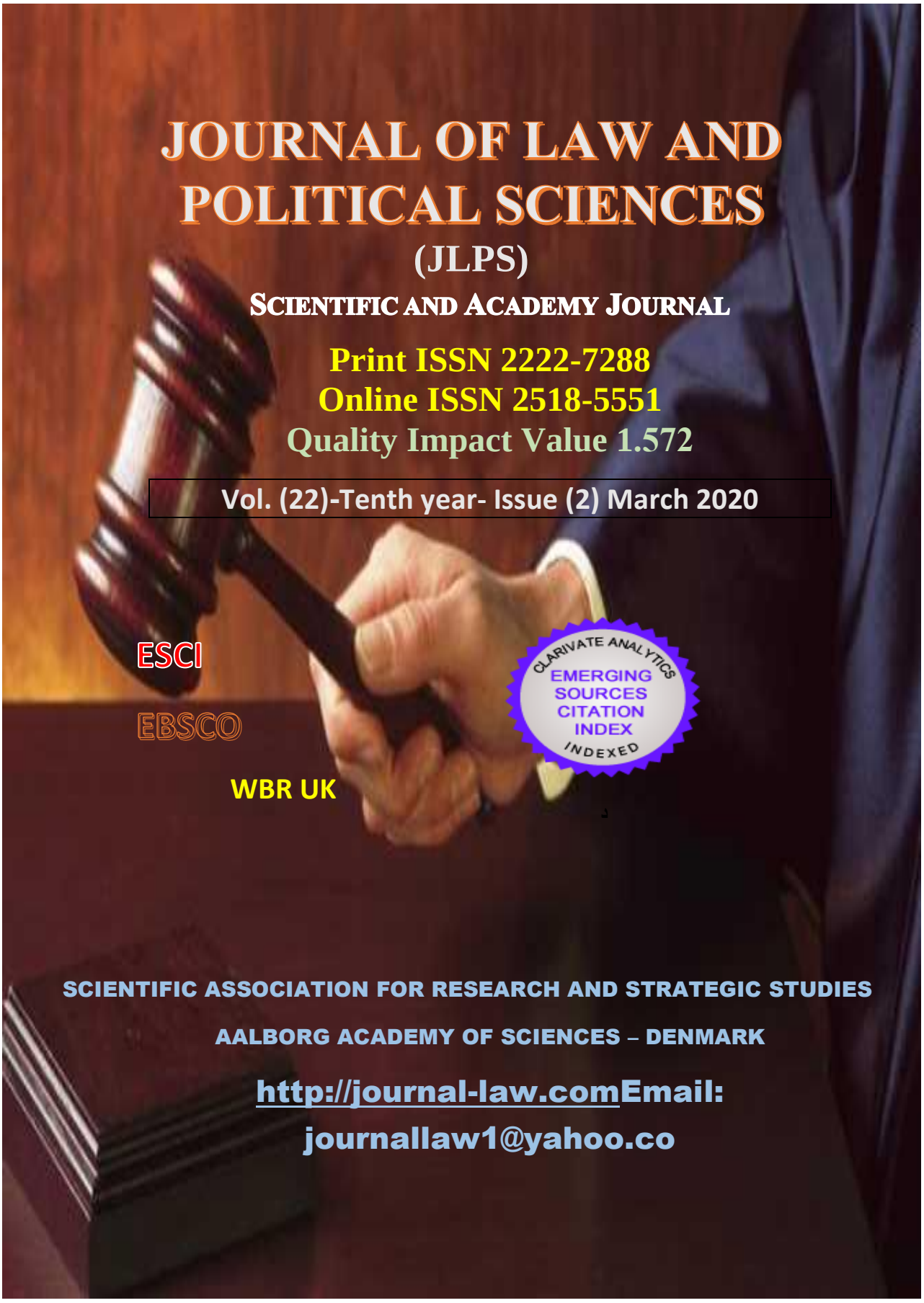

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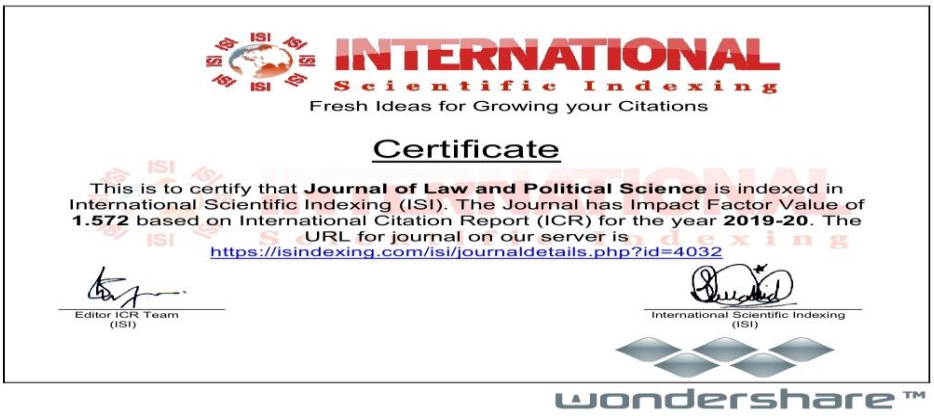

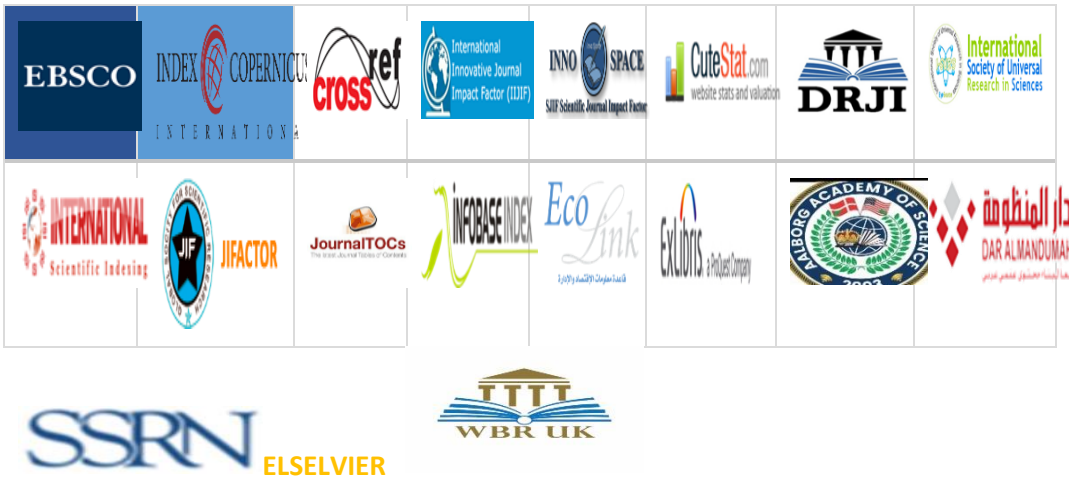

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(1)

REDUCTION OF THE FOREST FUND AS A RESULT OF ILLEGAL ACTIVITIES OF THE LOCAL AUTHORITIES AND AS A CAUSE FOR PROTECTION OF THE ENVIRONMENTAL RIGHTS OF CITIZENS IN ADMINISTRATIVE COURTS

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Abstract

One of the environmental problems in Ukraine, with which are faced residents of territorial communities, is a gradual destruction of forests and the location of various objects of residential or industrial character within their territories. The purpose of the research is to carry out a legal assessment of the situations arising in Ukraine in connection with the transfer of forests to the category of green areas by local self-government bodies. In the paper the model is formulated for carrying out a legal assessment of situations and modelling protection of citizens` rights in forest and land relations that have arisen in connection with the transfer of forests to the category of green spaces by changing the purpose of lands of forest fund into another categories by local self-government bodies. In disputes concerning the implementation of environmental law by citizens (in particular, safe environment), any citizen of Ukraine should be considered a proper plaintiff in court without any restrictions on the territorial relationship (land plot and place of residence of the citizen).

Keywords: activities of the local authorities, administrative justice, environmental public-law dispute, environmental rights, forest land.

INTRODUCTION

Scientific, Practical Problems.

One of the environmental problems in Ukraine, with which are faced residents of territorial communities, is a gradual destruction of forests

and the location of various objects of residential or industrial character within their territories. Obviously, this does not happen without the participation of the authorities, which by their decisions or inaction allow and even contribute to the destruction of natural forest resources. Although pragmatists try to explain this situation as the possibility of solving social and economic problems, nonetheless, experts who take care about the health of the nation and the environment believe that such activity is illegal because it prevents enforcement of environmental rights (right to a safe environment) not only citizens of a particular territorial community, but also residents of other communities, the country as a whole, and also causes changes of interconnected ecosystems.

Without getting into the complex debate concerning the priority of human needs, it should be noted that in fact such activities can be justified, admissible and effective in cases, as a rule, caused by generally accelerated urbanization, increasing urban populations and workers, especially around large cities and their satellite cities. At the same time, such activities should be a measure of last resort, comply with the current legislation of the country, be carried out by clearly defined procedures and be accompanied by use of compensation and recovery mechanisms.

However, the current state of the problem demonstrates the irreversibility of environmental consequences that were caused to nature in the early 2000s as a result of violation of the procedures for changing the purpose of forest lands without implementation of forest restoration measures and the current rapid start of building on forest lands devastated almost 10-15 years ago. In these days, when citizens of

the forest areas become witnesses of the unexpected and unwanted starting of building works and are faced with restrictions on access to forest resources, some of the most initiative activists embark on a path of restoration of justice and the lost right to a safe environment and access to forest resources. In connection with this, the number of appeals to courts has recently increased in an attempt to appeal against local government decisions taken in the early 2000s aimed at building halt or returning forest status to the lands. However, the lack of unity of the positions of administrative courts in resolving such cases and delaying litigations in resolving public disputes makes it necessary to involve scientists in the process of resolving these problems.

In fairness, it should be noted that certain aspects of these problems have obviously already been explored by various scholars, while at the same time under the current conditions we should emphasize the value of the results of the analysis of case-law and comparison of the legal position applied by judges with complex branched legislation.

Purpose of the Study.

Based on the aforementioned, *the purpose of the research* is to carry out a legal assessment of the situations arising in Ukraine in connection with the transfer of forests to the category of green areas by local self-government bodies that causes reduction of the state forest fund, prevention of enforcement of environmental human rights, as well as the development of citizens' behaviour model to protect their environmental rights and interests in administrative courts.

Object and Subject of the Research

The object of the research is the management legal relations arising in the field of forest management and protection of environmental

human rights. The subject of the research is activities and decisions of local self-government bodies and state bodies concerning the transfer of forests to the category of green spaces.

Research Methods and Techniques

The specific feature of the applied methodology of the research is determined by the concentration of attention on the study of public disputes and related decisions of local governments, dating from 2000-2004, which were adopted according to the legislation in force at the time, and have continued character and carry consequences in 2016-2019. For these purposes, the retrospective approach of legal analysis was used in the study, as well as historical and legal and documentary analysis in combination with legal comparison of the provisions of the past and present legislation, which helped to establish the laws and causes of "doubtful", in terms of lawfulness, the activity of the authorities. The method of experimental selection, quantitative methods and generalizations made it possible to identify the situations that were the subject of analysis and to determine their typicality. And the evaluation methods contributed to the critical verification of the legitimacy and lawfulness of the decisions and activities of local government bodies. Information resources were also used in the research, namely: state register of judicial decisions, state forest cadastre, state land cadastre, national information-analytical system "Liga-Zakon", information resources with official data of local self-government bodies. In addition, we have already studied in other our

researches some questions about land disputes,[1] the results of which were also used in this paper.

THE FIRST TOPIC: GENERAL CHARACTERISTICS OF THE LEGAL REGIME OF FORESTS IN UKRAINE

In accordance with the general norm contained in Article 13 of the Constitution of Ukraine, the land, its subsoil, atmosphere, water and other natural resources within the territory of Ukraine, natural resources of its continental shelf and of the exclusive (maritime) economic zone shall be the objects of property rights of the Ukrainian people. State authorities and local self-government bodies shall exercise the ownership rights on behalf of the Ukrainian people within the limits determined by this Constitution. Every citizen shall have the right to utilise the natural objects of the people's property rights in accordance with the law. Property entails responsibility. Property shall not be used to the detriment of the individual or the society.[2]

The Forest Code of Ukraine of 21.01.1994 No. 3852-XII (hereinafter referred to as the Forest Code) determines that the *woods* of Ukraine are its national wealth and according to the destination and to location carry out mainly environmental (the water preserving, protective, sanitary and hygienic, improving, recreational), aesthetic, educational,

[1] Pyvovar, Y., Pyvovar, I., Babyak, A., Nazar, Yu. & Ostrovskiy, S. (2019). Permission for the Development of a Land Management Plan for a Land Plot Allocation as an Administrative Service: a Theoretical Approach for Legal Practice. *Amazonia Investiga, 8*(22): 370-380.

[2] Constitution of Ukraine. Law of Ukraine, No. 254k/96-VR. *Information from the Verkhovna Rada of Ukraine*. 1996, 30: 141.

other functions and have limited operational value are subject to public accounting and protection.[1]

As follows from Article 4 of the Forest Code, all forests within the territory of Ukraine make up the forest fund of Ukraine. The forest fund also includes land not covered by forest vegetation but provided for forestry purposes.[2]

In general, all forests of Ukraine by environmental and economic importance, according to Article 36 of the Forest Code, are divided into the first and second groups.

The *first group* includes forests that perform mainly nature conservation functions.

Depending on the function, forests of the first group are classified into the following security categories:

1) water conservation (windbreak forest along river banks, around lakes, reservoirs and other water bodies, forest strips that protect the spawning grounds of valuable industrial fish, as well as protective forest plantations on drainage strips);

2) *protective* (forests are erosion preventive, landslide, *protective strips of forests along* railways, *highways* of international, state and regional importance, especially valuable are forests, state protective forest strips, ravine forests, steppe copses and other forests of steppe, forest and steppe regions and mountain areas, which play an important role for environmental protection). This category also includes

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[1] **Forest Code of Ukraine, No. 3852-XII. *Information from the Verkhovna Rada of Ukraine.* 1994, 17: 99.**

[2] ***ibid.***

protective forest strips, protective forest plantations on railroad strips, *protective forest plantations along highways strips*;

3) sanitary-and-hygienic and health-improvement (forests of settlements, forests of green zones around settlements and industrial enterprises, forests of the first and second zones of zones of sanitary protection of water supply sources and forests of zones of districts of sanitary protection of health-improving territories).[1]

In addition to the first group, forests within the territory of the nature reserved fund (reservation parks, national nature parks, natural monuments, natural landmarks, regional landscapes, forests of scientific or historical importance (including genetic reserves), forest plantations and subalpine tree and shrub clusters.

The *second group* includes *forests* that within the ecological value have operational one and in order to preserve the protective functions, the continuity and unexhausted use of which a restricted forest management regime is established.

While dividing forests into groups and referring them to the categories of protection, the boundaries of the lands occupied by the forests of each group and the category of protection are determined.[2]

At the same time, the legislator clearly states that the following objects *are not referred* to the forest fund: all types of green spaces within settlements that are not classified as forest; individual trees and groups of trees; shrubs on farmlands, estates, personal ploti of land, country houses and garden areas.

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[1] ***ibid.***

[2] ***ibid.*, part 1 of Article 37.**

Therefore, from the abovementioned analysis and based on the circumstances of the investigated situation, it can be asserted that, initially, before making decision of the local authority, the object referred to the forests of the first category with an appropriate legal regime; and after such a decision – to green areas not belonging to the forest fund of Ukraine, and in accordance with another legal regime.

THE SECOND TOPIC: LEGAL REGIME OF GREEN SPACES (NOT RELATED TO THE FOREST FUND)

Describing the legal regime of green spaces, it should be noted that the creation, protection and use of plantations that are not related to the forest reserves shall be regulated by other acts of legislation, than the forest reserves.

Thus, according to the Regulations on the maintenance of green areas of cities and other settlements of Ukraine, approved by the Order of the State Committee of Ukraine on Housing and Utility Services of 29.07.1994, No. 70 (valid till 10.04.2006)[1] all green plantings in cities and other settlements (hereinafter – urban plantation) on functional signs are divided into three groups, of 1) general use – municipal and regional parks; parks of culture and rest, gardens at residential areas and groups of houses, squares, boulevards, promenades, wooded parks, meadow parks, waterparks and others; 2) limited use – plantations on the territories of public and residential buildings, schools, children's institutions, sports facilities, healthcare institutions, industrial companies, warehouse territories and others; 3) special purpose –

[1] **Regulations on the maintenance of green areas of cities and other settlements of Ukraine. Order of 29.07.1994, No. 70. [valid]. Retrieved from: https://zakon.rada.gov.ua/laws/show/z0301-94**

plantings along streets, in sanitary-protective and conservation zones, on the territory of botanical and zoological gardens, exhibitions, cemeteries and crematoria, high voltage power lines; forest improvement plantations; the planting of nurseries, flower farms; roadside plantation within cities and other settlements.

According to Order No. 70, all green spaces within settlements during any implementation of activities shall be subject to protection and restoration, except for green spaces that are planted or self-seeded in the protected areas of air and cable lines, transformer substations, electrical distribution points and enterprises and are removed on time.[1]

Protection of green spaces is a system of administrative and legal, organizational and business, economic, architectural and planning, and agrotechnical measures aimed at preserving, restoring or improving the performance of the relevant functions by green spaces.[2]

According to Order No. 70 protection, maintenance and restoration of green spaces at the land improvement facilities, and the removal of self-sown trees shall be implemented using state or local budget funds, depending on the subordination of the land improvement facility, and at land plots that are transferred for permanent use or rent, – at the expense of their owners or leaseholders according to regulations approved in the prescribed manner.[3]

It is also important that the General plan for the development of settlements in Ukraine is being developed and implemented taking into

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[1] ***ibid.*, par. 7.1**

[2] ***ibid.*, par. 2.1**

[3] ***ibid.*, par. 7.2**

account the requirements for the protection of green spaces,[1] and urban development in settlements, in turn, are being carried out in compliance with the requirements for the protection of green spaces.[2]

Thus, the legal regime of maintenance of green spaces shall include protection and restoration, which in turn protect them from being cut down without any reason, except provided by legislation, for example, removal of hazardous trees, separate dried or defective trees, removal of plantings in protective zones, removal of self-sown trees, etc.

In addition, further, the procedure for cutting down green spaces was provided by the Law of Ukraine "On improvement of settlements",[3] the Procedure for removing trees, bushes, lawns, flower beds in settlements,[4] the Rules for the maintenance of green spaces in settlements of Ukraine.[5]

THE THIRD TOPIC: STATE RECORDING AS A MEANS OF FORESTS SECURITY AND PROTECTION

It should be noted that both modern and current in 2002 legislation provides for the state registration of forests and the *state forest cadastre* to effectively organize the security and protection of forests, rational use of forest resources, forest reproduction, systematic control over

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[1] ***ibid.*, par. 7.3**

[2] ***ibid.*, par. 7.4**

[3] **On improvement of settlements. Law of Ukraine No. 2807-IV. *Information from the Verkhovna Rada of Ukraine.* 2005, 49: 517.**

[4] **Procedure for removing trees, bushes, lawns, flower beds in settlements. Resolution No. 1045. Retrieved from: https://zakon.rada.gov.ua/laws/show/1045-2006-%D0%BF**

[5] **Rules for the maintenance of green spaces in settlements of Ukraine. Order, dated 10 April, 2006, No. 105. Retrieved from: https://zakon.rada.gov.ua/laws/show/z0880-06**

qualitative and quantitative changes in the forest reserves and provision of the Councils of People's Deputies, interested state executive authorities, forest users with information about the forest reserves (Article 94).[1] While Forest Code provides that the state accounting of forests and state forest cadastre contains a system of data and documents on legal regime of the forest reserves, its distribution among users, qualitative and quantitative state of forest reserves, the division of forests into groups and assignment to categories of protection, economic evaluation and other data needed for sustainable forest management and evaluation of the results of economic activities in the forest reserves.[2] The basis of the state forest accounting and the state forest cadastre is made up of materials of forest management, inventory, surveys and primary accounting of forests according to the unified system.[3]

In general, forest management is a system of state measures aimed at ensuring effective protection, rational utilization, increase of productivity of forests and their reproduction, forest resource assessment, as well as improve the culture of forest management, which is conducted on the whole territory of Ukraine by the state forest management bodies for public funds and under a uniform system in the manner prescribed by the Ministry of Forestry of Ukraine in coordination with the Ministry of Environmental Protection.[4]

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[1] **Forest Code of Ukraine, No. 3852-XII.** ***Information from the Verkhovna Rada of Ukraine.*** **1994, 17: 99.**

[2] ***ibid.,*** **art. 95.**

[3] ***ibid.,*** **art. 96.**

[4] ***ibid.,*** **art. 93.**

That is exactly during the forest management there are implemented: 1) definition of the boundaries and internal organization of the territory of the forest reserves that are in use by regular forest users; 2) execution of topographic and geodetic works and special mapping of forests; 3) *inventory of forest reserves* with definition of species and age composition of forest stands, their condition, qualitative and quantitative characteristics of forest resources; 4) identification of forest stands that require felling related to forest management, the establishment of reforestation and afforestation, land reclamation, protection of forests etc., as well as order and methods of carrying out these activities; 5) *justification of division of forests into groups and assigning them to categories of protection*; 6) calculation of the calculated felling rate, the volume of felling related to forest management, and use of other forest resources; 7) determination of amounts of works on restoration of forests and afforestation, forest fire protection, protection against pests and diseases, as well as other forest management work; 8) forestry biological and other surveys and studies; 9) supervision of the forest management activities implementation developed by forest management and other managerial activities.

Accordingly, *the forest management materials should contain a comprehensive assessment of forest management, use of forest resources, use of land plots of the forest reserves*, and develop the main provisions of the organization and development of forestry. It should be noted that the forest management materials shall be approved by the state forestry authorities in coordination with local Councils of People's Deputies and environmental protection bodies. Such materials are the basis for the

organization of forest management and use of forest resources by permanent forest users.[1]

Thus, *in establishing eligibility of local government body for disposition of a specific land plot of forest reserves* it is recommended to study the materials of forest management and other information and documents to determine the legal regime of the forest reserves, its users, qualitative and quantitative characteristics of the forest reserves, groups and categories of forests protection, economic valuation, other data and inventory content, surveys and primary accounting of the forest that make up the state accounting of forests and state forest cadastre.

The above allows us to state that as a result of administrative actions of local governments to change the purpose of forests, such objects are actually excluded from the *forest reserves of Ukraine*.

FOURTH TOPIC: CHECKING THE ELIGIBILITY OF THE LOCAL GOVERNMENT BODY TO MAKE DECISIONS ON CHANGING THE PURPOSE OF FORESTS

Determining the legal nature of the decision of the local council to change the category of forest lands and referring them to another category of land, it should be noted the following. We believe that this decision is a *regulatory act* within the meaning of paragraph 18 of part 1 of Article 4 of the Code of Administrative Justice of Ukraine (CAJ),[2] as

[1] ***ibid.*, art. 94.**

[2] **Code of Administrative Justice of Ukraine, No 2747-IV. *Information from the Verkhovna Rada of Ukraine*. 2005, 35-37: 446.**

adopted by the authorized power entity (the respective village, settlement, city council) in statutory form and order, which establishes legal rules for public at large (including members of the local community) and is designed for repeated use. The same concerns a decision to transfer forests to land plantations.

To delineate the boundaries of the jurisdiction of local councils, it should be noted that according to the provisions of Article 6 of the Forest Code, all forests in Ukraine are the *property of the state*.[1] At the same time, Forest Code divides all forest resources into *forest resources* of *national standing* and of *local significance*. Forest resources of national standing include wood from the cuttings of main use and turpentine. *Local forest resources* include forest resources that are not classified as state resources.[2]

In addition, in Article 39 of the Law of Ukraine "On environmental protection" of 25.06.1991, No. 1264-XII (hereinafter – the Law No. 1264-XII),[3] the legislator designated as the natural resources of national significance, in particular, the forest resources of national significance, and to *natural resources of local significance* – natural resources that are not classified by the legislation of Ukraine as natural resources of national significance.[4]

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[1] **Forest Code of Ukraine, No. 3852-XII. *Information from the Verkhovna Rada of Ukraine.* 1994, 17: 99.**

[2] ***ibid.*, art. 7.**

[3] **On environmental protection. Law of Ukraine, No. 1264-XII. *Information from the Verkhovna Rada of Ukraine.* 1991, 41: 546.**

[4] ***ibid.*, part 2, art. 39.**

Despite the legal division of forest resources into state and local forest resources, the special value of all forests should be emphasized. This is stated in Article 5 of Law No. 1264-XII, which establishes that the state protection and regulation of use on the territory of Ukraine cover: the natural environment as a set of natural and natural-social conditions and processes, natural resources, both attracted to economic turnover and unused in the economy during this period (land, subsoil, water, atmosphere air, *forest (that is, all forest, and, accordingly, all forest resources) and other vegetation, wildlife)*, landscapes and other natural complexes.

It follows that the state, represented by state bodies, has its own exclusive powers to ensure state protection and regulation of the use of all forests on the territory of Ukraine.

In addition, the law stipulates that the Verkhovna Rada of Ukraine manages forests on behalf of the state. The Verkhovna Rada of Ukraine delegates to the relevant Councils of the People's Deputies its powers to *dispose of forests*, as defined by this Code and other legislative acts. The Council of the People's Deputies, within its competence, shall grant land plots of the forest reserves for permanent use or withdraw them in accordance with the procedure defined by the Land Code and this code (Article 6).[1]

Regarding the jurisdiction of local self-government bodies in the field of regulation of forest relations, we note that the competence of village and settlement Councils of the People's Deputies include:

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[1] **Forest Code of Ukraine, No. 3852-XII. *Information from the Verkhovna Rada of Ukraine.* 1994, 17: 99.**

1) provision of land plots of the forest reserves for permanent use within the boundaries of settlements and villages and termination of the right to use them;

2) provision of land plots of the forest reserves for temporary use within settlements and villages for special use of forest resources, cultural, recreational, sports and tourist purposes, for carrying out scientific research, as well as outside of them for utilization of secondary forest materials, implementing minor forest production and terminating the use of these plots;

3) implementation of measures for the security and protection of forests, suppression of forest fires, engagement of fire-fighting equipment for their extinction, as well as the prohibition of public visits to forests and entry of vehicles into them during a period of high fire danger in the manner prescribed by law.

4) organization of improvement of land plots of the forest reserves and cultural and consumer services for vacationers in the forests of green spaces and other forests used for these purposes;

5) ***solving other issues in the field of forest relations regulation within its competence.***[1]

According to Forest Code*, the transfer of forest lands to non-forest for use in the interests not related to forest management*, the use of forest resources and the use of land plots of the forest reserves for the needs of hunting, cultural, recreational, sports and tourist purposes and research, shall be carried out by decision of the authorities that provide these lands for use in accordance with land legislation. Transfer of

[1] ***ibid.*, art. 16.**

forest lands to other categories shall be carried out with *the consent of the relevant state forestry authorities of the Republic of Crimea, regions, cities of Kyiv and Sevastopol.*[1]

THE TOPIC FIFTH: CERTAIN LEGISLATIVE GUARANTEES FOR FOREST CONSERVATION

To protect forests, it should be noted that according to Forest Code in case of transfer of land from the forest reserves into other categories of lands and their transfer to the property or making available for use for the needs not related to forest management, the bodies making such decision *at the same time solve the question of maintaining or cutting-down trees and shrubs* and on the order of use of the resulting wood.[2]

Enterprises, institutions, organizations and citizens, who are given ownership or use of land plots without the right to cut down trees and shrubs, must ensure their preservation and maintenance.[3]

If in the future there is a need to cut down trees and shrubs in these areas, the issue of felling and the procedure for using the harvested wood shall be solved by the body that decided to transfer ownership or grant use of the land plot.[4]

At the same time, we must pay attention to the mandatory participation of the state (its bodies) also in case, if local authorities make the next *decision on the future of forest resources (after making a decision to change the purpose of forests) - to cut down trees and shrubs.*

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[1] ***ibid.*, art. 42.**

[2] ***ibid.*, part 1, art. 44.**

[3] ***ibid.***

[4] ***ibid.*, part 3, art. 44.**

Such a decision must be made by prior agreement with the relevant state bodies for environmental protection.[1]

From the analysis of the circumstances of a typical situation, we must state that in cases where the local government does not agree with any state body on the appropriate decision *to cut down trees and shrubs* and does not accept it, then there are no legal consequences.

THE TOPIC SIX: STATUS OF LANDS, WHERE FORESTS ARE LOCATED

According to Article 18 of the Land Code of Ukraine No. 2768-III of 25.10.2001 (hereinafter referred to as the Land Code), all lands of Ukraine within its territory, including islands and lands occupied by water bodies, which are divided into categories according to their main purpose. Each category of land in Ukraine has a special legal regime.[2]

The categories into which the lands of Ukraine are divided according to the main purpose are established by part 1 of Article 19 of the Land Code. In particular, they are: a) agricultural land; b) land of residential development; c) lands of nature reserve and another environmental protection purpose; d) lands of health-improvement purpose; e) lands of recreational purpose; f) lands of historical-cultural purpose; g) land for forestry purposes; h) lands of water resources; i) lands of industry, transport, communications, energy, defense and other purposes.[3]

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[1] ***ibid.*, part 4, art. 44.**

[2] **Land Code of Ukraine. Law of Ukraine No 2768-III. *Information from the Verkhovna Rada of Ukraine*. 2002, 3-4: 27.**

[3] ***ibid.***

According to Land Code the assignment of land to a particular category shall be carried out on the basis of decisions of state authorities and local government bodies in accordance with their powers.[1]

Land Code of Ukraine establishes that changes in the purpose of land shall be carried out by executive authorities or local self-government bodies *that make a decision on transfer of these lands to ownership or granting them for use, withdrawal (purchase) of land and approval of land management projects or make a decision to create objects of environmental, historical and cultural purpose.* [2]

THE TOPIC SEVEN: SPECIAL PROCEDURE FOR TRANSFERRING LAND PLOTS FROM THE FOREST FUND TO OTHER LAND CATEGORIES

A systematic analysis of these norms gives grounds to assert that the legislation provides for a special procedure for transferring land plots from the forest reserves to other categories of land, which is characterized by:

obtaining by the relevant village, settlement, city council agreement of the relevant state forestry authorities of the Republic of Crimea, regions, cities of Kyiv and Sevastopol for the transfer of forest lands to other categories and making such a decision;

adoption by the relevant village, settlement, city council of the decision on the referring of the land plot, which is in municipal property and has the status of forest fund lands to another category of

[1] ***ibid.*, part 1, art. 20.**

[2] ***ibid.*, part 2, art. 20.**

lands (for example, to lands of public and residential development, etc.);

simultaneous transfer of land plots into ownership or use, for needs that are not related to forest management, that is, the decision of the council to transfer them to ownership or provision for use;

approval of the land management plan or making a decision on creation of environmental, historical and cultural objects;

a simultaneous solution of a problem on the conservation or felling of trees and shrubs by prior agreement with the relevant state bodies for the protection of the natural environment and on the procedure for using the resulting wood – that is, making the appropriate decision by the council on the basis of a prior agreement with the relevant authority.

Thus, making by the relevant village, settlement, and city council of only a decision to transfer forests to the category of green spaces with the prior consent of the relevant state forestry authorities of the Republic of Crimea, regions, cities of Kyiv and Sevastopol to transfer forest lands to other categories is only one of the first stages of a special complex procedure for transferring land plots from the forest reserves to other categories of land.

THE TOPIC EIGHT: CONSEQUENCES OF VIOLATION OF THE PROCEDURE FOR TRANSFERRING LAND PLOTS FROM THE FOREST FUND TO OTHER CATEGORIES OF LAND

As follows from Article 21 of the Land Code, violation of the procedure for establishing and changing the purpose of land is the

basis, firstly, for invalidating decisions of local governments on the provision (transfer) of land plots to citizens and legal entities; secondly, for invalidating agreements on land plots; thirdly, for bringing to justice under the law of citizens and legal entities guilty of violating the procedure for establishing and changing the purpose of land.

By Order of the Cabinet of Ministers of Ukraine of April 10 2008 No. 610-r "Some issues of disposal of forest land areas",[1] to prevent violations of the state and society interests while alienation and change of purpose of forest land plots, decision-making on granting permission for withdrawal of plots, transferring them into ownership and lease with right to change the purpose was suspended, except cases provided in this regulation.

Also, the specified regulation should withdraw previously granted permission to the withdrawal of plots, transfer them into ownership and lease with right to change the purpose in a case, when the local bodies of executive power or bodies of local self-government did not make the appropriate decisions or, where the results of verification established that such decisions were made with violation of requirements of the legislation.

According to Article 49 of the Law of Ukraine "On the Cabinet of Ministers of Ukraine", the Order of the Cabinet of Ministers of Ukraine shall be a compulsory act.[2]

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[1] **Some issues of disposal of forest land areas. Order No. 610-r. Retrieved from: https://zakon.rada.gov.ua/laws/show/610-2008-%D1%80 (invalidated on June 14, 2017)**

[2] **On the Cabinet of Ministers of Ukraine. Law of Ukraine No. 794-VII. *Information from the Verkhovna Rada of Ukraine*. 2014, 13: 222.**

This act of the Government, on the one hand, is an indicative and acceptable way to protect, in particular, forest lands, but it and other similar acts do not actually cover all similar problematic issues for reasons, in particular, of improper control by the authorized state executive bodies, and, accordingly, of identifying violations and informing the Government about them.

Therefore, the activities of the local authority (the relevant rural, village, city council) on the decision to classify the land, which was community property and had the status of forest reserves lands to other categories of land (including on the basis of the decision on the transfer of forests to the category of green space) without proper land management project, in the absence of the consent of the forestry authority, in violation of Article 19 of the Constitution should be considered illegal because it was made not on the basis of and not in the way envisaged by the Land Code of Ukraine. That is, in such cases, changing the purpose of land should be recognized as illegal, and the corresponding decision of the local government - illegal.

However, it should be borne in mind that the adoption by the respective village, settlement, city council of only decisions on the transfer of forests in the category of green space in itself does not predetermine the legal implications of automatic change of land purpose, and is only one of the prerequisites (subject to appropriate order) to complete the procedure of transfer of forest land to another category.

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THE TOPIC NINE:

RIGHT TO APPEAL TO A COURT

The other important task in this work is to identify the person who has the right to appeal against the decisions of local governments on the transfer of forest reserves lands to another category. The problem of this task lies in the answer to the question: does any capable citizen have the right to appeal against this type of a decision, or does this right belong exclusively to citizens-residents of the corresponding territorial community?

According to part 2 of Article 55 of the Constitution of Ukraine, everyone shall be guaranteed the right to appeal to the court against decisions, actions or omissions of public authorities, local self-government bodies, officials and officers.[1]

The decision of the Constitutional Court of Ukraine No. 19-rp/2011 of December 14 2011 states that human rights and freedoms and their guarantees determine the content and direction of the state's activities (part 2 of Article 3 of the Constitution of Ukraine). To carry out such activities, public authorities and local self-government bodies, their officials and public servants are vested with public authority, that is, they have a real opportunity to make decisions or perform certain actions on the basis of the powers established by the Constitution and laws of Ukraine. A person, in respect of whom a power entity has made a decision, committed an action or inaction has the right to protection.[2]

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[1] **Constitution of Ukraine. Law of Ukraine, No. 254k/96-VR.** ***Information from the Verkhovna Rada of Ukraine*****. 1996, 30: 141.**

[2] **Decision on Case No 1-29/2011.** ***Official Bulletin of Ukraine*****. 2011, 101: 72.**

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that everyone has the right established by law to a fair and public hearing of their case within a reasonable term by an independent and impartial court.[1]

Since the analyzed situations reside in the jurisdiction of administrative courts, we note that the objective of administrative proceedings in accordance with part 1 of Article 2 of the CAJ is a fair, impartial and timely resolution of disputes by a court in the sphere of public law relations for the effective protection of the rights, freedoms and interests of individuals, rights and interests of legal entities from authorities misconduct.[2]

Code of Administrative Justice provides that every person has the right to apply to the administrative court in accordance with the procedure established by this Code, if she believes that the decision, action or inaction of the power entities violated their rights, freedoms or legitimate interests.[3]

Consolidation of the rule-of-law state in accordance with the requirements of Article 1, the second sentence of part 3 of Article 8, Article 55 of the Constitution is, in particular, to guarantee everyone

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950. Retrieved from: https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=

[2] Code of Administrative Justice of Ukraine, No 2747-IV. *Information from the Verkhovna Rada of Ukraine*. 2005, 35-37: 446.

[3] *ibid.*, part 1, art. 5.

judicial protection of rights and freedoms, as well as to introduce a mechanism for such protection.[1]

From the analysis of the above provisions of the law, it is seen that the right to judicial protection provides for the possibility of applying to the court for protection of the violated right, but requires that the violation alleged by the plaintiff was justified. Such a violation must be real and relate to the individually expressed rights or interests of the person who claims on their violation.

General approaches to the question of whether the plaintiffs have a substantive interest, which is a prerequisite for the protection of their violated rights, were formulated in the Supreme Court's decision as of February 20 2019 in Case No. 522/3665/17. In this decision, the Court noted that the interest must have a legal character, which shall be manifested in the fact that the court's decision must have legal consequences for the plaintiff (para. 58); the interest must have an objective basis (para.59); the plaintiff must prove that they have a legitimate interest and are a victim of a violation of this interest by the power entity (para. 74).[2]

Based on the subject of our research, we draw attention to Article 50 of the Constitution,[3] which serves as a basic regulation that guarantees

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[1] **Constitution of Ukraine. Law of Ukraine, No. 254k/96-VR. *Information from the Verkhovna Rada of Ukraine*. 1996, 30: 141.**

[2] **Resolution in the Case No. 522/3665/17. Retrieved from: http://reyestr.court.gov.ua/Review/80167902**

[3] **Constitution of Ukraine. Law of Ukraine, No. 254k/96-VR. *Information from the Verkhovna Rada of Ukraine*. 1996, 30: 141.**

everyone the right to a safe environment for life and health and to compensation for damage caused by violation of this right.

Regarding the environment, this provision is detailed in Article 9 of Law No. 1264-XII, which states that every citizen of Ukraine has the right to: a safe environment for his life and health; participation in the discussion of draft legislative acts, materials regarding the placement, building and reconstruction of objects that may negatively affect the state of the natural environment, and making proposals to state and economic bodies, institutions and organizations on these issues; participation in the development and implementation of measures for the protection of the natural environment, rational and integrated use of natural resources, and so on.

Answering the question, if the problem of changing the purpose of forest lands concerns any citizens, or only those who live in this type of land, we have our own position, which is based on the provisions of the legislation and is as follows. In forestry and land relations, the citizens and officials should be aware that the situations on transfer of forest reserves lands of the first category (that is, forests that perform environmental functions, in particular, protection from the roads influence) to lands of public and residential development and subsequent clearing of trees and shrubs to build the relevant objects of urban planning, concern the interests and rights not only of the residents of the locality near which the road passes, and suffering from noise, dust, gas, etc., but also any other citizen of Ukraine. This connection is due to the fact that, firstly, forests are objects of property rights of the entire Ukrainian people, secondly, forests are the national wealth of Ukraine, and thirdly, forests have useful properties – the

ability to reduce the impact of negative natural phenomena, protect soils from erosion, regulate water flow, prevent pollution of the natural environment and clean it, promote the health of the population and its aesthetic education.

CONCLUSIONS

The situation outlined in this research is typical for Ukraine within the period of 2000-2005, with environmental consequences of which citizens are facing within the period of 2016-2019. Scientific analysis of such a situation allows recognize it as a kind of abuse scheme (gaps in the legislation) on the part of the local self-government bodies, with the help of which the removal of forests from the forest fund was carried out due to the change of purpose of the lands on which the forests were located. As it is demonstrated in the study, this is caused by the inconsistency of the legal regimes of the forest fund objects and the land fund objects, which makes it impossible to consider objectively interdependent objects as a whole, such as forest located on the ground, i.e. as "forest land", which should be in a single legal regime for land and forest on it.

However, while carrying out a legal assessment of situations and modelling protection of rights in forest and land relations that have arisen in connection with the transfer of forests to the category of green spaces by changing the purpose of lands of forest fund into another categories by local self-government bodies, the following legal facts should be taken into account and investigated:

1) whether the local government body has the authority to manage a specific land plot of the forest fund, based on forest management records and other information and documents;

2) whether the requirements of the legislation were followed by local self-government body and whether the statutory procedure for the transfer of forests to the category of green spaces has been fulfilled, which may be a cause for declaring the decision unlawful.

In order to start using the land plot in the new status, it is considered insufficient to make only one decision of the local self-government body to transfer the forest to the category of green spaces, it should be followed by other decisions of this body, provided by the procedure, in particular the decision to grant permission for extraction of timber, shrubs;

3) whether the local self-government body received special agreement from the authorized state body (forestry authority) to change the category of land of forest fund;

4) whether a land development plan has been developed and approved for a land plot that is planned to be transferred from the forest fund to another appropriate category (in particular for residential or industrial building, etc.).

In case of negative response at least at one of mentioned (non-exhaustive list) issues, one can definitely declare the illegality of the respective decision of the local self-government body and the illegality of their activity that may serve as a basis for appeal to the court, as well as the cancellation of subsequent decisions, agreements of the governing body concerning transfer of such lands to the disposal of other entities.

In disputes concerning the implementation of environmental law by citizens (in particular, safe environment), any citizen of Ukraine should be considered a proper plaintiff in court without any restrictions on the territorial relationship (land plot and place of residence of the citizen).

In cases when a cause of public ecological-land dispute and an appeal to a court become disagreement of a resident of the territorial community with the decision of the respective village, settlement, city council to transfer the land that had the status of lands of forest fund to another category of land and such decision is an obstacle in exercising environmental rights (in particular, the right to a safe environment), then it should be considered that such a resident is not of personal (individual) interest, but "social", "public" interest. The basis of substantive legal interest of such a resident is to resolve a socially important and socially significant issue – to cancel the change of purpose of the lands of the forest fund, as well as to protect the public interests – property right of the Ukrainian people to forests, woods – the national wealth of Ukraine and forests as a source of meeting the needs of society in forest resources.

At the same time, it should be taken into account that only one decision to transfer forests to the category of green spaces does not directly affect the rights and interests (in particular, concerning a safe environment, environmental degradation, not using property as a harm for an individual and society) of the resident of the respective settlement and member of the territorial community, since such a decision does not entail the automatic change of purpose of the land as a legal consequence and does not imply an automatic authorization for the destruction of trees. In this context, we would like to draw your attention separately to the fact that permission for the felling of trees and shrubs should be obtained in any case, regardless of the legal regime of use of natural plantations.

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VARIED FORMAL REQUIREMENTS IN CIVIL AND ADMINISTRATIVE LAWSUIT (STUDY IN JORDANIAN LEGISLATION)

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Abstract

The research deals with the variation between the formal and substantive conditions in both civil and administrative lawsuits, as the Jordanian administrative judiciary has been regulated under Law No. 27 of 2014 stating the formal and substantive conditions for filing an administrative lawsuit.

The study focus on breaching the formal conditions for case registration, which leads to dismissal, nullity, and rejection, thus, missing out benefits for the appellants.

Keyword: variation, administrative, judiciary, nullity, administrative.

Introduction

The Jordanian judiciary has witnessed various developments when the judicial system that prevailed in the Ottoman Empire in eastern Jordan continued until the Basic Law of the Emirate of Transjordan was issued in 1928, which regulated the judiciary and identified the three types of courts, civil, religious and private courts, and governed all disputes, even those involving the public administration. The Government Claims Act was subsequently issued in 1935 as a law on which responsibility of government administration is based. Following the promulgation of the Jordanian Constitution in 1952, constitutional provisions included the issuance of a law to regulate Jordanian administrative law and the establishment of a supreme court of justice.

After the entry into force of the Constitution of 1952, the Jordanian Courts Formation Law was issued, which included the establishment of the Magistrates' Courts, First Instance, Appeal and Discrimination Courts.

The Constitution defines three tasks for the Court of Cassation to hear cases through, a civil task for the consideration of rights-related disputes, a penal task in criminal cases, and an administrative prescription when considering applications for annulment of administrative decision and appeals relating to municipal and local council elections exclusively. It also had jurisdiction only to repeal without compensation and was convened to consider it as a Supreme Court of Justice.

The Interim Supreme Court of Justice Act was subsequently promulgated, establishing the Supreme Court of Justice as an independent court. Accordingly, the administrative judiciary became

separate from the regular judiciary. After the 1989 elections, the Supreme Court of Justice Act was enacted and was a serious step in shaping the Jordanian administrative judiciary. This law extended the jurisdiction of the administrative judiciary, recognizing the compensation judiciary as well as the annulment and contesting the election of municipal and local councils. One criticism of the administrative judiciary was that it was of one level and that the decision of the Supreme Court of Justice did not accept appeal to any court.

Subsequently, the Administrative Court Law No. 27 of 2014 was issued, which is considered a real qualitative leap and development in the field of the Jordanian administrative judiciary. Administrative judiciary has achieved the following features:

First: It establishes a judiciary that is called the Administrative Judiciary in the Hashemite Kingdom of Jordan. This shall grant full independence to the administrative judiciary (Article 3 of the Administrative Judiciary Law).

Second: It makes administrative litigation of two levels, consisting of the Administrative Court as the first level and the Supreme Administrative Court as the second level.

Third: It expands the jurisdiction of the administrative judiciary, where the Administrative Court is competent to hear all appeals related to the final administrative decisions as well as:

1. Appeals against the results of the elections of the councils of chambers of industry and commerce, trade unions, associations and clubs registered in the Kingdom, and electoral appeals conducted in

accordance with the laws and regulations in force, unless otherwise stipulated in another law to give this jurisdiction to another court.

2. Appeals filed by the concerned parties in the final administrative decisions related to appointment to public office, promotion, transfer, assignment, secondment, commissioning, and confirmation of service or classification.

3. Appeals to public officials concerning the cancellation of final administrative decisions related to termination or suspension of their services.

4. Appeals to public officials concerning the cancellation of final decisions issued by the disciplinary authorities.

5. Appeals for salaries, allowances, bonuses, annual increases and retirement rights due to public officials or retirees or their heirs under the legislation in force.

6. Appeals filed by any aggrieved party requesting the cancellation of any system, instruction or decision based on the system's violation of the law issued pursuant thereto, violation of the instructions of the law or the order issued pursuant thereto, or violation of the decision of the law, order or instructions issued on the basis thereof.

7.Appeals made by any aggrieved party relating to the cancellation of final administrative decisions even if they are immune to the law issued pursuant thereto.

8.Appeals against any final decisions issued by administrative bodies with jurisdiction, except those issued by conciliation and arbitration bodies in labor disputes.

9. Appeals that are the jurisdiction of the Administrative Court under any other law.

10. The Administrative Court shall have jurisdiction to hear claims for damages suffered as a result of the decisions and procedures stipulated if it is submitted to it pursuant to the cancellation claim.

Given this important development, it was necessary to discuss the formal aspects of accepting the administrative case, as this dispute is of a special nature and has a special court, as it has a special legal form that must be followed before the administrative court, especially since it is newly applied. It was necessary to discuss the formal conditions of the statement of claim in the general form, and the conditions for those who file the lawsuit and the conditions of the administrative decision subject to appeal.

The Administrative Judiciary Law required data concerning the administrative lawsuit and whoever filed the administrative lawsuit. The law has required the signature of a lawyer who practiced the legal profession for a period of not less than five years.

Since the Administrative Court was modern, it was necessary to discuss the formal stages of the registration of the administrative case, and the stages of registration before the Supreme Administrative Court, because of the need to provide a practical and formal acceptance of the administrative case to reach the results and recommendations of this study.

Problem f the study

The problem of the study revolves around what are the formal requirements for filing the administrative lawsuit.

Limits of the current study

The Jordanian Administrative Law and conducting a comparison between the formal requirements for registering the lawsuit in general and the administrative lawsuit in particular.

Methodology

Descriptive Analytical Approach.

Hypotheses

1 - There are formal requirements for the lawsuit in general.

2. There are special formal requirements for administrative lawsuit.

3. Failure to follow the formalism leads to the inadmissibility of the lawsuit.

Importance of the study

The law of administrative justice is new, and it needs to be enriched and debated in all its aspects, but the subject of the study is the importance of the availability of formal requirements for the registration of administrative proceedings, because the failure to comply with the formal requirements for the registration of administrative lawsuit leads to its invalidity makes the appellant lose his rights. Since there are no in-depth studies on these conditions , it was necessary to discuss them to make it easy for lawyers to access to them and be the beginning of subsequent studies, especially since any modern law needs a lot of studies.

Division of the current study

Topic (1): the special conditions of statement of claim before the judiciary.

Topic (2): the special data in the statement of claim of administrative lawsuit.

Topic (3): the formal requirements in the procedures of the registration of the administrative case

Conclusion

Topic (1): the special conditions in the list of lawsuit before the judiciary

The law requires a set of formal requirements relating to public order which, if not available, lead to the invalidity of the lawsuit. There are two conditions: Registration and signature of a lawyer, which we will discuss[1] in Jordanian law in three sections. Section (1) shall be in the examination of the special conditions for the registration of the lawsuit in general, and Section (2) shall be on the formal conditions for those who file the administrative lawsuit. Section (3) shall be on the formal formalities in the administrative decision subject to appeal.

Section (1): the special conditions for the registration of the lawsuit in general

Article 52 of the Code of Civil Procedure stipulates the data to be available in the statement of claim[2]:

First: The name of the court before which the lawsuit is filed.

The law stipulates that the name of the competent court shall be written in the statement of claim, but if the name of the court is not mentioned in the list of lawsuit, this does not render the case invalid and this is stipulated by the Court of Cassation (Resolution No. 2589/2000)[3]. In another Resolution (Article 56/1 of the Code of Civil Procedure

[1] **Journal of the Bar Association of 2003.**

[2] **The Jordanian Code of Civil Procedure No. 52 of 1985 as amended.**

[3] **Journal of the Bar Association of 2003.**

required the lawsuit to include the name of the court, and the provisions of the Code of Civil Procedure did not include the nullification of the lawsuit due to omission of the name of the court in the statement of claim, even if this is necessary to identify the competent court. The lawsuit shall be valid and of full effect from the date of its registration in the Registry of the Court, even if it is not competent. In such a case, the court shall refer the lawsuit to the competent court as required by articles 57/2 and 112 of the Code of Civil Procedure[1] (Decree No. 1910/2007).

Second: The name of the plaintiff, his status, his place of work, his place of residence, the name of his representative, status and address of the person representing him, if any.

The name of the plaintiff must be mentioned in the statement of claim, in order to clearly identify the plaintiff, so that the defendant can know his opponent in the case and indicate whether he is claiming for himself or others as an agent. The name must also match civil records, so it is necessary to add the national number of the plaintiff. The domicile is necessary in order for the court to consider spatial jurisdiction and to follow up the requirements of legal notices that require the determination of the person's legal domicile.

Third: The defendant's name, his status, place of work and place of residence.

This requirement is for the defendant to be clearly identified and for the court to be able to inform him and call him to trial. The legal status of the defendant must be determined if he is disabled. This statement

[1] **Journal of the Bar Association of 2003.**

identifies the real opponent where the law requires that the lawsuit be filed against real opponents, and may not involve the real opponent if it turns out that the opponent is imaginary.

The Court of Cassation states that (one of the recognized principles of jurisprudence and law that the inclusion of a second defendant in the lawsuit after its establishment is not permissible unless the original lawsuit is based on a real opponent) decision No. 112/1985.[1]

If the defendant is a legal person, the name of the legal person shall be mentioned, and the representative of the legal person shall be mentioned.

Fifth: The facts of the lawsuit

This includes the legal and material facts of the case, the date of its creation and the requests clarifying to the court the competence to consider the case. The facts vary according to the type of dispute, and they form the basis on which the opponent rely to claim right, whether such rights are stipulated by the law, contract, injurious act, beneficial act or sole will. Article 56 of the Code of Civil Procedure stipulates that the list of lawsuit shall include all what the plaintiff has the right to claim at the time of filing the lawsuit. Article 57 of the Code of Civil Procedure stipulates that requests made by a legal representative may not be combined with requests relating to his or her personality.

Article 58 stipulates that the Court cannot examine all the reasons together and may order the examination of each cause separately, or issue such decisions as it deems appropriate according to Article 59.

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[1] **Journal of the Bar Association of 1990.**

6. Signature of Plaintiff and his agent

In order for the regulation to be valid for accreditation, it must include the signature of the plaintiff or his agent to demonstrate the true binding will to file this lawsuit. The signature of the lawsuit by the agent shall be accompanied by proof of the agent's capacity and power to sign on behalf of the principal attached to a certified power of attorney. (Article 63 of the Code of Civil Procedure forbids individuals other than lawyers to appear before judges to hear a case, except by an attorneys representing them under a power of attorney. The attorney also has the right to prove his power f attorney via an official document if power of attorney is general or certified by the principal's signature if it is special and the lawyer's signature must be on the statement of claim or the appeal (Court of Cassation decision 1732/1997).[1]

Moreover, the jurisprudence indicates that although Article 56/7 of the Civil Procedure Law stipulated that statement of claim should be signed by the plaintiff or his agent, it did not indicate its nullity for the breach of the law. Such an end would be achieved by subsequent acknowledgment, recurrence or endorsement by the Court before the trial proceedings were entered into. Decision No. 1814/2004. The decision has also stipulated that[2]:

If the original attorney attends the first session of the trial and reiterates the statement of claim signed by the apprentice attorney and then continues to present the evidence and pleadings himself, the

[1] Journal of the Bar Association of 1998.

[2] Journal of the Bar Association of 2005.

signing of the statement of claim by the apprentice attorney does not require the dismissal of the case because the purpose of the plaintiff's signature of the attorney is to redress decision 2000/2002.

Section (2): the special conditions of the plaintiff who files administrative lawsuit.

- Interest in the Administrative lawsuit:

The administrative claimant must have an interest in making this case, otherwise the lawsuit will become unacceptable.

The interest is defined as the need to protect the law. It is defined by some as the practical benefit of the plaintiff, and this interest is either a positive request (benefit from the lawsuit) or negative request to prevent the enforcement of an illegal right.

The jurisprudence considers interest as the only condition for accepting the lawsuit[1] because the status is the personal and direct interest of the person. The Interest must meet several conditions:

Interest must be legal, personal, direct and existed (will be discussed hereinafter).

1- Legal interest:

The interest shall be based on a legal right or status, and the case shall be for the protection of this right or status, not contrary to public order or morals. The legal rule in contravention of the contested administrative decision must be in favor of individuals or bodies that have challenged the decision and not in favor of the administrative authority.[2]

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[1] **Mahmoud al-Kilani, The Civil Procedures Law, 2006, Dar Al-Thaqafa, p. 157**

[2] **Mahmoud Maher Abul-Enein, Abolition Law, Dar Al-Nahda, 1988, p. 460**

2. The interest shall be personal and direct:The plaintiff must be the right holder or his representative as the agent. A person shall not claim the right of others unless he is an agent or representative. It is sufficient in the administrative case that the appellant has a direct right where the decision affects his personal interest directly and does not mix with the public interest.[1]

Accordingly, the Supreme Administrative Court decision No. 180 of 2015 (the Court recognized that the requirement of interest - as a condition of admission of an administrative case - requires that the plaintiff's plaintiff be in a special legal situation in relation to the contested decision would have an impact on a personal interest).

Accordingly, the Supreme Administrative Court decision No. 180 of 2015 stipulates that (the Court recognized that the requirement of interest - as a condition of admission of administrative action - requires that the plaintiff be in a special legal situation with respect to the contested decision that would affect a personal interest).[2]

Direct interest is a condition for accepting a case where there is no action without interest, but the administrative judiciary depends on the leniency of the requirement of personal follow-up of the interest by filing a lawsuit to facilitate individuals in filing the administrative case because the appellant does not seek to protect a personal right as much as it seeks to protect the law and achieve the public interest. [3]

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[1] Mohamed Abdel Salam Mokhles, Theory of Interest in the Abolition Law, PhD Thesis, Ain Shams University, 1981, p. 122.

[2] High Administrative Court Decision No. 180 of 2015.

[3] Amina Joubran, Public Interest Clause in Abolition, Protection of Administrative Affairs, Morocco, 1986, No. 6, p. 780

3. Existing Interest:

The interest must be in place to accept the case and not merely a possibility. The individual must have the right before the assault takes place, and the occurrence of an assault on this right or legal status has caused harm to him immediately and this means the established interest is not probable and not future. The interest of the appellant is achieved by removing the assault and restoring his legal status.

The provisions of the Code of Civil Procedure did not differentiate between the potential interest in a civil or administrative case, but rather it addressed absolute right. The administrative judiciary is lenient in the notion of interest because an administrative action can be based on a right called an appellant in particular.

Section (3): Third requirement: Special formal conditions in the administrative decision subject of appeal

The issue of appeal before the administrative judiciary is the administrative decision issued. The judiciary defines the administrative decision as "disclosure of the administration of its binding will by its authority under laws and regulations with a view to having a legal effect that is possible and permissible and which was for public interest."[1]

The administrative decision requires four conditions in order to be subject to appeal before the Administrative Court:

1. The decision concerns an administrative activity.

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[1] Suleiman Tamawi, The General Theory of Administrative Decisions, 5th edition, p. 170, Ain Shams Press.

2. The decision shall be issued by a competent national administrative authority.

3. The decision shall have legal effect and achieve legal status for a person.

4. The decision shall be final.

First: The decision concerns an administrative activity.

The administrative decision is a legal act, and therefore the material works do not fall within the decision as this activity does not create, modify or abolish legal centers.

The decision of the High Court of Justice No. 177/96 (to remove the student from the school and ask him to join the commercial branch is a material and correction work and is not an administrative decision in the sense intended and does not accept the appeal on the grounds of cancellation. Status of the student and the statement of the instructions in force Administrative decisions in the legal sense intended [1]. Expression of will may be explicit in writing or by word and can be implicit expression through the silence of the administration.

One of the applications of tacit silence is to accept the resignation that has been submitted for more than thirty days without an explicit decision to accept, reject or postpone the decision. It also refused to accept the appeal of the decision, which has been submitted sixty days without a response from the competent authority. The administrative decision shall be issued by an individual will and this distinguishes the administrative decision from the administrative contract.

[1] **Supreme Court Decision No. 177/96 dated 8/4/1997 Journal of the Bar Association of 1997, p. 4337.**

Second: The decision shall be issued by a competent national administrative authority.

The administrative decision shall be issued by a national administrative body, and this shall be determined by the body that issued the decision. The administration shall make the decision, and it shall be national of legal persons to whom the administrative status applies. The decision of the Supreme Court of Justice No. 87/68 (the decision issued by the company is not considered an administrative decision in the legal sense because it requires the administrative decision that may be challenged on the grounds of cancellation to be issued by legal persons)[1]. The competent authority shall be in accordance with the laws to issue this decision. The Supreme Court of Justice decision No. 6 of 1978 stipulates that (an administrative appealable decision must be issued by an administrative authority with its public authority under the law and not under the contract).[2]

The decision must be made by a national authority where the Supreme Court of Justice decision No. 119 of 1973 states (the cancellation case against a decision of a foreign embassy shall not be considered as the embassy is part of a foreign country).[3]

3. The decision shall have legal effect and achieve legal status for a person.

The decision shall have legal effect and achieve legal status for a person

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[1] Supreme Court Decision No. 87 of 1968, Journal of the Bar Association, 1969, p. 1487.

[2] Supreme Court Decision No. 17 of 1965, Journal of the Bar Association, 1967, p. 63.

[3] Supreme Court Decision No. 119 of 1973, Journal of the Bar Association, 1974, p. 390.

Therefore, a decision that does not produce an effect, as is the case in the preliminary proceedings or inquiries, notices and notices, more precisely, the decision issued must be the title of the truth in what it was issued for.[1]

In the view of the jurisprudence[2]: the impact of the administrative decision may not be the establishment of the right or the abolition of legal status, but merely it has an attitude and justifies the decision to refuse a particular license, it reflects the will of the administration to keep the legal status unchanged.

4. The decision shall be final:

The final decision is a decision that does not accept an appeal before a higher body of appeal, which would have an immediate effect.[3] It must be made by a body with full jurisdiction for all elements of its existence.

The Supreme Court of Justice states (the administrative decision that may be appealed is the final executive decision)[4]. Article (5) of the Jordanian Administrative Judiciary Law No. 27 of 2014 explicitly states: (The Administrative Court shall have exclusive jurisdiction to hear all appeals relating to final administrative decisions).

Topic (2): the special data in the statement of claim of administrative lawsuit.

The Law of Administrative judiciary contains special conditions in terms of the data of the lawsuit before the Administrative Court. These

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[1] Supreme Court of Justice Decision No. 346 of 2004, Journal of the Bar Association, 2005, p.

[2] Hamdi Al-Qablat, Administrative Judiciary, p. 223.

[3] Omar Shweiki, Administrative Judiciary, Dar Al-Thaqafa, Amman, 2011, p. 199.

[4] Decree No. 45 of 1985. Journal of the Bar Association of 1986.

data are those of the person who signs the lawsuit and begins to appear before the court. The other aspects are in the form of the case list and its annexes. The third aspect is in terms of the list of responses and the facts created after the lawsuit is filed. This is what will be discussed in these sections:

Section (1): the formal conditions for those who sign the lawsuit:

The law stipulates important formal aspects of those who initiate administrative proceedings before the Administrative Court.

Conditions for who signs the statement of claim :

The claim must be signed before the Administrative Court by a practicing lawyer.

This requirement is contained in Article 9 of the Jordanian Judicial Law[1] (a) subject to the provisions of the Chief Administrative Prosecutor and his assistants: 1. The summons must be signed by a lawyer .....)

A lawyer is a person who has acquired the status of a legal profession after joining the Bar Association, completing the training requirements and a decision from the Bar Association was issued as a practicing lawyer.

2. A lawyer shall be a practicing lawyer for a period of not less than five years:

This requirement is evident through Article 9 (a) (The summons must be signed by a lawyer who has practiced law for at least five years.

[1] **Jordanian Administrative Judiciary Law No. 27 of 2014**

The exception to these conditions is that those who have signed the summons must be included in the same article" "9 (or he has worked in a judicial position for a similar period before practicing law). This includes those who have served in the judiciary for five years before filing the lawsuit and retired from the service because the judge is already exempted from training in legal works.

Section (2): the formal conditions of the administrative lawsuit and its attachments:

The formalities of the statement of claim will be discussed in addition to its attachments.

Part (I): Conditions of the Administrative Lawsuit

Jordanian law stipulated several formal requirements administrative lawsuit, which must be adhered to, and if omitted, this will lead to the non-acceptance of the case in form[1]. These conditions are:

First: The name of the court to which the appeal is submitted:

The name of the court of the court to which the appeal is submitted must be mentioned because it relates to the specific jurisdiction of the court. After the determination of the competent court, the summons shall be printed. Article 9 of the Jordanian Administrative Judiciary Law stipulates that: (the summons of a lawsuit filed before the court must be clearly printed, be printed on one side of each paper.

It seems that the legislator stresses on this condition where the concept of printing means the use of a tool for printing rather than handwriting and that it must be printed on one side of the paper only.

[1] **Jordanian Administrative Judiciary Law**

the researcher 's point of view is that this restriction is a kind of arbitrariness of the legislator as the legislator had to require writing only and make an option for those who want to print more clearly.

Second: The full name of the summoner, his status, place of work and place of residence:

This requirement is in line with the requirements for filing a claim in general. The case is a personal legal proceeding and the plaintiff is the stakeholder, who is legally competent. The summons must be filed in his name, even if he has appointed a lawyer on his behalf or has authorized a person to appoint a lawyer to act on his behalf. There is no difference if the plaintiff is a natural or legal person and there is no difference if the lawsuit is filed by one or several persons. Article "9" of the Jordanian Administrative Judiciary Law stipulates this requirement (9 / B / 2) to include the full name of the summoner, his description and the place of his residence .

Place of his residence and place of work are necessary for the purposes of judicial notifications when needed.[1]

Third: The name of the defendant and his status clearly described

Usually, the name of the defendant is the name of the issuer of the decision. Failure to identify the party that issued the decision leads to the dismissal of the case in form.

The decision of the High Court of Justice confirms this requirement in decision No. 536/2004 (since the appeal of this case is directed against the decision of the Security Affairs Committee, and since the defendants were the Legal Committee and the Commission for the Settlement of

[1] **Abdel Fattah Hassan, Administrative Judiciary, Dar Al-Nahda, Egypt, 1979, p. 450.**

Rights; they did not make the decision and did not participate in its issuance, so the Committees are not considered adversaries to the plaintiff, which makes the case rejected in the form due to non-existence of litigation.[1]

Fourth: The subject of the lawsuit:

Regarding the subject of the lawsuit, the formal requirements came with three elements:

First: Summary of facts. Second: the content of the resolution. Third: the requests that the plaintiff wants. Summary of the facts of the case are the set of facts on which the plaintiff rely and which are derived from the source of the right. Source means the reasons that establish and decide a right.

When the plaintiff appeals the administrative decision, he has legal facts that give him the right to reinstate the situation because there would be violation of the law and powers[2]. When the claimant claims compensation, it is based on the damage caused by the unjust decision against him.

Article 9 (b) (3) stipulates that the right shall be included in the proceedings. Since the administrative decision is an expression of the sole will of an administrative authority with a view to having a certain legal effect, the substance of the decision is the effect of this decision, which has led to appeal to the competent court.

As for requests, Article (9 / B / 3) stipulates (and the reasons for the appeal and the specific requests of the claimant from his case). This

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[1] Supreme Court Decision No. 536/2004, Journal of the Bar Association, 2005, p. 801.

[2] Mohamed Hafez, Administrative Judiciary, Dar Al-Nahda Al-Arabiyah, Cairo, 1979, p 350

requirement is of the utmost importance because the most important is the final judgment, which is what the court decides upon requests, because the judge cannot judge more than what the litigants request, since they determine the fate of the dispute.

Part (II): Requirements for Attachments to a lawsuit

The law requires several conditions to be met in the attachments of a lawsuit that vary according to the type of such attachments in terms of written evidence, personal evidence, or written evidence held by the opponent or others as follows:

First: written evidence

The plaintiff shall submit the written evidence on which the claim is based upon the filing of the case. Article 10 / A of the Jordanian Judicial Law stipulates that the plaintiff should enclose the following:

1. The written evidence on which he /she relies in his claim certified as authentic and attached to the list of elements of such evidence. The original written evidence must be presented. If he is unable to do so, the attorney must certify that it is identical to the original (true copy). Written evidence is any written proof issued either as an official or ordinary document signed or a certified copy by the adversary or written correspondence and in a manner that is readable, specific and relevant to the subject dispute.[1]

Second: Personal Evidence

Personal evidence is testimony through witnesses before the court to testify material facts that may be substantiated by them. The text of Article 10/2 of the Jordanian Administrative Judiciary Law stipulates

[1] **Mahmoud al-Kilani, evidence and implementation, Dar Al-Thaqafah, 2010, p 100.**

(a list of the names of witnesses whose testimonies are desired to be heard by him (plaintiff) to prove his claim and their full addresses). The testimony is: information of a person other than the parties to the litigation before the courts of an incident that has occurred from another person(s) and entails a right of others.

The testimony depends on what the witness sees and hears. Jordanian law allowed only indirect testimony based on hearing except in special cases (Article 39) of the Jordanian Evidence Law. These cases include proof of death, descent and endowment to a charity. This was confirmed by the Court of Cassation in its decision No. 452/76 (that the certificate based on the hearing is inadmissible to prove the fact that the leased company has abandoned the pay to another company).

The value of the certificate depends on the conviction of the court, where the decisions of the Court of Cassation No. 748/87, 430/83 and 96/64

(The estimation of the value of the testimony in terms of the fairness of witnesses and the weighting of evidence over another are matters of court conviction pursuant to the provisions of the Evidence Act and are therefore not subject to the control of the Court of Cassation)[1]. The cases in which the testimony of witnesses may be proved are: (1) If the principle of proof is found in writing; (2) If the creditor loses his written document for a reason beyond his control;(3) If the contract is challenged as prohibited by law or contrary to public order or morals, and (4) If there is a material or literary impediment to obtaining written evidence, and in all matters relating to the testimony, it must be

[1] **Journal of the Bar Association for the years 1986, 1987 and 1997.**

in accordance with the Evidence Law in terms of those who are prohibited from performing the testimony and the testimony procedures before the courts.[1]

Third: The written evidence found in the possession of the opponent or a third party

The law did not stand idly by in the face of intransigence on the part of the adversary or a third party regarding its refusal to submit documents and instruments under in his/her possession for the sake of justice in order to obtain proof of the right before the judiciary. Adversary means a person who is a litigant in the case, a third party means a person who is not an adversary in the case. Article 10/4 of the Jordanian Judicial Law stipulates (a list of the written evidence in the possession of the opponent or third party to be specified in a specific manner and the entity it has to be directly related to the case and productive in its proof …)

Through the text it is clear that there are formal conditions to accept the written evidence held by the opponent or a third party, namely:

1. Evidence must be in a written list independent of the other evidence portfolio.

2. This evidence should be directly related to the administrative case.

3. Such evidence shall be effective in establishing the case.

4. The entity that possesses the evidence has refrained from submitting , providing a copy of it, describing it or providing it after the claimant has filled his claim, and the legal period has elapsed upon providing it.

5. It must be mentioned and as far as he knows in detail about it.

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[1] Al-Kilani, op.cit., P. 110.

6. The Court shall issue a decision accepting this evidence.

The penalties for non-submission of the document and non-compliance with the court were not provided for in the Jordanian Administrative Law. Therefore, the provisions of Article 24 of the Jordanian Evidence Law apply which stipulates that "If the litigant fails to submit the document on the date specified by the court or fails to do so, the document presented by his opponent shall be deemed to be true in conformity with its origin. If the opponent has not provided a copy of the document, his says may be approved in form and substance.[1]

The third requirement: the formal conditions related to the submission of the answer list and the updated facts

This aspect of the formal requirements of the administrative case includes the conditions for submitting the answer list, the special rules for the notification of the answer list, the submission of a reply to it, the conditions for the new facts after filing the case, and the obligation of the parties to provide an explanatory list.

Section (3): The formal requirements for counter –plea

This aspect of the formal requirements of the administrative lawsuit includes the conditions for submitting the counter –plea, the special rules for the notification of the counter –plea, the submission of a reply to it, the conditions for the new facts after filing the case, and the obligation of the parties to provide an explanatory list.

First: The conditions for submitting counter –plea

[1] **Al-Kilani, op.cit., P. 113.**

The counter –plea is the response that the defendant shows on statement of claim, either by denial or by giving legal arguments to respond to the lawsuit.

The Jordanian law gave the defendant the right to submit the counter –plea in the administrative lawsuit. Article (11) of the Jordanian Administrative Judiciary Law states: (a) The defendant may submit a counter –plea on the summons within fifteen days from the day following the date of notification of the summons. The Head of the Administrative Court may extend this period for a period not exceeding ten days at the request of the defendant, provided that the application is submitted with explanation within the original period for submitting the counter –plea. The other formal requirement in the counter –plea is that it must be signed by a lawyer who meets the same conditions as those who submit the summons.[1]

The third formal requirement in the counter –plea is that stipulated in Article 11, paragraph (c) (The provisions of the same Law of Procedure stipulated in this Law shall apply to the Answer List and the submission of attachments).

Second: Requirements for notifying and responding to the plaintiff's counter –plea.

Jordanian law established a formal control to enable the plaintiff to see what the defendant presented and to provide a response. Article 12 of the Jordanian Judiciary Law stipulates: (a) The counter –plea and its annexes shall be communicated to the summoner within ten days from

[1] **Suleiman Al-Tamawi, Administrative Judiciary, Dar Al-Fikr Al-Arabi, 1971, p. 514.**

the day following the date of the notification, in addition to its attachments and to provide a response).

We find that the formal requirement concerns: First: the summoner must be informed of counter –plea provided by the defendant. Second: The summoner has the right to submit a reply to the counter –plea and its attachments within ten days from the date of notification. Otherwise, he has no right to give any response to the counter –plea, but he has the right to register the objection and present the arguments.[1]

Third: The formal requirements related to the new facts after filing the lawsuit.

Due to the specificity of the case, Article 12 of the Administrative Judicial Law provides for an exception that gave the court the power to invite the plaintiff to explain his claim. (B) The Administrative Court may, on its own initiative, invite the plaintiff, not the defendant, to explain his claim. The court may reject the case if it considers it unnecessary.)

This right of the administrative court is not grated to the judge in civil disputes, so this was enacted in order to reduce the burden on the court. The researcher believes that this exception is not justified because the judicial facility is available to all and everyone is entitled to a judicial decision.

Article (13) of the Jordanian Administrative Judiciary Law stipulates that (a) Neither the plaintiff nor the defendant may submit or report during the hearing of the case before the Administrative Court any facts , reasons or evidence that have not been included in the summons

[1] **Suad al-Sharqawi, Dar Al-Nahda Al-Arabiyah, Cairo, 1976, p. 115.**

or counter –plea). Therefore, we find that the litigants may not submit any facts, reasons or evidence that emerged after filing the lawsuit or was not mentioned in the summons.[1]

Fourth: Explanatory Regulations:

Article (14) of the Jordanian Judicial Law stipulates as follows: (a) The Administrative Court may instruct the parties or any of them in a case filed before it to submit one or more additional regulations to clarify or elaborate any of the facts and reasons mentioned in the summons and the response in counter –plea, either before considering the proceedings or at any stage).

This exception came in order for the court to reach the truth and not to abide by the formality stipulated in the law, but the legislation established a formal control for this procedure, as stated in paragraph (b) of the same Article, namely:

1. If no additional regulations are submitted within the time limit specified by the administrative tribunal, those matters which it has requested shall be deemed to be outside the facts and the reasons for the case.

2. The party from which it has requested and who has not submitted it shall not invoke it in its lawsuit or provide any evidence thereon.[2]

Topic (3): the formal requirements in the procedures of the registration of the administrative case

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[1] Ali Khattar Shatnawi, Encyclopedia of Administrative Justice, Dar Al-Thaqafa,, 2012, p. 567.

[2] Hosni Darwish Abdel Hamid, Administrative Decision, PhD Thesis, Cairo University, 1978, p. 293.

Section (1): the stages of the registration of the case at the Administrative Court:

These stages include the formal and procedural aspects of filing the case before the Administrative Court.

First: Refer to the Director of the Office of the President in order to specify the fees.

Second: Refer to the registration officer to issue a receipt and pay the legal fees.

Third: Prepare copies of the notification at the number of defendants.

Fourth: Add the evidences after approval and the list of evidence separated from the statement of claim.

Fifth: A copy of the power of attorney granted to the lawyer (the agent of the summoner) in order to be kept with copies of the notification.

Sixth: A request to suspend execution shall be submitted by an urgent request and in an independent file to the President of the Bureau.

Seventh: Bring pleading stamps (syndicate) worth (60) piasters (half dinars stamps will be placed on the power of attorney and 10 piasters on the case list (on court's copy only).

Eighth: After the registration of the lawsuit, if the summoner has evidence in the possession of a third party, a summons shall be submitted to the court to obtain such evidence upon the registration of the lawsuit directly.

Compliance to the regulatory instructions to receive the lawsuit, namely:

1. Lawyers shall observe the circumstances of the court and attempt to pay the fees according to the following times 9-9.30am and 10.30-2pm.

2. Submitting the counter –plea within fifteen days from the day following the date of notification of the lawsuit.

3. Submission of the reply to counter –plea within ten days from the day following the date of the counter –plea.

Section (2): the stages of registration the appeal of the decision of the Administrative Court with the Supreme Administrative Court

First: The amount of the fees to appeal the Administrative Court's decision with the Supreme Administrative Court is the same as the fees paid when registering the case with the Administrative Court.

Second: A presentation fee of JD (20) shall be collected for power of attorney.

Third: After paying the fee, the appeal shall be submitted to the competent employee.

Fourth: The Appellee shall submit the reply to the appeal within fifteen days from the next day of being notified of the appeal list, and a presentation fee of JD (20) shall be collected for power of attorney.

Fifth: The appellant shall submit a counter –plea within ten days from the day following the notification.

Sixth: The Administrative Court shall send the case file to the Supreme Administrative Court after the completion of the exchange of counter –plea from both parties.

Section(3): Total requirements in Legal Periods before the Administrative Court:

1. The period for submitting the list of lawsuit is within (60) days from the day following the notification of the administrative decision or being aware thereof (Article 8 of the Jordanian Administrative Judicial Law).

2. The period for submitting the answer list on the counter –plea shall be within (15) days from the day following the notification (Article 11).

3. The Court may extend the period of submission of the counter –plea for a period not exceeding (10) days, provided that the application is submitted within the original period of submission of the counter –plea (Article 121).

4. The period of submission of the counter –plea is within (10) days from the day following the notification of the counter –plea (Article 11).

5. The period of appeal is within 60 days from the day following the notification or being aware thereof.

6. The period of appeal of result of the obligatory grievance is within (60) days from the day following the notification or being aware thereof.

7. The period of appeal against the decision of refusal or refraining from taking a decision is within (30) days starting from the day following the submission of a written request to the competent authority.

8. An appeal against non-existent decisions shall be accepted at any time without being bound by a deadline.

9. The appeal shall be suspended in the following cases:

1.Force Majeure.

2 .Filing the lawsuit to a court that is not competent provided that it is filed during the specified period of time.

3. Submit a request to postpone payment of fees provided that the application is submitted within the specified period of time.

Section (4): Works that are not under the jurisdiction of the Administrative Court:

1. The acts of sovereignty.

2. Judicial orders. Such as: Imprisonment order, release order, travel ban, etc. issued by the judge.

3. Personal material works of employees. This means any work or material behavior of the employee and of course is subject to other laws.

Part (I): Reasons for Appeal

1. Defect in the Jurisdiction of issuing the decision. This means that the decision is issued by a person who is not competent or unauthorized or from a body not competent to issue such a decision.

2. Defect of form. It is intended for formal matters such as the absence of the name of the issuer or his/her signature.

3. Defect of the cause. It is intended to be invalid, unacceptable, or misplaced.

4. Defect of breaching the law. This means the issuance of the decision contrary to law, regulation or instructions.

5. Abuse of office. It is intended for personal benefit or harming a person.[1]

Section (2): Reasons Unacceptable to Administrative lawsuit

1. Non-competency.

2.Non-existence of litigation.

3 .Lack of capacity.

4. Non-existence of interest.

5. End of period.

6. The absence of an administrative decision is subject to appeal.

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[1] Nawaf Kanaan, Administrative Judiciary, p. 259.

7. Power of attorney.

8. Lack of specific facts.

9. Lack of specific reasons.

10. Lack of specific requests.

11. Failure to submit counter –plea attached to the lawsuit.

12. Non-payment of fees.

13. Acts of sovereignty.

14. Judicial acts.[1]

Conclusion

The Jordanian administrative judiciary has undergone many stages of development, as it was part of the regular judiciary and was independent by a special administrative judiciary under the 1952 constitution. The Jordanian administrative judiciary remained under the umbrella of the regular judiciary, and the Court of Cassation relied on it as an administrative court. The jurisdiction of High Court of Justice has been extended to include the cancellation and compensation judiciary. The administrative judiciary remained the same until the issuance of the Administrative Judiciary Law No. 27 of 2014, which decided to establish the Administrative Court as a first instance and the Supreme Administrative Court as a second instance administrative court. The Jordanian administrative judiciary is clearly independent of the regular judiciary and its competence has expanded. Due to this development, there are new formalities to register the case before the administrative judiciary.

[1] **Majed Helou, Administrative Judiciary, p. 383.**

This research came to discuss the formal conditions for accepting the administrative lawsuit and it was necessary to address the formal conditions for registering the lawsuit in general in accordance with the provisions of the Code of Civil Procedure, as it is the general law for litigation procedures and is referred to in what is not stipulated in the Law of Administrative Justice. The Code of Civil Procedure stipulated several statements in the statement of claim in general: the name of the court, the name of the plaintiff, his status, place of work and residence, the name of the defendant, his status, place of work and residence, the subject of the lawsuit, the facts of the case, its supporting documents, and the signature of the plaintiff or his agent.

With reference to the Administrative Judicial Law, the requirement of interest, which falls within the special conditions of the administrative lawsuit, was found. The applicant must have and interest and its features must be a personal, direct and existing, as a lawsuit must be signed by a lawyer who has practiced law for at least five years.

The administrative law stipulates the formal data in the administrative lawsuit as follows: First: The conditions related to the statement of administrative lawsuit and its attachments: Written evidence, personal evidence and independent request for evidence under the control of the opponent or third party. Second: The special formal conditions in the counter –plea and the updated facts are to be submitted within fifteen days from the day following the date of notification of the summons and the legislator gave the right to the summoner to respond to the counter –plea within ten days from the day following the date of the notification. As for the new facts, the plaintiff or the defendant may not present or

report any facts, reasons or evidences during the hearing of the case unless they are mentioned in the lawsuit.

On the practical leve; of the application of the law there are formal procedures for recording the administrative case in terms of how to register the case after the approval of the Head of the Court , record it in the registry , put the necessary copies of the notification and payment of fees.

The most important formal aspects of the Administrative Judicial Law are the legal period. The law stipulates that the lawsuit must be submitted within sixty days from the day following the notification of the administrative decision and that the counter –plea should be submitted within fifteen days from the day following the notification of the lawsuit.

It is a formal requirement that the administrative court be competent to consider the dispute, so the case is refused if the subject of the appeal relates to acts of sovereignty, judicial orders or material acts of persons. The reasons for the appeal may be a defect in the competence of issuing the decision, a defect in form, a defect in the reason, or a breach of the law or abuse of office.

Results

1.The administrative judiciary has witnessed different phases and was within the jurisdiction of the Court of Cassation. Subsequently, the Supreme Court of Justice was established as a court of first instance until enacting Law No. 27 of 2014, which made the administrative judiciary independent and on within levels ; the Administrative Court and Administrative Supreme Court, and extended its jurisdiction to include cancellation and compensation.

2. There are formal requirements for the registration of the case in general and administrative case in particular which are compatible with each other in terms of the name of the court , the name of the plaintiff , the name of the defendant , the subject of the dispute , the facts , requests and signature, but the Administrative Judicial Law stipulated that the list of administrative lawsuit must be signed by a lawyer who practiced law not less than five years.

3. There is a compatibility between the requirement of interest between the regular and administrative judiciary, but the administrative judiciary gave a broader concept of the interest so as to tolerate this requirement on the grounds that it would affect the future right of the appellant as a result of the appealed decision.

4. The Administrative Judicial Law requested that the statement of claim should be submitted before the Administrative Court within sixty days from the day following the notification of the administrative decision or certain being aware thereof.

5. The Administrative Judicial Law stipulated that the counter –plea must be submitted within fifteen days from the day following the notification.

6. The legal periods are the periods of the lapse of the right in relation to public order.

Recommendations

1. The researcher recommends the law to explicitly stipulate that any deficiency in the Administrative Judicial Law should be referred to the procedures of the Code of Civil Procedure.

2. The researcher recommends mitigating the requirement that" the administrative lawsuit should be signed before the administrative court by a lawyer only to enable lawyers to appeal before the court.

3.The researcher recommends the abolition of legal fees-like labor cases- exempted from paying fees to enable the employees to resort to the judiciary to complain against administrative decisions.

4. The researcher recommends that the law to explicitly stipulate the authority of the court to summon the appellant and question him/her personally to determine the nature of the grievance.

5 - The researcher recommends the researchers to become interested in carrying out further study on the Jordanian Administrative Justice Law.

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6. Suleiman Al-Tamawi, The General Theory of Administrative Decisions, 5 th edition, p. 170, Ain Shams Press.

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8. Ali Khattar Shatnawi, Encyclopedia of Administrative Justice, Dar Al-Thaqafa, 2012.

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11. Jordanian Administrative Judiciary Law No. 27 of 2014.

12. Supreme Administrative Court Decision No. 180 of 2015.

13. Decree No. 45 of 1985. Journal of Bar Association of 1986.

14. Supreme Court of Justice Decision No. 119 of 1973, Journal of Bar Association, 1974.

15. Supreme Court of Justice Decision No. 17 of 1965, Journal of Bar Association, 1967.

16. Supreme Court of Justice Decision No. 177/96 dated 8/4/1997 Journal of the Bar Association of 1997.

17. Supreme Court of Justice Decision No. 346 of 2004, Journal of Bar Association, 2005.

18. Supreme Court of Justice Decision No. 536/2004 Journal of Bar Association 2005.

19. Supreme Court of Justice Decision No. 87 of 1968, Journal of Bar Association, 1969.

20. Majed El Helou, Administrative Judiciary.

21. Journal of the Bar Association of 1990.

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26. Mohamed Hafez, Administrative Judiciary, Dar Al-Nahda Al-Araiah, Cairo, 1979.

27. Mohamed Abdel Salam Mokhles, Theory of Interest in the Abolition Law, PhD Thesis, Ain Shams University, 1981.

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DISTRIBUTION OF THE JURISDICTION OF GOVERNMENT AUTHORITIES ON GRANTING THE PERMIT FOR THE DEVELOPMENT OF A LAND MANAGEMENT PLAN IN UKRAINE: ADMINISTRATIVE AND LEGAL

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Abstract

The article addresses the relevant issue on the peculiarities of providing legislative framework for authorities concerning the decision making in the process of a land allocation in ownership for Ukrainian citizens as the potential owners and non-residents as the prospective investors. The aim of the article is to delimitate the boundaries of the subject-matter jurisdiction of the government bodies and local government authorities with regard to granting the permit for the development of a land management plan by the citizens in Ukraine. Clarifying the range of entities authorized to grant citizens the permit (rejection) for the development of a land management plan for a land plot allocation in Ukraine and also determination of their legal obligations which entirely facilitates the subject-matter jurisdiction became the outcomes of research. Separately, the study outlines the methods of law manipulations used by the local authorities to make a decision about granting so called "land allowance". Owing to the legal evaluation, it is possible to make a conclusion about unlawful actions of local self-government bodies regarding the current practice of changing the lawful schedule (frequency) of sessions held by the local government bodies (at least once a month), refusal to introduce the "land issue" on the session and unreasonable change of the chairman.

Keywords: administrative jurisdiction; land allocation; land legislation; land management; legal and administrative framework; local self-government bodies.

INTRODUCTION

Scientific, practical problems.

In the exercise of the constitutional right for the free land allocation every citizen of Ukraine faces a complicated bureaucratic process while applying to state or local government bodies. For the initial stage of the land management project it is obligatory to get a permission from the executive authority or local self-government body depending upon the location of the land plot. Giving permission or denial shall be issued to the applicant on grounds directly designated by the Land Code of Ukraine, with due regard for the provisions of the Law of Ukraine "On Administrative Services".[1] The land management project on land allocation is one of the types of documentation on land management (clause h part 2 of Article 25 of the Law of Ukraine "On Land Management"),[2] which is developed in the form of a scheme, project, working project or technical documentation (Part 1, Article 25 of the Law No 858-IV).[3]

The system analysis of the legal norms of land legislation (inter alia, Article 79-1 of the Land Code of Ukraine)[4] indicates that the

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[1] VRU (Verkhovna Rada of Ukraine). (2013). On Administrative Services. Law of Ukraine No. 5203-VI. *Information from the Verkhovna Rada of Ukraine*. 2013, 32: 409.

[2] VRU (Verkhovna Rada of Ukraine). (2003). On Land Management. Law of Ukraine No 858-IV. *Information from the Verkhovna Rada of Ukraine*. 2003, 36: 282.

[3] VRU (Verkhovna Rada of Ukraine). (2003). On Land Management. Law of Ukraine No 858-IV. *Information from the Verkhovna Rada of Ukraine*. 2003, 36: 282.

[4] VRU (Verkhovna Rada of Ukraine). (2001). Land Code of Ukraine. Law of Ukraine No 2768-III. *Information from the Verkhovna Rada of Ukraine*. 2002, 3-4: 27.

development of a land development project for the land allocation is necessary in case of change of the purpose of land plots or formation of new ones. Such a conclusion is also consistent with the provisions of Article 50 of the Law No 858-IV, which states that land development projects concerning the allotment of land plots shall be drawn up in case of changing the purpose of land plots or forming new ones. [1]

In the current circumstances of implementing the land reform in Ukraine and approaching to the opening of the land market, the citizens of Ukraine more and more often face the situations when their submissions to the government authorities with the request to allocate land plots free of charge do not find a relevant decision. In this case the authorities mainly either ignore the submissions or redirect them to other duty-bearers, give refusal, or drag out the application process with the aim to deny the citizen in advance.

Instead, according to the provisions of Article 118 part 7 of the Land Code of Ukraine,[2] public body that transfers land plots from public or communal ownership to private property according to jurisdictions determined in Article 122 of Law is obligated to examine the request for granting an appropriate permit within one month or a reasoned refusal for granting a permit by the relevant executive authority or local self-government body.

Namely, the land management plan is developed on the basis of the permission of the competent body that deals with the issue of land

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[1] VRU (Verkhovna Rada of Ukraine). (2003). On Land Management. Law of Ukraine No 858-IV. *Information from the Verkhovna Rada of Ukraine*. 2003, 36: 282.

[2] VRU (Verkhovna Rada of Ukraine). (2001). Land Code of Ukraine. Law of Ukraine No 2768-III. *Information from the Verkhovna Rada of Ukraine*. 2002, 3-4: 27.

transfers to citizens (establishing the jurisdiction to dispose a corresponding land plot). However, the main factors for establishing the jurisdiction of particular authorities that consider the issue of granting the permit and giving approval for the land management plan and land allocation will be the definitions: 1) forms of ownership of land plots or/and land belonging to a certain category (in particular, agricultural purpose); 2) earmarking (individual cottage construction); 3) status of the land plot according to its location in relation with administrative and territorial entities (in particular village, urban settlement, city etc.) 4) regarding state-owned land plots for agricultural use – availability (formation) of district state administration; 5) regarding land plots from the state-owned ones, existence/absence of powers of the Cabinet of Ministers of Ukraine.

At the same time, a variety of regulations of factors mentioned above, on the one hand, has a negative impact on citizens who intend to exercise their constitutional right to land (or to change its earmarking), on the other hand, creates conditions for unfair use of legal provisions by officials for creating circumstances that prevent citizens from realization of the right stated.

Although this problem is not new, its existence has been recognized by bureaucratic representatives of the small and large scales on the local and national levels, as well as public represented by scientists, non-governmental organizations and citizens, however, there is a lack of systematic information on distribution of legal obligations and rights between the public bodies that deal with permits for developing a land management project for land allocation. This issue remains extremely

relevant for foreign citizens who explore the land market in Ukraine with the aim to invest there in the future.

Purpose of the study.

As a consequence of the reasoning above and developing theoretical and applied approach according to which granting citizens the permit for the development of a land management plan for a land plot allocation should be recognized an administrative service,[1] the *purpose of the article* is to define the boundaries of the administrative jurisdiction of public authorities in granting the permit to citizens to develop a land management project in Ukraine. To that end the numerous tasks have been solved in the study, in particular specifying the range of entities authorised to resolve the issue mentioned above and their legal obligations.

The methods and materials of the research.

Positivism has become the methodological approach of this study, which is completely based on the research of current legislation and the main methods of the research are: generalizations and classifications that allowed to separate groups of authorities responsible for granting citizens the permit for the development of a land management plan for a land plot allocation; systematisation and legal analysis contributed to the allotment of legal provisions that have the power to decide on settling land-related issues; inductions and deductions helped to form the conclusions sufficient for the further use in legal enforcement and

[1] Pyvovar, Y., Pyvovar, I., Babyak, A., Nazar, Yu. & Ostrovskiy, S. (2019). Permission for the Development of a Land Management Plan for a Land Plot Allocation as an Administrative Service: a Theoretical Approach for Legal Practice. *Amazonia Investiga, 8*(22): 370-380.

scientific research. Legal acts, departmental acts, decisions of local self-government bodies, court decisions have become the research material of the study.

THE FIRST TOPIC
JURISDICTION OF LOCAL COUNCILS REGARDING GRANTING THE PERMIT FOR THE DEVELOPMENT OF A LAND MANAGEMENT PLAN FOR A LAND PLOT ALLOCATION

Legal analysis of provisions of the Land Code of Ukraine allows to separate the first group of legal entities authorized to solve land issues – village councils, urban settlement and city councils. Legal powers of these bodies in the field of land matters on the territory of villages, urban settlements and cities include: the disposal of the land plots of territorial communities; transfer land plots of communal property to the private property of citizens and legal entities in accordance with this Code; provision of land plots from the communal ownership in accordance with this Code; organization of the land management, coordination of the performance of local self-government bodies; ensuring control and protection over the use of communal property lands, compliance of land and environmental legislation; solution of other issues in the field of land relations according to the Law, etc. (Article 12).[1]

[1] VRU (Verkhovna Rada of Ukraine). (2001). Land Code of Ukraine. Law of Ukraine No 2768-III. *Information from the Verkhovna Rada of Ukraine*. 2002, 3-4: 27.

At the same time a special legislative act which regulates the exercise of the governance in territorial communities, in part 1 of Article 10 defines village, urban settlements and city councils as local self-government bodies which are entrusted with the representation of corresponding territorial communities and exercising on their behalf and in their interests the functions and authority of local self-government bodies, which are laid down by the Constitution of Ukraine, the above Act and other legislation.[1]

It should be pointed that this law also clearly regulates the form of work of this authority. Thus, paragraph 34 of Part 1 of Article 26 of Law No 280/97-VR determines that the decision on issues of land relations is made solely at plenary sessions of the village, urban settlement and city council.[2] In addition, the clear procedural requirements of Part 5 of Article 46 of Law No 280/97-VR, should be sited for further argumentation. It indicates that the session of the council is convened whenever necessary, but not less than once a quarter, and on issues of the land allocation and provision of permits in the sphere of economic activity - at least once a month.[3]

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[1] VRU (Verkhovna Rada of Ukraine). (1997). On Local Self-Government in Ukraine. Law of Ukraine No 280/97-VR. *Information from the Verkhovna Rada of Ukraine*. 1997, 24: 170.

[2] VRU (Verkhovna Rada of Ukraine). (1997). On Local Self-Government in Ukraine. Law of Ukraine No 280/97-VR. *Information from the Verkhovna Rada of Ukraine*. 1997, 24: 170.

[3] VRU (Verkhovna Rada of Ukraine). (1997). On Local Self-Government in Ukraine. Law of Ukraine No 280/97-VR. *Information from the Verkhovna Rada of Ukraine*. 1997, 24: 170.

Despite the uniqueness of the provision of law, in practice local self-government bodies in order to "refuse" to satisfy "the land application" quite often resort to the delay of sessions and consideration the corresponding land issue.

However, following the provision, we consider that the current legislation of Ukraine does not provide the right for the power entity to change the statutory regime (frequency) of sessions (at least once a month) in the case of arrival of documents for land allocation (in particular, request for permission to develop the land management plan for a land plot allocation for approval or adoption etc). In addition, the latest permit procedures are the parts of the "whole" – the process of the land allocation, that is why they are covered by the concept of "land allocation issues".

Another manipulation that is used by the local self-government bodies and causes public debates about lawfulness of decision on granting "the land permits" is holding the sessions by ambiguous officials. Therefore, the citizens initiate the courts to identify and check the fact of holding the session by the authorized person.

According to the general rule, examination of issue about granting the permit for the development of the land management project on the session of village, urban settlement, city councils shall be carried out with the adherence to the norms of the current legislation, which is an absolute ground for confirmation of the legality or cancellation of the decision of the council.

Village, urban settlement, city, chief according to Article 12 of the Law No 280/97-VR, is the main official of the territorial community of the corresponding village (voluntary association of residents of several

villages into one territorial community), urban settlement, city.[1] In accordance with paragraph 3, part 4, Article 42 of the Law No 280/97-VR it is the village, urban settlement, city chief who signs the decisions of the council and its executive committee.[2]

The village, urban settlement, city chief opens and conducts the session of the village, urban settlement and city councils and only in the cases established under Part 6 of Article 46 it can be done by the secretary of the council; session of the district in the city, district, regional council - the chairman of the council or the deputy chairman of the district in the city, the district council or the first deputy, the deputy chairman of the regional council respectively. [3]

Hence, a systematic analysis of the legal norms mentioned above leads to the conclusion that only the chairman of the local council is the authorized person to hold the session of the council; in other cases, chairmanship requires the necessary legal grounds for the application of part 6 of Article 46 of the Law No 280/97-VR.

Another potential risk that needs examination and concerns the exercise of the authority by the local self-government bodies is the potential possibility of failure to submit the issue for granting the permit for the land development project for the citizen during the

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[1] VRU (Verkhovna Rada of Ukraine). (1997). On Local Self-Government in Ukraine. Law of Ukraine No 280/97-VR. *Information from the Verkhovna Rada of Ukraine*. 1997, 24: 170.

[2] VRU. (1997). On Local Self-Government in Ukraine. Law of Ukraine No 280/97-VR. *Information from the Verkhovna Rada of Ukraine*. 1997, 24: 170.

[3] VRU. (1997). On Local Self-Government in Ukraine. Law of Ukraine No 280/97-VR. *Information from the Verkhovna Rada of Ukraine*. 1997, 24: 170.

plenary session. The relevance of such risks is confirmed by the existing court practice. Thus, in May 2016, the plaintiff applied the court with an administrative lawsuit against the Kiev Mayor V. Klitschko, Kyiv City Council, third party, Department of Land Resources of the executive body of the Kyiv City Council on the recognition of the illegal inaction of Kyiv Mayor V. Klitschko, which consisted of not submitting within one month (from the date of registration of petition) the issue on granting the permit for the land development project for several land plots.

Stated claims are motivated by the fact that a defendant, in violation of the requirements of the current legislation, did not reasonably include plaintiff's application for consideration at the plenary session of the Kyiv City Council.

The resolution of the Kyiv District Administrative Court of November 27, 2017, is left amended by the ruling of the Kyiv Administrative Court of Appeal of January 11, 2018, satisfied the administrative claim, which was also agreed by the Supreme Court as well as the panel of judges of the Administrative Court of Cassation.

The Supreme Court disagreed with the contentions of the cassation appeal that the plaintiff's petitions were not addressed directly to the Mayor and a failure to approve the plaintiff's request within a month to grant the permit for development of the land documentation did not violate his right because he was not deprived of the possibility of independently, without getting the permit, to order the development of relevant documentation.

The conclusion of the Supreme Court is the following: since the Kyiv mayor failed to submit and include none of the plaintiff's requests on

the agenda of the plenary session of the city council, the Mayor accepted the unlawful inactivity and violated the requirements of part seven of Article 118 of the Law, Article 42 of the Law of Ukraine "On Local Self-Government in Ukraine" and Article 4 of the Kyiv City Council Regulation.

The Kyiv City Council's failure to carry a resolution on the plaintiff's applications within the time limit enshrined in part seven of Article 118 of the Law of Ukraine places it in legal uncertainty, which is unacceptable within the meaning of the nature and principles of the rule of law and legitimacy and violates his constitutional rights regarding the constitutional rights Applying to the Local Self-Government Body".[1]

Therefore, in such a situation, the local councils and their officials should be guided by the position of the Supreme Court and not allow such cases to be recognized as unlawful inactions.

[1] **SC (Supreme Court). (2018). Resolution in Case No 826/8107/16. Retrieved from: http://reyestr.court.gov.ua/Review/73487448**

THE SECOND TOPIC
JURISDICTION OF LOCAL PUBLIC ADMINISTRATIONS FOR GRANTING PERMIT (REFUSAL) TO DEVELOP THE LAND MANAGEMENT PROJECT FOR LAND ALLOCATION

Another group of power entities under examination are local public administrations (district, regional ones).

According to part 3 of Article 122 of the Land Code of Ukraine the "land" jurisdiction of district state administrations and transfer land plots from state-owned ones expands to the property within villages and towns of district subordination for all needs such as: water management; construction of facilities related to the service for (schools, cultural institutions, hospitals, trade enterprises, etc.), taking into account the requirements of part seven of this article; individual cottage construction.[1]

According to part 6 of Article 122 of the Law of Ukraine regional public administrations transfer land plots from state-owned lands on their territory except the cases specified by parts three, four and eight of this article, to property or for use within the cities of regional subordination and outside localities and also land plots which are not parts of a particular district or, in cases, when a district public administration is not formed, for all needs. [2]

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[1] VRU (Verkhovna Rada of Ukraine). (2001). Land Code of Ukraine. Law of Ukraine No 2768-III. *Information from the Verkhovna Rada of Ukraine*. 2002, 3-4: 27.

[2] VRU (Verkhovna Rada of Ukraine). (2001). Land Code of Ukraine. Law of Ukraine No 2768-III. *Information from the Verkhovna Rada of Ukraine*. 2002, 3-4: 27.

Moreover, according to paragraph 7 of Article 13 of the Law of Ukraine No 586-XIV the issues that are resolved by local public administrations are: land use, natural resources, environmental protection, paragraph 2 of Article 21 of this Law, the disposal of land of the state property according to this law belongs to the powers in the field of land disposal and protection.[1]

As a result of the analysis and systematization of provisions of land legislation (in particular, Articles 17, 122 of the Land Code of Ukraine[2]), statutory legal acts (paragraphs 1, 7 of Article 13 of the Law No 586-XIV[3] and the Regulations on the State Geocadastre approved by the Cabinet of Ministers of Ukraine from 15.01.2015 no 15,[4] the Regulations on the Main Directorate of the State Geocadastre in the region approved by the order of the Ministry of Agrarian Policy and Food of Ukraine dated September 29, 2016 No 333[5]) it is possible to

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[1] **VRU (Verkhovna Rada of Ukraine). (1999). On Local Public Administrations. Law of Ukraine No 586-XIV. *Information from the Verkhovna Rada of Ukraine*. 1999, 20-21:190.**

[2] **VRU (Verkhovna Rada of Ukraine). (2001). Land Code of Ukraine. Law of Ukraine No 2768-III. *Information from the Verkhovna Rada of Ukraine*. 2002, 3-4: 27.**

[3] **VRU (Verkhovna Rada of Ukraine). (1999). On Local Public Administrations. Law of Ukraine No 586-XIV. *Information from the Verkhovna Rada of Ukraine*. 1999, 20-21:190.**

[4] **CMU (Cabinet of Ministers of Ukraine). (2015). Regulations on the State Geocadastre. Decree No 15, dated January 15, 2015. Retrieved from: https://zakon.rada.gov.ua/laws/show/15-2015-%D0%BF/ed20190917**

[5] **MAPFU (Ministry of Agrarian Policy and Food of Ukraine). (2016). Regulations on the Main Directorate of the State Geocadastre in the region. Order No 333, dated September 29, 2016. Retrieved from: https://zakon.rada.gov.ua/laws/show/z1391-16**

make a conclusion that the separation of competence of district public administrations and central executive body that deals with land resources in the field of land relations and its territorial bodies regarding land use of state property beyond the locality is conducted depending upon the designation of such a land plot.

In this group of entities can be distinguished Kyiv and Sevastopol city public administrations, whose jurisdiction in land relations is extended due to the special statutory acts.

Part 2 of Article 118 and part 2 of Article 140 of the Constitution of Ukraine has been established that the peculiarities of the exercise of executive power and local self-government in the cities of Kyiv and Sevastopol are determined by separate laws of Ukraine.[1]

The Law of Ukraine "On the Capital of Ukraine - Kyiv Hero City" denotes the special status of the Kyiv city as the capital of Ukraine, the peculiarities of the executive power and local self-government in the city according to the Constitution of Ukraine and the laws of Ukraine.[2]

The official interpretation of certain provisions of this Law was provided by the Constitutional Court of Ukraine. In particular, the decision of December 25, 2003 No 21-rp/2003, which states that the Kyiv City State Administration is the only institution, in terms of organization, that performs the functions of the executive body of the Kyiv City Council and, at the same time, the functions of the local

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[1] VRU (Verkhovna Rada of Ukraine). (1996). Constitution of Ukraine. Law of Ukraine No 254k/96-VR. *Information from the Verkhovna Rada of Ukraine*. 1996, 30: 141.

[2] VRU (Verkhovna Rada of Ukraine). (1999). On the Capital of Ukraine - Kyiv Hero City. Law of Ukraine No 401-XIV. *Information from the Verkhovna Rada of Ukraine*. 1999, 11: 79.

executive authority. This body is accountable to and controlled by the Kyiv City Council, on aspects related to the local self-government, and on the exercise of powers at the executive level - by the Cabinet of Ministers of Ukraine.[1]

According to sub-paragraph 3.1 paragraph 3 of the Regulation on the Department of Land Resources of the Executive Body of the Kyiv City Council (Kyiv City Public Administration), approved by the decision of the Kyiv City Council of December 19, 2002 No 182/342 (as amended by the decision of the Kyiv City Council of March 10, 2016 No 144/144), this division ensures the compliance of the powers of the Kyiv City Council and the executive body of the Kyiv City Council (Kyiv City Public Administration) on the use and protection of the land of communal property of the territorial community of Kyiv city and state-owned land within the city of Kyiv, land reforms, as well as performing other powers delegated by the Kyiv City Council and the executive body of the Kyiv City Council (Kyiv City Public Administration),[2] sub-paragraph 3.11 paragraph 3 develops draft decisions of the Kyiv City Council according to the established procedure, prepares and submits the instructions of Head of the Kyiv City, the instructions of the executive body of the Kyiv City Council (Kyiv City Public Administration), and submits its conclusions on the following issues:

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[1] CCU (Constitutional Court of Ukraine). (2003). Decision on Case No 1-45/2003. *Official Bulletin of Ukraine*. 2003, 52(1): 318.

[2] KCC (Kyiv City Council). (2002). Regulation on the Department of Land Resources of the Executive Body of the Kyiv City Council (Kyiv City Public Administration). Decision No 182/342, dated December 19, 2002. Retrieved from: https://ips.ligazakon.net/document/view/MR020568?an=971&ed=2016_03_10

land management within the city of Kyiv; transfer of land plots to the property of citizens and legal entities; provision of land for use, withdrawal of land plots, land sales, land acquisition for public needs of the city; release of self-occupied land plots; establishment and change of boundaries of districts in the city in the order established by the legislation of Ukraine, delineation and modifying the boundaries of districts in the city in accordance with the legislation of Ukraine.[1]

In accordance with the Constitution of Ukraine, the Land Code of Ukraine, and Article 26 of the Law of Ukraine "On Local Self-Government in Ukraine", Article 22 of the Law of Ukraine "On the Capital of Ukraine - Hero City Kyiv", in order to determine the peculiarities of land use in the city of Kyiv as the capital of Ukraine the council approved the "Procedure for Acquisition of Land Rights from Communal Property Lands in the City of Kiev" by the decision of the Kyiv City Council dated April 20, 2017 No 241/2463, which was designed with the view to resolving the procedure for realizing the rights to land by physical and legal entities from communal property lands of the territorial community of Kyiv.[2]

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[1] KCC (Kyiv City Council). (2002). Regulation on the Department of Land Resources of the Executive Body of the Kyiv City Council (Kyiv City Public Administration). Decision No 182/342, dated December 19, 2002. Retrieved from: https://ips.ligazakon.net/document/view/MR020568?an=971&ed=2016_03_10

[2] KCC (Kyiv City Council). (2017). On Procedure for Acquisition of Land Rights from Communal Property Lands in the City of Kiev. Decision No 241/2463, dated April 20, 2017. Retrieved from: http://kmr.ligazakon.ua/SITE2/l_docki2.nsf/alldocWWW/D6E76505026C114EC225813100370781?OpenDocument

Thus, there is a definition of term in clause 1.2 Procedure No 241/2463 "the permit of the Kyiv City Council to develop a land management project for a land allocation" as a decision reached at the plenary meeting of the Kyiv City Council in the manner prescribed by the Land Code of Ukraine and the present Procedure. An integral part of the permit is an application with a planning-template, made on an appropriate scale, indicating the approximate boundaries, area and location of the land plot, its special purpose and the account code in the city land cadastre. [1]

The applications (declarations) provided under the designated Procedure shall be submitted to the Kyiv City Council through the Kyiv City Council's Reception Office on Land Issues (section 1.3 of paragraph 1 of Procedure No 241/2463). The Kyiv City Land Reception Council is subordinated to the Land Resources Department, which takes appropriate measures for the logistical support of the reception area (clause1.2. paragraph 1 of Procedure No 241/2463).

The procedure for obtaining the permission of the Kyiv City Council, the resolution (assignment) of the Kyiv city mayor or the deputy mayor - secretary of the Kyiv City Council to develop documentation on land management, provided in paragraph 2 of Procedure No 241/2463. So, according to clause 2.5 the Department of Land Resources, based on the data of the city land cadastre, town-planning cadastre and the State

[1] **KCC (Kyiv City Council). (2017). On Procedure for Acquisition of Land Rights from Communal Property Lands in the City of Kiev. Decision No 241/2463, dated April 20, 2017. Retrieved from: http://kmr.ligazakon.ua/SITE2/l_docki2.nsf/alldocWWW/D6E76505026C114EC225813100370781?OpenDocument**

Land Cadastre, analyzes the submitted materials of the request for compliance with the boundaries of the land plot, its declared purpose according to the data of the city planning cadastre and within a maximum of seven working days prepares a draft decision for the provision of the Kyiv city cadastre permit (a draft decision of the Kyiv City Council on refusal to grant a permit) to develop a land management project for the land allocation, which promptly, not later than the next working day, submits to the secretariat of the Kyiv City Council in the manner established by the Regulations of the Kyiv City Council. The explanatory note to the draft decision of the Kyiv City Council must contain information on: the legal status of the land plot; the legal status of the real estate object (if any); the applicant's identity and other available information relevant to the decision of the Kyiv City Council. The following must be attached to the case-application: extract from the town-planning cadastre and the another cadastral plan from the software package "Cadastre" about the land plot; materials of the satellite imagery of the land plot made no later than one year before the date of registration of the draft decision at the secretariat of the Kyiv City Council; materials of the relevant photographic evidence, made not later than thirty calendar days before the date of registration of the draft decision in the Secretariat of the Kyiv City Council (if any), or at the request of the deputies of the Kyiv City Council. The Department of Land Resources is responsible for the availability and comprehensiveness of the information, mentioned above. It is prohibited from requiring of materials and documents to confirm the information contained in the town-planning cadastre, city land cadastre

and state land cadastre (clauses 2.6, 2.7, paragraph 2 of Order No 241/2463).

The draft decision of the Kyiv City Council on granting the permit (the draft decision of the Kyiv City Council on refusal to grant the permit) for the development of the land management project regarding the land allocation is approved and adopted in the order established by the Regulations of the Kyiv City Council, approved by the decision of the Kyiv City Council, dated July 7, 2016 No 579/579.[1]

The decision of the Kyiv City Council to grant the permit (draft decision of the Kyiv City Council to refuse to grant the permit) to develop a land management project for land allocation is transmitted in due course to the Kyiv City Council reception office on land issues for uploading information to the city land cadastre which is issued at the request of the party in interest or the authorized representative, together with the materials of the case-requirement for the development of a land management plan for a land plot allocation.

Therefore, the analysis of the regulations shows that the Department of Land Resources of the executive body of the Kyiv City Council (Kyiv City Public Administration) is authorized to develop, in accordance with the established order, draft decisions of the Kyiv City Council to grant the permit to develop relevant documentation on the land management or draft decisions on refusal to grant such a permission. At the same time, decisions on the allocation and transfer of the

[1] **KCC (Kyiv City Council). (2016). Regulations of the Kyiv City Council. Decision of No 579/579, dated July 7, 2016. Retrieved from: https://kyivcity.gov.ua/kyiv_ta_miska_vlada/kmr/korisna_informatsiya/perelik_dokumentiv_z_publichnoyu_informatsiyeyu/reglament_kivsko_misko_radi_313813/**

ownership of the land plot are made only by the bodies designated by Article 118 of the Land Code of Ukraine.

THE THIRD TOPIC
JURISDICTION OF THE CABINET OF MINISTERS OF UKRAINE ON GRANTING THE PERMIT (REFUSAL TO GRANT THE PERMIT) TO DEVELOP A LAND MANAGEMENT PROJECT FOR THE LAND ALLOCATION

At the national level, the law-enforcement "land" jurisdiction belongs to the Government.

According to the part 8 of Article 122 of the Land Code of Ukraine, the Cabinet of Ministers of Ukraine transfers land from state-owned lands to the property or for use in the cases specified by Article 149 of this Code and land plots of the territorial sea bed.[1]

So, Article 149 of the Land Code of Ukraine regulates the procedure of land plots withdrawal granted for permanent use from state and communal property lands, which may be withdrawn for public and other needs by the decision of public authorities, the Council of Ministers of the Autonomous Republic of Crimea and local self-government bodies on the basis of and in order provided by this Code. [2]

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[1] VRU (Verkhovna Rada of Ukraine). (2001). Land Code of Ukraine. Law of Ukraine No 2768-III. *Information from the Verkhovna Rada of Ukraine*. 2002, 3-4: 27.

[2] VRU (Verkhovna Rada of Ukraine). (2001). Land Code of Ukraine. Law of Ukraine No 2768-III. *Information from the Verkhovna Rada of Ukraine*. 2002, 3-4: 27.

The seizure of land plots is carried out by agreement of land users on the basis of decisions of authorized bodies of governmental authority and local self-government in accordance with their powers (part 2 of Article 149). [1]

The Cabinet of Ministers of Ukraine seizes state-owned land plots that are in permanent use – ploughed land perennial plantations for non-agricultural purposes, forests for non-forestry purposes, as well as land for environmental, health, recreational and rail transport entities of general use due to their reorganization by the merger during the formation of a public joint-stock company of the public rail transport according to the Law of Ukraine "On peculiarities of formation of a public joint-stock company of public railway transport", except the cases specified by parts five - eighth of Article 149 of the Law of Ukraine which defines the powers of village, town, city councils, Verkhovna Rada of the ARC, regional, district councils, district public administrations, Kyiv, Sevastopol city public administrations, the Council of Ministers of the ARC on land seizure and in cases determined by article 150 of the Law of Ukraine, which determines the procedure for the seizure of particularly valuable land (Part 9 of Article 149). [2]

Besides, according to Part 2 of Article 20 of the Law of Ukraine "On the Cabinet of Ministers of Ukraine" No 794-VII to the main powers of the Cabinet of Ministers of Ukraine in the field of social policy, health

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[1] **VRU (Verkhovna Rada of Ukraine). (2001). Land Code of Ukraine. Law of Ukraine No 2768-III.** ***Information from the Verkhovna Rada of Ukraine*****. 2002, 3-4: 27.**

[2] **VRU (Verkhovna Rada of Ukraine). (2001). Land Code of Ukraine. Law of Ukraine No 2768-III.** ***Information from the Verkhovna Rada of Ukraine*****. 2002, 3-4: 27.**

care, education, science, culture, sports, tourism, environmental protection and post-disaster recovery shall be exercised within the limits of their powers of the government control in the field of protection and rational use of land, its subsoil, water resources, flora and fauna, other natural resources.[1]

Article 50 of Law No 794-VII includes the preparation of draft acts and Article 51 provides the adoption of acts of the Cabinet of Ministers of Ukraine. Thus, in particular draft acts of the Cabinet of Ministers of Ukraine are prepared and submitted for consideration by the Cabinet of Ministers of Ukraine by ministries, other central executive bodies, public collegial bodies, the Council of Ministers of the Autonomous Republic of Crimea, regional Kyiv and Sevastopol city administrations (paragraph 1, paragraph 2, Part 2 of Article 50). [2] The resolutions and orders of the Cabinet of Ministers of Ukraine shall be adopted at sessions of the Cabinet of Ministers of Ukraine by a majority of votes of the Cabinet of Ministers of Ukraine, determined in accordance with Article 6 of Law No 794-VII. If the draft decision has received the support of exactly half the Cabinet of Ministers of Ukraine and the Prime Minister of Ukraine has voted in favor of the draft decision, the decision shall be considered adopted.

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[1] VRU (Verkhovna Rada of Ukraine). (2014). On the Cabinet of Ministers of Ukraine. Law of Ukraine No 794-VII. *Information from the Verkhovna Rada of Ukraine*. 2014, 13: 222.

[2] VRU (Verkhovna Rada of Ukraine). (2014). On the Cabinet of Ministers of Ukraine. Law of Ukraine No 794-VII. *Information from the Verkhovna Rada of Ukraine*. 2014, 13: 222.

CONCLUSION

The main groups of authorities empowered to resolve the issue of granting (refusing) citizens to develop a land management project in Ukraine at the local level are local self-government bodies, namely village, town, city councils and their chairpersons, as well as local (district, regional, the cities of Kiev and Sevastopol) public administrations; and at the state level, solely the Cabinet of Ministers of Ukraine. The main basis for the differentiation of competence is the designation of such land. Moreover, it should be taken into consideration that ministries, other central executive bodies, state collegial bodies, the Council of Ministers of the ARC, regional, Kyiv and Sevastopol city state administrations are empowered to develop draft decisions of the Cabinet of Ministers of Ukraine according to the established procedure for granting permission for the development of related documentation on the land management or refusal to grant such a permission.

However, the decision on the allocation and transfer of ownership of the land plot is made exclusively by the bodies defined by Article 118 of the Land Code of Ukraine. The Cabinet of Ministers of Ukraine grants permission/reasonable rejection to grant permission to develop the land management project for land allocation on state-owned land, state-owned land that is withdrawn from the permanent use, and land plots of the territorial sea bed.

Regrettably, the current Ukrainian legislation has numerous inconsistencies and incompleteness in land relations, which now causes

risks of manipulation and abuse by public authorities in the process of resolving issues of granting citizens the permission to develop a land management project, which generally has a negative impact on the opportunity to exercise their constitutional right. The practice of court as an indicator of the real situation gives grounds to highlight the following basic forms of abuse from the side of local councils: change the schedule (frequency) of holding sessions of councils (at least once a month) in the case of submission the documents on the land allocation to the council; groundless refusal to submit to the session of the council the "land" issue of citizens; deliberate unjustified change of the chair during the consideration of a specific land issue that lacks "interest" for the council (officials). A legal evaluation of such practices made by local councils indicates that the public administration is unlawful in its actions (actions or inactions), which is gradually becoming the subject of appeal to the administrative courts. In order to minimize the risks, it is considered important to improve the existing legislation and to take it into account when implementing and undertaking next actions in the field of land and administrative reform.

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DEFICIENCY OF AUTHENTICITY OF THE PENAL VERDICT IN CONFRONTING MULTIPLE EXCEPTIONS (JORDANIAN LEGISLATION AS A MODEL)

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ABSTRACT

This research dealt with an important subject of criminal law, which is the deficiency of authenticity of the criminal Verdict in confronting multiple exceptions (Jordanian legislation as a model), as it is a requirement of justice not to prosecute the perpetrator for the same act twice, and the stability of legal status is one of the basic principles in criminal policy, which is Natural result of authenticity of the criminal Verdict, the criminal case must have a limit to determine the legal status, and the verdict must has legal strength to put an end of the

dispute. The Jordanian criminal legislator followed this approach, so that the criminal case ends with a final Verdict. However, this principle came out with a number of exceptions, which are aggravation of result, crimes that undergo objective jurisdiction reference and other crimes committed within the Kingdom, these exceptions undermined the authenticity of the criminal Verdict as well as the stability of the legal status. The texts governing these exceptions are deficient, this research discussed points of deficiency as well as weakness, researchers have concluded a number of recommendations, the most important of which is the amendment of the text of Article 58 of penal code to determine the duration of the prosecution of the offender when the result aggravates, and the amendment of the text of article 13 of penal code ,so that the offender will not be prosecuted again unless the crime category differs between Jordanian law and foreign law.

Key words: Aggravation of result, Authenticity of criminal Verdict, Double jeopardy

Introduction

The criminal case shall be terminated for general or special reasons. While it is considered as a general reason, the statute of limitations, general amnesty, final sentence and death is considered to be one of the special reasons. However, the Jordanian legislator has made several exceptions to this rule, These exceptions are devoid of precise that guarantee the proper application of the provisions of the law, Therefore, this research came to show these controls, which were ignored by the Jordanian legislator to ensure the good application of

the law and maintain the authenticity of the criminal judgment and its role in the expiry of the criminal lawsuit.

So we will divide this research into two subjects, one devoted to final judgment and the second to devote exceptions to final judgment.

1.Final judgment

We will talk about Final judgment through the definition of the final judgment, its justifications, conditions, scope and the strength of the final judgment .

1.1.Definition of the final judgment and its justifications

We will divide this topic into the definition of final judgment and then the justifications for authenticity.

1.1.1.Definition of final judgment

Final judgment is the reasonable way for the expiry of the criminal suit.[1] The nomenclature of the ruling is numerous, whether in the different legislations or in the same legislation, The Jordanian legislator sometimes uses the final verdict, as stated in article 331 of the Code of Criminal Procedure.[2] Elsewhere, the Jordanian legislator used the term peremptory judgment, As stated in Duplicate Article 427 of the Penal Code, as the Jordanian legislator used the term provision in article 5 of the Penal Code, while the Egyptian legislator used the term

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[1] . Jokhdar, Hassan, (1993), Explain the Jordanian Code of Criminal Procedure A comparative study of the first two parts I 1, without publishing house, p. 137.

[2] . . Article 331 of the Code of Criminal Procedure: Unless there is another provision, the criminal lawsuit shall expire in respect of the person brought against him and the facts entrusted thereto by a final judgment in which he is acquitted, irresponsible, dropped or convicted. By challenging this ruling in the manner prescribed by law.

final sentence as contained in articles 454 and 455 of the Egyptian Code of Criminal Procedure, A definite judgment can be defined as a judgment that has exhausted or overdue the appeal methods, so that it has the strength of the case and therefore cannot be challenged. It resolves the dispute once and for all. While the jurisprudence makes a distinction between these concepts, where the final judgment is not accepting the appeal at the beginning, such as the judgment issued a fine of the Magistrate's Court, either final or concluded it was exhausted methods of appeal or overdue appeal.[1]

1.1.2.Authentic justifications for final judgment

The legislator did not mention the justification of the authoritative judgment or the wisdom of the final judgment, as this is not the function of the legislator , But it falls into the function of jurisprudence or judiciary, although the legislator sometimes refers to the wisdom or justification of the procedure, This is what the Jordanian legislator did in the recent amendment to the Code of Criminal Procedure, where it mentioned the justification for the arrest in Article 114 of the Code of Criminal Procedure, It is possible is that due to the seriousness and importance of the arrest, we will present in brief to the justifications of authentic in the jurisprudence of the traditional school and then in the jurisprudence of positivism school and then in modern criminal jurisprudence: the justifications of authentic in the jurisprudence of the traditional school and then in the jurisprudence of the positivism school and then in modern criminal jurisprudence:

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[1] . Nimour, Mohamed Said, (2019) Origins of Criminal Procedures, 5th Edition , Dar Al Thaqafa for Publishing and Distribution, p. 560.

1.1.2.1 Authentic necessity in traditional philosophy:

Given the role of traditional philosophy in establishing the principle of the legitimacy of crimes and penalties and the exclusion of the rule of judges that prevailed before, the traditional school adhered to the objective and abstract character that devoted its attention to the material of crime and ignored focusing on the criminal him self.[1] This was linked to the briefing of the elements of the judicial verdict in terms of establishing the facts and assigning them to the accused of legal abstraction itself, To this end, the content of the judicial verdict has gained authenticity as the authoritative rule of law is that the final adjudication of the dispute is not repeated until the verdicts achieve it is prestige as a title of truth that puts an end to the disputes.[2] Authenticity in this sense in traditional philosophy went beyond establishing the facts and assigning the convicted to the punishment imposed by the judge on the perpetrator of those Chronicle. Because the aim of the criminal suit is to judge a fact, not to judge a human personality[3], Judgment of the facts in this case is based on the fact that the facts have happened and ended and that they date back to the past and can not be controlled, and this shows the need for authenticity to be immune from the review, because those facts and attributed to the convict fixed does not change. Besides the idea of legal security in the previous sense,

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[1] . Hosni, Mahmoud Najib, (1973), the science of punishment, Dar Arab Renaissance, 2nd edition, Cairo, p. 65.

[2] . . Wazir, Abdel Azim Morsi, (1978), The Role of the Judiciary in the Implementation of Criminal Sanctions, A Comparative Study, Dar Al-Nahda Al-Arabiya, Cairo, p. 743.

[3] . . Wazir, Abdul Azim Morsi, op. Cit., P. 746.

which is based on the stability of legal positions and the end of disputes in society,[1] The necessity of the principle of authenticity imposes another necessity in traditional philosophy, which is to guarantee the individual freedom of the convict so that his legal status is established by determining the sentence pronounced by the judge. The amount and manner of execution of such punishment shall not be changed either by the judge or by the penal administration .[2]

1.1.2.2 Authentic Alternative in Positive Philosophy

Positivism philosophy has contradicted traditional philosophy ideas by rejecting abstract legal models. Crime was considered as a social phenomenon rather than an abstract legal phenomenon,[3] Crime, according to their view, is merely an act that has occurred in the past and cannot be changed and drew attention to the criminal as a persistent humanitarian situation in the future that could be controlled and changed to cope with its gravity, [4] As a result of these ideas emerged the idea of separating the conviction and the decision of the penalty in the judicial verdict, The positivists considered that the condemnation of its two elements, the establishment of the facts and

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[1] . . Abu Amer, Mohammed Zaki, (1974) impurity error in criminal judgment, Ph.D. Thesis, Alexandria University, p. 387.

[2] . . Abdel-Moneim, Suleiman, (2003), Criminology and Part, Halabi human rights publications, Beirut, p. 431.

[3] . Al-Wraikat, Mohammed Abdullah, (2009), The Origins of Criminology and Punishment, 1st Wael House for Publishing and Distribution, Amman, p. 276.

[4] . Ali, youser Anwar and Osman, Amal Abdel-Rahim, the origins of criminology and punishment, I 20 Part II - the science of punishment, Dar Arab Renaissance, Cairo, (TN) not mentioned, p. 43.

their attribution to the convicted are the part of the judgment in which the principle of Authenticity can produce its effect because the elements of this part are unchanged, The part of the criminal penalty relates to the status of the offender which is dynamic rather than static, It is inconceivable that a judge should impose a fixed sentence on a person who is in a changeable situation Therefore, the positivists denied Authenticity , Criminal judgments according to this view do not acquire temporary Binding force of a decision in order to ensure that the penalty is permanently amended in proportion to the future development of the convicted person. [1]

1.1.2.3: The justifications of Authenticity in modern criminal jurisprudence

Modern legislation did not adhere to the ideas of philosophical doctrines alone, but selected from both doctrines to form its punitive policy, it has taken from the traditional ideas the following justifications:

A- Legal stability, ie the stability and clarity of legal status, so that everyone knows the legal status and is supposed to be treated according to this status, either he is convicted and bears the responsibility of his actions or is innocent and can exercise his normal life, and this can only come to an end to the methods of appeal to stand in order to ensure the smooth functioning of the judiciary so as not to Squanders his time in an endless dispute.[2]

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[1] . . Wazir, Abdul Azim, op. Cit., P. 751. Abu Amer, Mohammed Zaki, op. Cit., p. 397.

[2] . Egyptian Court of Cassation, April 26, 1960. Set of Cassation Provisions Q11, No. 77, page 380.

The importance of legal stability is that the legislator has prevailed over the force of law to achieve legal stability unless the law prevails over the final verdict, as in the retrial.[1]

B- Considerations of justice: requiring that a single act should not be prosecuted twice[2], which is enshrined in article 58/1 of the Penal Code.

C- Ensuring public freedoms: The power of criminal judgment is one of the most fundamental guarantees of public freedoms, which requires that state intervention to punish the offender is at a certain limit and a specific penalty and not an unspecified number of penalties, otherwise it becomes a means of tyranny.[3]

1.2. Conditions of invoking the final judgment

These conditions revolve around one essential condition: the unity of Lawsuit, which is requires: the unity of liability and cause

[4] In addition to the presumed condition, a previous judgment.

First: A final verdict

The provision that can be invoke with, requires several conditions, which are summarized as follows:

A- The judgment shall be punitive

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[1] . Al-Saeed, Kamel, (2010), Explanation of the Code of Criminal Procedure, Dar Althaqafa for publication and distribution, i 3 p 181

[2] . Al-Saeed, Kamel, op. Cit.,P. 181

[3] . . Hosni, Mahmoud Najib (1977), the power of criminal judgment in ending criminal proceedings, Dar Al-Nahda al-Arabiya, i 227

[4] . . Hosni, Mahmoud Najib 2013, the revision of Abdul Sattar, Fawzia, Explanation of the Code of Criminal Procedure, Dar al-Nahda al-Arabiya, p. 267

In other words, the judgment must related to a criminal case, but when The verdict issued by civil or disciplinary Court it has no any authentic before the Criminal Court Such a provision shall also be made by a delegated and authorized court , whether it was ordinary or special, even if it was not spatially and qualitatively competent, For example, if a court of first instance convicted a felony as a misdemeanor or a misdemeanor beyond its spatial jurisdiction, [1]The verdict of the disciplinary councils or the civil courts has no authority before the criminal court, as well as the decisions of the Public Prosecution retaining the case.[2] in the event that the perpetrator is unknown or that the complaint has unclear reasons or that the evidences produced are not sufficiently supported by them do not possess this authentic, as well as the decision to prevent the trial does not have this authentic and can not be invoked with,[3] A new investigation should be conducted if new evidence emerges in support of the charge against those whose trial was prevented for lack of evidence or insufficient evidence, It should be noted here that Jrdanian legislator in Article 138, which allowed the investigation to be re-examined for new evidence, was limited to repetition if the trial ban was issued because there was no or insufficient evidence. This means that the legislator allows a new investigation only because there is no evidence or is not sufficient?

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[1] . Jokhdar, Hassan op. Cit., p. 138

[2] . The Jordanian legislator introduced the decision of retaining the case under the latest amendment to the Code of Criminal Procedure under the Law amending the Code of Criminal Procedure No. 32 of 2017 in Article 61 of the Code.

[3] . Article 61 of the Jordanian Code of Criminal Procedure

Referring to Jordanian jurisprudence, it is clear that some of them have no opinion in this delicate issue, [1] While some Jordanian jurisprudence assumed that the legislator had equated the two cases, with no explanation how the legislator had equated the two cases, although the text of article 138 mentioned only the absence or insufficient evidence,[2] The researchers believe that the Jordanian legislator was not successful in drafting the text of Article 138 of the Criminal Code and that this text is deficient and although it addressed only two cases are the lack of evidence or insufficient, there is nothing to prevent action if the decision to prevent the trial was issued The fact that the act does not constitute a crime or does not require punishment and new evidence has emerged to prove that a crime has occurred, As if the decision to prevent the trial had considered the act to be a suicide case, which is not punishable under Jordanian law, except for the military, then there is evidence to prove that the act was a murder, not a suicide. Rather, it is bound by the text of article 17 of the Code of Criminal Procedure to investigate the crime, We agree with this jurisprudence that analogy is permissible in the Code of Criminal Procedure and that the interpretation of procedural provisions can be broadened as they have been established to ensure the proper functioning of criminal justice, contrary to the provisions of the Penal Code relating to criminalization and punishment, in which analogy is forbidden and cannot be interpreted in a broadband .

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[1] . . Jokhdar, Hassan, op. Cit., P. 100 and 101

[2] . Al-Saeed, Kamel op. Cit., p. 531

B- The judgment shall be decisive concerning the case

That means the judgment shall terminate the litigation by conviction, innocence, irresponsibility or omission, The other provisions that do not end the litigation are not as authoritative as the provisional ones, And introductory as a release and the delivery of seizures and lack of jurisdiction [1] And others, such as suspension of prosecution for not claiming the personal right to libel, defamation, or contempt decisions - which reveal a court's decision to adjudicate, Such insistence on arresting the accused to the maximum extent prescribed by law, where it is considered a presumption of conviction.

C: The judgment shall be final

That means it has acquired a definitive degree and becomes enforceable either because it has exhausted the normal appeal methods, or if it is too late to appeal[2], if the judgment is rendered, It does not affect the verdict, if the verdict that it may be challenged in unusual ways, such as Denunciation by written warrant and retrial. It should be noted that absentee judgment does not acquire a definitive degree except in two cases: the lapse of the statute of limitations and the death of the convict[3]

1.2.2: unity of reason

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[1] . Suleiman, Mohammed Ali, Criminal Judgment 1993, University Press, Alexandria, 1st floor, p. 150

[2] . Hosni, Mahmoud Najib, Explain the Code of Criminal Procedure, previous reference ,p 262

[3] . . Hosni, Mahmoud Najib, The power of criminal judgment, op. Cit., P. 91 and 92

Generally, the cause of the action, whether civil or criminal, is the fact on which the plaintiff relies, and therefore the cause of the criminal action is the crime for which the accused is to be sentenced[1] The basis of this requirement is the provision of article 58/1 of the Penal Code that no person may be prosecuted for the same act twice , The unity of the incident means that the criminal offense for which the defendant is being trialed in the new case is the same as the one in which the verdict was rendered.. The court shall refrain from prosecution of the complainant for any aggravating circumstance If the accused is found guilty of theft, Article 404 shall be punished and his prosecution shall refrain from damaging the property of others, It also refuses to renew the case for the emergence of an aggravating circumstance, such as a premeditated circumstance in murder after the verdict[2] Similarly, in the case of moral diversity in article 57 of the Penal Code, if the act has several descriptions, all of which are mentioned in the judgment, the case shall not be filed with another description, as if the crime was a theft. Another as if the crime was theft and refraining from filing a lawsuit for violating the sanctity of housing The unity of the incident is the unity of the act and not the union of the description ([3]), and this is the basis of the jurisprudence of the esteemed Court of Cassation (Article 58/1 of the Penal Code

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[1] . . Hosni, Mahmoud Najib, Explain the Code of Criminal Procedure, page276

[2].Al-Hadithi, Fakhri (2011), Explanation of the Code of Criminal Procedure, Dar Al-Thaqafa for Publishing and Distribution Edition1 page 99

[3] . . Al-Saeed, Kamil, op. Cit., P. 198

obliged not to prosecute a single act only once and the lesson in this is the union of the act and not the union of the description or indictment .... The prosecution of the perpetrator for the death caused by a final judgment does not permit the prosecution of the same act in another description).[1] There are exceptions to the unity of the incident, which is the case of successive and continuous crimes and habitual offenses. These crimes are all facts before the final judgment, even if the court is not aware of it, because it is considered a one crime, provided that no incident occurs after the judgment.[2]

1.2.3: The Litigants Unity

The litigants in the criminal case are either primary or secondary, The main litigants are the General prosecution and the complainant. The secondary litigants are the plaintiff and respondent, They may be called secondary because the case is moved without them and they may join the criminal case and may not, as well as the respondent is linked to the presence of the plaintiff of personal right, where the presumption of the money is not assumed if there is no plaintiff of personal right, although the respondent only exists if the complainant may not be filed Claim for compensation such as juvenile. With regard to the litigants unity, the Public Prosecution is considered as one unity, that any prosecutor can represent the Public Prosecution

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[1]. Penalty Cassation No. 95/485 referred to by Dr. Kamel al-Saeed, op. Cit.,. P. 198

[2] Najm, Mohammad Subhi (2012), Brief in the Code of Criminal Procedure, House of Culture for Publishing and Distribution, 2nd edition, p. 129

to fulfill litigants unity, As for the accused, the accused must be the same as the one who had already been sentenced in the previous case and the verdict has become definitive, But what is the status of a new defendant who may be charged for the same offense within the subject of the previous lawsuit, does he has the right of invoking Authenticity ? In fact, the answer to this question is not easy, as it appears, but it is in great detail, we must distinguish between if the judgment in the first case was convicted or acquitted or irresponsible as follows:

1. **The case of conviction: The complainant shall not have the right to invoke Authenticity if the judgment in the first case is convicted, where more than one person can be convicted in the case of criminal participation and this is the consensus of jurisprudence and the judiciary[1].**
2. **The case of innocence The court shall grant innocence in Jordanian law when there is no evidence or insufficient evidence In the sense that the act constitutes an offense but if there is no evidence or it is not sufficient to convict the defendant[2]Accordingly, the complainant has no right to uphold the previous judgment of innocence against another convicted person, since the evidence of guilt and innocence may be shared by each of the accomplices There is no reason not to condemn the new complainant and this point has mutual agree between both jurisprudence and judiciary[3] Of**

[1] **. . Suleiman, Muhammad Ali, op. Cit.,, P. 151**

[2] **. Articles 178 and 236 of the Jordanian Code of Criminal Procedure**

[3] **. . Al-Saeed, Kamil, op. Cit.,p 162**

course, the court in front of the new defendant has all the options, whether conviction, innocence, irresponsibility or dropping .

3. In the case of irresponsibility according to the Jordanian legislator 's plan, the court shall declare irresponsibility if the act does not constitute an offense or does not deserve a punishment, [1] The fact that the term does not require punishment is not accurate, the literal meaning of the term does not deserve a punishment means exempt excuses, which are called obstacles of punishment, such as theft between assets and branches, but the court in this case does not rule irresponsibility, but impose a penalty and exempt the perpetrator from it, So what is meant by a non-punitive term .

The researchers believe that what legislator has meant by using a non-punitive term is the case of contraindications of responsibility, such as mental impairment and young age, as well as if the perpetrator benefits from a justification reason because these are the cases that the court can judge by irresponsibility, but the Jordanian legislator followed the approach of the Lebanese legislator because he called the contraindications of responsibility, so this term is incorrect as it has been taken from the Lebanese legislator , who mix the impediments of responsibility with impediments to punishment due to a mistake in translating the French term

[1] . . Articles 178 and 236 of the Jordanian Code of Criminal Procedure

(causes de non imputabilité) **While the contraindications of punishment in French are (*causes de non punibilite*) which goes out to make Excuse for punishment[1] If the perpetrator benefits from an excuse, the court must condemn and exempt him from the penalty prescribed by law and not exonerate him, This is confirmed by the opinion of the Court of Cassation(If the Major Felonies Court decides to convict the accused of theft for violating the provisions of Article 407 and does not judge him for the duration of the sentence, then it has rushed to exempt the discriminatory against him from the crime for being the husband of the complainant without deciding to convict him and issue a penalty and then exempt him from punishment after determining the amount of Penalty in accordance with the provisions of Article 425 of the Penal Code, which seeks theft between assets and branches or spouses, which should revoke the contested decision)[2], According to the Egyptian legislation, we find that the Egyptian legislator does not know the term irresponsibility, but uses the term acquittals for objective reasons, so the meaning of the acquittals in Jordanian law differs from the Egyptian law, where the Egyptian legislator uses the term acquittals either when there is no evidence, insufficient evidence or if the act was neither an offense nor punishable, which in Jordanian law constituted the term**

[1] . . Hosni, Mahmoud Najib (1984), Explanation of the Lebanese Penal Code, General Section I, Dar Al-Nahda Al-Arabiya, p. 188

[2] . Penalty Cassation No.253 for the year 2017 issued on 5/3/2017

irresponsibility, The case of irresponsibility has raised controversy in criminal jurisprudence about the possibility of invoking it by the second complainant, because if the judgment in the first case is irresponsible because the act does not constitute an offense, how will the second complainant be prosecuted for an act (does not constitute a crime) at all ?

This subject has caused wide controversy and jurisprudence are divided into several opinions:

The first opinion: This opinion prevailed in French jurisprudence and the judiciary is old and believers of this opinion see: ([1]) that the second defendant could invoke with (*res judicata)* and their argument that how could a person be trialed for an act that the judiciary had determined that it had not been committed or that it did not constitute an offense[2] in the past The Egyptian Court of Cassation followed this view[3], As well as a large part of the Egyptian criminal jurisprudence ([4]), this view was also espoused by

[1] **. Jousse , Julius Clarus and Hosni, Mahmoud Najib, Criminal Justice Force, op. Cit., P. 177**

[2] **. . Hosni, Mahmoud Najib, the power of criminal judgment op. Cit., 176**

[3] **. Suleiman, Mohammed Ali, Criminal Judgment, op. Cit., P. 152**

[4] **.Mustafa, Mahmoud Mahmoud, Dr. Ahmed Fathi Sorour and Dr. Raouf Obaid referred to by Dr. Al-Saeed, Kamil, op. Cit., p 192**

some Jordanian criminal jurisprudence ([1]) influenced by the old jurisprudence of the Egyptian Court of Cassation.[2]

Second opinion: They believe that the partner does not have the right to invoke the previous verdict against another defendant , as the partners are independent in terms of procedures, if the judge decides not to blame one of the partners may be the result of a mistake, there is nothing to prevent the judge from correcting the error depending on the amount of knowledge The court is not obliged to achieve consistency between the parts of the judgment unless all accomplices are trialed simultaneously, but if they are trialed in different times, they are not obliged to achieve consistency between the parts of the judgment due to the different knowledge of the judge of the facts and the law.[3] Moreover, what if the second defendant confessed to the crime and proved it happened, as if the court consider it suicide, but the defendant proved that he committed a homicide and he confessed.

The researchers believe that the second opinion is the closest to the argument of righteousness because of the independence of each accused of his circumstances and the difference in the amount of knowledge of the judge of the law and facts as a result of providing new and different evidence, as well as the previous ruling may have included a mistake

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[1] . Nimour, Mohamed, The Origins of Criminal Procedures, op. Cit., P .292 , as well as. Al-Saeed, Kamil,, Explanation of the Code of Criminal Procedure, op. Cit., P.192

[2] . Egyptian veto 281/1934 referred to Dr. Mohamed Nimour, op. Cit., P. 292

[3] . Hosni, Mahmoud Najib, the power of the final rule, op. Cit., P. 180

from the court, what prevents the court from remedying the error, in addition to the lack of unity of the Defendants, Above all Jordanian legislator does not follow Judicial precedents and therefore the judge is not obliged to follow the judgments of other courts or even his judgment in a similar previous case.

2. Exceptions of final judgment

The Jordanian legislator mentioned five exceptions to the final judgment. These exceptions were distributed to the Penal Code and the Code of Criminal Procedure, where the Penal Code contained three exceptions, while the Code of Criminal Procedure included two of these exceptions, and we will limit this research to the exceptions contained in the Penal Code. Without going into the two exceptions contained in the Code of Criminal Procedure, namely, cassation by written order and retrial as they fall into the extraordinary methods of appeal first (on the one hand), and Because the scope of it is research lies in the methodological books when talking about the extraordinary methods of appeal on the other hand, so to avoid prolongation and types of research methodology we will limit our study to the exceptions contained in the Penal Code only.

2.1. Aggravate the result

The Jordanian legislator made this exception in Article 58 of the Penal Code. ([1])No 'person' shall suffer double jeopardy for the same crime . 2. However, if the results of the criminal offense are aggravated after the first prosecution, it shall be subject to a more severe description of this

[1] **. Correspond to the text of Article 182 of the Lebanese Penal Code**

description, and the more severe penalty shall be inflicted only if the previously imposed penalty has been dropped from the new penalty.

Initially, the researchers record their observation on the wording of this article, in terms of (one action is pursued only once) since the prosecution of the perpetrator and not the act because if the perpetrator unknown, the prosecutor will issue a decision of retaining the case ([1]),The more reasonable text is that, Does not prosecute the perpetrator for one act only once, but for the act it can be pursued if multiple contributors are not prosecuted at once, as if the investigation did not find out the partner and then identified after the final verdict can be trialed so Act twice at different times in case of multiple perpetrators.

The aggravation of the result means the aggravation of the outcome of the act itself, rather than the possibility of applying more than one description to the act, which is the case of the moral multiplicity mentioned in article 57of the Penal Code or the mistake of the court in the description, this does not aggravate the result because the description itself does not aggravate. If the perpetrator was prosecuted for misdemeanor causing death by mistake and after the final verdict, it was determined that the act constitutes intentional homicide and it is not permissible to prosecute him for intentional homicide .

This content was expressed by the Honorable Court of Cassation (because death is a stable material condition and its consequences cannot be exacerbated to another case by a new, more severe or lighter description of the death caused by a final judgment which does not

[1] . Article 61 of the Jordanian Code of Criminal Procedure

permit the prosecution of the same act by another description)[1], while aggravation case assumes that a final judgment has been issued in the case and has acquired a definitive degree and then the result has been aggravated, so that the act has become a more serious offense and the natural area of this case is the crimes of victimization and attempted murder The victim may die after the final verdict of his injury or may be sentenced to a crime of victimization and then lose sight, speech or hearing from his injury, even though the court does not issue the verdict on the case unless a definitive medical report prove complete recovery, but complications may occur and it is important that the relationship remains Causality exists between the act of the perpetrator and the new result, which is independent of the experienced specialists of the doctors and forensic physicians. In fact, this situation raises practical problems that were not addressed by the legislator in the text of article 58 of the Penal Code: there is no time limit for the perpetrator to be held accountable.

The researchers believe that in the absence of a text specifying this period, which constitutes the instability of legal positions , it is inevitable to be guided by the general rules and the enforcement of statutes of limitation to find a period when the responsibility of the convict ends, although this leads to another problem which is: when the calculation of statute of limitations begins? Does it start from the date the crime was committed, or from the date the verdict was issued? As

[1] . Penalty Cassation No. 95/485 referred to by Dr. Kamel Al-Saeed, op. Cit. P. 198

well as on any description of the statute of Prescription, as if the description changed from a felony or misdemeanor?

In fact, the Jordanian legislator has not decided on any of these thorny issues, which may lead to contradictory jurisprudence .Return to the statute of limitations, we find that the Jordanian legislator knows two types of statute of limitations: the statute of Prescription of the crime, the statute of Prescription of Sentence, when crime is not discovered until after the expiry of the statute of Prescription, Prescription shall be calculated from the date of committing the crime, and the statute of Prescription shall be realized if the crime is discovered, but the investigation did not reach the perpetrator's knowledge.

Here the calculation of the statute of Prescription begins from the date of the last investigation conducted by the Public Prosecution.[1] While the statute of Prescription of Sentence shall not be realized unless the perpetrator is known and has not been arrested or he was arrested, but he managed to escape and the statute of Prescription period starts from the day of the verdict if it was absent and from the day he evaded (if he fled) if it was face to face. [2]However Crime Prescription is longer than Sentence Prescription.[3]

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[1] . Article 338/1 of the Jordanian Code of Criminal Procedure. The public Lawsuit and personal right lawsuit shall Drop by the expiry of ten years from the date of the felony if the crime is not prosecuted within that period. 2. The two cases mentioned shall also Drop upon the expiry of ten years from the last transaction in which they were made if the case is instituted and investigations are conducted and no judgment has been issued.

[2] Article 343 of the Jordanian Code of Criminal Procedure

[3].3.Article 342 1. The period of Prescription for the death penalty and life sentences shall be twenty-five years. 2. The period of Prescription for temporary criminal

2.2 : The Foreign court verdict that undergo territorial and objective jurisdiction references

The effect of court verdict in general has positive and negative powers[1]: the positive power is executive one[2], which means implementation of the original, complementary and sub punishments including criminal effects like recidivism and deprivation of civil rights, while the negative power means that the verdict is decisive enough to end the dispute so it cannot be re trialed[3], the positive power divided into original executive power that means implementation of original punishments and the secondary executive power which means deprivation of civil rights as well as qualified to be considered as a recidivism[4], while the national court verdict has these two powers, the foreign verdict is controversial as we will discuss in the following passage.

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penalties shall be twice as long as the sentence imposed by the court, provided that it shall not exceed twenty years or less than ten years. 3. The period of Prescription for any other criminal penalty is ten years. Article 344 1. The period of Prescription for misdemeanor punishments shall be twice the duration of the sentence imposed by the court provided that it shall not exceed ten years and not less than five years. 2. The period of Prescription for any other misdemeanor penalty is five years

[1])Behnam, Ramses, General theory of criminal law, 1997, ALMAAREF Center in Alexandria, ed3, p125

[2]) Hosni, Mahmood, explanation of Lebanese penal law, DAR ENNHADA the arabian,1984, p 164.

[3]) Behnam, Ramses ,op, cit,p125.

[4]) Hosni, Mahmood, explanation of Lebanese penal law, op,cit, p 164.

2.2.1: Effects of foreign court verdicts

This subject has raised a controversial dialogue among scholars and researches who are divided into two opinions: one acknowledge foreign courts effects and other deny these effects[1], as we will discuss below:

2.2.1.1: The opinion that deny foreign courts effects:

this opinion rely on these arguments:

1. **Foreign verdict contradicts state sovereignty.**
2. **Foreign verdict replaces national verdict which may not enough and does not fit the crime.**
3. **Unityy of parties of dispute does not exist any longer due to foreign prosecution interference.**
4. **Foreign punishments may unknown in national criminal justice system, as well as implementation of punishment may differ.**

2.2.1.2:The opinion that acknowledge foreign courts effects:

This opinion has adopted the following arguments:

1. **Foreign verdict does not contradict sovereignty, because state implement it by its own well without any force.**
2. **The obligation of the state is protect human wherever they are, and geographical borders should not restrict the aim of punishment.**
3. **Society is always victim of crimes, and the ethics values are the same everywhere, so the duty of all states is to protect public interest and prevent threat of society.**

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[1]) Sroor, Ahmad, (1985), Medium in Criminal law. Ed4, DAR ENNHADA the Arabian. P152-153.

2.2.1.3: Opinion of researchers:

We have found that it is not easy to support single opinion, but distinguishing between positive and negative powers of the verdict is necessary, the executive power of verdict is not static due to practical issues rather than its foreign nature as bellow:

1. **Inability to implement of foreign punishment due to different prison systems in various countries, lack of punishments matching as well as different implementation mechanisms, beside that some punishments are unrecognized in some legal systems like death sentence[1].**
2. **Sub punishments and preventive measures may unavailable in national legal system[2].**
3. **Conditions of Suspended punishment system differ from legal system to another, for example, French courts denied previous Algerian criminal verdicts for recidivism in France[3].**

Concerning negative power of foreign verdict, we do agree with many scholars about the importance of acknowledgment of its effects in order to join international efforts to protect societies and fighting border crossing crimes which has been enlarged due to modern transports and communications, also we would like to emphasize the importance of implementing foreign verdicts to reduce budget and save costs for retrials.

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[1] **Behnam, Ramses ,op, cit,p126.**

[2] **Behnam, Ramses ,op, cit,p127.**

[3] **Crim.7 Nov,1968 J,P 220. Mentioned in Behnam, Ramsis, op, cit, p-127.**

Scholar controversial about power of foreign verdict has been reflected in trends of legislations, most legislations deny executive power of foreign verdicts due to sovereignty needs, unless obliged by an international treaty[1], which Jordanian legislator has adopted in article (17) of Extradition Convention[2] between Arab league countries in 1953, which allow foreign verdict to be implemented upon request of the country that issued verdict[3], but this does not include other countries who are not signed a convention with Jordan , but criminal law in Jordan set a rule that acknowledge negative power of foreign verdicts in cases included in national jurisdiction according to both personal and comprehensive [4] references, which means that foreign verdict possess decisiveness in case the punishment totally executed, pardoned or gained prescription, this rule does not include cases that included in national jurisdiction according to both territorial and subjective references , which means that criminal should be trialed again in front of national courts in these cases[5].

Controversial among scholars still exist in case the foreign verdict is dropped whither due to pardon or prescription, as which legislation is referable national or foreign one concerning terms of pardon or prescription? One opinion of Jordanian scholars suggested national

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[1] Hosni, Mahmood, explanation of Lebanese penal law, op,cit, p 165

[2] This convention is published on page 144 formal journal No.2075 date: 10 Feb 1968

[3] Ibid, Article 17

[4] Articles 9,10 of criminal law.

[5] Almjai, Nedam, (2017), explanation of criminal law, general section, ed6, DAR ELTHGAFFA for publication and distribution, Amman, p167.

legislation as the reference in this case[1], while other opinion consider the foreign legislation is the reference[2], we agree with the second opinion, and find it is substantial, also we notice that the formulation of the article implies that the foreign law is the reference as it add drop of verdict to execution of verdict which extend in our opinion to the terms as well, besides if Jordanian law were the reference, there was no need to re mention pardon and prescription in this article because they are general reasons of dropping verdicts which means that repeating them in this article is a kind useless excess.

2.2 .2: Foreign court's verdicts that undergo objective jurisdiction reference

The Jordanian legislator made this exception in section B of article 13, paragraph 1, of the Jordanian Penal Code (5), since a sentence has been pronounced abroad. In offenses subject to the principle of objective jurisdiction reference, it is only invoked before Jordanian courts to calculate the punishment carried out by the perpetrator abroad in order to download it from the sentence imposed in the new trial, and we shall state the conditions of this exception to the possibility of being pursued again:

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[1] . Al-Saeed, Kamil op cit, p 125.

[2] Aljboor, Muhammed (2012), medium in criminal law, general section, ed1, DAR ELTHGAFFA for publication and distribution, Amman, p109. also Almjai, Nedam, op, cit,p168.

2.2.2.1: First: The offenses shall be offenses of objective jurisdiction reference,

The principle of objective jurisdiction reference is an exception to the principle of territorial jurisdiction reference, so that the legislator allows the Jordanian Penal Code to be applied outside the territory of the State for the perpetrator of such offenses, as it poses a danger to the entity and its security and affects its fundamental interests regardless of the nationality of the offender and the place of the offense. This principle has been followed by the legislation of several Arab countries, including Egypt, Lebanon, Syria and the United Arab Emirates[1], This principle also justifies other countries' indifference to the protection of Jordan's security and the maintenance of its interests, so these crimes are not required to be criminalized in their place of Committed , and it does not require their return to Jordan, as they are trialed in absentia[2]

According to article 9 of the Jordanian Penal Code, these offenses include the following offenses:

A: Offenses of State security contained in articles 107 to 153 of the

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[1] . . Articles 13 (1) Jordanian Penal code : Do not preclude the right to be pursued in the Kingdom, the provisions abroad in any of the offenses set forth in articles 9 (b), the provisions abroad of any offense committed within the Kingdom.

(2)In both cases, the right to the property shall not be upheld if the foreign judgment has been pronounced After official news from the Jordanian authorities 3. His term of arrest and sentence, which the sentenced person has served, results in his or her judicial or judicial measures or a sentence carried out abroad deduct from the court that sentenced him in the Kingdom.

[2] . Fadel, Muhammad (1973), General Principles in Penal legislation, Edition 2, Damascus Al ihsan Press, p. 135

Penal Code, including also offenses of espionage contained in articles (14،15 and 16) Of the Law on the Protection of State Secrets and Documentation, which replaced articles 124, 125and 126 of the Penal Code and the offenses against Terrorism contained in special laws and conventions.[1]

B: State stamp imitation offenses these offenses are set forth in articles 236-238 of the Penal Code, but what is State seal? It is meant to seal state ministries, interests, local administrations, and armed forces, and stamp rule takes the instrument of being labeled on papers or objects to produce a meaningful sign that may be used by certain departments, such as customs and taxation،[2] However, there is a contrary view believe that، the seal of the State is the largest official seal on laws, royal decrees, treaties, diplomatic documents and other important documents[3]، However, the researchers do not agree with this opinion and support the first opinion mentioned by the criminal jurist Dr. Mahmoud Mostafa, because the state is a moral person, consists of a Ministries and different bodies, all representing the state, having an official status, working in the name of the state, Moreover considering there is just one stamp in state unreasonable, in addition to There is no stamp in the name of the state, but the seal suppose to be for different Ministries and departments use it when dealing with others like foreign Ministry or interior ministry. On the other hand The restriction of the State's seal to one seal is narrowing of the scope of the criminalization

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[1] . Jabour, Muhammad, op. Cit.,p. 99

[2] . . Mostafa, Mahmoud Mahmoud (1976), model of the Penal Code, Edition 1, Cairo University Press, p. 125

[3]. Jabour, Muhammad, op. Cit.,p.100

with no evidence and lead to unwarranted impunity for criminals. In addition to, if there is a State seal on treaty , would it be conceivable that someone might use fake seal on a treaty and the State does not know?

C. The use of money or the counterfeiting of Jordanian and foreign bank notes or securities is a form of currency or transaction in the Kingdom, These are specific crimes including Jordanian banknotes issued under a special law, treasury bills and debt bonds. Each financial bond was issued by a bank in the Kingdom and each currency card considered as a cash in its country and also includes money and foreign financial documents that are traded in the Kingdom by law or in circulation.[1]

What should be noted that the Jordanian legislator , unlike the Lebanese and Syrian legislator s, is punished for crimes of objective jurisdiction reference, even if It contravene the international custom[2], In the sense that if a foreigner commits an offense that affects Jordan's interest in a foreign country, which in a state of war with the Kingdom, As if conspiring against Jordan, although his action is allowed and his right to serve his foreign country

, The Jordanian legislator punishes him, contrary to Syrian and Lebanese law, which placed a restriction on the application of the penal code to a foreigner who does not contradict his act from international law.[3]

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[1] . Jabour, Muhammad, op. Cit.,p.101.

[2] . Majali, Nedam, op. Cit., P. 158

[3] . . Al-Saeed, Kamil, op. Cit., P. 114

The researchers believe that the position of the Jordanian legislator is the first position to follow, Since each state establishes its punityive system in a way that serves its interests and protects its national security. In addition, what if this foreigner had a Jordanian an accomplice ? If we consider that his action is not a crime, then how will the Jordanian accomplice be punished, since the intervention assumes an original act punishable in order to borrow the criminalization from the criminalization of the original actor, otherwise the act of the Jordanian intervention is not a crime, which is not accepted by common sense.

2.2.2.2: Second: The foreign verdict should not have been issued upon demand from the Jordanian authorities

This exception has been mentioned in paragraph (2) of Article 13 of the Penal Code, whereby the legislator considered that the request of the Jordanian authorities to prosecute the perpetrator by the foreign country in which the perpetrator is present is considered as the participation of the Jordanian authorities in charging the perpetrator and in a manner that does not affect the sovereignty of the state. [1] But what is meant by the demand ? is it a request to be tried abroad, or only to inform the authorities or Request for extradition?, which may be rejected as if he was a citizen of that country to which he fled?

The researchers believe that this exception does not fit unless the Jordanian authorities asked the foreign authorities to charge him abroad explicitly, But if the Jordanian authorities submitted a Request

[1] . Majali, Nedam, op. Cit., P. 169

for extradition and the request was rejected and he was trialed abroad, then the right to try him again remains valid, It is unreasonable for Jordan to have participated in his trial if the request is rejected.

At the conclusion of this exception, the researchers record their criticism of the text of Article 13 of the Jordanian Penal Code in that the Jordanian legislator recognized the effect of foreign rule in terms of calculating the length of the sentence that the perpetrator spent from the period of the sentence imposed by the Jordanian courts, because the legislator did not indicate what the solution is If the length of the sentence in the foreign verdict is equal to or greater than the Jordanian verdict , what is the solution? shall we trial him again and wasting the time of judiciary without a result? Or if the difference in punishment is slight, why should he be trialed again? Therefore, researchers believe that it is assumed that the trial should be conducted again if the crime category differs from a felony to a misdemeanor. There is no reason to prosecute him with a criminal description instead of a misdemeanor because the legislator take into account effects on the felony that differ on the misdemeanor in terms of statute of prescription , reinstatement and deprivation of rights. As for the criterion being the length of the sentence Only this is inconsistent with the punitive policy, so the researchers see that if the crime category unities, then there is no justification for the trial again, out of respect for legal stability and practical ineffectiveness, especially since the ruling may fall by statute of limitations and is not carried out in a real practical way.

2.2.3. Foreign verdict issued for crimes subject to the principle of territorial jurisdiction reference

The legislator mentioned this exception in Article 12 of the Jordanian Penal Code, but the Jordanian legislator has not clarified the justifications for this exception, and we will address this exception in terms of explaining the justifications for this exception and cases of this exception, then clarifying the conditions for this exception:

First : exception justifications

In light of the legislator 's silence -legislator is not supposed to explain the wisdom of the texts - researchers believe that the justifications for this exception are as follows:

1- **Achieving general deterrence, as punishing the perpetrator in the vicinity of the crime achieves general deterrence by informing society about the details of the crime and punishing the criminal.**

2- Justice and the interest of the investigation represented in the presence of evidence of the crime in its scene, since the trial of the perpetrator in the place of its occurrence facilitates the search for its evidence, as well as the procedures of investigation and familiarity with the circumstances of the crime and the criminal, It also makes it easier for a judge to determine responsibility and as result it is Closer to justice so that an innocent is not convicted and a criminal does not escape of punishment.

2- **Imposing the prestige and sovereignty of the state, as the application of the penal code to the territory of the state is considered one of the most important manifestations of**

sovereignty, as it is the means to secure rights worthy of criminal protection.[1]

Second: Exceptions:

These exceptions appears in one of two hypotheses: The first hypothesis is committing the crime and discovering the perpetrator, and here, it is certain that the perpetrator will be trialed in absentia and according to the Code of Criminal Procedures, the trial in absentia is a speedy trial, because the prosecution highlights the investigation file at once and the evidence is not presented separately, because the absent verdict is Shaky verdict, Whereas, the perpetrator is often re trialed, by accepting his objection to the absence verdict in misdemeanors and in the only case in the felonies mentioned in Article 212 of the criminal trial principles[2] Which requires that the accused be questioned by the public prosecutor and inform him of the date of the trial, but in felonies in general, as soon as the perpetrator is arrested, the verdict is annulled by the force of law, so there is no need to hear the evidence because it will be repeated if the verdict is rescinded and re trialed.[3] Despite the

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[1] . Hosni, Mahmoud Naguib, Explanation of the Lebanese Penal Code, op. Cit rence, p. 125

[2] . If the accused, who appeared before the public prosecutor, who is notified of the date of the trial, does not attend, then the court can try him in absentia, and if he attends one of the sessions and then fails to attend, then the trial is conducted against him as a prima facie, and the verdict in the first case is subject to objection according to the procedures stipulated in Articles (184) to (189) of this law, and in the second case, the verdict is subject to appeal within the specified dates.

3 . Article 254 of the Code of Criminal Procedure

If the absent accused surrenders himself to the government or apprehends him before the sentence imposed by the statute of limitations lapses, then the judgment and all

provision in Article 248 of Criminal principles to hear the evidence, but the practical reality is not to waste the time of the court by hearing evidence that will be re-heard in the event of a retrial, except in the case of the plaintiff demand compensation due to Personal claim that justifies the court hearing the evidence despite the absence of the accused.

The second assumption is that the Public Prosecution office does not know about the crime, or if the identity of the perpetrator is not revealed, So the crime may lapse by statute of prescription if the periods specified by the legislator in the Law expire, and in this case, there is no possibility of a new trial.

The researchers believe that this exception is pointless if the punishment abroad is from the same category of punishment prescribed in Jordanian law because the legislator consider the results mostly on the crime category and not on its amount except for the statute of prescription for the penalty, as the deprivation of rights is in felonies and misdemeanors affecting honor alone. ,

Thus, if the punishment is of the category of felony in the two laws or of the category of misdemeanor, there is no justification for prejudice to the authority of verdict and the stability of legal centers in order to impose on him a new penalty that may not exceed the sentence imposed abroad only a few months or days, and we do not forget the court's authority to take mitigating reasons The discretion that allows the court

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other ongoing transactions as of the issuance of the arrest warrant or the time-out decision are canceled as a judgment and the trial is repeated according to the normal rules.

to reduce the sentence imposed by the minimum set by law according to the provisions of Articles 99 and 100 of the Penal Code, which adds another reason to be satisfied with foreign judgment.

Conclusion

At the conclusion of this research, the researchers have come up with a set of results and recommendations, which we include below:

Results:

1- That the Jordanian legislator does not make a differentiate between many concepts of final verdict., despite the subtle differences decided by jurisprudence between these concepts.

2- The justifications for the unjust verdict are not task of the legislator but enter into task of jurisprudence and judiciary.

3- The principle of the authenticity of the criminal verdict in traditional philosophy is based on the idea of legal security and its essence is the infallibility of the judicial verdict from the review, while positive philosophy proposes an alternative to the unjust verdict that is the periodic review of the criminal provisions.

4- The absence verdict in the Jordanian legislation does not acquire the final degree except in two cases: the penalty is prescribed by statute of prescription , and the death of the convict.

5- Articles 178 and 236 of the Jordanian Code of Criminal Procedure mix between impediments to punishment and the reasons for non-liability

6- Difference in the meaning of innocence in Jordanian legislation from Egyptian legislation

7- The final verdict does not give an absolute permanent authorization, but the final verdict can be affected in more than one case.

8 - The legislator and in light of the provisions of the current penal law has made the aggravation of the result as a sword hanging over the convict's neck so that he can be re trialed at any time, no matter how long and without the limit of the criminal case.

9- The provisions of the Penal Code related to lack of responsibility lack accuracy and need to correct concepts in order to avoid translation flaws, especially the text of Articles 178 and 236 of the Code of Criminal Procedure

10- The provisions of the current Penal Code allow for the prosecution of the accused to be re-pursued for the slight differences between the sentence imposed and the potential sentence after the retrial, in a manner that appears to be a futility retrial.

Recommendations

1- **Amending Article 138 of the Criminal Procedures so that a case is added if the decision of dismissal of charge was issued because the act does not constitute a crime or does not require Penalty .**
2- **Amending the text of Articles 178 and 236 of the Code of Criminal Procedure so that the decision of non-liability shall be made if the act does not constitute a crime or if there is A non liability or reason of justification .**
3- **Amending the text of Article 331 of the Code of Criminal Procedure so that Accomplice who has not been trialed in the lawsuit has no right to the incident in which a decision of no liability was issued to invoke the final verdict.**

4- Amending the text of Article 58 of the Penal Code so that the perpetrator is not prosecuted if the result is aggravated after the expiry of the statute of Prescription for the crime from the date of the issuance of the irrevocable judgment.

5- Amending the text of Article 9 of the Penal Code by replacing the term state stamp with the seal of a government administration to remove confusion about the concept of state stamp and the lack of impunity for criminals.

6- Amending the text of Article 13 of the Penal Code so that the perpetrator should not be prosecuted again for one offence unless the category of Penalty abroad is less than the category of Penalty mentioned in Jordanian law.

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2- Abu Amer, Mohammed Zaki, (1974) impurity error in criminal judgment, Ph.D. Thesis, Alexandria University.

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13- **Suleiman, Mohammed Ali, Criminal Judgment 1993, University Press, Alexandria.**

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(5)

HYBRIDITY OF THE WORLDVIEW BASIS OF THE INTERNATIONAL LAW AND ORDER

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Abstract

The internal contradiction of the ideological basis, on which the international law and order is based, and which is formed on a random and mostly intuitive combination of the elements of the new (Kantian) and old (Cartesian) philosophical systems of Modern Age in the social and individual consciousness is studied in the work as a significant reason for the modern activation of manifestations of hybridity. Both systems have their origins in the depths of history, and their elements are embodied, above all, in two alternative models of interpersonal relations, embedded in the constants of human nature: the 'intersubjective' Kantian model is based on the relations of equal subjects, 'subject-object' the Cartesian model recognizes the subjectivity of only one party.

The purpose of the research is to substantiate the hypothesis that the prerequisite of the hybridity phenomena is the internal contradiction of the worldview basis of modern international law and order, which is formed by a random combination of the elements of the Kantian and Cartesian systems of philosophy in the individual and social consciousness, and the intensification of their manifestations at the turn of the XX-XXI centuries is a component of the general revision of worldview orientations and established standards of interpersonal relations and the organization of law and order, which, at least during Modern Age, tends to become more active at the turn of the centuries, acting cumulatively as a 'self-fulfilling prophecies'.

Keywords: international law and order, Kantian model, Cartesian model, hybridity, practical philosophy of morality, worldview

INTRODUCTION

Scientific, practical problems.

The conceptualization of the phenomena of the 'hybrid war' became a significant event on the turn of the XX-XXI centuries, especially in connection with the fact that one of the largest nuclear states, whose activities can have unpredictable effects – USSR's legal successor, a permanent member of the Security Council, has turned to wars 'not according to the rules', systematically, with the aim of destroying the existing international law and order.[1] However, warfare that violates not only the purposes and principles of the UN Charter but also the humanitarian law governing the rules of war is not the only example of hybridity. Some authors point out the hybridity of some modern political regimes in which declared democratic forms of government do not correspond to the realities of their authoritarian embodiment.[2] Obvious signs of hybridity, that is, the discrepancy between the other party's actual behavior and the expected one, can be observed in corporate relations with customers when the stated intentions of the first ones – to improve the welfare of the latter – do not meet the real purpose of expanding sales and maximizing enrichment.

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[1] Horbulin, V.P. (2017), *Hybrid World War: Ukrainian Front*. Kyiv: NISD, p. 9.

[2] Shulman, E., (2015), *Hybrid Modes* [online]. 24 September 2015. Available from: https://www.youtube.com/watch?v=BQSXotyDDuU (viewed 23 December, 2019).

Assuming that hybridity is the embodiment of the larger trends in history, it is necessary to pay attention to the idea of J. Habermas about the internal contradiction of Modern Age, which, in his opinion, was systematically justified in the early XIX century by Hegel for the first time, revealing the dialectic opposition of 'new' and 'even newer' elements in each institution of this period.[1] A series of scholarly discoveries of Modern Age, presenting new and even newer worldviews to the Western Christian society, periodically shocked its established system of views, filled it with contradictions and deprived of a sense of stability and expectation of habitual patterns of behavior,[2] that is, represented a variety of hybridity forms.

The internal contradiction of the ideological basis, on which the international law and order is based, and which is formed on a random and mostly intuitive combination of the elements of the new (Kantian) and old (Cartesian) philosophical systems of Modern Age in the social and individual consciousness is studied in the work as a significant reason for the modern activation of manifestations of hybridity. Both systems have their origins in the depths of history, and their elements are embodied, above all, in two alternative models of interpersonal relations, embedded in the constants of human nature: the 'intersubjective' Kantian model is based on the relations of equal subjects, 'subject-object' the Cartesian model recognizes the subjectivity of only one party.

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[1] Khabermas, Yu. (2003), *Philosophical Discourse of Modernity*. Moscow: Whole World, pp. 4-5.

[2] Khabermas, Yu. (2003), *Philosophical Discourse of Modernity*. Moscow: Whole World, p.19.

For more than two centuries, the philosophy of I. Kant has been overcoming the inertia of the subject-object approach to human relations with social and natural environment, embodied both in the Cartesian methodology itself, and in the style and means of ideological influence and command and administrative regulation of social relations, and the latter are held in a particular society the stronger, the longer and more aggressive they have been in the past.

Aim of the study.

The *aim of the research* is to substantiate the hypothesis that the prerequisite of the hybridity phenomena is the internal contradiction of the worldview basis of modern international law and order, which is formed by a random combination of the elements of the Kantian and Cartesian systems of philosophy in the individual and social consciousness, and the intensification of their manifestations at the turn of the XX-XXI centuries is a component of the general revision of worldview orientations and established standards of interpersonal relations and the organization of law and order, which, at least during Modern Age, tends to become more active at the turn of the centuries, acting cumulatively as a 'self-fulfilling prophecies'.

Methods and Sources of the Research.

Statistical data, sociological studies, comparative and historical, and hermeneutical methods are used to analyze modern hybrid wars. A considerable amount of literature, both foreign[1,2,1,2,3] and domestic,[4,5,6,7]

[1] Davis, J.R. (2013), "Defending Future Hybrid Threats", *Military Review* 5: 21-29.

[2] Herrmann, B., Thöni, Ch. and Gächter S. (2008), "Antisocial Punishment Across Societies", *Science* 319: 1362-1367.

gives a broad idea about the actual side of the phenomena of the hybrid war and, partly, its sociological explanation. A good example of the subjective conditionality of perception and interpretation of facts is demonstrated by the works of Russian authors.[8,9] But all these studies do not pay attention to the long-term origins of the current crisis state of the international community, which are, firstly, the psychological constants of human nature that underlie any social phenomena, and secondly, the tendencies of social and cultural dynamics. The appeal to the psychological foundations of international law was largely aided by

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[1] Hoffman, F.G. (2009), "Hybrid Warfare and Challenges", *JFQ* 52. National Defense University Press.

[2] Barbara, Stark (ed.) (2015), *International Law and Its Discontents*, Cambridge: Cambridge University Press.

[3] Renz, B. and Smith, H. (2016), Russia and Hybrid Warfare – Going Beyond the Label. Project «Russia and Hybrid Warfare: Definitions, Capabilities, Scope and Possible Responses». pp. 2–4, (internet) available at: http://www.helsinki.fi/aleksanteri/english/ (viewed 23 December, 2019).

[4] Vyshynskyi, S. (2015), "Autonomy of Space, Ukrainisn Revolution", *Philisophy* 2(6): 31-36.

[5] Vlasiuk, V.V. and Karman, Ya.V. (2015), "Some Main Concepts "Hybrid War in International Law", *Law and civil society* 1: 226-234, (internet) available at: http://lcslaw.knu.ua/index.php/item/207-deyaki (viewed 23 December, 2019).

[6] Magda, E.V. (2015), *Hybrid War: Survive and Win*. Kharkiv: Vivat.

[7] Horbulin, V.P. (2017), *Hybrid World War: Ukrainian Front*. Kyiv: NISD.

[8] Kariakin, V.V. (2010), *Modern Geopolitical Dynamics of the Near and the Middle East*. Moscow: IG Granitsa.

[9] Neklessa, A. I. (2015), "Hybrid war. The Appearance and Palette of Armed Conflicts in the XXI Century", *Economic strategies* 17(8): 78-87.

the work of O. Merezhko,[1] as well as a number of works on the analysis of the psychological nature of law[2,3,4] and social psychology,[5,6,7,8] the classic work of P. Sorokin,[9] as well as the works of A. Toynbee,[10] Yu. Khabermas,[11] K. Popper[12] became the basis of social and cultural dynamics studies, the ideas of general trends in the dynamics of the development of philosophical thought were formed on the basis of the

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[1] Merezhko, O. O. (2012), *Psychological Theory of International Law (public and private)*. Odesa: Phenix.

[2] Radzivill, O. and Pyvovar, Y. (2019), Philosophical and Legal Concepts in the Context of Regulating National and International Public Order. In: I. Sopilko, ed. *Jurisprudence in the modern information space*. Hamilton: Accent Graphics Communications & Publishing. pp. 40-54.

[3] Pyvovar, Yu., Radzivill, O. and Rozum, I. (2017), "The Role and Significance of the Regional European Organizations in the Process of Humanization of National Public Policy: Legal Analysis", *Internauka. Series: «Juridical sciences»*, 5(5): 22-29.

[4] Khuk, Mark Van (2012), *Law as Communication*. St.-Petersburg: St.-Petersburg State University, LLC "University Publishing Consortium".

[5] Karlsen, J. E. (2004), Self-fulfilling Prophecy. In: S. Larsen ed.; transl. *Theory and Methods in Social Sciences*. Moscow: MGIMO; ROSSPEN. pp. 102-114.

[6] Kroche, B. (1920), *Aesthetics as the science of expression and as general linguistics*. Moscow: Publishing House M. and S. Sabashnikovy, (internet) available at: http://vispir.narod.ru/croce/croce.htm (viewed 23 December, 2019).

[7] Markuse, H. (1994), *One-Dimensional Man. Studies in the Ideology of Advanced Industrial Society.* Moscow: Progress.

[8] Teilhard de Chardin, P. (1989), *Phenomenon of Man*. Moscow: Nauka.

[9] Sorokin, P.A. (2006), *Social and Cultural Dynamics*. Moscow: Astrel.

[10] Toynbee, A.J. (2004), *A Study of History*. Moscow: Aires-Press.

[11] Khabermas, Yu. (2003), *Philosophical Discourse of Modernity*. Moscow: Whole World.

[12] Popper, K. (1994), *Open Society and its Enemies,* 1, 2, Kyiv: Osnovy.

works by G. Reale and D. Antiseri.[1,2] In the end, the need to investigate the origins and fluctuations of contemporary philosophical ideas more thoroughly made it necessary to turn to the works of I. Kant,[3,4,5] which proved to be the source of most philosophical theories of the next two centuries, regardless of whether they were intended to criticize or further develop the ideas of the philosopher, they acted on their basis.

THE FIRST TOPIC

HYBRIDITY AND CHARACTERISTIC OF PHASE TRANSITION AND BIFURCATION

As it is stated in the monograph edited by V.P. Horbulin, the term 'hybrid warfare' started to be used in the late 1990s by US military men.[6] This term has become widely used in connection with the 2006 Second Lebanon War, where 'Hezbollah' used irregular armed formations and their ideological training against Israel.[7] The extension of the term 'hybrid war' is associated with the beginning of Russian

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[1] Reale, G. and Antiseri, D. (1996), Western Philosophy from the Beginnings to the Present Day. In: *Modern Age*. St.-Petersburg: Petropolis.

[2] Reale, G. and Antiseri, D. (1997), Western Philosophy from the Beginnings to the Present Day. In: *From Romantism to Present Day*. St.-Petersburg: Petropolis.

[3] Kant, I. (1965), Critique of Practical Reason. In: *Immanuel Kant Work*, Moscow: Mysl, 4(1). pp. 311-501.

[4] Kant, I. (1966), Critique of Judgment. In: *Immanuel Kant Work*, Moscow: Mysl, 5. pp. 161-529.

[5] Kant, I. (1994), *Critique of Pure Reason*, Moscow: Mysl.

[6] Horbulin, V.P. (2017), *Hybrid World War: Ukrainian Front*. Kyiv: NISD, pp.29-31.

[7] Davis, J.R. (2013), "Defending Future Hybrid Threats", *Military Review* 5: 21-29.

aggression against Ukraine in the spring of 2014, which included subversive activities of professional Russian military men, armament, training and financing of the separatists in Ukraine, the official denial by Moscow of its illegal actions and all subsequent actions of the aggressor state which only diversified hybrid means of warfare.[1] Its current stage is characterized by intense pressure on the international community to weaken its support for Ukraine, which uses the activities of the Moscow's secret service abroad, constant dissemination of false information in official media and the Internet, as well as such material arguments as gas supplies to Europe and constant threat of a nuclear attack.

There is no doubt that hybrid warfare has a long history: on the one hand, acting as a stronger and more prepared party, the Russian Federation follows the practice of hegemons of the Warring States, the Second and the Third Reichs, as well as the USSR and the United States during the Cold War.[2] On the other hand, the treacherous actions of powerful states provoke a gradual intensification of resistance – a hybrid one: for instance, the resistance of the Scythian campaign of Darius I, the tactics of the Taborites or Geuzens, and many other examples of violations of the idea of the strong partyof these conflicts of 'due' warfare. D. Kuleba considers the instigation to the rebellion of Sparta's helots by the Athens during the Peloponnesian wars as one of the examples of hybridity.[3] Thucydides, who described these wars as

[1] Horbulin, V.P. (2017), *Hybrid World War: Ukrainian Front*. Kyiv: NISD, p.28.

[2] Horbulin, V.P. (2017), *Hybrid World War: Ukrainian Front*. Kyiv: NISD, pp.142-143.

[3] Magda, E.V. (2015), *Hybrid War: Survive and Win*. Kharkiv: Vivat, p.3.

being a their participant, gives us an example of, perhaps, the first 'export of the revolution' recorded in history, which had to break the well-established notions of the conservative opposite party.[1]

But, in our opinion, the Peloponnesian wars should be considered in the context of previous events, which were mentioned by Thucydides himself and covered by Herodotus in sufficient detail.[2] It is a struggle of Hellenic poleis against the Achaemenid Empire, which by that time had already been defeated by the Scythians within the territory of Ukraine (514 BC): it was opposition not only to the imperial ambitions of Darius or Xerxes, but also to the attempts of their own tyrants to regain power over poleis under the patronage of the empire. Former tyrants of Hellas poleis and members of their families took an active part in the Achaemenid imperial aggression and, being aware of the dangers of freedom of demos, used full-scale techniques against their fellow citizens that fell entirely within the characteristics of a hybrid war. The Peloponnesian wars only continued Hellas' struggle for freedom: conservative Sparta, whose totalitarian system made not only helots or perioeci but also full-fledged Spartiates 'the slaves of the system', together with the supporters of the old order from other policies fought against democratic poleis led by Athens.

Comparing the current confrontation between Ukraine and the Russian Federation with the confrontation between Hellas– the Achaemenid empire or Athenian democracy and Spartan timocracy, it becomes

[1] Thucydides (1981), *History*. Lviv: Nauka, pp.14-15.

[2] Herodot (2004), *History*. Moscow: OLMA-PRESS Invest, (internet) available at: http://lib.aldebaran.ru (viewed 23 December, 2019).

clear that the deep basis of the conflict in both cases lies in the choice between the two antagonistic models of interpersonal relations, which determine the features of the dominant worldview in society, and nature of its public order formation. One of them implies equal relations of cooperation, the other one impiles the 'superior-subordinate' relations. Supporters of both models exist on both sides of the front line, which also explains Russia's radical return to aggressive international politics, the 'personality cult', and other attributes of the totalitarian regime, and the difficulty in realizing Ukraine's European integration choice. However, this choice, exercised by each person individually, accumulates during significant historical events in the spontaneous 'cooperative effects' of solidarity in public attitudes of mind: the war has finally completed the 'bifurcation' between these two post-Soviet societies, which are now strongly moving in opposite directions choosing principles of interpersonal relations and public order development, strengthening their choice by intensively forming alternative worldviews.

THE SECOND TOPIC

ORIGINS AND MODERN MANIFESTATIONS OF ONE-DIMENSIONALITY AND TOTALITARIAN THINKING

Whereas in ancient times the worldview discrepancies of the parties in major international conflicts were based on the difference of centuries-old ethnocultural or civilizational traditions, since Modern Age the growth of the pace of social and cultural dynamics and its uneven influence on different societies contributes to the growth of the share of temporary attitudes that are clearly defined ideologically and

purposefully disseminated in the worldview. In the modern world, the advancement of science, especially information technology and mass consciousness management practices, that are available to states with significant opportunities to effectively mobilize their resources, are used in full scale to develop such attitudes.

On the example of Russia–Ukraine relations, one can even assume that the capabilities of a state that is intentionally prepared for a hybrid warfare, allow it to carry out effective ideological indoctrination of the population on both sides of the front line in a relatively short period of time, regardless of the content of the ideology itself. However, the effectiveness of such ideological strike, in turn, is due to another long-lasting factor peculiar to the majority of the population of modern societies. This refers to the 'one-dimensionality' of the mind of the average citizen, who is unable to critically evaluate the coverage of facts and trends, the extent of which goes beyond his particular problems of today.

One-dimensionality, defined by H. Marcuse as a trait inherent in the industrial phase of civilization development,[1] in our opinion, has its origins in totalitarian religions, which have 'enlightened' a person to realize the multiplicity of the universe and the diversity and inertia of its processes for more than two millennia. Substantially suppressed by totalitarian religions, more ancient 'multidimensional' worldview, formed, perhaps, even in the Upper Paleolithic, was based on the respect of person for any manifestations of nature, the recognition of

[1] Markuse, H. (1994), *One-Dimensional Man. Studies in the Ideology of Advanced Industrial Society.* Moscow: Progress, p.6.

subjectivity of which and the awareness of solidarity unity with which maintained person's natural dignity, that is, confidence in the completeness of one's own subjectivity. The preserved phonetic and substantive relationship of the concepts of 'world', 'light', 'holiday', 'holy' in the languages of individual peoples is the evidence of the life-affirming potential of such worldview, while the totalitarian religions brought from the foci of ancient civilizations identified holiness with the 'sanctity' and therefore something inaccessible to the consciousness of the 'flock', and most importantly – with the 'fear of the Lord', which embodied the dramatic experience of suffering from 'the good and the great' and survival under their power in religious metaphors, including various hybrid methods.

Based on the relations of 'pastor-flock', 'domination and punishment for disobedience' totalitarian religions, even enriched in the process of contact with other worldview systems, new historical experience and elements of humanistic nature, contributed to the displacement of the sense of legal personality from human consciousness, subordinating it to the incomprehensible, not explained by common sense or good practice – the higher will, which could be interpreted and embodied only by specially authorized persons, without any consideration of their personal characteristics. Although the spread of totalitarian religions occurred at different rates in different regions of the globe, they have influenced has much of the world – firstly, due to their proselytism, which often acts as an ideological aggression, and secondly, because totalitarian thinking serves the aspirations of the dominant classes of the caste societies, which have become the main form of organization of social relations in the last five thousand years of the 'era of civilization'.

As shown by A. Toynbee,[1] the 'era of civilization' is, in fact, an era of confrontation, on the one hand, the centers of civilization, the cultural and economic basis of which were self-governing city-states, on the other hand, the great 'barbaric movements' that periodically conquered them, establishing empires – hybrid forms of coexistence of barbarism and civilization, in which public order was provided by a 'system of violence', justified by a particular religious system. Accordingly, the dominant feature of the caste societies was the 'subject-object' attitude of the privileged strata to the subjects, that is, the feeling of complete disregard for the dominant side of the problems and the legal personality of the party under control. The emergence of totalitarian religions (mid-2nd – early 1st millennium BC) only finally consolidated the rationale and sacralization of such relations.

Even when Western society of Modern Age intensified the movement to significant ideological shifts, associated with the revival of polytheistic ancient philosophy, the development of practical science and the struggle of the state against caste privileges, totalitarian thinking for a long time only took new forms and was not overcome by neither new reformers, nor Cartesian philosophy, nor Enlightenment figures. On the contrary, the most ambitious results of its prolonged action are embodied in the 'one-dimensional' man of industrial society, whose conveying totalitarianism has caused a decisive blow to the stable, ideological foundations of multidimensionality laid before the Neolithic. In the process of industrial society formation, the unidimensionality of thinking, as well as the subject-object approach, have been embodied in

[1] Toynbee, A.J. (2004), *A Study of History*. Moscow: Aires-Press, p.364.

vulgar materialism and linear interpretation of history, rigid models of social order and the practice of their realization in social revolutions, early sociological theories and legal positivism.

On the other hand, the spread of ideas in Modern Age, which later emerged as values of civil society, initiated their long-standing opposition to the values of caste societies, until a certain time, however, without touching the depths of public consciousness, which mostly eclectically united new ideas with totalitarian thinking.

THE THIRD TOPIC

KANT'S PHILOSOPHY OF SELF-REFLECTION AND THE "MOSAIC" OF ITS AWARENESS

Systemic changes in the social consciousness of Western society, which P. T. de Chardin compared to the Neolithic revolution in historical significance, occurred at the turn of the XVIII – XIX centuries.[1] The most significant figure of this period is I. Kant, whose contribution to the methodology of the knowledge system is metaphorically called the 'Copernican revolution' in metaphysics: just as Copernicus proved the fallacy of the 'Sun rotating around the Earth' in astronomy, in epistemology I. Kant proved that the obviousness of certain characteristics of reality does not guarantee their adequate reflection, which they are 'by themselves'.[2] In both cases, direct sensory experience must be reflected, that is, it is necessary to take into account

[1] Teilhard de Chardin, P. (1989), *Phenomenon of Man*. Moscow: Nauka.

Thucydides (1981), *History*. Lviv: Nauka, p.172.

[2] Reale, G. and Antiseri, D. (1996), Western Philosophy from the Beginnings to the Present Day. In: *Modern Age*. St.-Petersburg: Petropolis, p.634.

all aspects of the subjective conditioning of human consciousness, which I. Kant systematically explored in his three 'Critiques'.

In 'The Critique of Pure Reason' (1781), Kant analyzes the cognitive capacity of human consciousness, distinguishing between sensual and rational cognition. The products of sensory cognition – 'phenomena' serve as a basis for rationally deduced judgments – 'noumenon', which give knowledge about something inaccessible to direct sensory experience.[1] Both components are proposed by Kant as working tools for the 'philosophy of nature', that is, the methodology of knowledge of objective reality.

Kant contrasts theoretical philosophy of nature with practical philosophy of morality, the basis of which is laid out in 'The Critique of Practical Reason' (1788). The key category of philosophy of morality is freedom, which is understood as freedom of consciousness from the pressure of biological instincts, which gives rise to lack of freedom in public relations. Practical reason responsible for the willful acts (that is, activity) of a human, forms rules – 'maxims', which, in most cases, are a compromise between the command of the 'pure practical reason' inherent in the nature of a human, and the 'pathological influence' on him in certain circumstances (aspirations, experience, environment, etc.).[2] The command of pure practical reason, which a human is aware of as far as he is able to attain a state of freedom, is embodied in moral

[1] Kant, I. (1994), *Critique of Pure Reason*, Moscow: Mysl, pp.32-33.

[2] Kant, I. (1965), Critique of Practical Reason. In: *Immanuel Kant Work*, Moscow: Mysl, 4(1). p. 425.

imperatives (hypothetical and categorical).[1] The categorical moral imperative has the meaning of a universal law, so it is the only one, though it may have different formulations, the most famous of which are: 'Do so that your will maxim corresponds to the law of universal order' and 'Do so to treat humanity in a constant way –in your own person, and in the person of anyone else – as a goal, and never as a means'.[2]

The Critique of Judgment (1790) systematizes knowledge about the possibilities, structure, and criteria of self-reflection of human consciousness. If the theoretical philosophy of nature is based on the cognitive properties of human consciousness, and the practical philosophy of freedom is intended to coordinate its capacity for expression of will, then the 'capacity of judgment' that binds both systems[3] relies on feelings of satisfaction or dissatisfaction that can have a multilevel hierarchy of criteria – from the lowest to the highest ones.[4] The reflective capacity of judgment, designed to control the state of consciousness in the processes of cognition, is divided by Kant into 'aesthetic' and 'solemn', because in these forms of perception of reality, in some of its phenomena, 'beautiful' and 'majestic' can be revealed, as

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[1] Kant, I. (1965), Critique of Practical Reason. In: *Immanuel Kant Work*, Moscow: Mysl, 4(1). pp. 332.

[2] Radzivill, O.A. (2017), *Right of Peoples from the Neolithic to Modern Times.* Kyiv: NAU, p.657.

[3] Kant, I. (1966), Critique of Judgment. In: *Immanuel Kant Work*, Moscow: Mysl, 5, p. 164.

[4] Kant, I. (1966), Critique of Judgment. In: *Immanuel Kant Work*, Moscow: Mysl, 5, p. 210.

the embodiment of transcendental characteristics of being not accessible to consciousness in most other phenomena.[1] The basic principle of the whole system of knowledge is defined by Kant in the maxim of the reflective capacity of judgment: 'Nature, nominally perceived, remains a 'thing in itself', but this does not prevent us from interpreting it as rationally organized, owing to the unwavering desire of the spirit to think about it in that way'.[2]

The influence of his idea on the successors has a 'mosaic' character, forming, in accordance with his concepts of characteristics of human consciousness, their eclectic combinations with the concepts of his researchers, interpreters and critics. Therefore, the followers of I. Kant's concepts should not be limited by the circle of 'Kantians'[3] or 'Neo-Kantians'.[4] His philosophy was perceived fragmentarily and subjectively, and its individual provisions were scattered in various, sometimes very contradictory, conceptions.

For example, the dialectic, to which Kant, along with analytics, has given a place in each of his 'Critiques', understanding it as a fixation of the interconnection of alternative tendencies in the human consciousness, without excluding the presence of appropriate

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[1] Kant, I. (1966), Critique of Judgment. In: *Immanuel Kant Work*, Moscow: Mysl, 5, p. 225.

[2] Reale, G. and Antiseri, D. (1996), Western Philosophy from the Beginnings to the Present Day. In: *Modern Age*. St.-Petersburg: Petropolis, p.667.

[3] Reale, G. and Antiseri, D. (1997), Western Philosophy from the Beginnings to the Present Day. In: *From Romantism to Present Day*. St.-Petersburg: Petropolis, p.28.

[4] Reale, G. and Antiseri, D. (1997), Western Philosophy from the Beginnings to the Present Day. In: *From Romantism to Present Day*. St.-Petersburg: Petropolis, p.278.

antagonism and objective reality, in speculative conclusions of G.W.F. Hegel arose as an immanent characteristic of objective reality,[1] which, in turn, caused further neglection of the subjective conditioning of human consciousness in dialectical materialism. Instead, I. Kant always clearly draws the line between proven and speculative conclusions. In particular, writing about the predetermined historical process, Kant points out the impossibility of proving or refuting it, while Hegel, followed this concept, defined the history of mankind as the embodiment of the Absolute Spirit,[2] and Marxism – as a sequence of social and economic formations, in which the driving force are contradictions between the productive forces and the way of production.[3] Herein, both conceptions are stated as a direct reflection of objective reality, that is, without any reservations concerning their subjective conditionality and speculative nature.

K. Popper, who qualifies systems of G.W.F. Hegel and K. Marx as 'oracular philosophy', substantiates their popularity 'according to Kant', that is, taking into account their influence on the individual motivations of their supporters.[4] Kant's ideas also correlates with K. Popper's definition and characteristic of the basic features of an open

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[1] Reale, G. and Antiseri, D. (1997), Western Philosophy from the Beginnings to the Present Day. In: *From Romantism to Present Day*. St.-Petersburg: Petropolis, p.65.

[2] Hehel, G.V.F. (2000), *Phenomenology of the Spirit. The philosophy of history*. Moscow: Science, p.246.

[3] Engels, F. (1882), *Anti-Dühring. Dialectic of Nature* [Litportal], (internet) available at: https://litportal.ru/avtory/fridrih-engels/kniga-anti-dyuring-dialektika-prirody-sbornik-603971.html (viewed 23 December, 2019).

[4] Popper, K. (1994), *Open Society and its Enemies,* 2. Kyiv: Osnovy, pp.81, 91.

society.[1] The most important of these is the way, in which society establishes its basic rules: for open society, it is 'a critical conventionalism' – a regime of free agreement and critical discussion by the parties of their positions and proposals, after and on the basis of which, only a system of common points of view can appear and obligatory law-convention; for closed societies, it is 'mythical taboo' – an organization of society based on a certain worldview myth, belief in which is the main criterion of loyalty of society's members, and a system of taboos that regulates the most important aspects of social relations.[2]

The direction of philosophy, in which K. Popper worked, was defined as Neo-Positivism or Critical Realism,[3] can serve as an example of the development of Kant's ideas in the formally opposing theory. Criticizing I. Kant's idea of the 'apriority' of virtues of human consciousness,[4] which could not be empirically studied at that time, K. Popper builds his research precisely on the Kantian methodology, based on the subjective conditionality of the creation and dissemination of any scientific theories or using the method of verifying scientific theories in accordance with the Kantian criteria of distinguishing scientific and speculative conclusions. In particular, in his work devoted to the study of the foundations of epistemology, K. Popper demonstrates how critical conventionalism works in the realm of

[1] Popper, K. (1994), *Open Society and its Enemies,* 1. Kyiv: Osnovy, p.13.

[2] Popper, K. (1994), *Open Society and its Enemies,* 1. Kyiv: Osnovy, pp.74-75.

[3] Reale, G. and Antiseri, D. (1997), Western Philosophy from the Beginnings to the Present Day. In: *From Romantism to Present Day*. St.-Petersburg: Petropolis, p.661.

[4] Popper, K. (1994), *Open Society and its Enemies,* 1. Kyiv: Osnovy, p.238.

scientific research: in the permanent process of science approaching to an adequate reflection of the objective reality, scientific theories, as an evolutionarily conditioned instrument of cognitive function of human consciousness should be constantly produced to accomplish certain tasks, and their verification should show the limits, beyond which they cease to be effective and shoud be replaced by more adequate theories.

The development of legal aspects of the philosophy of I. Kant can also be considered systematic criticism, at the turn of the XIX-XX centuries, a positivistic understanding of law, which resulted in formation of a set of new, alternative approaches, under the general name 'sociological legal awareness'.[1] Legal positivism, which limit the right only by norms formally issued on behalf of the state, found itself unable to recognize their social adequacy, which were aimed at correction of these new trends in the theory of law. Particularly close to Kantian philosophy is the psychological theory of law developed by L. Petrazhytskyi and his followers.[2] Fundamental discoveries of the XX century in the sciences of human and society have strengthened the position of sociological legal awareness, according to which, the right is the embodiment of the most relevant social laws, realized and verbalized in intersubjective communications as rules, which are obligatory, not because the threat of punishment for failure, as it follows from the positivistic approach, and but because of their importance for maintaining the mutual

[1] Khuk, Mark Van (2012), *Law as Communication*. St.-Petersburg: St.-Petersburg State University, LLC "University Publishing Consortium", p.14.

[2] Merezhko, O. O. (2012), *Psychological Theory of International Law (public and private)*. Odesa: Phenix, pp.13-15.

expectancy of social relations.[1] In the theory of law, this approach caused the understanding: firstly, the primacy, in relation to the collective legal personality – the individual legal personality, due to the psycho-physical characteristics of a human; secondly, the multilevelness of the collective subjects of social relations, as the established levels of interpersonal communications, if it is possible, to influence the characteristics of social and cultural dynamics at each level.[2]

The interconnection of a complex characteristic of a society (including its state of law and order) with the individual characteristics of its members, as it has shown P. Sorokin, is a dynamic and can potentially act in the mode of mutual reinforcement or weakening, being subordinated to fluctuations of social and cultural dynamics.[3] In Kant, such interconnection is defined only in a general form: on the one hand, in the assessment of the historical process as the realization of a 'Nature's Secret Plan' is to achieve such a national and international civil system, which can reveal all abilities inherent in a man,[4] on the other – in determining the conditions for the development of such a system – an achievement of a proper level of consciousness by

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[1] Khuk, Mark Van (2012), *Law as Communication*. St.-Petersburg: St.-Petersburg State University, LLC "University Publishing Consortium", pp.20-21.

[2] Khuk, Mark Van (2012), *Law as Communication*. St.-Petersburg: St.-Petersburg State University, LLC "University Publishing Consortium", p.24.

[3] Sorokin, P.A. (2006), *Social and Cultural Dynamics*. Moscow: Astrel, pp.53-55.

[4] Radzivill, O. and Pyvovar, Y. (2019), Philosophical and Legal Concepts in the Context of Regulating National and International Public Order. In: I. Sopilko, ed. *Jurisprudence in the modern information space*. Hamilton: Accent Graphics Communications & Publishing, p.10.

humanity.[1] Kant also identified three levels (individual, national and interstate) of legal support for the movement of mankind to build such a system.[2]

In the work 'Social and Cultural Dynamics' P. Sorokin, exploring the development of the European cultural tradition for the period from the 9th century B.C. to the 19th century A.D., identifies in it the fluctuations of two 'types of culture', which over a long historical boundaries (up to 600 years) are characterized by a complex of all forms of spiritual and intellectual activity of society and a set of 'types of mentality' of certain categories of individuals:[3] an ideational type of culture, formed on the basis of religious worldview, and sensual, based on empirical researches and their rational explanation.[4] The sensual replaced the ideational twice: in the VI-III centuries B.C. (antiquity) and in the XV-XVII centuries A.D. (Modern Age) – in the form of change of sign of large fluctuations, complicated by fluctuations of smaller scale. Thus, among three dimensions of history – constant, progressions and fluctuations –

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[1] Radzivill, O. and Pyvovar, Y. (2019), Philosophical and Legal Concepts in the Context of Regulating National and International Public Order. In: I. Sopilko, ed. *Jurisprudence in the modern information space*. Hamilton: Accent Graphics Communications & Publishing, p.11.

[2] Renz, B. and Smith, H. (2016), Russia and Hybrid Warfare – Going Beyond the Label. Project «Russia and Hybrid Warfare: Definitions, Capabilities, Scope and Possible Responses». pp. 2–4, (internet) available at: http://www.helsinki.fi/aleksanteri/english/ (viewed 23 December, 2019).

[3] Teilhard de Chardin, P. (1989), *Phenomenon of Man*. Moscow: Nauka, pp.77-80.

[4] Sorokin, P.A. (2006), *Social and Cultural Dynamics*. Moscow: Astrel, pp.64-65.

the latter are pointed out by P. Sorokin as the most informative for the study of social and cultural dynamics.[1]

D. Kelley, who explored the development of the Western legal tradition, in the same range as P. Sorokin (from the 'Dark Ages' of ancient Greece to the Modern Age of Europe), uses a different algorithm of historical dynamics. In the paper 'The Human Dimension of Being: Public Opinion in the Western Legal Tradition', he identifies local acts of the 'movement to maturity' of the collective legal awareness of certain societies of ancient, medieval and New Europe,[2] showing how each of them in certain time passed three of its stages-states: Physis, as an embodiment of the natural understanding of law; Nomos, as the domination of volitionally established (by power of the monarch, collegially or nationally) laws of a society organized as a state; Logos, as a stage of awareness of the transcendental, supernatural and superhuman ideal law.[3] Each of the distinguished stages-states, on the one hand, is correlated with the subject of the three 'Critiques' of Kant, that is, the awakening, as dominant elements of the collective consciousness a lot of complex levels of individual consciousness for self-reflection: Physis is an integral and direct perception of nature a component of which is a human activity; Nomos is a separation from natural law and the dominance of volitionally established law (the practical component of the collective world-view); Logos is an

[1] Sorokin, P.A. (2006), *Social and Cultural Dynamics*. Moscow: Astrel, pp.97-98.

[2] Kelley, D.R. (2002), *The Human Dimension of Being: Public Opinion in the Western Legal Tradition*. Odesa: AO BAKHVA, p.20.

[3] Kelley, D.R. (2002), *The Human Dimension of Being: Public Opinion in the Western Legal Tradition*. Odesa: AO BAKHVA, pp.15-17.

awareness of the universal transcendental laws of the Universe, reflected metaphorically according to a particular cultural tradition. On the other hand, the stages-state of legal awareness, defined by D. Kelley, reflect the scale of the worldview, at least, of the leading part of society at each of these stages: Physis is a scope of family relations, in which, mainly, acts personal will of the patriarch; Nomos rules in a society that has formed a state the laws of which are subordinated to the will of patriarchs; the Logos stage is connected with the ecumenical processes and intense cultural contacts between states and civilizations.[1]

On the example of both complementary approaches applied by P. Sorokin and D. Kelley, it is clear that the driving forces and patterns of historical dynamics do not yet have a generally recognized understanding. D. Kelley demonstrates the 'quantization' of the historical process, the large-scale fluctuations of P. Sorokin, reflecting periodic fluctuations in worldview foundations or public attitudes,[2] shown by him as the embodiment of objective dynamic confrontation – in space, time and levels of organization – large sociocultural bodies of an antagonistic nature, that is, in the context of Hegel's dialectics or dialectical materialism.

Instead, Kant's methodology considers dialectics, first of all, as a feature of the human mind – to identify and contrast differences – in order to explore more deeply the natural or social phenomenon in its internal diversity and variability in time. The main motive of any

[1] Radzivill, O.A. (2017), *Right of Peoples from the Neolithic to Modern Times.* Kyiv: NAU, p.86.

[2] Sorokin, P.A. (2006), *Social and Cultural Dynamics*. Moscow: Astrel, pp.106-107.

cognitive activity of a human is an achievement, albeit a temporary, but optimally integral reflection of the reality. In the context of 'theoretical philosophy of nature' Kant shows that the induction method (synthesis) at some point reveals a common basis for any identified opposites.[1]

Two works devoted directly to the issues of building international law and order became an important component of I. Kant's legacy. In the 'Idea for a Universal History with a Cosmopolitan Purpose' in 1784, I. Kant shows that private motives of human activity of multiple vectors, acting collectively as the driving force of history, reveal signs of predetermination at the level of 'the most large-scale universal processes',[2] which is understood by him as the movement of mankind towards the highest purpose of nature – the development of the virtues inherent in a human.[3] The means that nature uses for this purpose is the antagonism of human interests, which, after all, must lead mankind to order in accordance with universal laws.[4] Such law and order is a

[1] Kant, I. (1994), *Critique of Pure Reason*, Moscow: Mysl, p.20.

[2] Kant, I. (n.d. a), *Idea for a Universal History with a Cosmopolitan Purpose*, (internet) available at: https://www.civisbook.ru/files/File/Kant_Idea.pdf (viewed 23 December, 2019), pp.3-4.

[3] Kant, I. (n.d. a), *Idea for a Universal History with a Cosmopolitan Purpose*, (internet) available at: https://www.civisbook.ru/files/File/Kant_Idea.pdf (viewed 23 December, 2019), p.11.

[4] Kant, I. (n.d. a), *Idea for a Universal History with a Cosmopolitan Purpose*, (internet) available at: https://www.civisbook.ru/files/File/Kant_Idea.pdf (viewed 23 December, 2019), p.6.

global legal civil society[1], in which only one can attain the highest purpose of nature – a free human whose consciousness is brought up in harmony with the universal laws embodied in the organization of world civil society. Among other problems of humanity, this seems to be the most difficult one and will be solved at latest, since it requires a long historical experience and an adequate level of culture, at least in most of humanity.[2] Kant shows that in order to achieve this goal, constant feedback must be maintained between the various levels of the international order, since the achievement of the status of world civil society is not possible without the establishment of a reliable civil society in individual states, which, in turn, can be achieved only under the conditions of mutual expectation and legal regulation of the relationship between them.[3] This approach is new to the one-vector cause and effect method inherent in Cartesian methodology; it became the basis of the logical and meaningful method proposed by P. Sorokin more than a century ago.[4]

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[1] "Civil society" (Latin "societas civilis") in I. Kant's works and in the Western legal tradition has a double meaning – as a society of full-fledged citizens and as a civilized society.

[2] Kant, I. (n.d. a), *Idea for a Universal History with a Cosmopolitan Purpose*, (internet) available at: https://www.civisbook.ru/files/File/Kant_Idea.pdf (viewed 23 December, 2019), p.7.

[3] Kant, I. (n.d. a), *Idea for a Universal History with a Cosmopolitan Purpose*, (internet) available at: https://www.civisbook.ru/files/File/Kant_Idea.pdf (viewed 23 December, 2019), p.8.

[4] Reale, G. and Antiseri, D. (1997), Western Philosophy from the Beginnings to the Present Day. In: *From Romantism to Present Day*. St.-Petersburg: Petropolis, pp.40-41.

For stability and mutual expectation, international relations must be governed by the just conditions that Kant systematically mentions in the work 'Perpetual Peace' (1795). The philosopher begins it by proclaiming faith in humanity's ability to obtain 'perpetual peace' other than at the cemetery, though this is hampered by many human flaws. This is especially true for heads of states who are not satisfied with war.[1] I. Kant outlines the conditions for the achievement of 'living' perpetual peace in 'preliminary' and 'definitive' articles. Six preliminary articles are conditions that should be reached as soon as possible, since trust between states is impossible without them. They all remain relevant to contemporary international relations, but the last of them is especially that is understood as subject to law, not the will of the mighty'.[2] In building a global civil society, he identifies three most significant levels of legal support: a) the state public order of the nation, which must be republican; b) the legal regime in the relations of the states with each other, which should be limited only to the norms of hospitality; c) world civil law and order, which encompasses both relations between states and relations between people with legal norms,

[1] Kant, I. (n.d. b), *Perpetual Peace,* (internet) available at: https://www.civisbook.ru/files/File/Kant_K_vechnomu_miru.pdf (viewed 23 December, 2019), p.2.

[2] Kant, I. (n.d. b), *Perpetual Peace,* (internet) available at: https://www.civisbook.ru/files/File/Kant_K_vechnomu_miru.pdf (viewed 23 December, 2019), p.6.

since all people must be regarded as its subjects.[1] In the annexes to the articles, Kant expresses aphoristic and quite up-to-date opinions on the subjective aspects of the administration of public authority and justice, in particular: 1. 'It seems humiliating for the legislative authority of a state to seek advice on the principles of its relations with other states in the works of subject philosophers, but it seems extremely reasonable'.[2] 2. 'The lawyer, who chose scales as the symbol of law and a sword as the symbol of justice, often uses the sword not only to protect the scales from unauthorized influence, but also to put it on the right scale if it does not want to fall. It is a great temptation for a lawyer if he is not a philosopher, since his formal duty is only to apply existing laws and not to check whether they need improvement'.[3]

THE FOURTH TOPIC

THE INTERNAL CONTRADICTIONS OF MODERN INTERNATIONAL LAW AND ORDER

The perspectives of world civil society outlined by Kant have been only partially embodied in the international law and order, which emerged in the second half of the XX century. Historically the last contribution

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[1] Kant, I. (n.d. b), *Perpetual Peace,* (internet) available at: https://www.civisbook.ru/files/File/Kant_K_vechnomu_miru.pdf (viewed 23 December, 2019), p.7.

[2] Kant, I. (n.d. b), *Perpetual Peace,* (internet) available at: https://www.civisbook.ru/files/File/Kant_K_vechnomu_miru.pdf (viewed 23 December, 2019), p.27.

[3] Kant, I. (n.d. b), *Perpetual Peace,* (internet) available at: https://www.civisbook.ru/files/File/Kant_K_vechnomu_miru.pdf (viewed 23 December, 2019), p.28.

of positivism to legal practice, it is based on agreements between sovereign states, providing international relations with a system of codified norms and international institutions subordinated to the purposes and principles of the UN Charter. Its name – 'neoliberal' is generally perceived in economic terms, although it refers to two interconnected systems, between which significant contradictions are periodically revealed:[1] universal international law and order, led by the UN, and international economic order, coordinated by specialized international organizations of the UN system.

On the other hand, international law in the second half of the XX century, emerging in the bipolar confrontation of capitalist and socialist geopolitical systems, developed under the influence of two contradictory paradigms – liberalism and solidarism.[2] The latter, in particular, was embodied in the idea of the New International Economic Order, which was formed in the process of mass accession to the UN of post-colonial countries and their leaders' awareness of common claims of their peoples to developed countries, having acquired its final formulation in 1974 in the relevant Declaration[3] and the Charter of Economic Rights

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[1] Karo, D. and Zhuiar, P. (2002), *International Economical Law*. Moscow: International relationships, pp.6-7.

[2] Tuskoz, Zh. (1997), *International Law*. Kyiv: Osnovy, p.217.

[3] Hoffman, Frank G. and Mattis, James N. (November 2005), "Future Warfare: The Rise of Hybrid Wars Proceedings", (internet) available at: http://www.nato.int/docu/review/2014/Russia-Ukraine-Nato-crisis/EN/index.htm (viewed 23 December, 2019).

and Duties of States.[1] After the Charter has not been signed, the solidarity aspirations are in line with the efforts of the international community to adjust neoliberal international economic law to relations between countries with different levels of development, which have been formalized in the concept of 'sustainable development'.[2] However, the inertia of the complex of contradictions that stretch back to the previous centuries continues to hinder the best programs and development strategies created under the auspices of the UN or at the level of regional legal systems.

The disadvantages of neoliberal international law are linked to the main disadvantage of positivism in international law: its legitimacy criteria do not take into account the extent to which the actions and decisions of the government of a state in international relations protect the interests of its citizens. The level of decision-making in international law remains interstate in form, although in reality various groups of influence on governments that are not subordinated to the rules of international law, the opacity of which significantly reduces the expectation and level of trust in international relations, play an active role in it.

In this regard, the United Nations in the declarations, strategies and 'action plans', like other international organizations, call upon States to

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[1] Barbara, Stark (ed.) (2015), *International Law and Its Discontents*, Cambridge: Cambridge University Press.

[2] United Nations (UN) (2006), Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission / A/CN.4/L.682/13, (internet) available at: https://legal.un.org/ilc/guide/1_9.shtml (viewed 23 December, 2019).

develop a new style of their relations with their citizens, while simultaneously addressing different groups of subjects of private and legal relations with the aim of intensifying their influence on their governments from a socially and humanistically oriented points of view.[1] At the level of regional institutions, at least in Europe, this strategy is embodied by Council of Europe conventions, goals and principles of the European Union, as well as the concept of the 'human dimension' of the OSCE, which is aimed at gradual and systematic implementation – through recommendations to states on the activities of their authorities, social services, public service broadcasting – at the national and local levels, to contribute to the effective provision of a friendly climate in a society that would maximize the disclosure of human potential, taking into account special needs for persons of different sex and age.[2] These recommendations are developed on the basis of the modern achievements of the human sciences and become part of the law as 'social engineering'.

At the universal level, the international community has high hopes for the emergence of a 'global information civil society',[3,4] which opens many new opportunities for the individual, providing international cooperation with new quality and multi-leveledness, through global

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[1] Markuse, H. (1994), *One-Dimensional Man. Studies in the Ideology of Advanced Industrial Society.* Moscow: Progress.

[2] Markuse, H. (1994), *One-Dimensional Man. Studies in the Ideology of Advanced Industrial Society.* Moscow: Progress.

[3] Herodot (2004), *History*. Moscow: OLMA-PRESS Invest, (internet) available at: http://lib.aldebaran.ru (viewed 23 December, 2019).

[4] Dyn, N. K., Daye, P. and Pelle, A. (2001), *Public International Law*. Kyiv: Sphera.

communications networks. By translating the bulk of international contacts into the level of interpersonal exchange of information, they help to increase general level of awareness and culture of the population, to realize all the benefits of non-governmental 'horizontal' international relations and to share experience in building a friendly socially-oriented environment in their countries.

However, these positive changes in international law do not seem to be sufficient to adequately respond to the crisis of international law and order, which has intensified significantly in the current transition between two centuries and millennia. The traditional contradictions between developed and developing countries are compounded by an increase in cases of spontaneous exacerbation of 'state selfishness', which increase the range of problematic issues in international relations. These cases reduce the level of trust not only in international relations, but also in the relations of the authorities with citizens and relations of different social groups, causing mutual distrust in interpersonal relations.

The intensification of social tension is facilitated by unpredictable activation the searches of new worldviews, the share of which should serve as 'bonds' for renovation of self-identity of certain large societies ('regional civilizations' A. Toynbee). This natural desire to realize one's own cultural tradition could be an important step towards implementation of the idea of a solidarity-based multicivilizational and multicultural international community after a long period of active

westernization.[1] However, ideological orientations of such direction, predominantly, continuing the tradition of one-dimensional totalitarian thinking, are antagonistic to all other points of view, often lead to primitive resistance to 'everything Western'.

Against the backdrop of such concepts continues the search of a new worldview paradigm acceptable to all mankind, which, without rejecting the significant achievements in this area of Western society, would systematically harmonize them with other cultural traditions in their multicultural diversity and in the context of humanization of social relations. Methodologically, the basis of this search, in many cases unsystematic and intuitive, can be the philosophical system of I. Kant, improved and modernized by his followers. The historical experience of several past centuries, shows that in the transitional periods, when the paradigms of the previous century are under concideration, science, in search of new paradigms, actively turns to philosophy, which, based on a full arsenal of the characteristics of human consciousness, can find new ones or renew already known heuristic ideas beyond the methodologies acceptable to science.

For more than two centuries, Kant's philosophy has taught mankind to think and act through self-reflection, constantly recognizing that all religious beliefs and 'scientific pictures of the world', perception or rejection of moral and ethical or legal norms, even taking into account or ignoring certain obvious facts – for each individual is conditioned by

[1] United Nations (UN) (2000), The United Nations Millennium Declaration. Res. of General Assembly 55/2, (internet) available at: http://www.un.org/russian/documen/declarat/summitdecl.htm (viewed 23 December, 2019).

his motivation, which in turn is determined by his characteristics (including gender, age, state of health, social and mental well-being, etc.) and influence on his consciousness of natural, social and cultural environment.

However, in the realm of the 'practical philosophy of morality', on which the regulation of social relations and the organization of public order is based, the primary impulse of a 'pure practical mind' is to define a common normative basis for multidirectional aspirations polarized in opposites. And though due to objective circumstances the moral imperative is embodied in the maxims determined by place and time, the adequacy of the latter will be the greater the more optimally contradictory characteristics of realities and the expected consequences of influencing them are agreed, that is, each individual or collective decision embodied in maxims, is a movement between Scylla and Charybdis of contradictory arguments. Accordingly, in the hierarchy of legal maxims constantly relevant issues, in the dynamics of their adoption and reassessment, remains a socially adjusted ratio of general and special norms.[1] And the most important condition for accepting the maxims of collective behavior, established by a custom or conventionally, should be a general subordination of their material content – the moral imperative, and while their definition – the conscientious orientation of the collective will to a steady approach to it. As a warning to politicians not to ignore this fundamental condition, the

[1] United Nations (UN) (2006), Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission / A/CN.4/L.682/13, (internet) available at: https://legal.un.org/ilc/guide/1_9.shtml (viewed 23 December, 2019).

first of I. Kant's 'preliminary articles' from the work 'To Eternal Peace' says: 'No peace treaty can be considered as such, while its concluding secretly are set up the grounds for a future war'.[1]

CONCLUSION

The phenomena of 'hybridity', that is disconformity of the actions of one party to the established and contractual standards, abidance of which is expected by the other party, have become a landmark event at the turn of the XX-XXI centuries, when the 'spontaneous' component of social relations especially sensually gets out of control of the rational component, set in worldview concepts and principles of the organization of national and international law of the previous period.

The major drawback of the neoliberal international legal order as an intellectual work of the Western legal tradition is that the positivistic criteria of legitimacy are underlied on its basis, are incapable of assessing as far as the actions and decisions of governments in international relations protect the interests of their citizens, and the intergovernmental level of making official decisions that are often fatal to all mankind, neglects the pressure they exert on governments that are not subordinater to norms of the international law, groups of influence, and the opacity of their activities, significantly reduces the level of confidence in international relations.

[1] Kant, I. (n.d. b), *Perpetual Peace,* (internet) available at: https://www.civisbook.ru/files/File/Kant_K_vechnomu_miru.pdf (viewed 23 December, 2019), p.2.

In the theory of law, 'Non-Positivistic' conceptions of legal awareness recognize the decisive role of an individual will in supporting law and order at different levels of collective legal personality. Accordingly, the modern international law increasingly takes into account these theoretical provisions in its practice: by taking on the role of 'social engineering' for the international community, it, on the one hand, through recommendations to governments, contributes to the formation of favorable conditions for the development of personality, on the other – addresses directly to the subjects of private law, calling them to participate actively in the development of civil society, capable to subordinate the activities of its governments to their direct duty – to serve the interests of nation.

However, these positive improvements in international law are blocked by the active counteraction of the subjective factor, determined by both the specific motives of the actors of international relations and the ideological basis, which, regardless of their belonging to a particular cultural and civilizational tradition, shows features of hybridity, especially pronounced in connection with the intensification of the search for new, often antagonistic worldviews, some of which should serve as 'bonds' of self-identity for certain individual large societies, often reduced to primitive condemnation of 'the Western', others – the elements of a new ideological paradigm acceptable to all humanity that would not rejecting significant achievements in this area of Western society, systematically harmonized them with other cultural traditions in their multicultural diversity and in the context of humanization of social relations.

On the example of the hybrid war of the Russian Federation against Ukraine, it is obvious that it is based on the choice between two antagonistic models of interpersonal and public relations, one of which forsees a 'superior-subordinate' relations, the other – equal relations of cooperation. This choice, made by each person at one time on both sides of the front line, under the pressure of historical circumstances, accumulates in the spontaneous 'cooperative effects' of public attitudes. Accordingly, the war unleashed by one post-Soviet state against the other one has finally completed the 'bifurcation' between their societies, quickly consolidating each of them on the basis of alternative worldviews.

Both of these models reveal themselves transhistorically, being esteblished in the constants of the inherently contradictory nature of a human. At the same time, the 'subject-object' relation of the superior to the subordinate, dominating the whole epoch of civilization, as one of the fundamental values of caste society, having received its sacralized justification in totalitarian religions, for millennia contributed to the formation of 'one-dimensional man', weaning him away from more ancient, formed before the Neolithic, 'intersubjective' attitude to its natural and social environment, built on the belief in the multiplicity of the Universe and on the duty, regardless of their situational significance, worship all its multiscale manifestations, including ones own legal personality.

It is only with Modern Age in Western society begins the movement, which, in the long run, should be embodied in the values of civil society, built on the equal co-operation of individuals, which, however, in its progress undergoes large-scale fluctuations associated with the eclectic

combinations of moods of worldview elements of caste and civil societies. A decisive breakthrough in this movement was provided by I. Kant's philosophical system, which for two centuries has been opposed to the Cartesian 'subject-object' attitude of the individual towards the natural and social environment, which still finds its embodiment in the command-and-control style of management and 'the pastor's' style of presentation of worldviews or ethical conceptions. According to the epistemology of I. Kant and the followers of his ideas, the decisive condition for the adequacy of the collective reflection of reality and the corresponding strategies and tactics of social activity is a free exchange (according to certain rules of communication) of subjective ideas and motives and complete rejection of any one-dimensional totalitarian political order, ideologies, scientific theories, or lifestyles, whether by coercion, unfair use of benefits or disseminated information it.

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THE EXTENT OF LEGALITY OF ARTIFICIAL INSEMINATION OPERATIONS "A COMPARATIVE STUDY"

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Abstract

The various methods of Artificial Insemination are considered a medical accomplishment that has an undeniable role in treating infertility which many families suffer from, and they almost became desperate without the invention of this new technique. This has raised many questions related to the legality of the reproduction through these methods in all their diversity. Recognizing the importance of this

matter, various countries have headed towards regulating the use of this technique within a legal framework in compliance with the religious and ethical aspects prevailing therein. Thus, they have enacted necessary legislations to regulate the technique of Artificial Insemination and criminalized any misusage.

Arab Countries were not far from keeping pace with the scientific development in this field. Most of these countries have headed towards approving this technique through enforcing independent legislations, as appropriate to the Islamic Shari'a provisions and with the social and ethical aspects prevailing in these countries in order to prevent overcoming Islamic values. This has opened the way for disagreement in juristic opinions regarding this matter. Accordingly this study aims at identifying the provisions of Artificial Insemination in different comparative legislations.

Keywords: Artificial Insemination, Artificial Fecundation, Medical Assisted Reproduction.

Introduction

1-Preamble: The process of artificial insemination are not new, but the result of development that go deep in time which passed various stages during the history until it was crystallized in its form currently. However, there were different attempts to get rid of the problems of Fecundation in the ancient civilization, as such attempts continued until achieving a notable success in the human field late in the previous century. This success is attributed to the development of medicine in

various medical aspects including treatment of Fecundation which has become is easy issue in most cases.

The result of this development in medical fields was the emergence of various forms and methods for artificial insemination, which surpassed the limits of fecundation of man and woman reaching to interference by other people that play an important role in various methods of artificial insemination. This comes as a response for human desire that does not stop on a limit, and in a way that sometimes does not consist with many religious, legal and ethical regulations. Consequently, the method of artificial insemination emerged through the use of pipes, or by using the alternative womb it this was admissible and acceptable when using man's sperm and woman's ovum. In Arab countries that consider Islamic jurisprudence among the most important legal rules in terms of personal affairs, the issue is not the same as in the western countries which allow free sexual relations without the framework of marital status. Therefore, such a relationship helped in the spread of sperm and ovum banks as well as the frozen fetus in most of these countries, and it became a trending business that is promoted in most media.

In fact, artificial insemination raised many problems especially knowing that it is a recent technology without organized regulations and rules in many laws, even though if most of them organized such rules based on independent laws, or within the family law and medical responsibility. As an example is the Jordanian regulation which responded to the medical technical modern development and stated on artificial insemination in article (13) of the law of medical and health responsibility. This requires studying its rules as per this article to

know the extent of coping with other comparative regulations and to know the shortages of the regulations which should be avoided.

2- Importance of the study: the modern technique of artificial insemination with its current concept have raised various scientific and practical problems, especially the ones related with the legality of its methods; not all of them are accepted from the perspective of regulation and jurisprudence, due to the variation of the perspectives of international regulation towards it; what is accepted in the western regulations is not accepted in the Arab one. Therefore, this issue was raised in various jurisprudence studies, and perhaps this study will contribute – even if slightly- in solving some various legal problems relating with its subject that is strongly related with the extinct of reproduction which is deemed among the main extinct sought by humanity; it need organization in a way that is consistent with the religious and ethical rules prevailing in the community.

Another feature of significance of this study, it that the technique of artificial insemination on which the Jordanian regulation stipulated (article 13) of law of medical and health responsibility lacks legal organization to organize it rules. The draft of the law for using assisted medical techniques (2009) organized such rules in a better way. However, it also contained organizational shortage. As a result, this study will attempt to handle the gaps to guide the Jordanian legislator organize the rules of artificial insemination upon discussing the draft prior to passing it.

3- Problem of the study: there is not doubt that the topic of this study raised a very important problem that discussed the legality of artificial insemination operation? Other questions submerge thereof which shed

light on the perspective of the regulations towards this issue: are there differences in there perspective in this regard? What the extent of reflection thereof on jurisprudence? Is artificial insemination as one of the scientific medical developments limited in one specific form and method? Or does it have different forms and methods? If so, to what extent each of them is deemed as legal? Did the comparative regulation provide penal protection for the parties who are concerned with the artificial insemination process? Is there any regulation for its rules and control? Are there penal punishments approved by the regulation to punish the violators of such rules and controls? If the Jordanian regulation has coped with comparative one by stating and admitting artificial insemination, then the question that impose itself in this place would focus on the extent of the Jordanian regulation's coping with such regulations in organizing it rules? Are there any shortages therein? Are there any suggestions that can be provided to the Jordanian regulator in this regard?

The researcher will attempt to answer all of these questions and other that can be raised about the study, through the scientific research he had, while relying on the legal texts that he could review in this regard.

4- Methodology of the study: this study requires using more than one scientific methodology, as the nature of its subject require using the descriptive analytical comparative methodology, by describing, analyzing and comparing the relevant legal texts, while referring to opinions of comparative jurisprudence to know the most efficient in organizing the rules of artificial insemination and in showing the legality of its methods.

5- Study plan: the researcher will discuss the topic of this study using the dual division, so that it will be divided into to themes preceded by an introduction consistent with the preamble, followed by a conclusion showing the most important results and recommendation. All of that will be organized as follows:

- **Introduction.**
- **Theme on: what is artificial insemination?**
- **Second theme: legality of artificial insemination.**
- **Conclusion.**

First theme

What is artificial insemination?

6- Preamble and division: there is not doubt that artificial insemination has become among the topics which gained more importance nowadays especially in the recent year. This is due to the fact that it is strongly related with man and his right to establish a family, not to forget the legal, religious and social effect. This caused the current regulations to organize the rules of its various methods requiring making a definition of artificial insemination (the first theme), then showing its forms and the subsequent methods (the second theme).

First branch

Defining artificial insemination

7- Division: the definition of artificial insemination require showing its concepts and the justifications on which it relies (the first branch), then a preview of its historical development, as it did not reach its current status once, but it passed through various stages (the second branch).

First division

Concept and justifications of artificial insemination

8- Variation of inference term on the techniques used to achieve pregnancy by artificial means: jurisprudence and legislation indicate to various terms when referring to such technique; jurisprudence used the term: Artificial impregnation [1] or the assisted medical impregnation[2]. Some jurisprudence used the term "Artificial Insemination"[3], which is the same term stipulated by the Libyan[4] and Bahraini legislation[5]. A part of jurisprudence[6] tend to use the term "reproduction in an unnatural way", while the French legislation uses the term "medical assistance for reproduction[7], that was approved in Moroccan law relating with this technique[8]. On the other hand, the Tunisian

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[1] Dr. Haidar Hussein Al-Shammari, problems of alternative womb and proving the relationship through Artificial Insemination, National Center of legal publication, Cairo, 2016, P. 11.

[2] Dr. Faraj Mohammed Salem, means and controls of assisted medical fertilization, Al- Wafa' Legal Library, Alexandria, 2012, p. 23.

[3] Dr. Ma'an Khalil Al-Omar, renovated crimes, Vol. 1, Dar Wael, Amman, 2012, p. 375, Dr. Saif Ibrahim Al-Masarweh, criminal adaptation of Artificial Insemination without the consent of either spouse, Dirasat Journal, University of Jordan, Shari'a and Law Sciences, Vol. 43, Ed. 2, year: 2015, p. 504.

[4] M/17 of law No, 76 of 1986 regarding the Libyan medical responsibility.

[5] M/1 of using assisted medical techniques for artificial Insemination and fertilization (Bahrain).

[6] Dr. Mahmoud Ahmed Taha, reproduction between criminalization and legality, Al-Ma'arif Est., Alexandria, 2003, p. 83.

[7] M/152/1 of the law for using body products and medical assistance for reproduction, France, 1994.

[8] M/2 of the Moroccan law of medical assistance No. 47014, which was passed by the Parliament in July, 2018.

legislation used the term "reproduction medical term"[1], whereas the Emirate law[2] uses the term "Assisting techniques to help pregnancy and reproduction". As for the Jordanian legislation, it uses the term "assisted technique to help for reproduction. An amendment was proposed to become "the medical assisted techniques for reproduction" within the law relating to use such techniques (for the year 2009) which was not yet passed until preparing this study.

The difference in pronouncing such terms does not negate their agreement in the meaning and use, but the term "artificial insemination" is the one to which the researcher tends to use due to two considerations: first: since it is the most common in jurisprudence and legislation as well as in the public opinion, second: since it is the closest in coping with its linguistic and scientific reference on its content.

9- The linguistic inference of the term "Artificial Insemination: This terms consists of two parts, namely: insemination and artificial. The first is taken from the term inseminate, which mean pregnancy. They say: it inseminated the she-camel, meaning the male camel made it pregnant. This means that the origin of insemination is in the camels and was borrowed to indicate for women. By inseminating a woman, meaning inserting the inseminate/sperm into her womb. As for the origin "artificial", its source is industry, which means the manufactured thing with which man's hand was used in making

[1] **F/1 of the Tunisian reproduction law.**

[2] **M/1 of the Emirate law for licensing fertilization centers.**

thereof[1]. Accordingly male's sperm is the inseminate, and the insemination is process through which a woman become pregnant and is described by (artificial) since it takes place by using developed techniques but not by natural known body intercourse.

10- The legislative definition of artificial insemination: a series of legislations mentioned the definition of artificial insemination. For example, the French legislation which defined it as: the practice of the applied or biological medicine which allows pregnancy in an artificial environment[2] . The Tunisian legislation defined it as all medical actions included within the framework of medical assistance for reproduction aiming at treating the infertility. This includes all clinical and biological works within a tube/pipe and any other technique that result in human reproduction outside of the natural track thereof[3]. The Bahraini legislation followed them when it defined it as: injecting a sample of sperms taken from man's sperm in the wife's womb during the natural or artificial ovum process[4]. However, the Jordanian legislation did not define it and the draft law for the year 2009 was void thereof.

11- The Jurisprudence definition of Artificial Insemination: scholars of law worked hard to propose various definitions for the term Artificial

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[1] Mohammed Bin Abi Baker Bin Abdulqadir Al-Razi, Mukhtar Al-Sihah, The Omawiay Library, Beirut. P. 602, Majduddin Al-Fayrouzabadi, Al-Qamous Al-Muheet, Vol. 1, Al-Alamy Publication, Beirut, 2012, p. 388.

[2] M/152/1 of the French law for using body products and medical assistance for reproduction.

[3] F/1,2 of the Tunisian reproduction law.

[4] M/1 of the Bahraini law for using assisted medical techniques for Artificial Insemination.

Insemination, but this new idea in the current legislations contributed in their disagreement on a solid definition for this scientific technique. A trend defined it as[1]: "inserting a healthy sperm in the woman's vagina without using the natural way. Another jurisprudence trend defined as: inserting male sperms in woman's vagina other than the ordinary way[2], or as: the entrance of sperms in the female's ovum[3].

Among the remarks that could be observed on these definition is that they do not show the treatment feature of Artificial Insemination, which has gained the interest of the scholars who are concerned with the International Conference for Infertility that was convened in New York in 1953 and resulted in the need to give treatment feature on the process of Artificial Insemination, in addition to showing the feature of internal Artificial Insemination but not the external one, adding that it did not require implementing Artificial Insemination through a medical work, which is limited in the framework of permitting the woman to insert man's sperm.

The researcher believes that an aspect can be observed through reviewing the definitions of Artificial Insemination is what has been claimed by a jurisprudence attitude[4] that is: a process that is implemented whether by inserting the sperm in woman's womb in

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[1] Chosson,J., "Defenation" en I'xvII congrèss de la federation des sociees de cyanecologiè et d'obstetrigue de langue francaise marsielle q-12 sept 1957,p.310.

[2] Simth II, through a lest tube Darkly, artificial insemination and the law,64 mich. l.Rev. 128-1968. referred to by Dr. Haidar H. Al-Shammari, Ibd, p. 13.

[3] Dr. Mohammed Bin Yahya Al-Nujaimi, artificial insemination between legality and prohibition, Al-Obaikan Library, Riyadh, 2011, p. 15.

[4] Dr. Mahmoud Ahmed Taha, Ibd, p. 89.

order to Inseminate the ovum inside the womb, or to plant the Inseminated ovum inside the test tube/pipe in the womb of the woman who desires to become pregnant, due to a treatment need that is imbedded in treating the effects of infertility by allowing the spouses or (friends) in the non-Islamic countries to reproduce children. The preference of this definition from other definitions is since it is far away from criticism which the previous definitions were subject to. The most important principles of Artificial Insemination is that it contains a treatment objective, and had two of the known kinds, not to forget its reliance on the medical scientific method in implementing the Artificial Insemination process, accordingly, this definition was more successful in defining the content and implementing this action.

12- Justifications of Artificial Insemination: jurisprudence stated various justifications for Artificial Insemination and all of them a strongly related, while each of them requires and supports the other on the same time; it is a treatment means in facing some cased of infertility that affected one of the spouses like a biological defect[1] which require finding a treatment for such case. It is a matter of God's desire and wish; curing from infertility that is considered a disease as deemed by many scholars, with the consent of doctors is only in God's hand, even if implemented by his doctor slaves. Different countries countered infertility through various methods, some of them can be adopted (which is refused by the Islamic Shari'a) while other are implemented by planting genital parts, which also was not accepted in Arab

[1] **priscilla Mijares, What women should know about artificial in Insemination: mod magazine" sptember 10,1976,p.10**

countries. However, the matter is not the same in western countries that admitted adoption such England, France and Polonia as they did not stop implanting genital parts, but they reached a good stage in changing the human sex[1] .

The opinion of assisting reproduction as a justification for Artificial Insemination can lead to the sustainability of the family and keep it from psychological and social problems that arise from the inability to reproduce. Furthermore, it is harmful and hurting for the masculinity of the husband or the femininity of the wife, which led to feeling of weakness in the social consideration, and can be a motive for divorce, then the disassembly and collapse of the family[2].

In justifying Artificial Insemination it has been said that it is deemed a social need to face some exceptional conditions which any country might be exposed to, such as wars that result in shortage of youth since they are the most production and fertile in the community[3]. Adding that it contributes in minimizing the transfer of inherited diseases to the children, such as mental retardation, weakness of mind cells and color blindness.

In fact, it is not enough to say that Artificial Insemination has its justifications to be a real truth while such justifications and other

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[1] Dr. Alnajwa Sulaiman, Artificial Insemination in the Algerian law, Islamic Shari'a and the comparative law. Unpublished PhD. Algeria University, 2010/2011, p. 38 and the following pages.

[2] Dr. Ma'an Khalil Al-Omar, Ibd, p. 375.

[3] Dr. Nafi' Taklif Al-Amari, Subjective penal protection of the human Artificial Insemination, Islamic Education Journal for Educational and Human Sciences, Babel University, Ed. 37, Feb. 2018, p. 389.

should lead to a belief that it is an easy issue; it is surrounded with difficulties that make some of them a reason for not considering it within the narrowest limits. Consequently, there should be a legal basis to rely on, then to draw its ethical, religious and medical borders based on this principle and should comply with as per the legislative organization; this structure is an urgent need after the technique of Artificial Insemination process took it passage to spread in different countries of the world.

Second theme

Historical development of Artificial Insemination

13- The historical roots of Artificial Insemination: It is difficult to talk about Artificial Insemination in the old primitive civilization, since the technical accurate meaning for this technique has not emerged then, even if it was known by referring to the basis of Artificial Insemination through the idea of fertilization and reproduction as a tradition of the Gods of fertilization. Some people view infertility as a punishment from God and an evidence of the weakness of absence of religious values. Woman was a point of concern and ridicule, which caused to her a psychological pain that can not be treated without getting rid of infertility[1].

Regardless of defining the first aspect for Artificial Insemination, ancient scientists knew similar treatments for infertility as per the knowledge of their time. In this context, a term called "Al-Sofa"[2] to make a woman get pregnant. The first Islamic scholars

[1] **Dr. Faraj M. Salem, Ibd, p. 39**

[2] **Dr. Nafi' Taklif Al-Amari, Ibd, p. 386**

admitted inserting man's sperm in the woman's womb, since it replaces intercourse and require the period and to follow kinship, even of the husband was absent- without a known address- without testicles to enable the flow of sperm therein through lesbianism, and they stated thereon in different chapters especially the ones relating to family and personal affairs and personal in terms of period, kinship, inheritance and other issues. With that, they have put a limit for over-passing and anarchy in the process of sperm insertion[1] .

14- The first beginnings of applying the Artificial Insemination technique

In another historical stage, some scholars consider that since the beginnings of the 14th century, Arabs practices this technique to choose the progeny of horses as some Arabs used to inseminate their horses from other sexual sperms after making certain of their originality[2]. Afterwards, the Europeans adopted this idea in the 18th century, and targeted animals and plants to apply it. The field of humanity – at that time was strange – for applying this technique. This was followed by Russia who was among the first countries in making Artificial Insemination through using scientific methods on cows, horses, sheep, rats and rabbits. Its experiments achieved a huge success in this field due to the easiness of dealing with it without problems. It used to transfer sperms taken from male animals (of special features) to the

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[1] Ala'eddin Al-Kasani, Badai' Al-Sanai; in Tarteeb Al- Shara'I, Vol. 2, Dar Al Kitab Al-Arabi, Beirut, p. 326

[2] Skerefieh Mohammed Al-Tayyib, Artificial Insemination between proposed law and Islamic Jurisdiction, unpublished MA thesis, Abu Baker Belqayed University, Algeria, 2016/2017, p. 5.

females in a non-traditional way. Most of the operations implemented were successful as their prevalence in Britain amounted to 70 % of the total of calves that were delivered there[1]. As a matter of fact, that does not raise any problems relating with the subject of our study since this Insemination was implemented on animals, which is out of our discussion, while referring to it is due to the fact that it is a clear development which entered human field after it was limited on other creatures.

15- Artificial Insemination in its current concept and development: Jurisdiction[2] states that the first Artificial Insemination operation was implemented by scientist (Hunter) who managed to make an Artificial Insemination operation for a woman by the sperm of her husband who was suffering from an inherited disease that prevented him from reproduction. It was natural that such success will results in the speed of such operations and the variation of the assisted techniques for reproduction. In this regard, the technique of Artificial Insemination outside the womb emerged since 1956 and was know as "the technique of child tubes". Through this technique, the first delivery of a female child took place in the world (she was called Lewiz Brown" in England in 1978. This scientific achievement was met with high admiration. Then the second tube child (female) was born in India in the same year. In the following year a third child was born in England, and then this technique paved its way in various countries[3].

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[1] Dr. Ziad Ahmed Salameh, Children of Tubes between science and Shari'a, Dar Al-Bayariq, Beirut, 1996, p. 326

[2] Dr. Faraj Mohammed Salem, Ibd, p. 29 and the following pages.

[3] Dr. Nafi' Taklif Al-Amari, Ibd, p. 386.

On the other hand, France knew the Artificial Insemination processes since 1865 as this was rejected by religious men since it is not consistent with the religious principles at that time. Their rejection perspective was confirmed when the French Academy for Science and Political Ethics (at the end of the forties of the previous century) a statement that condemn Artificial Insemination. However, the success of Artificial Insemination that was implemented by doctors secretly, were accepted by the public, especially knowing that they take place easily and after the doctors managed to Inseminate a woman with a sperm not from her husband in 1918 that was considered the first of its type[1].

It was not difficult for doctors to use frozen human sperms in Artificial Insemination. This really took place in 1953 which is deemed as a license to establish banks to preserve/ keep sperms, ovum and infant to use them when needed. The country that did so was the United States of America, in 1980, and then was spread in various countries, which were concerned to buy the sperms of genius and scientists, and sell them to the ones who want to reproduce a distinguished child. These banks exert great efforts to promote their commodity through all kinds of media[2]

By the beginnings of the eighties of the previous century, a new scientific technique emerged within the framework of Artificial Insemination, called "the lease womb" or (the alternative womb) so

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[1] Dr. Karim Al-Sayyid Ghunaim, reproduction and copying between scientists' experiments and God's legislation, Vol. 1, Dar Al-Fikr Al-Araby, Cairo, 1998, p 254.

[2] Dr. Karim Al-Sayyid Ghunaim, reproduction and copying between scientists' experiments and God's legislation, Ed. 1, Dar Al-Fikr Al-Arabi, Cairo, 1998, p 254.

that the woman would bear in her womb an ovum of another woman who can reproduce. She continues being pregnant until delivery, then she would hand the infant to the owner of the ovum, in return for a wage/ compensation or as a kind of contribution. This technique spread and then was implemented by organized companies to lease the wombs.

The Arab states were not far away from this huge scientific development; they began using Artificial Insemination in a way that is consistent with the rules of Islamic Shari'a. In this context, the first tube child was born in the Kingdom of Saudi Arabia in 1986, which is the same year when Egypt witnesses the birth of another infant using this technique. The following year, the medical operations in Jordan resulted in the birth of two twins by tube. As for Iraq, the first birth of a child (a female) was registered in 1988[1] .

Second theme

Types of Artificial Insemination

16- Division: Artificial Insemination comes in one of two forms: the internal Artificial Insemination (the first branch), and the external Artificial Insemination (the second branch).

The first branch

The internal Artificial Insemination

17- Definition: A series of medical actions that can be taken according to specific conditions to extract the male's sperm or of one male and inject it in the womb of the female to reach the ovum for reproduction.

[1] **Dr. Faraj M. Salem, Ibed, page 482**

This sperm/ liquid should be fresh (which is preferred by doctors) or frozen, even if the later raises some legal and practical problems[1].

18- Methods: Artificial Insemination takes place by two methods, namely:

19- Repeated – (the first method)- Inseminate the wife's ovum with a sperm of her husband: through this method the wife is Inseminated by injecting the husband's sperm in a suitable place of the wife's womb to meet with the ovum so as to Inseminate it, then sticks in the wall of the womb. This method is similar to the natural Insemination to a large extent. This method is used to treat men who represent about 40 % of the infertility cases in general[2]. In case a man was not able to intercourse with his wife a natural sexual intercourse, which result in weakness in conveying his sperm to her womb, then it is expected that Insemination will take place during the existing marital life, whether both of them lived in a free community, or due to the absence of one of them to implement a punishment that deprive his freedom, or after the end of the martial status between them due to the death or divorce of the couple.

20- The necessary conditions to apply this method: Legislation and legal jurisprudence agree on a set of provisions that should exist to say that such method as admissible and is consistent with the religious and legal rules, first of them is making Insemination between spouses who are gathered by an existing legal marital status. Hence, come the

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[1] Devichi,(J.R). Les les procréations assistés, état des questions, Rev. trim.dr.civ 1987, p.460, Kayser (p.) les Limitesmorales et Juridigues de La procréation attificielle D.s 1987, p.189.

[2] Baudouin (J.L .)et I Rion (c.l), produire de l' homme, de guel droit? p.u.f. 1987, p.29.

importance of marriage. As it is – as proposed by some scholars[1] it is admissible to use artificial insemination, and if insemination took place outside of the frame of marital status, then it is deemed as adultery (as expressed by the opinion of jurisprudence). In addition, it might cause a mix of descents which is prohibited by Islamic Shari'a. Accordingly, Arab legislations were full keep to mention such requirement, and it was required by the regulations of some countries that allow free relationships between unmarried persons[2].

Moreover, it is required to make artificial insemination the consent of the spouses without any force or cheating or deceiving. If the consent of the husband in this case was necessary to avoid denying the kinship of the child to himself, and the resulting negative psychological and social effects, then the wife's consent is more important since she is the place for the artificial insemination process[3]. Lack of this process (the consent condition) represents a crime that requires legal accountability as will be discussed later on in this paper. Among the other provisions is the insemination should target treating infertility once it was impossible to treat it by other means[4]. In this regard, insemination does not aim to achieve another purpose such as defining the sex of the infant or enriching the characteristics of human race[5].

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[1] Dr. Faraj M. Salem, Ibed, page 482

[2] Baudouin (J.L)et (c.l), Riou, op. cit.p.32.

[3] Dr. Al-Nahawi, Sulaiman, Ibd, p. 139.

[4] Dr. Abdulaziz Al-Khayyat, the verdict of infertility in Islam, Ministry of Awqaf and Islamic Affairs and Holly Places, Amman, 1981, p. 18.

[5] Raymond. (G), la procrenation artificelle et le droit francais. J.C.P. 1983,no6

Another part of jurisdiction adds[1] to the above the required precautions in insemination to insure the safety of the couple and infant, and to insure the mixture of kinships. Details of theses provisions and the perspective of jurisprudence and Shari'a will be discussed in the second theme of this study.

21- (The second branch): Insemination of the ovum with a sperm of a man other than the husband: the content of this method is to inject man's sperm in the suitable place of a wife of another man so that Insemination will be internal, then to stick in the wall of the womb as in the method stated above, with a difference that the sperm with which the wife was Inseminated is not her husband's, but to another foreigner man, due to an infertility the husband suffers. This method is common in the countries that do not apply Islam as an official religion. An aspect helped the spread of this method is the spread of sperm banks which opened their doors to those who desire artificial insemination using that method[2]

[1] **Dr. Faraj Mohammed Salem, Ibd, p. 119**

[2] **Dr. Nafi' Taklif Al-Amari, Ibd, p. 390.**

Second theme

The external Artificial Insemination

22- Definition: Insemination of woman's ovum with a sperm of man in a testing tube or a lab container, then return the Inseminate to the woman's womb (the owner of the ovum) or planting it in the womb of another woman[1]. This was terms the external Insemination since the insemination of a woman's ovum takes place outside her genital system prior to planting it in the womb.

23- Aspects of agreement and disagreement between the two types of Artificial Insemination: internal artificial Insemination agrees with the external artificial Insemination in terms of looking to achieve the desire in reproduction without a natural sexual intercourse and each of them require a medical interference to implement it, in addition to the easiness of control (through them) with the sex of the infant and choosing the desired sex (male or female)[2]. On the other hand, each of them various from the other as the ovum is Inseminated with the male's sperm inside the woman's womb in the internal artificial Insemination, whereas in the external Insemination, the ovum is Inseminated outside the womb, not to forget that the medical interference in the first form has a limited scope, while in the second form, this scope becomes wider, and the differences increase in terms of application methods; methods of internal limited scope are limited in only two methods (as mentioned

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[1] Dr. Ahmed Mohammed Lutfi, artificial Insemination between doctors' say and the scholars' opinions, Ed. 1, Dar Al-Fikr Al-Jami'y, Alexandria, 2009, p. 113.

[2] Dr. Faraj M. Salem, Ibd, p. 473.

above) but the external limited scope has various methods as will be stated later in this paper.

24- Methods: external artificial limited scope takes place according to different methods, namely:

25- Repeated (the first method): Inseminating the ovum from the husband's sperm through a testing tube then planting it in the wife's womb. This method requires taking a male's sperm and an ovum from the wife, then putting them in a medical testing tube according to specific physical conditions. After Insemination, it begins to divide and increase then moves to the wife's womb (the owner of the ovum) and stays there until the natural delivery process[1], which is called (the tubes' child). This name contains some contradiction as it indicates that the infant stays in the testing tube during the whole pregnancy period, whereas in fact, such a stay only last for a specific period (36 hours), as it is medically enough to make the Insemination process, which does not affect the infant as a biological child for the husbands and he is theirs[2]. Jurisprudence states [3] that testing this method on animals was older as it was applied on rabbits in 1890[4] and experiments began on humans in 1970. The first operation was successful with the birth of child (Lewiz Braown) in 1978, and then it began to spread. Research states to a

[1] Cohen. (G), Aspectes éthigues de La fécondation in vitro, publieé in génétigue, proce réation et droit, 1985, p.478.

[2] Dr. Mohammed Al-Mursi Zahra, artificial reproduction, Kuwait, 1993, p. 77.

[3] Dr. Karim S. Ghunaim, Ibd, 239

[4] Baudouin (J.L)et (c.l), Riou, op. cit.p.36

continuous improvement in the averages of its success as a means of modern reproduction methods[1].

Doctors use this method in case it was difficult to make natural fertilization between the couple, whether for reasons relating to the husband or the wife. The success of this technique require various conditions by the wife such as being young where doctors do not advise to make for women who are above forty year old, in addition to fitness, as it is not preferred to be done for fat woman, not to forget her psychological conviction with the process and that a doctor shall make sure of the safety of her womb and that she does not suffer of any diseases that may hinder accepting the infant[2].

26- (The second method): fertilization of a donating woman's ovum for a sperm of a donating man (other than the husband) in a testing tube then planting it in the woman's womb: this method is used when the husband is infertile, as the wife's ovum is defected or removed, but her womb is healthy and accepts the sticking of the sperm, so that the infant's pregnancy takes place (whose source is the sperm of another man) and the ovum of a different wife (she might be a donator, or purchased from sperms and infants bank, as in Australia and other countries)[3].

27- (The third method): Inseminating the wife's ovum with her husband's sperm in a testing tube then planting the ovum in the womb of another woman (not the wife): this method represents another new

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[1] progées genetigues et biologigues: effets sur lademograprie et la polation, La documentation francaies,1988,p.38

[2] Dr. Karim S. Ghunaim, Ibd, p. 238

[3] Dr. Ziad Ahmed Salameh, Ibd, p. 95

technique within the framework of artificial Insemination. It has various terms, but the most of them are: the borrowed mother, the leased mother, the rented womb, and/ or the alternative womb[1]. The researcher tends to accept the juristic attitude[2] which prefers using the last term as it has the closest inference to the content of this method. It means to deposit the ovum of a woman with man's sperms (her husband mostly) in the womb of a different woman, who might be a wife or a foreigner, by contribution or in return for a financial compensation, as she bears the infant until delivery, then hands it to the parents so that he will their legal child.

28- Reasons for using the technology of alternative womb: there are various reasons for that, but most of them is the medical ones of which a spouse or both of them may suffer, such as infertility, or when the wife has a disease that prevent her from pregnancy or completing its term, or fearing of duplications of pregnancy that threaten her life[3], or due to beauty reasons such as her desire to preserve her beauty and fitness. She uses this method to have children without affecting her life negatively, not to forget the economic reasons if she is a working woman, or occupies an important position and wants children without stopping from her fearing to loose it especially if she works in the private sector[4].

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[1] Devichi, (J.R), op.cit.p149, Harichiaux,l'assurance matériaté et la maternité par pubstitution, Rev trim. dr Dance et Das., 1985, p. 555.

[2] Dr. Haidar Hussein Al- Shammari, Ibd, p. 32 and the following pages.

[3] Dr. Mohammed Al-Mursi Zahra, Ibd, p. 162

[4] Baudouin (J.L)et (c.l), Riou, op. cit.p. 108

29- (The forth method): Insemination of the ovum with her husband's sperm in testing tube then planting it in the womb of another wife: it is the same as the previous method with a difference that the woman who bears the Insemination is another wife of the husband (owner of the sperm). This method is applied in the Islamic countries where their systems allow multiple wives and is prohibited in foreign countries which prohibit multiple wives. This method is used in case the wife who has the ovum can not bear and deliver, while the other wife can do that in case the husband can reproduce[1].

30- (The fifth method): Insemination of the ovum of a donating woman to bear the sperm of a donating man and put them in a testing tube then planting the Insemination in the womb of another foreign woman (other than the wife): this method is used when both spouses are infertile and can not reproduce and they have no hope to do so. In this case they purchase a frozen infant from the infant's bank and agree with a foreign woman to bear it through womb lease agencies, as she bears it in her womb until delivery. After that, the spouses receive the infant to provide him / her with car. This method is common in the west[2].

Second theme

Legality of artificial insemination

31- Preamble and a division: artificial insemination occupies a high degree, since it is a new scientific achievement reached by medical sciences. Accordingly, jurisdiction has been concerned to detect all of its

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[1] Dr. Ziad Ahmed Salameh, Ibd, p. 100

[2] Devichi, op.cit.p490.

methods to show the extent of its legality. On the other hand, various legislations have attempted to organize its rules in accordance with legal texts. We will present the legality of internal artificial insemination with all of its methods (the first theme) then will show the legality of external artificial insemination methods (the second theme).

First section

Legality of internal artificial insemination

32- Division: this theme will be divided into to branches: to handle the perspective of jurisdiction from the legality of internal artificial insemination (first branch), and then we will discuss the plan of comparative legislations in this regard (the second branch).

First theme

The juristic perspective from the legality of internal artificial insemination

33- Various juristic attitudes: legal jurisdiction does not disagree with the prevailing attitude in the religious jurisdiction[1] by admitting the insemination of the wife with her husband's sperm during the marital relationship based on the requirements mentioned above. This is deemed an admissible and legal act, but there is argument between the legal jurisdiction and the religious one in terms of the first method of

[1] Dr. Abdulaziz Al-Khayyat, Ibd, p. 28, and Sheikh Mohammed Ali Al-Taskhiri, human reproduction through the help of modern technology, Resalat Al-Taqreeb, Journal of the world forum to approximate between doctrines and the unity of Islamic nation, No. 53, 2006, p. 80. Sheikh Rajab Al- Tamimi, Tube children, Journal of Islamic Jurisdiction, 8th term, Vol. 1, Ed. 2, 1986, p. 309 and the following pages.

the internal artificial insemination that occur between the husbands in two cases:

34- (The first case): the presence of a marital status between the couple but one of them is spending a punishment (in jail) that deprive his freedom: jurisdiction argued on admitting the insemination of the wife with her husband's in case he is a resident in a punishing organization, as some of them denied that person relying on the opinion of some scholars to reject natural sexual intercourse by those residents[1], which is called the Islamic regulations "legal solitude", or the sexual solitude (as called in other regulations).

The supporters of this opinion claim that such solitude may violate the punishment system applied in the punishing organizations, not to forget that it contradicts with the philosophy of the punishment in achieving prohibition and deterrence adding that convicting the resident with a punishment that deprive freedom is an evidence for loosing authority and play the role of fatherhood or motherhood. This solitude is consistent with the artificial insemination of the resident in this framework.

The penal jurisdiction opinion [2] supports the solitude for the residents of the punishment organizations. The supporters of this opinion rely on the Islamic customs and habits which admitted such solitude, not to forget its contribution in minimizing the case of sexual

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[1] Dr. Mohamoud Najib Husni, science of phunishment, Dar Al-Nahda Al-Arabia, Cairo, 1967, p. 454.

[2] Dr. Mohammed Abu Al-Ola Aqeeda, Principle of punishment science, Dar Al-Fikr Al-Arabi, Cairo, 1997, p. 380, Dr. Abdulla Abdul Ghani Ghanim, effect of jail on the resident's behavior, Nayef Academy for security sciences, Rihadh, 1999, p. 67.

queerness that prevail in such organizations[1] and considered it a cause for psychological and social stability of those residents. Moreover, the supporters of this opinion agree that the resident has rights that can not be taken while implementing the verdict, including his right to return his social compatibility, which is the concern of the modern punishment organizations. Some countries are concerned to raise the protection level of this right (the legislation principle)[2], and accordingly artificial insemination is unified with the solitude of the residents of punishment organizations to achieve the same purpose.

The researcher tends to support the second opinion and believes that it should be followed. In admitting resident's solitude and depriving them from achieving artificial reproduction, can be attributed to the strong evidence that are consistent with the correct logic and have positive effects if various legislations responded to them and stipulated on this solitude through legal texts[3]. After the science of punishment admitted that the pain of the punishment that deprive freedom should not exceed taking freedom and that its purpose is to improve and reform the resident, but not by using additional

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[1] Various studies indicated to the spread of sexual queerness by the residents of punishment organizations, including: Dr. Abdulla Abdu Ghani Ghanim, Ibd, p. 67, Dr. Na'ila Sulaiman Al-Sarayra, and Dr. Abdulla Al-Tawayha, homosexuality and sexual violence by the residents of reform centers in Jordan, the social journal for social sciences, University of Jordan, Vol. 8, Ed. 2, 2015, p. 341.

[2] See article (218) of the Jordanian legislation and article (66) of the Egyptian legislation.

[3] Including the Jordanian legislation M/20 of the law of reform and qualification centers, and the Bahraini M/43 of the law of reform and qualification corporation, and the Sudanese M/ 29 of the law of jail organization and treating the residents.

punishment, as one of its features is to deprive the resident from reproduction whether natural or artificially. In this context, the practical experience of countries make their regulations admit and allow solitude for the residents which proved that the fears of the first opinion from this solitude does not have any justification; such solitude is only a motive to improve the resident's behavior, which is related in enhancing the system of the punishment organization, and thus, can achieve the objectives of the modern punishment policies that revolve around social compatibility of the residents. However, it is impossible to re-compatible a group of them especially the ones who committed sever crimes and are characterized as dangerous criminals, and thud giving them solitude is not desired, and this applies on Artificial Insemination.

35- (The second): the case of Inseminating the wife with a sperm of her husband after the end of the marital relationship: there is no doubt that the legal relationship between the spouses end with the death (the natural way for its end), and expires with the divorce, where the wife in both cases shall spend the period to prove that the womb is free of infants. Jurisdiction countered the legality of Insemination the wife the frozen sperm of her husband that is deposited in the sperms' bank during his life; but he passed away prior to completing the Insemination process. There are three opinions in this regard:

36- (The first): supporters (whether of legal[1] or religious[2] jurisdiction) believe that it is inadmissible to Inseminate the wife with her husband's

[1] Supporter of this perspective is Dr. Mahmoud Ahmed Taha, Ibd, p. 129

[2] This opinion is lead by Dr. Mustafa Al-Zarqa, Ibd, p. 30, among other supporters: Sheikh Atyyieh Saqr the former chairman of the Fatwa Committee in Azhar, and Dr.

sperm after his death. During the period, the marital relationship ends with the death but not by the end of the monthly period and if Insemination took place after the death, then it is a prohibited sperm. This opinion relies on the fact the treatment purpose for artificial Insemination has not place with the end of the marital relationship. It is also feared that the sperm's Insemination may result in mixture of the descent which is negated by Islamic Shari'a. The scholars state prevention thereof may put the wife away from suspicion and evidence if such pregnancy took place during the period. Adding to that, the prior consent of the husband to inseminate his wife artificially, have no additional effect after the end of his marital relationship with her. This opinion was concluded in the conference of Faculty of Rights at Cairo University (1993) which considered that Insemination of the wife with the sperm of her husband after the end of their relationship (whether with the death of the husband or due to divorce) are deemed as artificial Insemination that takes place outside the scope of the relationship between the spouses and this kind of Insemination is considered illegal as stated in the second recommendation of the conference.

37- (The second): Legal[1] and religious[1] supporters admit the wife's Insemination with her husband during the legal period, since the rules

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Saud Saleh, professor of Shari'a in Azhar University, quoted by Dr. Haidar Hussein Al-Shammari, Ibd, p. 133, and Dr. Farag Mohammed Salem, Ibd, p. 190.

[1] Supporters of this opinion are: Dr. Ihad Yusr Anwar, Dr. Shawqi Zakaria Al-Salihi, referred to by Dr. Haidar Hussein Al-Shammari, Ibd, p. 137, and Dr. Al-Najwa Sulaiman, Ibd, p. 77.

of marital status (as they rely on) does not end with the death, but by the end of the legal period, while requiring the prior consent of the husband and confirming his desire to Insemination prior to his death, in addition to the need of taking necessary action to prevent the mixture of the husband's sperm with other ones[2]. Modern scholars allowed the process of wife's Insemination by her husband's sperm during the legal period, while not preferring this process despite limiting it with the pervious conditions; adding the need to testify by experts upon depositing her husband's sperm, and removing it thereof so as not to be accused with adultery, and consequently, this opinion states that such a process should be according to specifying its time- meaning: the term of the legal period- is legally admitted, and may result in the religious rules such as kinship, spending and inheritance.

38- (Third): Arab, legal and religious jurisdiction agree that it is not admissible to Insemination the wife with her husband's sperm after the end of the religious period, since Insemination is legal prohibited by the group of jurists, and no one of the Arab legal jurisdiction accepted it, despite some western jurisdiction who did not rely much on legality of the relationship between spouses; the free relationships are well-known to them as per the legislation of their states/ countries. A French opinion [3] allowed the Insemination of the wife with her husband's

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[1] Supporters of this opinion are: Dr. Abdulaziz Al-Khayyat, Ibd, p. 30, and Dr. Ziad Ahmed Salameh, Ibd, p. 82,

[2] Dr. Hana' Mozan Thahir, legal and religious adaptation of artificial Insemination processes, Iraqi University Journal, Vol. 35/2, p. 546.

[3] Robert (G.,),La revoulation Biologigue et Gentigue Face aux Exignces de droit, R.S.C.1984,P.1269.

sperm after the elapse of the marital relationship. The supporters of this opinion relied on a fact that the French legislation has allowed adoption even with provisions, and if it is so, then there is not justification to deprive the wife from artificial Insemination with the use of her husband's sperm after his death, and in this case it is considered an alternative for adoption.

In comparison between the above said opinions, the researcher would prefer the first one and believes that it is the most correct and appropriate; the marital relationship and the resulting effects ends with the death, and it is not preferable that a woman bears a child after the death of her husband or divorce. This can not be approved by correct logic, in addition that the safety of the sperm from being mixed with other sperms can not be judged as certain, while being far with the wife and suspects is desired and encouraged by Islam. As for the second opinion, there is no way to show opinion thereof, the Arab consensus regarding it is clear and this is consistent with the rules of Islamic Shari'a.

In terms of the second method of insemination which is represented in inseminating the wife's ovum with a sperm from a man other than her husband, it is legally and criminally prohibited with the consensus of jurisdiction in the Arab countries; it completely looks like the marriage of (Istibda') which was common and known during the pre-Islamic period, and it was prohibited by Islamic Shari'a in order not to mix descents and the kinship of the child to his father. On the other hand, it is consistent with adultery in one framework in terms of essence and result, while leading to the same results as the legally prohibited adoption where the illegality of this method was confirmed by the

Islamic jurisdiction Forum in its 8th term which was convened in Mekka Al-Mukarrama in 1985. This perspective was adopted by the Egyptian Dar Al-Ifta', and the Jordanian Dar Al-Ifta' and prohibited it completely without any suspicion and considered it as the covered adultery.

The second branch

The legislative perspective from the legality of internal artificial insemination

39- Preamble: comparative legislations vary in terms of organizing the rules of artificial insemination according to the religion, habits and traditions of each country and through deducing the legislations that facilitate guiding thereof. It is possible to divide it into two attitudes:

40 – Repeated (The first): Perspectives of the western legislations: legislations tend to stipulate clearly regarding the internal artificial insemination whether was by both spouses or between two friends as most of them acknowledge the free relationships outside the framework of marriage; if it was between the husbands, then it required legality of insemination of the wife's ovum with the sperm of her husband while both husbands are alive. This applies on the German legislation as per the law for protecting the fertilized ovum (1990), and was adopted by the English legislation in the law of human insemination and the science of infants (1990).

However, if insemination took place between friends who have no marital relationship, then some legislation required spending a minimum limit of the mutual free life. This applies on the French legislation which stipulated spending two years (as per article 152/1) of

the law of medical assistance for reproduction (1994). These legislations acknowledge the kinship of the child to his parents since he/she is the fruit of such relationship outside of the marital framework.

Regardless of this perspective, whether insemination took place between husbands or friends, legislations agreed to required specific conditions to conduct it, mainly their consent for insemination[1]. Most legislations required to write such consent on a written form (the French and British legislations), but the later did not require thereof in case if the husbands receive treatment in order to reproduce (article 214/10 of the British Health Law).

The provision of the necessity/ need takes its place in most of these legislations; it is necessary the insemination shall intend to treat infertility (the French legislation M/152/1" of the above said law, and the German legislation (M/1/1) of the above said legislation. Some of them stated that the requirements relate with the age of the woman who desires insemination. This is the attitude of the Spanish legislation which stipulated on a minimum limit for the wife's age (18 years), and the Danish law which required the maximum age of the wife for 45 years[2]. Adding to that, other requirements that were stipulated by such legislations to organize the artificial insemination processes such as practicing insemination techniques by specialized medical committees, and in approve and certified medical centers that are subject to the laws and regulations issues in their regard. A violator will be subject to legal accountability.

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[1] Raymod,(G.,) La procrenation artificelle et droit francais. J.C.P 1983,3114, Rubellin Divchi, meres pourteures. permier et deuxieme,1993,p.142.

[2] Dr. Faraj Mohammed Salem, Ibd, p. 147 and the following pages.

Regarding woman's insemination with the sperm of her husband after his death, it does not take the same application in such legislations; among them consider it as prohibited and do not permit it for the wife of girlfriend (the French, German, Swedish and English legislations). The last legislation was more strict in prohibiting that till not full acknowledge the kinship of the infant due to this process (for his father). However, a legislative part took a different track, as it allowed the wife to inseminate herself with the sperm of her husband after his death (the Spanish legislation, article 9/2 of the Law No. 135, 1988, while limiting the process of insemination during six months of the date of death and registering the prior consent of the husband officially or in a written recommendation.

The method of the wife's insemination with a sperm not by her husband, is common in foreign countries and their legislations allow thereof. This was helped by the spread of sperm banks in such countries (England, Germany and France).

41- (The second): Attitude of Arab legislations: most of these legislations were concerned to stipulate on the artificial legislations whether through the law of medical responsibility (the Libyan legislations M/17) or in the Family Law (the Algerian legislations M/45 , repeated of the same law. However, the other Arab comparative legislations proposed independent law to organize the rules of artificial insemination. For example the Tunisian legislation organized it through the law of reproduction medicine, while its rules were organized in the Moroccan legislation (the law of assisted medicine for reproduction). The Emirate legislation organized it in the law of licensing fertility centers, while the Bahraini law organized it in the law of using assisted

medical techniques and helping artificial insemination, the Saudi legislation organized these rules in the system of fertility units, infants and infertility treatment.

42- The legal framework of the rules of artificial Insemination in the Arab comparative legislation: By inducting the legal texts that organize the rules of artificial insemination in such legislation, we would notice the most important rules mentioned regarding the internal insemination between the husbands, which can be listed as follows:

43- Repeated (1): These legislations agree on admitting the insemination of the wife's ovum with the sperm of her husband consistent with the rules of Islamic Shari'a which is deemed as the source of Arab legislation. Most of them confirmed that insemination should be between husbands who have an existing marital status that is documented with an official marriage contract (e. g. the Tunisian, Emirate, and the Bahraini), which mean the admissibility of insemination during the Shari'a period whether due to divorce or death. Some legislation (the Saudi) clearly prohibited insemination whether after death or divorce. This Saudi track is appreciated as it decided the arguments on the legality of insemination during the Shari'a period, contrary to some legislations (the Algerian) which did not close the door discretion in jurisdiction; it admits insemination during the life of the husband (article 45/repeated/2). Prohibition is clear (after the death of the husband), is this prohibition has a place in case of divorce and during the husband's life if he kept his sperm and agreed on the insemination between the husbands before divorce?

In addition, the Libyan legislative law did not require that (in article 17), but insemination between the husbands without mentioning

anything that may prohibit inseminating the wife with the frozen sperm of her husband during the period term. However, a juristic attitude[1] admits that despite containing a text, since it is restricted with another condition which is the provision of necessity, while there is legal and religious attitude that allows insemination during the Shari'a period, since the marital relationship (according to their opinion ends with the end of the period but not upon the death "as stated above). Accordingly, the most correct and required aspect is to fill the legislative gap to prevent any diligence in this regard.

44- 2- These legislations agree on requiring the consent of both spouses regarding the issue of insemination, as most of them require announcing a written consent. This is the Tunisian legislative methodology F/4, and the Bahrain law M/6/C and no legislations violate this methodology except the Libyan and Algerian legislations, as each of them required the consent of spouses without writing such consent. The researcher believes that such methodology is subject to criticism; the written document is a confirmation of the consent of both parties regarding this insemination and it might be evidence in case one the spouses canceled his/her consent or denied it.

In this regard, a question arises regarding the description of the artificial insemination in case it took place without the consent of one of the spouses or both of them, and to what extent the doctor who made

[1] Dr. Abdulla Abdussalam Oraibi, artificial Insemination between admission and criminalization in the Libyan Law, legal research journal, sixth year, Ed. 10, Jan. 2019, p. 98

the operation might be under legal accountability?[1] There is no doubt that the emptiness of legislations from the required description motivated jurisdiction to diligence. Most often, diligence view non-applicability of the criminal forms relating to adultery or raping in criminalizing anyone who violates the provision of consent and there is a punishment imposed on the one who commits that (severity varies from one legislation to another). In the Bahraini legislation, a penalty (a fine) is imposed only M/13. In the Libyan legislation, imprisonment of no less than a year in addition to a fine M/35, whereas the Emirate "M/29 and Moroccan legislation M/40 define it in imprisonment from one to five year and the fine. The later imposes an addition fine and may double the punishment in case of returning to the violation. This is a good conduct is such crime require sever punishment especially in case of repetition. On the other hand, such legislations did not indicate to the case of starting and criminal participation which require referring back to the general rule.

Moreover, punishment would not be sever regarding the capacity of the criminal, whether one of the husbands is a doctor and used his medical knowledge to make insemination for his spouse without the consent of the other husband.

45- 3: The legislations that organized the rules of the artificial insemination require special law with a series of provision relating to the special centers for insemination, how to practice it, and the

[1] See the presentation of jurisdiction opinions in this regard: Dr. Saif Ibrahim Al-Masarweh, Ibd, p. 50 and the following pages, Dr. Mohammed Al-Mursi Zahra, Ibd, p. 294 and the subsequent pages, Dr. Nafi' Taklif Al-Amari, Ibd, p. 402, and the subsequent pages.

necessary standards to preserve the sperm, ovum or infants for the purpose of future insemination, as most of them imposed administrative punishments on the ordinary person in of violating such provisions (they vary between temporary closure to permanent closure). As an example for that are the Emirate legislation M/28, 33, and the Bahraini law M/18.

46- (4): All of these legislations agree to criminalize inseminating the wife with a sperm from another man (other than the husband); as this insemination is legally prohibited since it looks like adultery in one framework. Similar to that is the Bahraini legislation which prohibit artificial insemination with a sperm of another man (M/7/B) and impose a punishment for how violated that (imprisonment from 3-10 years) and a fine of 10-20 thousand Dinars "M/14".

47- The plan of the Jordanian legislation regarding the artificial insemination: The Jordanian legislation (M/13) of the law of medical health accountability stated that" it is not admissible to make the assisting technique for reproduction of the woman or planting an infant in her womb except from the husband and based on their written consent. From this text it is obvious that the Jordanian legislation did not violate the consensus of other Arab legislations by admitting the first method other than the second for the internal artificial insemination, and requiring the written consent of the spouses to announce their consent for insemination.

A negative point in this text deals with the time of insemination, as it did not limit it with the end of the marital relationship by death or divorce. This means admitting it during the period for any of them, but did not state on a punishment whether insemination took place without

the consent of either party, as he/she will be punished in such case by penalty (from 3000 – 5000 Dinars). This misdemeanor punishment of high severity. Accordingly, what is the punishment of a person who inseminates the wife's ovum with a sperm other than the husband's in light of the absence of the punishment thereof? In addition, this text is void from showing the reason for using artificial insemination, which means that it might be for disease reasons or for other reasons, representing a legislative shortage in this regard.

The scholars who study law drafts have attempted to solve such legislative problem as they propose a law for using assisted medical techniques for reproduction (2009). Article 5 prohibited using these techniques except by two husbands who are alive; and due to the infertility of either husband/ or both, and in case of marriage relationship between them, by sperms from each of them. With a punishment for violators (imprisonment for no more than two years and a fine not less than 2000 Dinars and not exceeding than 5000 Dinars "M/19/C" of the draft. This text kept punishments on this violation under misdemeanor, which negate the criminalization of starting such crime in case of the absence of the criminalization text which is required by the Jordanian legislation, and neglected the punishment of repetition of such case and participation in the crime, which all require referring back to the general rules.

Second theme

Legality of external artificial insemination

48- Preamble and division: As stated above, methods of external artificial insemination vary. However, they could be divided into two groups to show the extent of their legality. First: represented in the

methods that take place within the framework of the marital relationship; second: those which contain the methods that are implemented outside this relationship, then to show the perspective of jurisdiction from the legality of each of them (the first branch), then discuss this legality in the comparative legislation (the second branch).

The first branch

The perspective of jurisdiction from the legality of external insemination

49- Juristic attitudes relating to the first group: under this group there are two methods of external artificial insemination, namely:

50- Repeated (The first): Insemination of the wife's ovum from the sperm of her husband in a testing tube then planting it in the wife's womb: According to this method, the wife's ovum is motivated with activating hormones, pullin and inseminating it with the husband's sperm in an external environment known as (testing tube)[1]. That is the reason why the infants of this method are called (tube children) as mentioned above.

This method varies in its legality whether in the legal or religious jurisdiction, based on two opinions: first: its supporters are few[2]- who do not consider this method as legal. This is based on a series of evidence that showed the possibility of controlling the sex of the infant and choosing one sex other than the other, with a possibility of doubt in

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[1] Cohen.(G.,). op. cit. p.478 .

[2] Among the supporters of this attitude: Rajab Al-Tamimi, artificial insemination and tube children, Islamic Jurisdiction Journal, 8th term, Vol. 1, Ed. 2, p. 309, Sheikh Mohammed Ibrahim Shaqra, artificial insemination and tube children, Islamic Jurisdiction Journal, 8th term, Vol. 1, 1986, p. 154

the descents/ kinship, in addition to prohibiting damaging the inseminated ovum which exceed the need since they are infants (as stated by jurisdiction)[1]. Secondly, the saying of the prevailing attitude in jurisdiction[2]- which believe of the legality of artificial insemination according to this method once it has been fully certain that the ovum was the wife's and the sperm is taken from the husband and was planted in the wife's womb after transferring it from the testing tube, with the consent of the husbands, but due a medical necessity, without suspicion that man's sperm was not changed or mixed with another one. If this has been insured, then this insemination method is admissible and legal since it does not violate the intention of the legislator as long as the infant descends from both husbands. Accordingly, the child is theirs and is their legal son, with all legal right. This was confirmed by the Council of Egyptian Efta' Department (1980)[3] and concluded by the jurisdiction Forum of Islamic World Association in its 8th term (1985).

The legality of this method is supported by most of foreign jurisdictions whether took place within the framework of the marital

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[1] Among the supporter of this attitude: Dr. Hasan Hammad Al-Hammad, towards treatments of some development in the criminal law, Al-Halabi legal publication, Beirut, 2013, p. 32

[2] Dr. Mohamoud Ahmed Taha, Ibd, p. 139, Dr. Mohammed Al-Mursi Zahra, Ibd, p. 88, in legal jusridiction: Sheikh Jadulhaq Ali Jadulhaq, rules of the Islamic Shar'ia in medical matters, p. 115, and Sheikh Badr Al-Mitwally Abdul Basit, opinions in artificial insemination, p. 486, referred to by: Dr. Faraj Mohammed Salem, Ibd, p. 503.

[3] Islamic Fatawa, Egyptian Efta' Department, Mohammed Abdo et al., Ministry of Awqaf, Vol. 9, 1985, p. 3215.

relationship or within the circle of free relationship between friends since it helps in solving some family problems that suffer from infertility, considering the attitude of the French jurisdiction in this regard as an evidence where it approved the descent of the child according to this method.

The researcher supports the second Arab juristic opinion, and believes that there is no place for the first opinion of fears and damages of this method. In this regard, it is worth stating that the process of controlling the sex of the infant can be limited or minimized by imposing more severe punishments on the one who implement this process. This can deter and frighten people and it allows to avoid mixture of descents through good control on implementing thereof, without slight towards any mistake that may take place. As for the damage of the inseminated ovum that exceed the need, this should be done upon the success of choosing the appropriate insemination, especially knowing that a jurisdiction stated that the inseminated ovum outside the woman's womb can not be considered as an infant; the infant, according to the opinion of some scholars is the material that is made from the meeting of the male's sperm with the ovum in the woman's womb, as the place of the infant is the womb, and in this case, the womb is protected. As for the inseminated ovum outside the womb, it can not be described as an infant, and accordingly, comes the need to damage the extra ones after the insemination process. That can be done by leaving them until death, to insure none using them in illegal ways. This has been stipulated by various legislations clearly, which the researcher believes that they are appropriate.

Since insemination by a tube does not take place within a specific period of time, but divided on two stages: first: insemination of the ovum inside the testing tube, second: the stage of transferring the pollination from the tube and planting it in the wife's womb, a question is raised about the legality of the insemination process in case the marital status between the husbands ended due to the death of the husband or as a cause for divorce, after the insemination of the ovum in the tube and planting it in the wife's womb? A juristic attitude [1] admits the legality of insemination whereas the process of planting the insemination in the wife's womb is a continuity of pregnancy and its period while making a change in its container only. However, the researcher states that the insemination outside the womb is not considered a fetus and it could not be said that it is alive and may not develop to be a full human being as long as it is still living under such conditions. It could not be described thereof unless it settles in the womb and the woman became pregnant, which result in well-known legal rules and have penal protection.

However, if the marital status ends between the husbands during these to stages, the wife's is not allowed to complete the project of insemination as the case in the internal insemination (as mentioned before), but she may continue pregnancy once the relationship between them expires after planting the insemination in her womb and result in rules and religious and legal rights.

51- (second): insemination of the ovum with the husband's sperm in a testing tube, then planting the insemination in the womb of another

[1] **Dr. Mohammed Al-Mursi Zahra, p. 88**

wife of the husband: The scope of this method is limited in the Islamic countries whose legislations approve and admit multiple wives as per the Islamic Shari'a in terms of this method, jurisdiction was divided into two opinions, first: which is represented by few scholars[1]- that states on the legality thereof while requiring the consent of the three parties- the husband and his two wives- with the existence of the necessity case and so as to avoid the mixture of kinships. As example for that is in case the wife's reach the age of despair, or has not ovum or it is not functional to produce ovum, and the husband's refraining from making sexual intercourse with his wife for a specific period after planting the insemination in her womb to make sure she is pregnant. The supporters of this opinion urged in deciding the real mother of the infant, and whether she is the owner of the ovum or the one who had it in her womb. The prevailing attitude believes that the later is considered the infant's mother, and she may not be the mother (the feature of motherhood) as her relationship does not exceed being breast feeder only.

The second juristic opinion[2] with which the researcher agree, does not approve the legality of this case due to the resulting damages for the pregnant woman as a reason for disconnecting her relationship with the infant after delivering it to the owner of the ovum, or for the infant and in proving his kinship for either mother. If the father was known and his kinship is confirmed, then the problem arises in regards

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[1] See: Dr. Haidar Hussein Al-Shammari, Ibd, p. 80

[2] Dr. Mahmoud Ahmed Taha, Ibd, p. 151; Dr. Ali Tantawi, opinions on the artificial insemination and reproduction in light of Islam, 1983, p. 186, referred to by Dr. Mahmoud Ahmed Taha, Ibd, p. 151

to the mother, to which woman would the child be related. As mentioned before, the issue has disagreements, not to forget the doubt in the mixture of kinships; the pregnant woman may deliver a twin, and thus it will not be possible to distinguish the infant of the insemination from the one who is born in case of marital intercourse. Based on this belief, the juristic forum (8th term) agreed to judge the inadmissibility of this method, and withdrew the resolution of admitting it (in the previous term) and the conference of the Faculty of Rights/ Cairo, 1993 adopted inadmissibility thereof[1].

52- The juristic attitudes regarding the second group: under this group all artificial external methods of insemination that take place through the interference of other parties, whether in the cases o having a male sperm of a female ovum, or in case of the provision of an alternative womb. The later case was subject of discussion in terms of it legality. However, as for the first two cases the Arab juristic consensus have agreed on their illegality due to violating the rules of Islamic Shari'a, where insemination takes place either internally or externally outside of the marital relationship. This result was also reached by the Conference of the Faculty of Rights in Cairo University.

As for the method of the alternative womb, jurisdiction did not fully agree on its legality. A part of the Tunisian jurisdiction [2] and minority of the Arab one stated that it is legal based on the legality of breast feeding and based on the opinions of doctors regarding the infant's bearing the genes and features of the father and mother, while

[1] Conference of the Faculty of Rights, Cairo, Ibd, p. 186.

[2] Devichi.(J.R), op. cit. p. 942.

the incubator of the infant is not his mother, which negate the possibility of mixture of kinships, in addition to the existence of the necessity case where the alternative womb solves the problem of infertility from which many woman suffer, provided that seeking such method requires that the make sperm and the ovum shall be from legal husbands, and no problem if the woman who is the owner of the alternative womb is another wife for the same husband, and the husbands have no hope to reproduce except according to this method provided that the purpose thereof shall not be a commercial one.

Regarding the prevailing attitude in jurisdiction[1], for which the researcher tends and supports- did not approve the legality of the alternative womb especially if the owner of the womb was a foreigner from the husbands; in this method she would spoil the meaning of motherhood as God created her and as people know her. This results in the mixture of kinships and is considered like adultery not to forget that it represents neglect for the woman's dignity in offering her womb for sale or donation. This violates the rules and regulations of the Islamic Shari'a, in addition to the need to preserve self or descent which should exist after the birth of the infant and keep him alive. Prior to that, she has no place and there is no cause to look for illegal methods. Efta' forums in various Arab countries prohibited the alternative womb and stated that it is illegal. This includes the Jordanian Efta' Council, which issued its decision to prohibit thereof in 1984, and the same applies on

[1] Dr. Mohammed Ali Al- Bar, Techniques of human inheritance and reproduction from Islamic perspective, Risalat Al- Taqreeb, International Forum Journal for approximation between religions and the unity of Islamic nation, Ed. 53, 2006, p. 112, Dr. Haidar Hussein Al- Shammari, Ibd, p. 92, Ma'an Khalil Al-Omar, Ibd, p. 357.

the Islamic Fiqh Forum of the Islamic World Association (1985) followed by the Islamic Research Forum in Al-Azhar, 2001.

The second branch

The legislative attitude of the legality of external artificial insemination

53- The perspective of the western legislations: among most of these legislations, Insemination of the wife's ovum with a sperm other than her husband or friend is common. This is listed under the methods of the second group for artificial insemination; this is not restricted on husbands only, but includes those are have free relationships outside the frame of marriage. Among the legislations that followed this track are the French legislation which allowed that (as per article 152/2) of the above said law while restricting that with provisions such as the owner of the sperm should have reproduce previously, and that the sperm of the donator should not lead to the birth of more than a limited number of children, while considering complete secrecy in this regard and the consent of the other party of the marital relationship or the free one to do so[1]. This is similar in the Spanish legislation which did not require except the consent of the friend to donate a sperm (M/217) of Law No. (35), 1988, and the German legislation which required the consent of the competent regional committee on the application of the friends to use this method of insemination under the framework of free relationship[2].

For the alternative womb, however, there are various legislations that approved it but criminalized the agency/ brokerage processes. An

[1] Smoudent et mitchelle, La Famille, artificielle, 1984,p.66.

[2] Dr. Mahmoud Ahmed Taha, Ibd, p. 107

example for that is the English legislation (Law issued on 1/11/1990) regarding the organization of the means of artificial insemination. The Swedish legislation approved the legality of insemination through using the alternative womb whether between husbands or friends and only required their written consent thereof (Law No. 17 of 1988, and Law No. 115 of 1991).

This applies on the German legislation which allowed the processes of alternative womb whether by the husbands or friends with the consent and approval of a special committee as per the law that was issued in 2009 regarding the protection of the attached ovum. As for the Italian legislation, it prohibited reproduction through the alternative mother (Law No. 40 of 2004) which caused many Italians to travel abroad (e.g. Spain) to conduct such operations[1].

54- Tracks of Arab Legislations: comparative legislations approved the first method listed in the first group of external insemination (stated above), and required from the one who makes insemination to comply with the accurate organization and to be fully careful to prevent the mixture of the ovum, sperms and infants or replacing thereof so as to prevent the mix of kinships and destroy them as well as stopping the insemination processes in case of the death of either husband or due to a legal separation between them. Among such legislations are the Bahraini M/6/a of the above said law, and the Saudi Law No. M/ 4 of the above stated law, unless of the insemination was planted in the wife's womb, as she may continue pregnancy in a legal way. This was also stated by the Emirate legislation in article 13/4 of the law of

[1] **Dr. Haidar Hussein Al- Shammri, Ibd, p. 42 and the subsequent pages.**

insemination licensing center, which is consistent with the above said opinion of the researcher. In this context, the insemination is not deemed as fetus prior to settlement in the wife's womb, which require deciding to damage it as long as it is still in the external environment during the occurrence of death or divorce, fearing of using such female ovum or male's sperms for donation or for commercial purposes, or to conduct scientific research. This aims to insure non-use thereof in such illegal aspects and thus it is vital to destroy them with the end of the marital status. In other cases, they could stored for a varied period of time which is decided by most legislations as (five years) unless of the husbands desire to end freezing and keeping them prior to the end of the specified period.

However, the second method of the same first group (as stated above), which is represented in planting the husband's insemination in the womb of the other wife of the husband, it has no place in all Arab legislations as they criminalized it through clear texts the same as the methods of the second group of the external artificial insemination, whether by other's donation of a male insemination or a female ovum or by an alternative womb, even if this womb was for another wife of the husband. An example is the Saudi legislation which state: it is not admissible plant an ovum inseminated by two husband in the womb of another wife or another woman, and it is not admissible to inseminate with sperms other than the husband or inseminate an ovum other than the wife[1]. This applies on the Bahraini legislation which prohibited insemination with sperms other than the husband or inseminate an

[1] **See article 5 of the above said Saudi system**

ovum other than the wife, or to borrow or rent the womb to plant infants resulting from external insemination between male's sperms and the wife's ovum, then planting them in the womb of another woman even if she is a second wife of the husband[1]. Perhaps the Emirate legislation[2] was the most organized by listing the methods of this group with clear legal and detailed texts and prohibited conducting any of them. However, the Libyan legislation was the leased organized which is still lacking the legal wise formulation that close the door for discretion in explaining article 17 that organize the artificial insemination. Even if it does not allow insemination except between and with the consent of the husbands, excludes insemination through the others' interference outside the scope of marriage. However, the text indicates to the admissibility of planting the spouses' insemination in the womb of another wife of the husband, since there is nothing that restricts this state/ case or indicate that it is inadmissible. The researcher does not think that it was the intention of the Libyan legislator and it is not possible to explain its intention in terms of the inadmissibility of this insemination in such case, which require reviewing the formulation of this article and to remove its shortage and weakness.

These legislations offered legal texts that contain penal punishments for whoever violated the rules of artificial insemination, but the most sever one relate to violating the methods of external artificial insemination, as listed under the second group which relate to

[1] **See article 7/B of the Bahraini system**

[2] **See article 10 of the Emirate system**

the interference of other parties in the insemination. Legislations do not go in one line in reporting such punishment; the Emirate legislation makes it an optional between imprisonment (no less than two year and does not exceed five years and the penalty / fine or both punishments), in addition to the closure of the insemination center in case of condemnation as per articles 29 an 32 of the Law of insemination. As for the Bahraini legislation, it tends to impose more sever punishment on the ones who violate the methods of insemination by other parties. It stipulates an imprisonment of no less than three year and not exceeding ten year in addition to the penalty (article 14 of the above said law), and to decide the responsibility of the ordinary person in terms of the punishment and issue a verdict on his to pay a penalty that equal the one decided for the crime that took place, with the possibility to stop his activity for one year up to five years, or to cancel his license completely in case of repeating the same violation. This legislation has an advantage on such crimes and danger due to the resulting mixture in the kinships which contradict with the rules of Islamic Shari'a that require imposing more severe punishments.

55- The track of the Jordanian legislation: in reviewing article 13 of the law of medical and health responsibility, we observe that the Jordanian legislation did not approve the legality of the external artificial insemination unless between the husbands, which means that it rejected the framework of legality of such methods where insemination takes place by other persons. The same criticism is addressed as the Libyan legislation due to approving the insemination between the husbands without deciding whether the insemination of the husbands is planted in the womb of the second wife since they are husbands, too. In addition,

this text lack the legal organization of the artificial insemination, that avoided the project of using assisted medical techniques (above said) as it prohibited using the womb of another woman to plant the infant (M/11) or donating the sperms or fetus or selling either of them (M/1/B) or for making scientific research and studies (M/11/WW) and to keep the sperms and infants for five years (M/1/B) and destroying them in case of the death of either husband or due to the end of the marital status between them (M/ 13/D/2), or by request of the husbands prior to the elapse of the term (M/13/C), and that insemination by sperms shall be from the husbands (M/5) and decided the punishment of imprisonment (as a misdemeanor) and did not impose a punishment on ordinary person/s nor on starting such crimes, or in case of repetition, which required taking that into account and the same applied on the artificial insemination upon discussing and approving the draft (the law

Conclusion

56- conclusion: this was a comparative study in the legality of artificial insemination process, which intended to show the vital principles on which such modern technique shall be based on within a controlled legal framework and in a way that is consistent with the religious and ethical rules in the community, so as to judge its legality. Even though this has some difficulties since such technique is modern in the human communities and due to the new legislations thereof in many countries.

Accordingly, this study was divided into two themes: the first: discussed the meaning of artificial insemination in terms of it definition, justifications, historical development, forms and methods of each form.

The second discussed the legality of the artificial insemination, so as to explore the most acceptable methods in Fiqh and legislation. The study concluded with a set of result and recommendations that can be presented as follows:

57 First

The results: here are the most important results of this study:

1) The study indicated that artificial insemination has historical roots that began in the old primitive civilization as a means to treat infertility. The old people during those times used Gods for fertilization and later knew the method of inserting the male's sperm in the womb of his wife (which is known as: Al-Sofa, to treat infertility). This method was admitted by Islamic jurisdiction. In a later stage, the Arabs knew artificial insemination to choose distinguished groups of horses, then that method was transferred to the west, as they applied artificial insemination based on scientific principles on plants and animals. Due to the success of this technology, application moved to the human field, and their experiments were highly successful in this field.

2) The study showed that artificial insemination takes to forms, the first: is the internal artificial insemination and the second is the external artificial insemination. Each of them has various methods and all of them are practiced between the husbands who have legal marital relationship. It might also be practiced by friend who are not linked by this relationship (as the case in the western countries), and might be through the interference of other parties, whether by offering the male sperm or a female's ovum, or an alternative womb to bear the insemination until delivery. This contributed in the spread of the banks of sperm, ovum and fetus to be used in the future.

3) The study showed differences of the comparative legislations regarding the legality of artificial insemination where most western legislations approved this legality that allow free sexual relationships outside the framework of martial relations. As for the legislations of comparative Arab countries, they all agreed on the legality of the methods of artificial insemination between the husbands and in light of a legal relationship between them in a way that is consistent with the rules of Islamic Shari'a. However, they did not approve the legality of the artificial insemination methods that take place outside this relationship.

4) The study showed that the comparative Arab legislations did not go in one track in organizing the rules of artificial insemination; its rules were organized through independent laws, while the other trend of them stated on the artificial insemination through other laws such as the law of family or the medical responsibility without organizing its rules in a detailed and accurate way, which created a disagreement in interpreting these texts in addition to the juristic argument whose chapter did not end regarding the legality of artificial insemination.

58- Repeated (second): Recommendation: most of them can be listed as follows:

First: The need for the intervention of the legislator to organize the rules of artificial insemination processes whether by updating or amendment according to the following controls and measures:

A. Artificial insemination should take place only between the husbands and in light of a legal marital relationship that exist between them, with the need to stop completing the insemination process upon the

end of such relationship whether by death or divorce with the need to damage the frozen fetus at the occurrence of any case.

B. Artificial insemination between the husbands shall be the only way for reproduction, which is decided by a specialized medical committee, with the need to have the consent of both husbands (the wife and husband) to make the artificial insemination process, where the consent shall be noted on a written form with their signatures.

C. To state clearly on the non-legality of the methods of artificial insemination that are implemented by others, whether this (other) is a donator with a male sperm or a female ovum or an alternative womb, even if the owner of the alternative womb was another wife of the husband.

D. The importance of informing the husband and wife with the possibilities of the success of artificial insemination, its risks and cautions that result thereof (if any), and should only be implemented by a specialized doctor in an approved medical center for this purpose.

E. It is necessary to allow some of the residents of the punishment institutions who are sentences with punishments that deprive their freedom to do artificial insemination according the above said controls, provided to limit that on those who are of less criminal dangers in addition to the group of persons who have good conduct as a kind of reward for them in return for this good conduct, which may encourage other residents to follow this behavior and contribute in their qualification and to achieve order in the punishment organizations.

- Second: the importance of stating deterring punishments against who violate the rules of artificial insemination, provided to take the following into account:

A. Increasing the punishment for a natural person who violates these provisions, and describing his act as a felony if it is in a context other than the marital relationship, or by means of an alternative uterus, even if this uterus is another wife's wife.

B. Equality in the punishment between the total crime and its initiation if it violates the provisions of the previous paragraph, and equality in that punishment also for the original perpetrator and other contributors to it.

C. Tightening of the punishment, as the artificial insemination was performed without the consent of the husband or wife, or both, or if one of the two parties was married medically, and he used his knowledge and knowledge to conduct this process for his wife without his consent.

D. In addition to the foregoing, penalties are imposed on the legal person through which the process of artificial insemination is carried out in violation of the provisions of the law, ranging from temporary and final closure and withdrawal of the license, according to the gravity of the crime committed in addition to imposing a deterrent financial fine.

- Third: The need to impose a strong permanent control on the centers of artificial insemination to insure the following:

A. Make sure of approval and continuity of this approval to practice this technique, by the specialized competent public authorities.

B. Preserve all documents relating with the technology of artificial insemination in conditions that insure observing secrecy of the information included therein.

C. Make sure of keeping inseminations and sperm in suitable medical conditions with the written consent of both husbands, for a maximum

of five years (renewable) based on legal reasons that justify thereof, and to be damaged with the presence of a representative of the public prosecutor in the cases of death and/ or divorce, or due to the husband's desire thereof prior to the end of the specified period.

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4. **Dr. Majdeddin Al-Fayrouz Abadi, Al- Qamous al-Muheet, Ed. 1, Al-Alami Publications, Beirut, 2012.**
5. **Dr. Mohammed Abu Al-Ola Aqeeda, principles of punishment science, Dar Al-Fikr Al-Arabi, Cairo, 1997.**
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3. **Dr. Haidar Hussein Al-Shammari, problems of the alternative womb and proving the kinship in the artificial insemination, the National Center for Legal Publications, Cairo, 2016.**
4. **Dr. Ziad Ahmed Salameh, Tube Children between science and Shari'a, Dar Al- Bayariq, Beirut, 1996.**
5. **Dr. Abdulaziz Al-Khayyat, the verdict of infertility in Islam, Ministry of Awqaf and Islamic Affairs, Amman, 1981.**
6. **Dr. Farag Mohammed Salem, Means and controls of assisted medical fertilization, Ed. 1, Al- Wafa' Legal Library, Alexandria, 2012.**
7. **Dr. Karim Al-Sayyid Ghunaim, copying and reproduction. Ed. 1, Dar Al-Fikr Al-Arabi, Cairo, 1998.**
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4. **Dr. Mohammed Ali Al-Bar, techniques of human inheritance and reproduction through an Islamic perspective, Risalat Al-Taqreeb, International Forum for approximation between religions and unity of the Islamic nation journal, Ed. 53, 2006.**
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6. **Dr. Na'ila Sulaiman Al-Sarayreh and Dr. Abata Al-Tawayha, homosexuality and sexual violence of the residents of reform**

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2. **Cohen.(G.).Aspectes èthigues de La fècondat in vitro, publieè in gènètigue procreation et droit 1985.**
3. **Devichi.(J.R), ART ,Prèc. rev, trime, dr.civ,p492.no 58**
4. **Harichiaux,L'assurance matériaté et la maternité par pubstitution, Rev trim. dr Dance et Das., 1985**
5. **kayser ,(p.) Les Limitesmorales et juridigues de La procreation attificielle, D .S.1987.**
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8. **Raymod,(G.) La procrenation artificelle et droit francais. J.C.P 1983,3114,**
9. **Robert (G.),La revoulation Biologigue et Gentigue Face Exignces de droit, R.S.C.1984.**
10. **Rubellin Divchi, meres pourteures. permier et deuxieme,1993.**
11. **Smoudent et mitchelle, La Famille, artificielle, 1984.**

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DEVELOPMENT OF THE CONCEPTS OF INTERNATIONAL PREFERENTIAL AND REGIONAL TRADE AGREEMENTS AND THE CHARACTERISTICS OF THEIR CONTENT

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Abstract

The article is devoted to defining a conceptual framework, content, correlation and international legal confirmation of the terms "regional trade agreement/treaty", "preferential trade agreement/treaty" within the framework of international multilateral trade system and its legal and normative support/regulation. The article argues for the necessity of the term "international agreement/treaty of economic integration" being introduced to reflect modern trends in international trade and its legal and normative regulation, as well as to clear some terminological extraneous features.

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INTRODUCTION

Scientific, practical problems.

The theory and practice of regulating legal relations in the form of international agreements are important for states, as in most legal systems international agreements' provisions are the main source of regulating the international trade sphere and its components, including international (world and regional) privileged and preferential spheres. International agreements play a significant role, first of all, because they contain the general consensus of participating countries and unified norms specially set to regulate international relations in a particular field.

Besides, it is worth remembering that the Preamble and Article 1 of the UN Charter provide that the UN mission is to contribute to the social progress of all nations and to realize international cooperation in settling international problems of economic nature[1] (which also include international trade issues), and, therefore, it is also an activity area of the UN's structural units (for example, ECOSOC) and its system's specialized institutions (for example, UNCTAD, IBRD, OECD). The

[1] **UN (United Nations). (1945).** ***Charter of the United Nations*** **of June 26, 1945, San-Francisco. Retrieved from: http://www.un.org/en/charter-united-nations/index.html**

key place in the international economic and trade regulation system is occupied by the General Agreement on Tariffs and Trade signed by 23 states in October 1947[1]. Its main objective is to create a mechanism for regulating economic relation between participating states through some mutual concessions and compromises in the field of trade policies. With the lapse of time the GATT ideas told on the package of 1994 Marrakesh agreements related to its modification and the establishment of the World Trade Organization,[2] which nowadays is the organizational and legal basis of the international multilateral trade system.

The international multilateral trade system is aimed at "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations" (the GATT Preamble[3] and the distortions[4] in the relations

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[1] **WTO (World Trade Organization). (1947).** ***The General Agreement on Tariffs and Trade*** **(GATT 1947), dated Oct. 30, 1947. Retrieved from:** https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

[2] **WTO (World Trade Organization). (1994a).** ***Agreement Establishing the World Trade Organization,*** **dated Apr. 15, 1994, Marrakesh. Retrieved from:** http://zakon2.rada.gov.ua/laws/show/995_342

[3] **WTO (World Trade Organization). (1947).** ***The General Agreement on Tariffs and Trade*** **(GATT 1947), dated Oct. 30, 1947. Retrieved from:** https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

[4] **Freund, C., & Ornelas, E. (2010). Regional Trade Agreements.** ***Policy Research Working Paper 5314 of The World Bank, Development Research Group, Trade and Integration Team,*** **dated May 2010:61. Retrieved from:**

between member countries. In other words, the whole WTO system of norms is aimed at the liberalization of international trade relations based on using the most favored nation treatment (Article I GATT),[1] which is related to tariff and non-tariff methods applied (or not applied) by states when implementing the national foreign economic policy. That is, it is possible to state that the spread of international trade agreements regulating the liberalization is a characteristic feature of today's international trade which also concerns the privilege and the preference during its implementation.

The concept of international agreements introducing/establishing various types of trade benefits and preferences has quite a broad interpretation and several names, among which, first of all we can distinguish regional trade agreements/treaties (RTA) and preferential trade agreements/treaties (PTA). The above mentioned terms are actively used by, for example, the World Bank,[2] UNCTAD,[3] WTO,[1] OECD[2] etc.

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https://openknowledge.worldbank.org/bitstream/handle/10986/3799/WPS5314.pdf?sequence=1&isAllowed=y

[1] **WTO (World Trade Organization). (1947).** ***The General Agreement on Tariffs and Trade*** **(GATT 1947), dated Oct. 30, 1947. Retrieved from:** https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

[2] **WB (World Bank). (2018).** ***Global Preferential Trade Agreement Database of World Bank.*** **Retrieved from:** http://wits.worldbank.org/gptad/trade_database.html

[3] **UNCTAD (United Nations Conference on Trade and Development). (2013).** ***Key Statistics and Trends in Trade Policy.*** **Geneva. Retrieved from:** http://unctad.org/en/PublicationsLibrary/ditctab20132 en.pdf

The theoretical and practical aspects of the creation and operation international multilateral trading system and its liberalization, regional economic integrations, regional trade agreements, preferential trade agreements have been explored in some way by foreign and national lawyers and, most of all, by economists, namely: Anuradha R.V., Bagwell K.W., Baldwin R.E, Bergsten, Breton P., Belkin L.,[3] Bhagwati J., Cadot O., Carpenter T., Chauffour J.-P., Child J., Egger P., Freund C., Krishna K., Krueger A., Lawrence R., Mathis J.H., Maur J.-Ch., Mavrodis P.C., Miroudot S., Mrazova M., Ornelas E., Ornelas E., Panagariya A., Rowden R., Roy M., Saggi K., Staiger R.W.,

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[1] **WTO (World Trade Organization). (2011).** ***World Trade Report 2011. The WTO and Preferential Trade Agreements: from Co-existence to Coherence.*** **Lausanne: WTO Publications. Retrieved from:**

https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf

[2] **OECD (The Organisation for Economic Co-operation and Development). (2018).** ***OECD work on Regional Trade Agreements*****. Retrieved from: http://oecd/rta**

[3] **Leonid Belkin, Julia Iurynets, Svitlana Golovko, Victoria Golubeva, Yuriy Pyvovar. Budapest Memorandum for Ukraine: Historical-Legal and Political-Legal Aspect in the Context of an Unsuccessful Experience of Denuclearization.** ***Journal of Law and Political Sciences (JLPS)*****. 2019. Vol. 20 Eighth Year. Issue (3), September: 69-108.**

Strelchenko O.,[1] Stephenson S., Van Grasstek C., Vicard V., Iurynets J.[2], etc.

Aim of the study.

The mentioned types of international agreements/treaties (both regional and preferential) introduce certain regulatory aspects and simplifications into the international trade process and, therefore, require their accurate and unambiguous understanding in order they could be used correctly and efficiently. However, there is certain terminological vagueness and confusion which needs clarifications, basing, first of all, on the existing legal, namely international conventional understanding rather than philological content (understanding) of the given concepts, taking into consideration international legal trends in the theory and practice which influenced and are influencing their formation and essence.

[1] **Olexandr Radzivill, Tetiana Minka, Yurii Sereda, Oksana Strelchenko, Yuriy Pyvovar. Prospects and Challenges for the Ukrainian Agricultural Market Under the Association Agreement with the European Union.** ***Management Theory and Studies for Rural Business and Infrastructure Development*****. 2019. Vol. 41 (2): 153-167. DOI: https://doi.org/10.15544/mts.2019.14**

[2] **Leonid Belkin, Julia Iurynets, Mark Belkin, Yuriy Pyvovar. Disproof of Inconvenient Negative Court Practice for Self-Protection in Economic Activity.** ***Management Theory and Studies for Rural Business and Infrastructure Development*****. 2019. Vol. 41 (1): 5-11. DOI: https://doi.org/10.15823/mts.2019.01**

THE FIRST TOPIC
PREFERENTIAL TRADE AGREEMENTS / TREATIES: PREREQUISITES FOR THE APPEARANCE, CONCEPT AND TYPES

According to Article 2.1, "a" of the UN Vienna Convention on the Law of Treaties dated May 23, 1969: "Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[1] In other words, international regional and preferential agreements/treaties in the sphere of international trade, made between states on the universal or regional level, fall under the above mentioned definition.

Historically the GATT and later on the WTO applied the term "regional trade agreements", as a result of the fact that originally trade liberalization agreements had undoubtedly regional nature in terms of the geographical proximity of their member countries. However, nowadays the regionality feature is losing its determinative character when interstate trade agreements are made, as over the last decades the majority of these agreements have been of interregional (cross-regional) character (for instance, the Free Trade Area Agreement between Ukraine and Canada of July 11, 2016,[2] the Transatlantic Trade and

[1] **UN (United Nations). (1969).** ***Convention on the Law of Treaties*** **of May 23, 1969, Vienna. Retrieved from: http://zakon2.rada.gov.ua/laws/show/995_118**

[2] **Canada-Ukraine. (2016).** ***Free Trade Area Agreement between Ukraine and Canada*** **of July 11, 2016. http://mfa.gov.ua/mediafiles/sites/canada/files/Canada_Brochure2015_v5.pdf**

Investment Partnership between the European Union and the United States (T-TIP) (the negotiations concerning the establishment of the partnership started in July, 2013 had been held)[1] etc.). Therefore, to some extent it is possible to consider correct the idea to the effect that the WTO is likely to start gradually abandoning the term "regional trade agreements", as it is losing its accuracy, in favor of the term "preferential trade agreements",[2] but I consider that the latter does not reflect all theoretical and legal peculiarities of the present either.

In the WTO's terminology the concept "preferential" traditionally meant (and in the WTO's statistical sources even now means) agreements between developed countries and developing countries based on the Generalized System of Preferences in Trade between Developed and Developing Countries[3] and the Global System of Trade Preferences among Developing Countries.[4] In other words, theoretically

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[1] **USA-EU, T-TIP. (2015).** ***Transatlantic Trade and Investment Partnership between USA and EU*** **(T-TIP). Retrieved from: https://ustr.gov/ttip // http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf**

[2] **WTO (World Trade Organization). (2011).** ***World Trade Report 2011. The WTO and Preferential Trade Agreements: from Co-existence to Coherence.*** **Lausanne: WTO Publications. Retrieved from: https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf**

[3] **UNCTAD (United Nations Conference on Trade and Development). (2018).** ***Generalized System of Preferences in trade among developed and developing countries*** **(GSP) of 1968. List of Beneficiaries. 2018. UNCTAD/ITCD/TSB/Misc.62/Rev.7. Retrieved from: https://unctad.org/en/PublicationsLibrary/itcdtsbmisc62rev7_en.pdf // https://unctad.org/en/Pages/DITC/GSP/Handbooks-on-the-GSP-schemes.aspx**

[4] **UNCTAD (United Nations Conference on Trade and Development). (1988).** ***Agreement on the Global System of Trade Preferences among Developing Countries,*** **dated Apr. 12, 1988, Belgrade. Came into force on Apr. 19, 1989. Retrieved from:**

the parties to the given international trade agreements are divided into the countries granting preferences and the countries granted preferences (only developing countries). Besides the specific and the determinative subject structure (at least one of the parties a developing country), preferential trade agreements have the following characteristics:

- **in the international contractual procedure they regulate exclusively international trade in goods as objects of material world;**
- **they cover only tariff matters (levy/non-levy, application/non-application) when the goods are traded, as well as some other customs issues connected with them (for example, identification of the country of origin for the goods in the given process), which are used when the goods are transported across states' customs borders;**
- **preferences are granted on the basis of both mutuality principle (in trade among developing countries) and non-mutuality, and are introduced to contribute to the economic development of the world's poor countries in order that they can pass from the group of countries granted preferences into the group of countries granting preferences. Thus, we can emphasize certain temporariness of the subject structure (particular countries) and its international contractual obligations in the existing preference system.**

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http://unctad.org/en/Docs/ditcmisc57_en.pdf

Admitting that preferences are a kind of advantages, the author considers it worth retaining its previous historically formed content for the term "preferential trade agreements/treaties", namely in respect of the issue of non-levy of duties on the goods originating from developing countries (if they are delivered to the territory of the countries granting preferences or in the mutual trade among developing countries).

It is necessary to note that preferential agreements may be permanent and temporary, those foreseeing unilateral liberalization (in favor of developing countries[1] and those foreseeing mutual liberalization (among the given countries.[2] Besides, we can observe some developing countries' certain unwillingness to lose the analogue of preference margin not only in the commodity trade, but also in other spheres of international trade (for example, services trade). Consequently, they unilaterally waive preferences and get down to the mutual cooperation in a different institutional format, including on the regional integration basis.[3]

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[1] **UNCTAD (United Nations Conference on Trade and Development). (2018).** ***Generalized System of Preferences in trade among developed and developing countries*** **(GSP) of 1968. List of Beneficiaries. 2018. UNCTAD/ITCD/TSB/Misc.62/Rev.7. Retrieved from: https://unctad.org/en/PublicationsLibrary/itcdtsbmisc62rev7_en.pdf https://unctad.org/en/Pages/DITC/GSP/Handbooks-on-the-GSP-schemes.aspx**

[2] **UNCTAD (United Nations Conference on Trade and Development). (1988).** ***Agreement on the Global System of Trade Preferences among Developing Countries,*** **dated Apr. 12, 1988, Belgrade. Came into force on Apr. 19, 1989. Retrieved from http://unctad.org/en/Docs/ditcmisc57_en.pdf**

[3] **Remchukova, V.K. (2015).** ***The impact of the preferential trade agreements on the multilateral trade system.*** **(Unpublished doctoral dissertation). MGIMO, Russia. Retrieved from: http://mgimo.ru/upload/2015/12/Remchukova_thesis.pdf**

THE SECOND TOPIC

COMPETITION BETWEEN DIFFERENT TYPES OF INTERNATIONAL TRADE AGREEMENTS/TREATIES

Nowadays some contradictions arose due to the fact that starting from the formation of the GATT[1] according to the mutuality principle the WTO differentiated between regional trade agreements (including, first of all, agreements on establishing free trade zones and customs unions (customs territories) and preferential trade agreements, that is those the subject of which is giving preference in trade among states on the unilateral (non-mutual) basis (though, the feature is not typical for the preferences granted in trade among developing countries). Besides, it is difficult to admit that "free trade agreements, customs unions, partial coverage agreements, economic integration agreements and preferential trade agreements" are variants of preferential agreements[2] as they contain various aspects of related but not identical concepts of facilitating international trade among states, and repeat themselves to some extent. In other words, we cannot mix up, identify or integrate the concepts of benefits and preferences, the use and content of which have already been formed in the international legal sources, legal relationship, law enforcement and legal consciousness.

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[1] **WTO (World Trade Organization). (1947).** ***The General Agreement on Tariffs and Trade*** **(GATT 1947), dated Oct. 30, 1947. Retrieved from:** https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

[2] **Chauffour, J.-P., & Maur, J.-Ch. (2011).** ***Preferential Trade Agreement Policies for Development.*** **Washington, DC, p. 38. Retrieved from:** https://www.openknowledge.worldbank.org/bitstream/handle/10986/2329/634040PUB0Pref00Box0361517B0PUBLIC0.pdf?sequence=4&isAllowed=y

Thus, in the author's opinion, *preferential trade agreements/treaties* are international agreements, at least one party to which is a developing country, and which are made to help their economic development through the application of tariff measures (as a rule, exceptionally the elimination of duties on the goods, on certain conditions, when the goods are imported to the countries granting preferences).

THE THIRD TOPIC
REGIONAL TRADE AGREEMENTS / TREATIES:
CONCEPT AND TYPES

The WTO's Doha negotiation round, which commenced in November 2001, was called the Development Round. Its agenda, on top of everything else, included the matter of special and differential treatment for the least developed countries.[1] However, its first stage in September 2003 collapsed showing the versatility of the participants' objectives and interests and, subsequently, a confrontation between developed and developing countries. In 2004 the WTO member countries accepted "differential treatment for the least developed countries"[2] as a basis for future agreements in the form of the Framework Agreement. However, so far the Doha Round has not terminated and has not worked out any legal (imperative) norms.

[1] **WTO (World Trade Organization). (2018c). *Work program on small economies.* Retrieved from: https://www.wto.org/english/tratop_e/devel_e/dev_wkprog_smalleco_e.htm**

[2] **WTO (World Trade Organization). (2004). *Doha Work Program "Decision Adopted by the General Council on 1 August 2004",* dated Aug. 2, 2004. WT/L/579. Retrieved from: https://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.doc**

Taking into account the history of establishment and development, summarizing, we can argue that in the WTO's "classical" comprehension: *regional trade agreements/treaties* are willful written agreements made between states or their associations located in the same (geographical) region with the purpose of promoting trade among them (in the first place, simplifying the movement of the goods and, sometimes, other objects between them), on the basis of which regional economic integrations (customs territories) are established in the form of free trade zones or customs unions, which, on top of everything else, have to be in conformity with the transparency principle.

Only two types of regional trade agreements are most often identified, namely in respect of the free trade zones and customs unions (customs territories) establishment (Article XXIV[1]).[2]

According to the WTO, on May 1, 2018 its member (459) countries were in 287 regional trade agreements (as compared with August, 2015 – 449 and 262 respectively; and in 1995 only 124 agreements were notified).[3]

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[1] **WTO (World Trade Organization). (1947). *The General Agreement on Tariffs and Trade* (GATT 1947), dated Oct. 30, 1947. Retrieved from:** https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

[2] **Freund, C., & Ornelas, E. (2010). Regional Trade Agreements. *Policy Research Working Paper 5314 of The World Bank, Development Research Group, Trade and Integration Team,* dated May 2010: 61, p.3. Retrieved from:** https://openknowledge.worldbank.org/bitstream/handle/10986/3799/WPS5314.pdf?sequence=1&isAllowed=y

[3] **WTO (World Trade Organization). (2018b). *RTAs Database.* Retrieved from:** https://www.wto.org/english/tratop_e/region_e/region_e.htm

However, according to the preliminary assessment by OECD experts, in addition to the included agreements, the number of preferential trade agreements actually in force, but not notified may reach about 100.[1] Besides, It is necessary to take into consideration different reasons for notification depending on the trade liberalization object: GATT Article XXIV on commodity trade liberalization[2] and GATS Article V on services trade liberalization.[3] It is worth noting that the mentioned notification is necessary as it gives states a legitimate opportunity on the basis of such international agreements to ignore, in the first place, the most favored nation commitment and to use more advantageous conditions of trade between a limited circle of parties without extending them to all the WTO members. In other words, it is world-level legalization (within the WTO framework) of a possibility of non-fulfillment of the basic principle of the WTO and international trade – the most favored nation treatment.

All the WTO member countries can take part and take part (except Mongolia) at least in one international trade regional or preferential

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[1] **OECD (The Organisation for Economic Co-operation and Development). (2015).** ***Deep Provision in Regional Trade Agreements: How Multilateral Friendly?*** **OECD Trade and Agriculture Directorate. Feb., 2015. Retrieved from:** http://www.oecd.org/tad/benefitlib/Deep-Provisions-RTA-February-2015.pdf

[2] **WTO (World Trade Organization). (1947).** ***The General Agreement on Tariffs and Trade*** **(GATT 1947), dated Oct. 30, 1947. Retrieved from:** https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

[3] **WTO (World Trade Organization). (1947).** ***The General Agreement on Tariffs and Trade*** **(GATT 1947), dated Oct. 30, 1947. Retrieved from:** https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

agreement,[1] which leads to the simultaneous interweaving and accretion of several various international trade regulation treatments with their participation. It is evident that international trade agreements (preferential and regional) in particular and the international trade system in general are directed at achieving international trade liberalization and satisfying the same needs of states, they being grounded on fundamentally different approaches which creates ambiguity in their comprehension, that's why they need not be incompatible.[2]

THE FOURTH TOPIC
DISCRIMINATORY OF PREFERENTIAL AGREEMENTS/TREATIES

Whereas interstate trade agreements/treaties (including both regional trade (bi- and multilateral) and preferential (Generalized[3])

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[1] **WTO (World Trade Organization). (2011).** ***World Trade Report 2011. The WTO and Preferential Trade Agreements: from Co-existence to Coherence.*** **Lausanne: WTO Publications. Retrieved from:** https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf

[2] **WTO (World Trade Organization). (2011).** ***World Trade Report 2011. The WTO and Preferential Trade Agreements: from Co-existence to Coherence.*** **Lausanne: WTO Publications. Retrieved from:** https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf

[3] **UNCTAD (United Nations Conference on Trade and Development). (2018).** ***Generalized System of Preferences in trade among developed and developing countries*** **(GSP) of 1968. List of Beneficiaries. 2018. UNCTAD/ITCD/TSB/Misc.62/Rev.7. Retrieved from: https://unctad.org/en/PublicationsLibrary/itcdtsbmisc62rev7_en.pdf // https://unctad.org/en/Pages/DITC/GSP/Handbooks-on-the-GSP-schemes.aspx**

and Global System of Preferences[1]) are instruments of enhancing trade on the world market, the latter are used not for all participants of international cooperation within the WTO framework. Respectively and in essence they have a discriminatory character, distinguishing some participants of the international trade process through their obtaining/using certain, in the first place tariff, advantages on the grounds of international treaty commitments which are not directly and immediately connected with the WTO documents. Such a discriminatory situation would have existed if there had not been exceptions for them in Article 1, par. 2-4 and in GATT Appendices A-G, GATT Article XXIV, GATT Article XXV, GATT Article XXXVI par. 8.[2] In this context it is necessary to refer to the Decision on Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries known as the Enabling Clause of 1979,[3] Understanding on the Interpretation of Article XXIV of The

[1] **UNCTAD (United Nations Conference on Trade and Development). (1988).** ***Agreement on the Global System of Trade Preferences among Developing Countries,*** **dated Apr. 12, 1988, Belgrade. Came into force on Apr. 19, 1989. Retrieved from: http://unctad.org/en/Docs/ditcmisc57_en.pdf**

[2] **WTO (World Trade Organization). (1947).** ***The General Agreement on Tariffs and Trade*** **(GATT 1947), dated Oct. 30, 1947. Retrieved from: https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm**

[3] **WTO (World Trade Organization). (1979).** ***Differential and more favorable treatment reciprocity and fuller participation of developing countries*** **of Nov. 28, 1979. Decision L/4903. Available at: https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm**

General Agreement on Tariffs and Trade 1994,[1] as well as Transparency Mechanism for Regional Trade Agreements of 2006.[2]

In consequence of the above mentioned we consider interesting the tenet on "permanent bifurcation and de-emphasis of the most favored nation treatment principle".[3] Also in order regional trade agreements can contribute to development, they must combine in themselves both liberalization of trade in commodities, services, capital, etc., and reforms in national economies through the private business and development facilitation instruments. Many states use their participation in preferential and regional trade agreements to overcome domestic political opposition to reforms. According to R. Baldwin, 21st century regionalism is driven by a different set of political economy forces; the basic bargain is "foreign factories for domestic reforms" – not "exchange of market access".[4] The lack of consensus in understanding how the global multilateral trade system can help countries avoid poverty was unfortunately confirmed by the Doha Round problems.

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[1] **WTO (World Trade Organization). (1994b).** ***The General Agreement on Tariffs and Trade,*** **dated Apr. 15, 1994. (GATT 1994). Retrieved from:** https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_04_e.htm

[2] **WTO (World Trade Organization). (2006).** ***Transparency Mechanism for Regional Trade Agreements,*** **dated Dec. 18, 2006. General Council Decision WT/L/671. Retrieved from:** https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm

[3] **Remchukova, V.K. (2015).** ***The impact of the preferential trade agreements on the multilateral trade system.*** **(Unpublished doctoral dissertation). MGIMO, Russia. Retrieved from:** http://mgimo.ru/upload/2015/12/Remchukova_thesis.pdf

[4] **Baldwin, R. (2010).** ***21-st Century Regionalism: Filling the Gap between 21-st Century Trade and 20-th Century Trade Rules.*** **Geneva: WTO Working Paper, p.3.**

The specific character of modern international trade defines the need of creating favorable conditions for unimpeded trans-border movement of not only goods, but also of services, investments, intellectual property rights etc., which requires that other legal support forms should be looked for. However, economical integrations/associations are not limited by geographical regions and by only two types (a free-trade zone and a customs union). They include formations, distinguished in the theory usually according to their integration level, with a deeper integration degree, namely: common markets, economic and political unions. Amid the WTO's functional inability urgent international trade matters are sorted out through regional cooperation (within regional trade agreements and respective benefits covered by them). Admittedly, nowadays the international multilateral international trade system and regional trade agreement/treaties are complementary in "the global trade architecture growing increasingly complex, coexisting and crossing in complex trajectories and constantly changing configuration".[1]

[1] **Remchukova, V.K. (2015).** ***The impact of the preferential trade agreements on the multilateral trade system.*** **(Unpublished doctoral dissertation). MGIMO, Russia, pp.26-27. Retrieved from: http://mgimo.ru/upload/2015/12/Remchukova_thesis.pdf**

THE FIFTH TOPIC

CONCEPT AND FEATURES OF INTERNATIONAL ECONOMIC INTEGRATION AGREEMENTS/TREATIES

We would like also to outline the fact that[1] economical integrations do not only envisage free movement of individual production factors (in a free trade zone, as a rule, these are the goods) and common foreign economic policy in respect of the third states (beginning from the customs union), but also certain interstate coordination of macroeconomic policies or some of their components (common market), coordination (harmonization) of national legislations, first in some directions and in some spheres (economic union), as well as establishment of respective interstate and suprastate bodies to coordinate their activities (beginning from the common market, and in the political union – supranational). In other words, within the integration framework, starting from the international trade liberalization, through the facilitation and freedom of movement of goods, services, capital etc., states begin cooperating more closely not only in the international trade and the adjacent (in the first place, customs) spheres, they switch to other forms and directions of international cooperation. We can accept that current regional trade agreements possess such distinctive features[2] as comprehensiveness,

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[1] **Kireev, A.P. (1997). International economics. In 2 parts. Part 1. *International Microeconomics: movement of goods and production factors; tutorial for higher educational institutions*. Moscow: Mezhdunaronyie otnosheniia, pp. 364-365.**

[2] **Chauffour, J.-P., & Maur, J.-Ch. (2011). *Preferential Trade Agreement Policies for Development.* Washington, DC, pp.75-77. Retrieved from:**

consolidation, consequence, mobile structural form and content, extension and deepening of the regulation sphere (range).

This matter is growing more and more important due to the increasing number of international trade agreements/treaties which underlie regional integrations providing for exceptions to the most favored nation treatment (and requiring notification according to the WTO' international agreement system for its member countries) as well as due to the change (extension) of their content. A surge in the number of international trade agreements has led to some up-to-date trends and problems in the international trade system, for instance to the "deeper integration potential" (not only by moving to the next integration type, but also by expanding cooperation within the same type), which affects the state and development of the regionalization.[1] All the more, so-called "deep and comprehensive free trade areas" (Preamble, Article 1[2]) are coming into the world, going behind the limits of international trade.

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https://www.openknowledge.worldbank.org/bitstream/handle/10986/2329/634040PUB0Pref00Box0361517B0PUBLIC0.pdf?sequence=4&isAllowed=y

[1] **Freund, C., & Ornelas, E. (2010). Regional Trade Agreements.** ***Policy Research Working Paper 5314 of The World Bank, Development Research Group, Trade and Integration Team,*** **dated May 2010: 61, pp.38-41. Retrieved from:**

https://openknowledge.worldbank.org/bitstream/handle/10986/3799/WPS5314.pdf?sequence=1&isAllowed=y

[2] **EU–Ukraine. (2014).** ***Association Agreement between the European Union, the European Atomic Energy Community and their Member States on the One Part, and Ukraine, on the Other Part,*** **dated June 27, 2014. Retrieved from**

http://zakon2.rada.gov.ua/laws/show/984_a11

Thus, we can identify the following tasks and distinctive features which exist and need fixing within the framework of a particular type of economic integrations: 1) they are established through making respective international agreements on the basis of the reciprocity principle and mutual trade concessions; 2) their subjects (parties, participants) may be, after reciprocal will approval, any states, except "high" integration levels, where domestic macroeconomic policies and standards are coordinated; 3) depending on the integration level they envisage the freedom of movement not only for the goods but also for other objects; 4) cooperation and simplification cover not only the tariff sphere (in terms of duty cuts or elimination), but also customs and non-tariff spheres, on top of everything else more and more often international treaty commitments go behind international trade cooperation (we mean, for example, international security aspects, etc.); 5) besides certain coordination of macroeconomic indices and policies, active cooperation on unification and harmonization of national legislations in the appointed directions (for instance, technical standards, etc.); 6) as a rule, except for free trade areas, a coordinated foreign economic policy in respect of third countries, which do not participate in the integration; 7) establishment of interstate or suprastate/supranational (depending on the integration level) coordination body/institution for joint actions.

To summarize, *international economic integration agreements/treaties* are written agreements made between states or their associations on the basis of voluntariness and transparency to facilitate the trade among them and to provide other advantages (in the first place, customs, tariff and non-tariff simplification of the goods, services and intellectual

activity outcomes movement among them), which are the foundation for the establishment of integration associations/ groups in any form.

CONCLUSION

Taking into account today's state and development trends in the sphere of the present paper, the author believes that it would be more advisable to switch from the term "regional trade agreements/treaties" to the term "international economic integration agreements/treaties" / "economic integration agreements/treaties" (regional trade agreements should be considered a variant of the latter). In other words, it is necessary to revise and extend the content of the notion of international trade agreements and change (unify, modernize) to some extent the name, which in essence will fit the reality. As a result of this the WTO's documents must be amended terminologically and inherently in terms of: names of the agreements themselves, types of international integration associations established by them, renaming of respective WTO sub-units, etc.

The WTO membership or its accession procedure, participation in international integration associations enable states to take into consideration international legal norms and international practice, mechanisms and experience of predecessors in the field of harmonization and implementation of requirements and standards of the international trade system on the national level. Usually international economic integration agreements/treaties do not contain

any norms for "special and differential treatment",[1] besides we can admit that these agreements fix: a) extended access of the developing countries to developed countries' markets; b) special exceptions for developing countries in liberalization programs; c) developed countries' forbearance from requirements for developing countries in respect of mutual market access; d) provision of technical support or assistance to organize trade. Countries' interest in making international economic integration agreements/treaties testifies to their "competitive attractiveness" and successful incorporation into the sophisticated world trade architecture.[2]

Thus, we consider it necessary to keep the name and narrow/specific understanding of "preferential trade agreements/treaties" for the goods originating from developing countries and only in the tariff sphere; - to distinguish the notion "international economic integration agreements/treaties", which include regional ones and show better correlation with deeper cooperation in the field of the multilateral international trade system development (in the customs and tariff sphere, cover a wider range of objects, suggest different approaches and methods of their regulation), as well as foresee other manifestations of foreign economic policy coordination, harmonization and coordination in the economic as well as in the legal and regulatory

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[1] **WTO (World Trade Organization). (2018c).** ***Work program on small economies.*** **Retrieved from: https://www.wto.org/english/tratop_e/devel_e/dev_wkprog_smalleco_e.htm**

[2] **Remchukova, V.K. (2015).** ***The impact of the preferential trade agreements on the multilateral trade system.*** **(Unpublished doctoral dissertation). MGIMO, Russia, p.149. Retrieved from: http://mgimo.ru/upload/2015/12/Remchukova_thesis.pdf**

spheres, and sometimes in administrative (organizational and administrative) institutions on the national, interstate and suprastate level.

Considering international treaty fixation and legal content of the terms "preferential trade agreements/treaties" and "regional trade agreements/treaties", their formation and application processes, today's realities and trends in the institutional and legal support of the international multilateral trade system as well as the conceptual framework application practice, there appears the necessity of their being revised, extended (through the introduction of the concept "international economic integration agreements/treaties") and clarified normatively (itemized, adjusted, explained) in the WTO's documents and within the framework of existing economic integrations.

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(8)

IMPLEMENT THE ORDER DECISIONS BY PROVISIONAL AND CONSERVATIVE MEASURES ISSUED BY THE ARBITRAL TRIBUNAL ON THE SUBMITTED DISPUTE IN ACCORDANCE WITH THE JORDANIAN LAW

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Abstract

The research included the decision to order provisional and conservative measures issued by the arbitration board in Jordanian Law, and Implementing the arbitration committee's decision to take temporary and conservative measures, The court competent to implement the arbitration board's decision to take temporary and conservative measures.

The research ended with a conclusion containing the most important recommendations and proposals.

Keywor: Order Decisions, Provisional, Arbitral, Dispute, Provisional And Conservative

Introduction

The role of the arbitral tribunal in issuing orders to take temporary and conservative measures in the arbitration litigation in Jordanian law, which is originally within the jurisdiction of the judge for urgent matters in accordance with the Code of Civil Procedures, the role of the arbitration tribunal must be strengthened to take over all procedures and orders for the settlement of litigation, thus reducing the burden on Country' litigation spending.

Arbitration imposed itself, as one of the alternative solutions to settling disputes, but in some stages it may require the nature of the dispute during the course of arbitration procedures, issuing some orders, and from these orders, taking temporary and conservative measures that must be implemented by one of the parties to the litigation, who must submit to the implementation of these orders.

Despite the Jordanian Arbitration Law, it was permissible for the litigating parties to agree to give the arbitral tribunal the authority to issue an order to take temporary and conservative measures, but this authority in its practical application may cause the arbitration panel the problem of implementing that in the event that the issuance or refusal to implement these measures that it issuedThe arbitration panel, as it does not have the capacity to compel its execution as the state's jurisdiction, which requires the matter to resort to the intervention of the judiciary to implement the order related to the measures based on an application submitted to the concerned competent court.

The study problem:

The problem of this study lies in the fact that the Jordanian legislator authorized the parties to litigation to allow the arbitration board to take actions and orders in the provisional and conservative measures that are enforceable and what are the problems that the arbitration board may face in implementing these orders?And the extent of the arbitration board's ability to have the authority to compel the parties to the litigation to implement its order or must resort to the jurisdiction of the state, to implement and orders temporary and provisional measures?

Study Approach:

In this study, the researcher follows the descriptive analytical approach, by reviewing the legal texts that deal with the implementation of the decisions of the matter with provisional and conservative measures in the dispute before the arbitration board in Jordanian law and analyzing these texts to indicate the problems that the arbitration panel may face in implementing these orders, which may be called the matter is to enter the judiciary tointervene to implement the matter related to the measures based on an application submitted to the concerned competent court.

Considering this, this research deals with the statement of the decision of the provisional and conservative measures issued by the arbitration board, the implementation of the arbitral tribunal's decision to take temporary and conservative measures, and the statement of the court competent to implement the arbitration's decision to take temporary and conservative measures.Accordingly, we divide the research into three sections:

The first topic: The decision to order provisional and conservative

measures issued by the arbitration board in Jordanian Law.
The second topic: Implementing the arbitration committee's decision to take temporary and conservative measures.
The third topic: The court competent to implement the arbitration board's decision to take temporary and conservative measures.

The first topic

The decision to order provisional and provisional measures issued by the arbitraltribunal in Jordanian Law

To study the decision to order provisionalmeasures issued by the arbitration panel as covered by Article (13) of the Jordanian Arbitration Law, you need to understand the following two requirements:

The first requirement: the concept of temporary and conservative measures

The second requirement: the parties of the litigation to agree on the competence of the arbitral tribunal to issue an order to take temporary and conservative measures

The first requirement

The concept of temporary and conservative measures: Temporary measures are meant as alternative protection that temporarily replaces regular judicial and executive protection.An example is the issuance of an urgent ruling to stop the expulsion of a tenant or the temporary delivery of abstract thing.[1]

1Muhannad Al-Sanouri, The Role of the Arbitrator in Private International Arbitration, First Version / First Edition, Dar Al-Thaqafa, Amman, p. 103.2005

As for the precautionary measures, which are aimed at preserving the right to guarantee it in the future, they are means of ensuring the existence of the right when a judgment is issued in the matter, for example, a precautionary reservation that aims to preserve the debtor's money and allows the creditor after obtaining evidence of the right and validity of the reservation to fulfill his right either voluntarily or compulsorily.[1]

The second requirement

The parties of the dispute to agree that the arbitral tribunal is empowered to issue an order to take provisional and conservative measures

During the dispute consideration by the arbitral tribunal, the circumstances of the case or the dispute before issuance of the decision to take urgent measures represented in temporary or conservative measures and before issuing the ruling ending the dispute, the Jordanian legislator gave the arbitration authority the authority to issue a decision ordering one of the parties to the dispute to take what it deems appropriate. One of the measures is temporary or conservative in the event that the parties to the dispute agreed to grant the arbitral tribunal the authority to issue this order, as Article (23 / A) of the Jordanian Arbitration Law states that:[2]

1Ibid., P. 103

[2]Including that stipulated in Articles 2 / 71, 2 / 61, 1 / 60. "The court or the judge of urgent matters shall consider urgent matters, without the need to invite litigants, unless the court or the judge decides otherwise. "The urgent matters identified by Article (32)

Taking into account the provisions of Article (13) of this law, the two parties to the arbitration may agree that the arbitral tribunal, whether on its own initiative or at the request of either party to the arbitration, order that either of them take whatever temporary or provisional measures required by the nature of the dispute and to request that adequate security be provided to cover the expenses of these measures. "[1]

Accordingly, the Jordanian legislator has given authority to the arbitration board in accordance with Article (23 / a) of the Arbitration Law to issue whatever temporary or conservative measures it deems necessary and which the nature of the dispute requires, either spontaneously or at the request of any of the arbitration parties.In order for the jurisdiction of the arbitral tribunal to be issued by issuing the decision to order provisional and conservative measures, it must be expressly stated in the arbitration agreement on that; whether it is in the arbitration clause or the arbitration clause and otherwise, the

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of the Civil Procedure Law are:1- Urgent matters that he fears may be too late.2- Consider requests to appoint an agent, custodian of money, provisional attachment, custody, or travel ban.3- Urgent examination to prove the case.4- A lawsuit to hear a witness who fears he missed the opportunity to cite it on a topic that has not yet been brought to the attention of the judiciary and may be brought before him.

1This is what Article (17) of the Model Law on International Commercial Arbitration states: "The arbitration board may order either of the two parties, upon the request of one of them, to take any temporary or conservative measure it deems necessary in relation to the subject matter of the dispute, unless the parties agree otherwise, and the arbitral tribunal may require either party to provide appropriate security in relation to this measure.

matter remains in the hands of the judiciary, whether before or during the dispute procedures, the agreement here must be explicit and clear And specific and away from ambiguity and allusion or the use of broad and non-specific expressions, and this according to the text of Article (13) Jordanian arbitration.

Also, it is not permissible to broaden the interpretation of the arbitration clause or to share it with the arbitration being competent to settle all disputes arising from a specific contract.

Conditions of urgency taken and do not affect the origin of the right.[1]

Accordingly, the arbitral tribunal has the authority to issue, during the course of the litigation, temporary and provisional rulings before issuing the ruling ending the dispute, on its own initiative, or at the request of one of the parties from the arbitral tribunal to issue this order.[2]

While the opinion of the majority of jurists is that the arbitrator should not be given the authority to take precautionary or precautionary measures because it is not correct to exempt the arbitrator from the principle of confrontation.[3]

And this, which was stable jurisprudence as It is supported by the Egyptian judiciary that the jurisdiction of the arbitral tribunal is limited to the determination of the merits of the dispute and does not

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[1]Mahmoud Mukhtar Berri, International Commercial Arbitration, Third Edition, Dar Al-Nahda Al-Arabia, Cairo, 2007, p. 150. And Reda Al-Sayed Abdel-Hamid, Issues in Arbitration, Reda Al-Sayed Abdel-Hamid, Issues in Arbitration, Dar Al-Nahda Al-Arabia, Cairo, 2003 P. 68.

2Reda Al-Sayed Abdel Hamid, previous reference, p. 69.

3Reda Al-Sayed Abdel Hamid, previous reference, p. 69.

extend to the issuance of temporary or provisional orders, such as the order to appoint a guard.[1]

The second topic
Implementing the arbitration board's decision to take temporary and conservative measures

To study the implementation of the arbitration panel's decision to take temporary and conservative measures issued by the arbitration panel, which calls us to divide this topic the following two requirements:
The first requirement: implementation of the arbitration board's decision to take temporary and conservative measures.
The second requirement: guarantees of covering the costs of temporary and conservative measures.

The first requirement:
Implementing the arbitration board's decision to take temporary and conservative measures.

The Jordanian legislator explicitly stipulated how to implement the arbitration board's order to take temporary and conservative measures and in case of failure, refusal, or refusal of the person who was issued the order to implement, the Jordanian legislator handled this case by expressly stipulating how the judiciary intervened to implement the

1Mahmoud Mukhtar Berri, previous reference, p. 147.

arbitration's order to take temporary and conservative measures as stipulated In Article (23 / b) of the Jordanian Arbitration Law that:

"If the person to whom the order was issued fails to implement it, the arbitral tribunal may, at the request of the other party, authorize this party to take the necessary measures to implement it, including its right to request the competent court to issue its order in execution."

As this text simulates the failure of the party to whom the order to take interim measures from the arbitral tribunal abstains.

We find that the Jordanian legislator is in harmony with the Egyptian legislator, who has devised two solutions that allow one of them to be taken to the will of the party who requested to take the measure, namely[1]:

The first: That this party requests the arbitration board to authorize it to take the necessary measures to implement its order directed to the other party, of course at the expense of this other party.

The second: That this party requests the president of the court originally competent to take the measure, to order that the arbitral tribe asked him to take the interim measures and refuse, to implement the order of this body.

Usually, the party requesting the measure may resort to this second solution because it avoids incurring the costs of implementation, even if he will then refer it to the person who was ordered to take this

1Reda El-Sayed, Issues in Arbitration, previous reference, p. 70 and beyond

measure[1], and the judiciary has the compulsory authority to implement the decision of the commission.

For the state's judiciary to intervene in the domain of the temporary and conservative measures in ordering the implementation of the measures taken by the arbitration board and the party who was assigned to implement them have failed to do so[2], that is, it does not order the taking of a temporary or conservative measure, but only orders the implementation of a previous measure ordered by the arbitration panel[3].

The Jordanian legislator did not mention in the arbitration law a way to file grievances or appeal the provisional and provisional orders issued by the arbitration board, as the only way that the legislator decided to stipulate what is issued by arbitration is to challenge the nullity of the ruling that ends the litigation, and those orders are not end to the litigation and thus exit from submission to this nullity appeal[4].

The articles dealt only with the methods of implementing the temporary order without referring to the grievance against it, which indicates that

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1bid., P. 70.

2Hafizah El-Sayed Al-Haddad; The extent of the jurisdiction of the national judiciary to take temporary and conservative measures in international private disputes agreed upon for arbitration, Dar Al-Fikr Al-Jami'e, Alexandria, 1996, p. 119.

3Reda El-Sayed, Issues in Arbitration, previous reference, p. 70.

4Ibid., P. 71.

this grievance is not permissible as it enjoys immunity that does not enjoy the same orders issued by the judiciary[1].

The second requirement:
Guarantees to cover the costs of temporary and conservative measures

In order for the arbitral tribunal to exercise its powers to issue an order to make temporary and conservative measures, adequate guarantees must be found to cover the expenses of the measures that are being ordered to take such measures as appointing a guard or seeking the assistance of an expert to prove the case and other measures that require expenditures that may be high, it must be a party that handles this spending has stipulated Article (23 / a) of the Jordanian Arbitration Law states that:

"Subject to the provisions of Article (13) of this law, the two parties to the arbitration may agree that the arbitral tribunal should have .... and request that adequate security be provided to cover the expenses of these measures.[2]"

1Nabil Ismail Amro, Orders on the Petitions and Their Legal Regime, Munsh'at Al-Ma'arif, Alexandria, 1987, p. 137

2This is what Article (17) of the Model Law for International Commercial Arbitration stipulates: "… the arbitration board may require either party to provide appropriate security in relation to this measure."

The Arbitration Commission requests that guarantee be provided to cover the expenses of the measure ordered by it. These expenses shall be borne by the party who requested the taking of the measure.

This guarantee aims to achieve two goals, namely[1]:

1- Risks of abuse that may be involved in taking the measure.

2- The injured party gets the compensation he may be entitled to for the damages he causes as a result of taking this action.

In some cases, there is nothing to prevent the arbitral tribunal from being entitled to some provisional or conservative measures and to decide on them without stopping at the agreement of the parties to the litigation, for example, an order to prove the case by an expert appointed by the arbitration tribunal, or the order to deposit the subject of the dispute in its public treasury or with a trustee or in a bank account subject to the signature of the arbitration court or its president, as well as the order not to withdrawLetter of guarantee prior to the issuance of the arbitration award, and so on, so why has the law not recognized the arbitration court the right to take such measures? If it is true that the Arbitration Court's order to do something of this only, in most cases, it lacks the executive force that is available to the court's order[2].

1Dr. Reda El-Sayed, Issues in Arbitration, Ibid., P. 69. Counselor, Muhammad Ali Skeiker, Arbitration Legislation in Egypt and the Arab Countries, D., 2006, p. 91.

Dr. Abdul Hamid Al-Ahdab, Ibid., p. 89.

2Ibid., p 89.

The third topic

The concerned court competent to implement the arbitral tribunal's decision to take temporary and conservative measures.

The court that is competent to implement the order of the arbitration board with temporary and conservative measures has been treated by Article (23 / b) of the Jordanian Arbitration Law as follows:

"If the person to whom the order was issued fails to implement it, the arbitration board may, at the request of the other party, authorize this party to take the necessary measures to implement it, including its right to request the competent court to issue its order in execution."

Through our presentation of the text, we find that the Jordanian legislator has made the Court of Appeal the competent court[1]to implement the order of the arbitration panel with provisional and conservative measures, meaning that its role has been limited in the event that the party assigned to implement the order of the arbitration committee refuses to the temporary and conservative measures, as it issues its order to implement the order of the arbitration body based on the request of the other party, in the sense that the legislator has not authorized the competent Court of Appeal to intervene directly to take

1Article (2 / a) of the Jordanian Arbitration Law stipulates that: "The Specialized Court: The Court of Appeal which is within the jurisdiction of arbitration unless the parties agree on the jurisdiction of another appeals court in the Kingdom

temporary and precautionary measures, because that is the prerogative of the competent urgent matters judge[1],

This is in contrast to the Egyptian legislator who authorized the parties to litigation to resort to the court that is competent to take temporary and conservative measures or implement an order to arbitrate these measures when needed[2].

The judiciary exercises its authority by strengthening the progress of procedures by issuing provisional and provisional orders or refusing to issue them. This is one of the forms of support for the state's judiciary's arbitration, which appears in many temporary and conservative measures that the arbitrator cannot issue, or when the parties are prohibited from taking it. In this case, the jurisdiction remains for the judiciary, provided that the latter does not affect the subject of the dispute or the authority of the arbitrators against it[3].

This case is considered one of the cases where the judge interferes during the course of the arbitration procedures when he issues urgent decisions that have a temporary character to protect a right or money

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1Abdul Hamid Al-Ahdab, The New Jordanian Arbitration Law, The Arab Arbitration Magazine, Fifth Issue, September 2002, p. 89. And Nadia Abdel Salam Mobaideen, The Role of the Appeal Court Concerning the Control of Arbitration Procedures Prior to the Arbitration Judgment (Study in Jordanian Law) , Master Thesis, Mu'tah University 2005, p. 39.

2Mohamed Skeker, Ibid, p. 57.

3Dr. Hoda Mohamed Abdel-Rahman, The Role of the Arbitrator in Arbitration Advocacy - and the Limits of its Powers - Dar Al-Nahda Al-Arabiya, Cairo, 1997, p. 356.

from damage before it is too late and before deciding on the basis of the right and these procedures are implemented immediately[1]

Summary

This study examines the implementation of decisions of ordering provisional and conservative measures issued by the arbitration panel in the dispute before it in accordance with the Arbitration Law No. (31) for the year (2001) and in line with the Jordanian Civil Procedures Law No. (24) for the year (1988).

The importance of this study lies in the fact that the Jordanian legislator authorized the parties to the litigation to agree to allow the arbitral tribunal to take decisions and orders in the provisional and conservative measures that are enforceable, and what are the problems that the arbitration committee may face in implementing these orders, which may require the need to enter the state's judiciary to implement orders related to provisional and conservative measures upon a request submitted by one of the parties to the concerned competent court.

Accordingly, we will divide this study into three topics according to the following methodology:

1Dr. Fawzi Muhammad Sami, International Commercial Arbitration - A Comparative Study of the Provisions of International Commercial Arbitration - First version / Third Edition, Dar Al Thaqafa, Amman, 2008, p. 282.

The first topic

The decision to order provisional and conservative measures issued by the arbitration board the second topic: Implementing the arbitration committee's decision to take temporary and conservative measures.

The third topic: The court competent to implement the arbitration board's decision to take temporary and conservative measures.

Conclusion:

Through our study to implement the decisions of ordering provisional and conservative measures issued by the arbitration panel in the dispute before it, we have completed this study with the following:

Results:-

- **It became clear to us from this study that the implementation of the decisions of the matter with provisional and conservative measures during the litigation of arbitration requires a party that has the authority to compel and compel to implement these orders in the event that the order issued by this mechanism abstains or rejects the implementation of this measure, which is lacking in the mechanism of the arbitration committee as it does not have the status obligation as state jurisdiction.**
- **This study indicated that the Jordanian legislator has given wide powers to the arbitration board to take temporary and conservative measures in the event that the parties agree to grant them the authority to issue these measures, as the**

Jordanian legislator has authorized the arbitration board to build a request from either party to the arbitration or on its own to order either of them to take what you see as temporary or conservative measures required by the nature of the dispute, and this is in contradiction to many Arab legislations, the most important of which is the Egyptian legislator who did not give this authority to the arbitration body except at the request of one of the parties to the dispute.

- **The Jordanian legislator also opened the way for any of the parties to the litigation by resorting to the competent court referred to in Article (2 / a) of the Jordanian Arbitration Law, which is the Court of Appeal within whose jurisdiction the dispute falls by submitting an application to implement the decisions of the matter with provisional and conservative measures in the event of refusal or refusal of This order has been issued for implementation.**
- **The Jordanian legislator also showed us in harmony with the provisions of the Model Law on International Commercial Arbitration in terms of granting the arbitral tribunal the authority to take temporary and conservative measures and that the party requesting the measure provides adequate assurance to the arbitration board about this. Article (17) of the last law stated that: "The arbitral tribunal may order either of the parties, upon the request of one of them, to take any interim or conservative measure it considers necessary in relation to the subject matter of the dispute unless the parties agree otherwise,**

and the arbitral tribunal may require either party to provide appropriate security in relation to this measure.".

Recommendations: -

- **We hope that the Jordanian legislator is entrusted with the task of implementing decisions and orders to take temporary and conservative measures from the jurisdiction of the state's judiciary (the competent appeals court), for the following reasons mentioned:**

  1- In order to save effort and time in the event of indecision or abstinence from the Arbitration Commission asking him to implement its order to take temporary and conservative measures.

  2- The party requested by the arbitration board to take temporary and conservative measures shall avoid incurring the costs of implementation, which may be prohibitive.

  3- The party requested by the arbitral tribunal to take the measure may not have sufficient guarantees to provide it to the tribunal, even though it is obligated to provide these guarantees to the arbitration panel in the event that it is the one who executed its orders with the measures.

  4-The arbitral tribunal does not have the capacity to oblige or compel it to request it to implement decisions and orders to take provisional and conservative measures such as state jurisdiction.

- **We also hope that the Jordanian legislator will reconsider the drafting of the text of Article (23 / b) of the Jordanian Arbitration Law, and we suggest that it become as follows:And if**

the person to whom the order was issued fails to implement it, the arbitration tribunal or the other party to the request from the competent court may issue its order for execution.

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Laws used in the study:

- Jordan Civil Procedure Law No. (24) for the year 1988.

-.Jordanian Arbitration Law No. (31) of 2001.

- Egyptian Arbitration Law No. (27) of 1994.

- Model Law for International Commercial Arbitration.

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PROPERTY RIGHTS AND PROTECTION OF NATIONAL FOLKLORE IN JORDANIAN LEGISLATION

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Abstract

The present study aimed to identify the importance of national folklore for societies. It sheds light on legal protection of national folklore, on the regional and international levels, as being an intellectual property right. It found that the national laws regulating intellectual property rights do not protect national folklore. Due to the division of territories, and experiencing wars and occupation, the infringements committed against national folklore are increasing, and their ideas are increasing as well. In light of such infringements, some ideas of national folklore of a specific society are ascribed to another society that doesn't enjoy property rights for such

ideas. In Jordan and some neighboring countries, there isn't any law to protect national folklore from such violations. That is because the laws in such countries do not protect national folklore nor do they enact laws to protect them.

There isn't any international agreement that regulates this type of intellectual property right (i.e. the property right to national folklore). The researcher here adopted a comparative analytical approach. For example, he analyzed several texts selected from several laws and international agreements. He found out that several ideas of the national Jordanian folklore and some neighboring countries have become part of the national folklore of other countries. It has become easier for any society to ascribe some ideas of the national folklore of another society to itself, due to occupation and wars being waged in these countries. Therefore, the researcher recommends amending Jordanian Copyright Laws in order to protect Jordanian national folklore, and the rights of the society, beneficiaries and owners of that folklore. He also recommends concluding agreements that aim at protecting the national folklore and regulating issues related to the liability arising from the infringements committed against it. He also recommends concluding agreements that aim at identifying the courts that have jurisdiction over settling national folklore-related lawsuits.

Keywords: Intellectual property; National folklore; Legal protection; Infringements; International agreements

1.0 Introduction

Issues related to intellectual property rights have been receiving much attention on the regional and international levels. Such rights are legally protected. To be more specific, there are applicable laws for protecting such rights. Today, civilized countries seek protecting the rights of society and citizens. However, the national folklore -which may be called cultural heritage- hasn't been protected under the Jordanian Copyright Law. It should be noted that the copyright laws in most countries do not provide adequate legal protection to the national folklore. Most of the international copyright conventions and agreements –e.g. the Berne Convention, Geneva Copyright Convention, TRIPS Agreement and Arab Agreement for Copyright Protection - do not provide adequate legal protection to national folklore. Most of the international organizations - World Intellectual Property Organization (WIPO), United Nations Educational, Scientific and Cultural Organization (UNESCO) - didn't provide adequate legal protection to national folklore. However, efforts have been exerted by WIPO and UNESCO to conclude an international convention to enact laws to protect it.

National folklore was extant ages ago. It refers to several traditional beliefs, stories, and customs of a specific society. It represents the heritage of that society. Due to the division of territories, wars, occupation, infringements committed against national folklore, ideas of national folklore are also increasingly robbed. Some ideas in the national folklore of a specific society are ascribed to another society although that society doesn't have property rights for such ideas. A

specific society may claim that it is the owner of these ideas in the absence of legal protection provided for national folklore.

It should be noted that protecting national folklore is very important because it is a protection of the national heritage and identity of any society.

1.1 Statement of the Problem

Many problems emerged because of the absence of legal protection for national folklore under the Jordanian laws, consequently, violations committed against it increased. For example, the Jordanian Copyright Law of 1992 doesn't protect the property right of national folklore.

The aforementioned problems may include: absence of a specific definition of the term (national folklore). Even Jordanian laws don't identify national folklore-related rights which must be protected. They also don't identify the courts that have jurisdiction over settling the national folklore-related lawsuits, neither do they address the issues related to compensation that must be paid as a result of committing any breach against national folklore.

1.2 Study Objectives

The present study aimed to shed light on a very important issue that has been recently receiving much attention (i.e. the legal protection of national folklore). It attempts to identify: whether the Jordanian Copyright Law provides adequate legal protection for national folklore and its property rights. It also investigates whether the latest laws provide legal protection or not, whether there is any international agreement on such an issue, or whether there is any court that is specialized in settling national folklore-related conflicts.

1.3 Significance of the Study

The present study is significant on both scientific and practical levels; on the practical level it suggests methods for protecting national folklore-related rights, on the theoretical level it provides results that help to activate the role of Jordanian government to protect the property right of national folklore. It also attempts to determine the conditions that must be met for protecting folklore rights

2.0 Study Methodology

The researcher adopted an analytical descriptive comparative approach. Through these approaches, he could shed light on problematic issues associated with the study's subject, and identify the significance of protecting national folklore. He also could compare legislations of several countries in terms of the legal protection of national folklore.

2.1 Structure of the Present Study

The present study is divided into the following:

1. **Meaning of national folklore, which incorporates definition of the term and the items that need to be protected**
2. **Contents of Folklore**
3. **Legal protection of national folklore manifested in the national and international protections**

The study ends with a conclusion which wraps up results and recommendations.

2.2 The Meaning of National Folklore

National folklore means creations of any People living in an area of land producing ideas related to their environment in the form of poetry,

stories, folk dance, handcrafts and inherited traditional customs which are parts of their cultural identity.

In general, it implies all that reflects their life style. Thus, the meaning of folklore incorporates the nation's customs, traditions, art and its way of life.

This folklore passes from one generation to another thus, becoming a culture to which generations adhere for it reflects all that the nation created and inherited from their forefathers.

The concept of folklore was elaborated upon by different nations. For example, The United Arab Emirates in Article (1) of its copyright law defines it as: any literary and intellectual works invented by popular categories in a state to express its cultural identity passed on from one generation to another and constitutes one of the basic elements of its heritage.

In Article (138) of Egyptian Intellectual Property Law number (38) 2002, Egyptians defined it as "Each expression resembled in distinguished elements that reflect traditional artistic heritage created or continued in Egypt.

Traditional folklore also means any traditional cultural expression of a group that passed on from one generation to another and related to the social cultural, life, religious, beliefs and values. Lebanese legislator defined it as:

"Protection of materialistic expressions of folklore Works only".

Through the concepts, terminology, and definitions outlined, folklore, elements might be divided into the following:

1- **Manual heritage: clothing, toys, decorations, painting, sculpture, and national artifacts**

2- **Oral tradition: tales, legends, folk poetry, riddles and puzzles**
3- **Cultural heritage: values and ethics**
4- **Ritual expressions: kinetic expression such as folk dance, plays, marriage rituals and festivals**

Tunisian legislator in Tunisian property law of literary works defined it as all artistic effects inherited from previous generations and related to customs and traditions, are considered as methods of manifestation of popular creativity like: tales, folk music and dance (Law no. 36, 1994).

Moroccan legislator also defined it as "Folklore is unpublished literature whose author is unknown, with signs bearing on the assumption that this author is a Moroccan citizen (Moroccan law, no. 135, 1970).

The Qatari legislator identified Folklore in the first article of the protection of intellectual works and copyright of Qatari law "it is the literary, artistic and scientific works, which were invented by the people of the state in which they express their cultural identity and were passed on from generation to another constituting the traditional Qatari heritage (Act no. 25, 1995).

Saudi legislator identified folklore in the first article of Saudi Copyright Law "it is all literary, artistic or scientific works, which are supposed to have been invented in the Saudi territory by authors presumed to be Saudi citizens or they were considered to be Saudi citizens, and were passed on from a generation to another forming Saudi Arabia's traditional national heritage (Law no. 11, 1990).

As for International agreements of folklore identification, the World Intellectual Property Organization considered folklore as Intellectual

creations that should be protected and placed a definition of folklore in the dictionary of copyrights.

It identified folklore as "works of cultural heritage of a nation, which was created, saved and developed by unidentified people of indigenous communities, and was passed on from one generation to another of original communities. Examples of such works:

Stories, folk songs, music, composed songs, dances and various folk rituals.

Also, UNESCO identified folklore as "folklore is all cultural legacies created by a group of people expressed by them or by individuals and reflects, to some extent, the cultural and social identity of the group and passed on from generation to another within the group orally or by simulation or in any other way, like language, music, literature, dance, games, myths, beliefs, habits, sculpture, architecture or any other form of arts.

The Arab Convention for the protection of copyright in paragraph (a) of Article 5 identified folklore as "folklore is the literary, artistic and scientific works, which were invented by people of member states as a reflection of its cultural identity and were passed on from one generation to another which constitute an essential element in its heritage".

World Intellectual Property Organization (WIPO) identified folklore as "all the traditional rules and foundations in literature, works of art, design, acts of art performers and the unannounced inventions and scientific discoveries and all traditional rules that relate to inventions and innovations that arise from an intellectual creativity , whether it is Industrial, scientific, literary or artistic:

In light of these definitions, we can define folklore as" any expression that reflects the artistic tradition, literary tradition or scientific tradition of a nation or a country.

2.3 Nature and Content of Folklore

National Folklore has a special legal nature similar to that of copyright law. It has a dual nature consisting of literary rights linked to the personality of authors of this folklore, as well as financial right which is the author`s financial return from this product. Each right is separate from the other, majority of the laws view that nature of folklore is a double right "Al Faqihe Al sanhory (1967) sees" duality of copyright fits with the theory of the nature of this right".

After the legal modification of the nature of national folklore which was considered a difficult task, the researcher sees that the content of the right of folklore protection falls within the rights covered by copyright protection act, therefore it must be included with the protection of copyright law. The content of the right of folklore could be materialized by the economic right, which is as follows:

Owners of folklore are entitled to:

1. **The right of copying and distribution of this heritage**
2. **The right to transfer this heritage to public and the right of public to perform it**
3. **The right to lease this heritage**
4. **The right to musically interpret this folklore and distribute it**

Article 40 of Tunis Model Law of Copyrights gave the right to owners of fellowship and financial rights.

On the other hand, the literary right is the right of the community and people to publish this heritage and their right to adjust, defend and protect it, as stipulated in the protection of copyright law.

Article 5 of the Tunis Model Law on Copyright (1976): "The rights should be attributed to the author without any alterations. Such rights are inalienable and remain as long as the author is alive, after his death his heirs are entitled to practice such rights.

2.4 Conditions to be met in folklore to be protected

National folklore is the property of people; it expresses the qualities, consciousness, awareness, behaviors and high values of a nation. It is a right ascribed to a certain group of humans. It is also a sign of national characteristics of a state; it also identifies the country and the nation as well.

What are the requirements to be provided in folklore so as to be eligible for protection?

1. **Availability of objective elements**
2. **Availability of form and material elements**

Folklore should include the subject element of the heritage in order to be covered by protection. This element is an original innovation which is a mind exertion that reflects the personal side of the author. It is not a copy of previous works. It is a renewed key element for the folklore eligibility of protection regardless of any kind of folklore and regardless of any expressed way of the purpose (Abu Baker, 2008).

Protection of innovative works is not subject to any restrictions except that it should be expressed in an innovative form to be attributed to its owner. The innovation could be done by an individual or by a group. It will always be a property of the group with no dispute over ownership.

This creativity becomes the property of the group and consequently becomes a right of the nation. Thus, creation may have been done by a certain group in the society, not by an individual; in this case the creator is anonymous. In all cases, this creation will become an accepted popular phenomenon and be adopted by the Community.

Creation means the Personal distinguished uniqueness which the author gives to his work in order to single it out from other similar works. Such a creation has certain elements which are:

A. **Idea: is the first step in the process, irrespective of being intellectual, artistic or scientific**
B. **Design: is the outcome frame**
C. **Expression: presents the last stage of work (Abu Baker, 2008)**

The formal physical frame must be present in folklore in order to be protected. The idea is substantiated into a concrete reality in the form of: drawings. designs, paintings, engravings, wooden sculptures, porcelain work, pottery, mosaics, metal ornaments, necklace, food and beverage, fabrics and needlework, carpets, clothes, toys, handicrafts, musical instruments, textile and architecture. Other non-tangible forms should be also present. These forms might be verbal expressions like: stories, tails, legends, Quizzes, signs and symbols, dance expressions, or rituals.

Lebanese legislator stated in the protection of literary and artistic property law in a article "2" Law protects all productions of the human mind whether they are written, Graphic, sculptural, calligraphic or oral, regardless of financial value, importance, goal, or of the expressible method (1999, article 5).

Arab Convention for the protection of copyright first article identified the graphic form as "materializing the idea and showing a sensual entity whether it was in writing, painting, sculpture, voice recording, speech filming or in motion.

For the graphic element, work should be materialized and prepared to be published, but not just a mere idea (Sanhory, (1967).

There are norms which have been set by Legal Consultative Organization of Asia and Africa to protect folklore:

1. **Folklore, in order to be protected, must be an intellectual creativity; an authentic creation of an individual or a group of a society of a nation or a region.**
2. **It expresses cultural identity of a society or a nation.**
3. **People continue protecting it in their folklore.**
4. **Tradition passes from one generation to another (ALCO, 2000).**

2.5 Works under protection

International agreements and laws did not pinpoint works under protection. All agreements and laws did not cover all aspects of folklore and all agreed that the folkloric works which are protected are within the following categories:

1. **Bedouin tradition like (clothes, dolls, decorations, graphics, engravings, sculpture, ceramic, clay and textile**
2. **Oral heritage: like (tales, legends, folk poetry, puzzles and riddles**
3. **Cultural Heritage: Values and morals**
4. **Rituals: Kinetic expressions, folk dance, plays, art forms, marriage rituals, and festivals**

Through reviewing protected works, we find that the word work is listed only with copyright, while folklore is expressions, and that is what the UNICSO Committee for legal Protection of folklore used wherever it studies a special case about the protection of any intellectual creation. The researcher put an illustrative list of folkloric expressions under protection. These were divided into several groups according to the way they were presented·

1. **Oral forms of expressions: tales and legends**
2. **Forms of popular idioms: Zajal, Riddles, puzzles and popular poems**
3. **Musical expressions: songs, popular chants and musical instruments**
4. **Physical movements like: dance, voice attractions, and popular art scenes**
5. **Folk art like: drawing and color drawings, intaglio, sculpture, pottery, mosaic, wooden engravings, tanning, leather, textile and fashion**
6. **Musical instruments**
7. **Architecture**

3.0 Legal protection of folklore

In this chapter the researcher will discuss the legal protection of folklore in terms of the following reasons for protection, ways of creativity protection, its importance, trustee, precautionary measures, who has the right to establish a case, competent court, civil penalty, conflict of laws, law applicability, international agreements and their effects on heritage protection. The researcher will also discuss ways of

folklore protection and international agreements pertaining it and penalties for folklore assault.

3.1 Ways of Folklore Protection

1. **Reasons for the protection of folklore**
2. **Creativity and its importance, the trustee**
3. **Who has the right to present the creation?**

3.1.1 Reasons for Folklore Protection

Folklore is a cultural and a civilization identity of people, communities and nations, individuals, groups and states. Folklore was assaulted because of colonialism, occupation; disintegration of states, which exposed folklore to illegal exploitation. Technological development had also a role in exploitation.

It is the right of any nation, a state, or a society to defend its folklore right. Another reason is that every nation, society, state has the right to maintain its culture and social heritage and has the right as well to defend against assault.

3.1.2 Creativity and its importance and trustee

Till now, there is no entity that folklore could be entrusted at, but protection of copyright rules are necessary to build on.

When comparing Folklore creativity to literary and scientific works, we find that they match as creations of folklore could be literal or artistic creations. The works covered by the protection of copyright law are nothing but literary, artistic or scientific works which cope with their equivalents in folklore.

We must go back to the same trustee body of copyright protection to protect folklore creativity. The ministry of culture and national library

is where folklore creativity can be entrusted to secure ownership, hence, protecting them from assault.

The archiving Center of national folklore in the American center of folkloric life in the US Library of Congress was established in 1982 and had gathered over two million photographs, manuscripts, audio recordings and moving images until now (WIPO).

In China artistic and heritage folklore had been recorded in ten sets under the name of (The civilization of the Great Wall). It holds 300 folders of songs, Operetta, musical instruments, folk songs, dance and tales.

Since folklore is owned by all nation members, then there must be international agreements and a trustee bodies to preserve it.

3.1.3 Who owns the right to entrust folklore

National folklore is either a joint capital or a public domain for it has been there for a long time.

Since the national folklore has been a cultural legacy for so long and had become public property, then the right of dispute should be endorsed by the state. Which have the right and duty to entrust folklore in their national library of the ministry of culture.

Article (38) of Jordanian copyright pinpointed creations entrust procedures in Jordan's National Library. The Jordanian legislator in article (39) specified ownership rights to entrust creation listing: Jordanian legislator author, publisher, owner of the printing press, distributor, importer or his representative whose works were printed, published or produced outside the Hashemite Kingdom of Jordan. The Arab Convention for the protection of copyright had identified who has

the right to protect folklore, which is the property of each member state as folklore falls within the limits of its sovereignty. Member states protect folklore by all legal ways and means. Competent national authority shall practice terms of reference of copyright law related to folkloric works to face distortion, modulation and Commercial exploitation (Arab convention, Tunisia, 1981).

3.1.4 Subject creations for entrust

There must be a distinguished and defined folklore for the objective conditions and formal requirements to make folklore eligible to be entrusted. Folklore might be one of the following:

1- **Oral forms of expression like: tales and legends, presented in writing**
2- **Forms of musical expression like: Songs and chants, presented in writing, recording tapes. Compact disks and musical notations**
3- **Expressions of physical movements through images, recording tapes and compact disks**
4- **Forms of folk art: Drawings portraits, Intaglio, engraving, sculpture, pottery, wood engravings, mosaics, weaving, fashion, leather and wooden tools are also samples of these creations**
5- **Musical instruments: (Jordanian national library)**

3.2 Penalty of assault on folklore

First: what kind of crimes that could be launched against folklore?

These might be in one of the following forms:

1- **Imitations of forms of expressions, or folklore creations of a trusted one.**

2- **Publishing, broadcasting, modulating of forms of expressions and of creativity folklore, creativity**
3- **Distribution, leasing and exhibiting folklore**
4- **Folklore modulation in an improper way to the sole owner**
5- **Any distortion, adjustment or any harmful act to forms of expressions or to culture creativity aimed to harm the reputation of local society, nations, indigenous communities, or the region of folklore (AALCO, 2010)**

Second; Criminal and Civil Protection and precautionary measures of heritage.

State, citizens and peoples have the right to defend the national heritage through criminal cases to punish the aggressor. Since national heritage is protected by copyright laws and since folklore is a public possession, then folklore protection should be consequently covered by such laws. Complaints can be submitted by Judicial Police or by the Minister of culture, the National Library director or by any citizen.

The complaint will result in bringing the defendant to trial. All penalties which are stipulated on by the Copyright Protection Law or penalties stipulated on in criminalization laws will apply against the defendant, regardless of his entity.

The question that presents itself here is, what are the procedures that can be followed to file a case in the event of an assault on the national folklore outside the state and by people living in another country?

There should be international agreements to define accountability and methods to be adopted in trials

Most importantly, each State has to record its national folklore by sets and entrust these sets to a recognized international body

Chinese folklore, for example, had been recorded in sets under the name of the civilization of the Great Wall. The sets contain 300 folders of songs, sayings, operetta, musical instruments, folk songs, dances and stories.

Also in the United States the archiving Center of national folklore in the American center of folkloric life in the US Library of Congress was established in 1982 and gathered over two million photographs, manuscripts, audio recordings and moving images (heritage). Tunis Model Law of Copyright presents the rights of protection of intellectual works in all certain provisions in its bylaws in paragraph (A) as follows: National works of national folklore, translations, quotations, distribution of music produced outside the country should not be copied, modulated, imported and distributed without a permit from a competent authority.

Assault on folklore requires us to use deterrent penalties in national legislation. Copyright laws need to be enacted to protect folklore. The Jordanian copyright act No.22 for 1922 had put penalties on cases of abuse of copyright as follows:

(Imprisonment or a fine or both penalties, posting the judgment in places designated by the Court, announcing the judgment in daily newspapers, destroying infringed copies, and bringing a case to the court).

As for the civil suit, compensation is required. It is the removal of harm done to people, society or the state whose folklore was assaulted; this is done through moral compensations restoring the original case. The Jordanian legislator in act no. 47 - 48) enacted a ruling to destroy the counterfeit and bring the case to its original form.

As for non-moral compensation which is the financial one, the value is estimated in relevance to the size of financial benefit gained by the assaulter and the size of damage done to people, society or the state.

No law did identify ways of protecting national folklore, but general norms and general rules must be implemented through identifying concerned persons and persons in charge to file a civil suit to have access to justice in order to claim for compensations:

3.3 The owners right to file a civil case

We see that national folklore is one of the rights of countries and peoples It is the state`s right to file a civil case to protect its heritage which can be performed through an order to arrest, halt the assault, and seize tools used in the crime.

The researcher believes that it is the right of every citizen, people, and community to file a law case to demand the same rights as claimed by the State so as to protect national folklore, but the question is how can individuals, society or a nation file a case in the country where the assault occurred? The answer might be found in the following:

3.3.1 Resorting to courts to protect folklore

It is the right of the state and every individual or group of people and the local community to file a law suit to a competent court in the country where the assault took place.

How can a state file a law suit against another country? What are the laws that are applied? How can an individual, society or a nation file a law suit against another state whose citizens had assaulted the folklore which is not theirs?

If a state needs to file a law suit against another for assaulting its folklore there must be international agreements to regulate this issue and there should be also an international competent court to regulate procedures and put an end to the assault. If the assault is committed by foreign individuals, then it is the right of people of the country whose folklore was assaulted to file a law suit against assaulters in the other country.

But a community or a nation whose folklore was assaulted cannot file a suit outside its border against a community or a nation; the state is the entity that has the responsibility to file such a suit.

According to what we mentioned earlier, there must be international agreements and charters to ensure legal protection of folklore and the right of each state to protect its folklore and the right for compensation.

We should not forget the so called Israel which is continuously assaulting all fields of Palestinian heritage like: national dress, some food types, monuments and religious holy places. It is extremely hard to protect this folklore under occupation without international agreements and charters or without a treaties to stop this kind of aggression.

As for compensation, there must be a way to entrust, record and publish this heritage, locally and internationally, in order to protect and enable the state to legally claim it.

Regarding the competent court, a number of questions pops up about folklore assaults and the competent courts:

Which competent court to go back to in case the folklore assault occurred inside the country? Which one to go back to in case the folklore assault occurred outside the country? How can law cases be filed? How can a complaint be presented? How can a suit be filed in

case the assault was carried away by a community inside the country? Or an assault by a state against another country`s heritage?

Based on copyright act, when an assault takes place inside the country, then the case should be held by a competent court in that country.

The other matter is what if the assault had taken place outside the country by individuals? The competent court that will examine the case is the one where the act had taken place. The aggrieved party or persons of interest can file a suit.

The other issue is if a folklore assault was committed by a foreign country then there is no alternative but to have international agreements to enact laws to solve the dispute through arbitration. States conflicts are resolved only by international courts and international agreements, not by suits before national courts.

What laws could be applied when the folklore assault is committed by a state? What law to apply if the folklore assault took place outside the country`s borders? What law is to be applied if the assault was committed by a foreign individual inside the country?

If the folklore assaults take place in the country which owns that folklore, then the court of the same country is entitled to treat with the issue.

If the assault had taken place outside the country, then there must be international agreements to specify the competent court.

In these cases international laws and agreements protecting this right must be present. There also should be trustees and applicable laws present as well, or otherwise these problems will aggravate and remain unsolved.

3.2 International protection of folklore

There should be protection of the national folklore to secure owners' rights. There should also be an international protection which comprises international and cooperation laws to serve such a purpose.

3.3 International protection of national folklore

BadrEddin, Saleh (1999) declared that he offered the General Diplomatic Conference of UNESCO in 1995 a draft of international treaty on the Protection of the world`s heritage from theft and was approved by state parties. Despite the adoption of the treaty by those parties, the folklore is still vulnerable to theft and assault for there are countries like the United States and Israel who put themselves above law, not to forget that Israel had stolen the folklore and heritage of Palestinians manifested in: national dress, cuisine, chants and name of Palestinian villages.

There are attempts to protect national folklore through: the development of a model law by UNISCO, and through the 1989 recommendation, and through the World Intellectual Property Organization, to use a system that protects and shields the folklore from any attack. The model developed an illustrative list of folkloric expressions covered by protection.

There were also recommendations from the General Conference of the UN Educational, Scientific and Culture Organization which considered traditional and popular culture as part of World Heritage of Humanity. There were also recommendations for recording, maintaining and disseminating folklore process and recommendations to establish a national archive whose task is to gather national folkloric expressions.

The (WIPO) for the first time, established an inter-governmental committee of Intellectual Property and inherited source and folklore in

its 26th session in Geneva in 2000 for the purpose of protecting folklore. Noting that this subject was discussed by (WIPO) in cooperation with United Nations Educational, Scientific and Cultural Organization in 1978, and in 2000 with the concerned intergovernmental committee (IGC), in addition to Intellectual Property and Genetic Resources.

In 1989, a recommendation by UNESCO was issued for the protection of national folklore, its definition, in addition to protecting dissemination of folklore and international cooperation relevant to that issue.

Tunis Model Law of author rights which was created for use by developing countries was adopted. In article (4) protection of national works of countries, was own attempt to enact a law, but it wasn't up to the expectations.

3.4 International cooperation for the protection of national folklore

This issue tackles what can be done on the national and international levels to protect folklore nationally and internationally through international cooperation. This can begin with setting a definition of forgery folklore for: assault, right, compensations, competent court, and international arbitration, etc.

The researcher believes that adjustments are needed to be done to copyright protection law including the protection of national folklore Law by identifying national folklore, methods of expressions of national folklore creations and application of financial and moral rights.

Other rights might also be included such as: right of owner of folklore, his creativity, restrictions related to folklore, procedures of trust, the

trust body, and the state's role in folklore protection, procedures of trust and competent courts to solve disputes.

Some countries see that there should be an independent law of folklore protection, while others see that the National Folklore laws should be included with intellectual property laws, particularly copyright protection laws.

The best method to protect the national folklore is through integrating this form of intellectual creativity with copyright and author right laws.

4.0 Conclusion

Through this study, the researcher found out that it is very important to enforce laws that protect intellectual property rights. He also found that it's very important to amend old laws in order to protect national folklore. That must be done because the legal protection of national folklore is considered an important issue on the regional and international levels. The national folklore must be protected because the violations committed by individuals and societies against it have been increasing, due to techno-logical development. Therefore, if there isn't any law or international agreement that protects national folklore, transgressions against it will not stop.

The researcher came up with some results outlined in the following:

1. **Jordanian laws that regulate intellectual property rights, in general and Jordanian Copyright Law in particular, aren't adequate to provide legal protection for national folklore.**
2. **Jordanian legislations don't provide methods for protecting national folklore. They don't address the issues related to the**

litigation right, nor to liability when any transgression is committed against national folklore. They don't address issues related to compensation that must be paid as a result of committing a violation against national folklore.

3. **The National and international legislations don't identify the methods that can be used for preventing the acts of theft and piracy committed against national folklore, nor do they identify the ones who are entitled to claim for the legal protection of the property right of national folklore.**
4. **Theft and piracy acts are still committed against national folklore in general and the Jordanian national one in particular. Till now, there isn't any legal method for preventing the commitment of such transgression, so lawsuits can't be filed to prevent such violations.**

5.0 Recommendations

In light of the aforementioned results, the researcher recommends the following:

1. **Providing more legal protection to the property right of national folklore through amending the Jordanian Copyright Law.**
2. **Ensuring that the interests of the owners of the property right of national folklore, society and beneficiaries are satisfactorily met.**
3. **Ratifying international agreements, by the Jordanian government, in order to protect the national folklore from acts of violation and burglary.**
4. **Enacting Jordanian legislations that require registering the ideas representing national folklore at the Ministry of Culture.**

5. **The researcher, finally recommends creating global information database, corporation, to save information about global creative works.**

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THE LEGAL FOUNDATION FOR THE PREVENTION OF UNNATURAL SEX BETWEEN SPOUSES IN JORDANIAN LAW

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Abstract

Unnatural sex is an anal one. In other words, it is having sex from the back. It may occur unwillingly when the wife doesn't agree to such mating. Such acts result in various harmful health consequences. It is also prohibited under Islamic law and considered one of the Grievous Sins. So, what is the legal characterization of this act? Is it regarded rape, sexual molestation, unlawful sex or premeditated harm?

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This research highlights the legal character of unnatural sex among spouses, its medical, legal, and familial impacts under the provisions of Jordanian Penal Code, and the extent of the criminal responsibility arising out of it.

Keywords: Anal sex; penetration; legal provisions; Criminalization; husband and wife; spouse.

1.0 Introduction

This study examines unnatural sex, namely the anal type. It may be carried out by a husband on his wife without her consent, or on a woman who is willing though unlawfully, to do that or on a girl over 18 years old, be a virgin, divorced woman or a widow. This study explores the topic with all its aspects and legal reverberations.

1.1 Significance and Purpose of the Research: To the knowledge of the researchers, this study is the first of its kind in Jordan. Researching this topic is essential for multiple segments of society, especially judges, lawyers, prosecutors, law school professors and students. Despite the importance of this subject, all that is available on it are a few passing references here and there, therefore, the current study aims to fill in this gap. It sheds light on the meaning of unnatural sex, Islamic ruling of it, its harmful consequences on health, and, most importantly, its proper criminal characterization, putting forward relevant suggestions and recommendations .

1.2 Research Problem: What is the correct criminal characterization of unnatural sex?

1.3 Research Questions: Is unnatural sex regarded rape, sexual molestation, unlawful mating, premeditated harm or something else? What is the true definition of this act? What are its harmful health consequences? What is Islamic ruling of it?

1.4 Research Methodology: The research adopts the analytical approach, under which relevant legal texts and opinions of Islamic scholars are analyzed.

1.5 Research Plan: This study consists of two sections and a conclusion. The first section explores the nature of unnatural sex. It is divided into three sub-sections: the first is dedicated to defining unnatural sex, the second to its harmful effects, and the third to Islamic ruling relevant to it. The second section is titled The Criminal Characterization of Unnatural Sex. It is also divided into three sub-sections: the first of which is entitled The Extent to which unnatural sex can be considered a lawful act; the second is the extent to which it can be considered as rape, sexual molestation, unlawful sex, or premeditated harm, and the third includes the researcher's views on the criminal characterization of this act. Finally, the research concludes with results and recommendations. 1.5.1 Nature of Unnatural Sex

Sex that is not done the normal way from the front is considered unnatural or perverted. The researchers will discuss this issue through the following three sections:

1.5.1.1 Definition of unnatural sex

1.5.1.2 Its harmful consequences

1.5.1.3 Islamic ruling pertaining it

1.5.1.1 Definition of unnatural sex

Unnatural sex is defined as a sexual relation between a male and a female, married or otherwise, which involves anal, rather than vaginal, penetration.[1] It is also known as penetration through the anus[2], abnormal and perverted sex, and anal sex[3]. It can further be defined as a sexual relation between a man and a woman who is lawful for him or otherwise, in which the man penetrates with his sexual organ , fully or partially, woman's anus, irrespective of ejaculation[4].

Based on the definitions previously stated, it can be noted that they all confirm that anal sex involves penetration through the anus, not the vagina where natural penetration occurs. Undoubtedly, unnatural sex holds true to its name. It is considered unnatural because it actually is, since it occurs contrary to natural human sex which is vaginal. However, penetrating a female anally is perverted, abnormal and contrary to natural disposition of human nature, henceforth, unnatural.

All in all, as the Jordanian penal legislator hasn't defined unnatural sex, nor has he regulated it with legal provisions that designate it as a distinct criminal offence different from sexual molestation, rape, and premeditated harm crimes, the penal legislator is urged to rectify this issue by criminalizing it with a just punishment that deter the public from such acts. This is due to the frequent

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[1] Kirah, Shaoqi. *[Sexual Crimes],* (Cairo: Dar Al-Nahda Al-Arabiya, 2008), 289.

[2] Abdul Munem, Qadri. *[Familial Crimes].* (Cairo, Dar Al-Kotob Al-Kanonyiah, 2004), 341.

[3] Farooq, Fouad Muntasser. *[Crimes Against Females]*, (Cairo: Dar Al-Nahda Al-Arabiya, 2002), 252.

[4] Luka Babawi, Salwa. *[Anal Sex: Between Permissibility and Prohibition. A Comparative Study with Islamic Laws]*, (Alexandria: Moncha'at Al-Maaref, 2007), 46-47.

occurrences of this act by husbands with their wives or otherwise. The husband more often does not force his wife into it, but tricks her into believing that it is legal. He threatens her to carry it out with another woman than her, and if she rejects, he will divorce her and have a new wife.

Moreover, should a wife engage in unnatural sex with a man other than her husband, the husband cannot legally prosecute her or the person with whom she had it, due to the absence of legal provisions that criminalize their actions and because their actions are not regarded

adultery, rape, sexual molestation, or a breach of the marital bond. For unmarried women, their guardians cannot either prosecute them for performing unnatural sex with men for whom they are unlawful, especially if they are over eighteen years of age. In other words, legislative inadequacies are what prevent the prosecution of perpetrators of this act, despite being identical with adultery when it comes to damaging the honor and dignity of the husband or guardian and defaming the family. Consequently, it will be highly valued if the legislator addresses this issue by enacting laws pertaining it.

1.5.1.2 Its harmful consequences

Unnatural sex, the anal one, results in health-harming effects of which few are summarized below[1]:

[1] **Abdul Baqi, Mohammed. *[Risks and Harms of Natural and Unnatural Sex]*, (Cairo: Dar Al-Kotob Al-Ilmiyah, 2011), 196 .**

Ayoub, Hind. *[Sexual Health Controls]*, (Cairo: Dar Mahmoud, 2014), 211 .

1. **A short while after a penile-anal sex between a male and a female; the victim suffers from, defecation, muscle contractions, and early signs of hemorrhoids.**
2. **In case of internal anal ejaculation, the female may get an anal human papillomavirus (HPV) infection, which could lead to anal cancer.**
3. **The female could develop an anal itching condition.**
4. **The male could get infected with a type of active and fatal coccus bacteria, known in scientific circles to resist all traditional antibiotics.**
5. **The penetration could cause an often-deep anal fissure in the female's anus.**
6. **Anal bleeding.**
7. **Fecal incontinence for the female.**
8. **Flatus incontinence for the female, which is embarrassing for her and causes her to isolate herself from people.**
9. **Severe pain in most of the female's body parts, especially the buttocks, back and head.**

Thus, it is evident from the foregoing how grave and serious are the health consequences of unnatural anal sex. It is an undisputed fact that any act becomes harmful when performed in a manner that is contrary to how it was meant to be performed naturally. For example, God created humans with healthy legs to walk on; however, if they persist on walking on their hands instead of their feet, they damage and impair them because their actions are not natural. The same applies to those who abandon vaginal sex in favor of anal.

1.5.1.3 Islamic ruling pertaining unnatural sex

The Jordanian General Iftaa' Department has explained Islamic ruling for people who perform anal sex with their wives, be it consensual or not, by issuing a Fatwa stating that anal sex with one's wife is prohibited in Islam. It is even considered by Islamic scholars one of the Grievous Sins. In fact, the Pious Ancestors referred to this act, regardless of whether it was consensual on part of the wife or not, as Minor Sodomy; the wife must not obey her husband when solicited for it. Evidence of this are the following authentic Hadiths, "Abu Hurairah narrated that The Prophet, Mohammed , (PBUH) said: 'If anyone … has sex with his wife through her anus, he has nothing to do with what has been sent down to Muhammad (PBUH),'" narrated by Abu Dawood (Hadith No. 3904); "Ibn Abbas narrated that The Prophet said: 'Allah will not look at a man who enters … a woman in the behind." Narrated by at-Tirmidhi (1165), who categorized it as Hasan-Gharib[1] (authentic version may be found in Ibn Daqiq Al-Id's Al-Ilmam

[No. 660/2]); "It was narrated from Khuzaimah bin Thabit that the Messenger of Allah said: 'Allah is not too shy to tell the truth,' three times. 'Do not have sex with women in their buttocks.'" Narrated by Ibn Majah (1924), and there are many other Hadiths. Now, even though the chain of transmission of many of them may be disputed, they are accepted as a whole body of Hadiths. Even Imam Al-Tahawi stated that

[1] Literally: Good-Unfamiliar. This expression was used by at-Tarmidhi as a categorization for Hadiths that are conveyed by one narrator only and not very well-established but authentic enough to be used as religious evidence.

sayings of the Prophet on this subject are frequent in his book Al-Hawi (319/9). Therefore, whoever commits this sin must repent, ask for God's forgiveness and resolve not to repeat it. Divorce does not occur as a result, and expiation is not required, for it is usually required with regards to minor sins, not major ones.[1]

It is worth noting that the Fatwa above is in concordance with the Islamic Jurisprudence that there is no severe punishment for anal sex with one's wife. This is because sex with one's wife is lawful; the husband has the right to do it with her. Nonetheless, there has been some sort of contradiction when it comes to the characterization of this act. The prevailing views do not regard it as unlawful sex, except for Abu Hanifa who considers it unlawful and liable to discretionary punishment[2].

2.0 Criminal characterization of unnatural sex.

The Jordanian Penal Code doesn't include any provision that provides insight into criminal characterization of unnatural sex. This poses the question of whether performing this act with one's wife is legal or not, considering she is lawful for him by marriage. If not, with what crime should the perpetrators be charged: rape, sexual molestation, premeditated harm, or unlawful sex?

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[1] Fatwa No. 623, dated 21/04/2010, issued by the Iftaa' Committee and revised by His Eminence the Grand Mufti Sheikh Abdul Karim Khasawneh. Published on the official website of the Jordanian General Iftaa' Department (www.aliftaa.jo).

[2] Odeh, Abdul Kader. *[Islamic Criminal Code Compared to Positive Law],* Vol. 2, (Cairo, 1968), 353.

In light of the foregoing and to identify the proper criminal characterization of unnatural sex, this section will be divided into three sub-sections as follows:

2.1 The extent to which unnatural sex can be viewed as a lawful act

2.2 The extent to which it can be viewed as rape, sexual molestation, unlawful sex, or premeditated harm.

2.3 The researcher's views on the criminal characterization of this act.

2.1 The extent to which unnatural sex can be viewed as a lawful act

Considering unnatural sex as a lawful act means that it is neither a crime nor punishable for a husband who forcibly performs it with his wife, due to the lack of legal texts in full force and effect that regard husband-wife unnatural sex as a punishable crime. In addition, the woman involved with him in this act is his wife, so she is lawful for him, and since vaginal sex with one's wife without her consent is not considered an unlawful sex, by analogy, it will still be legal if the sex is anal, for the wife doesn't have to give her consent to such type of sex. But law neither illegalizes nor criminalizes the act. If non-consensual anal sex with one's wife was criminalized, any sexual act performed by a husband on his wife without her consent (e.g., sexual contact, teasing, kissing, cuddling) will also be considered a crime. This is irrational, unreasonable , and defies

the impulse behind marriage[1]. Top of that, vaginal sex with one's wife while the husband is under the influence of alcohol or narcotics is not

[1] Mohsin, Ashraf. *[An Explanation of the Penal Code]*, (Cairo: Dar Al-Nahda Al-Arabiya, 2014), 478 .

criminalized, even if it is without her consent, so why should non-consensual anal sex be unnatural?

Moreover, if the husband performs natural sex with her without her consent when she suffers from a chronic disease or postpartum or menstrual bleedings, his actions are not considered a crime. Likewise, if the sex was through the anus it should not be considered a crime, even if the wife did not agree. This is because the first case is actually more dangerous and painful for the wife[1]. Also, the husband has the right to fully satisfy himself sexually with his wife's body[2]. Plus, as the husband's relationship with his wife is lawful, unnatural sex between them cannot be criminalized, due to the absence of legal provisions related to this issue, and due to the fact that the person with whom the man is performing this act is his wife.

The researchers do not agree with these views because the absence of a distinct legal text criminalizing unnatural sex and punishing the spouse who engages into it does not make it lawful. unnatural sex results in pain, severe health impacts, injuries, etc., and inflicting any of these is criminalized. Therefore, the lack of a legal provision in the Jordanian Penal code about this issue with one's wife without her consent does not necessarily mean it is allowable [3].

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[1] Abdullah, Hasan. *[An Explanation of the Private Penal Code]*, (Cairo: Dar Al-Nahda Al-Arabiya, 2006), 398 .

[2] Raghib, Mohammed Attia. *[Sexual Crimes in Egyptian Criminal Code]*, (Cairo,:Dar Al-Nahda Al-Arabiya. 1957), 230.

[3] Abu Hujailah, Ali. *[Legal Protection of Honor in Positive and Islamic Laws],* (Amman: Dar Wael, 2002), 235.

2.2 The extent to which unnatural sex can be viewed as rape, sexual molestation, unlawful sex, or premeditated harm.

What is meant here is that unnatural sex is an unlawful act and a crime. The crime could be rape, sexual molestation, unlawful sex, or premeditated harm. Therefore, to identify the extent to which unnatural sex can be regarded unlawful, all types of sexual deviations need to be tackled separately:

2.2.1 First: rape as unnatural sex:

Rape is defined as a full sex carried out by a man on a non-consenting woman[1]; it is the unlawful penile penetration of a female's vagina against her will[2]. The elements of rape are the following:

1. **Physical element: this refers to the actual sex; a copulation between a man and a woman.[3].**
2. **No-consent element: fulfilled when the perpetrator engages into sexual intercourse with a woman other than his wife against her will, while she is under physical or moral duress; if she consented as a result of fraud, deception or misinformation**

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[1] Hosni, Mahmoud Najib. *[An Explanation of the Penal Code – The Private Section]*, (Cairo: Dar Al-Nahda Al-Arabiya, 1986), 527.

[2] Tantawi, Ibrahim Hamed. *[Honor and Public Modesty Crimes]*, (Cairo: Dar Al-Nahda Al-Arabiya, 2004), 10.

[3] Nmour, Mohammed Saeed. [*An Explanation of the Penal Code: The Private Section. Vol.1: Crimes Against Persons]*, (Amman: Dar Al-Thaqafah, 2008), 196.

which nullifies her consent; while she is sleeping, unconscious, unable to make her mind or when she is underage, 18 years old[1]

3. **Moral element: This looks into the criminal intent in general, which is based on the perpetrator's knowledge and awareness that the female with whom he is performing this act is not his wife ,nor is she consenting to the sex, yet he still commits this act out of his own free will[2].**

By projecting the concept and elements of rape into unnatural sex, it is clear that this act is not rape because, legally, rape cannot be carried out by a husband against his wife. Also, rape involves vaginal sex not anal which is an unnatural kind of copulation.

2.2.2 Second: Unnatural Sex as unlawful sex:

Unlawful sex is defined as a natural sex between a male and a female who are not bound by a marriage contract, in other words, between a man and a woman who is unlawful for him[3]. It can also be defined as full unlawful copulation between a man and a woman not married to him[4], or as coitus between a man and a consenting woman other than his wife[5]. By presenting the concept of unlawful sex as unnatural one, this act cannot be considered unlawful because legally, unlawful cannot

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[1] See Article 294/1 of the Jordanian Penal Code No. 16, dated 1960.

[2] Mostafa, Mahmoud Mahmoud. [*An Explanation of the Penal Code: The Private Section]*, (Cairo University Press, 1984), 317.

[3] Srour, Ahmed Fathi. [The Penal Code: Private Section], (Cairo: Dar Al-Nahda Al-Arabiya, 1979), 556.

[4] Jordanian Court of Cassation, in its penal capacity, ruling No. 739/1997, dated 08/03/1998, Adalah Center publications.

[5] Abu Hujailah, Ali. Previous source, 35.

be carried out by a man with his wife. Plus, it only occurs consensually and involves vaginal, rather than anal. Hence, unnatural sex is not an unlawful one.

2.2.3 Third, unnatural sex as sexual molestation:

Sexual molestation can be defined as the grave intentional violation of the victim's modesty through an action performed on his/her body that involves contact with his/her genitals[1]. Another definition is that it is a deliberate disgraceful offense to the victim's body against his/her will, which comes into direct contact with his/her genitals[2].

It consists of a physical element that involves any action against the victim's body and genitals that violates his/her modesty by uncovering and/or coming into direct contact with his/her genitals.

It also has a moral element that looks into the general criminal intent which requires knowledge and will; meaning, the perpetrator knows that his actions attack the victim's dignity, but he still commits them out of his own free will[3].

By elaborating on the concept and elements of sexual molestation into unnatural sex, it is clear that such a thing can not be regarded sexual molestation, for if engaging into sex with one's own wife through the anus was to be considered sexual molestation under the pretext that in doing so, the man would be carrying out an act against his wife's body that involves coming into direct contact with her

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[1] Hosni, Mahmoud Najib. *[An Explanation of the Penal Code – The Private Section]*, previous source, 545.

[2] Tantawi, Ibrahim Hamed. Previous source, 64.

[3] Nmour, Mohammed Saeed. Previous source, 223 . Also see Articles 296-298 of the Jordanian Penal Code.

genitals, it follows that he will also be committing sexual molestation if he undresses his wife against her will and touches her genitals, or has a sexual interaction with her inside the marital home. This sounds logically illegal.

It is worth mentioning that some views of Islamic jurisprudence[1] which claim that natural sex is the only type of sex permitted to the husband by marriage contract. Hence, if he performs sex with his wife in an unnatural way without her consent, he is charged with sexual molestation. This implies that the husband's right to sex with his wife is restricted to acts that are not harmful to her. Otherwise, all forms of sexual contact by the husband are prohibited. The marriage contract does not permit the husband to engage into anal sex, and his relationship with his wife should be based on respecting her modesty, regardless of any sexual drive .

Other views in Islamic jurisprudence that support considering anal sex without wife's consent as sexual molestation[2], added that if a

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[1] Refer to:

- **Abu Amer, Mohammed Zaki. *[Legal Protection of Honor in Modern Legislation]*, (Cairo: Al-Faniyah Printing & Publishing, 1985), 105.**
- **Awad, Awad Mohammed. [Perpetrator and Victim in Carnal Knowledge Crimes: A Comparative Study Between Egyptian and Libyan Laws], *Benghazi University Legal Studies Journal* Vol. 3, (1984): 34.**
- **Shamsuddin, Ashraf. [Legal Protection of the Right to Safeguarding Honor]. PhD Thesis, Cairo University – Faculty of Law, 1995: 164.**

[2] Refer to:

- **Hosni, Mahmoud Najib. *[An Explanation of the Penal Code – The Private Section]*, previous source. 385.**

husband had anal sex with the consent of an underage wife, he is still committing sexual molestation because it is still considered non-consensual.

On the basis of what has been clarified above, researchers do not agree with these arguments. In arguing that sex between spouses must not be harmful to the wife, such a jurisprudence has limited harming her to being only through anal sex despite the fact that there are variety of acts that are harmful for her other than anal sex. It could be through vagina during her postpartum or menstrual period or when she is sick or nearing labor. In all these situations, sex harms her so the pretext behind this view is too weak and unsubstantial to justify the consideration of anal sex being a molestation.

It is noteworthy that the Jordanian Court of Cassation has ruled against regarding anal sex between spouses as rape or sexual molestation, holding that Article 290 of the Penal Code is not applicable to husbands who have sex contrary to nature with their wives. Its applicability is restricted to sexual molestation crimes committed by a

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- Tantawi, Ibrahim Hamed. Previous Source. 85.
- Al-Nimr, Yazan. *[Honor Crimes in the Egyptian Penal Code]*, (Cairo: Arab Encyclopedia House, 1984), 312 .
- Al-Thahabi, Edward Ali. *[Sex Crimes]*, (Cairo: Al-Raaye Printing & Publishing, 1997), 132 .
- Mohsin, Abdul-Aziz. *[Legal Protection of Honor in Islamic and Positive Laws: A Comparative Study]*, (Cairo: Dar Al-Nahda Al-Arabiya, 1989), 320 .

person against another while they are not bound together by marriage[1]. Clearly, this ruling is consistent with what we have concluded.

2.2.4 Four, unnatural sex as premeditated harm

Premeditated harm may be a felony, depending on its consequences. However, be it a felony or a misdemeanor, the physical element of premeditated harm consists of battering, wounding and injury[2]. The first can be defined as any act that damages the tissues of the human body without teasing them, such as pushing, pressing or striking. Battering may be direct (e.g., kicking or punching) or indirect (when the perpetrator uses a tool such as club, rock, hammer, etc.). On the other hand, wounding is when the body tissues tear due to the damage inflicted upon them[3]. This could be done with a sharp object or with teeth, fingernails, etc. Injury is any act that damages the human body, but cannot be classified as battering or wounding. Examples are exposing a person to harmful or burning solar radiation, foul odors, or toxic or harmful vapors. By projecting the concept of wounding under premeditated harm into unnatural sex, it can be argued that penetrating a woman through the anus by her husband without her consent makes this act a premeditated harm crime in the form of wounding if it results in an injury. If it doesn't, it can be considered battering since it damages the tissues of her body, particularly, anal tissues.

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[1] Jordanian Court of Cassation, in its penal capacity, ruling No. 60/1954, dated 01/01/1954, Adalah Center publications.

[2] See Articles 333-353 of the Jordanian Penal Code.

[3] Al-Saeed, Kamel. *[An Explanation of the Penal Code: Crimes Against Persons – A Comparative Study]*, 5th ed. (Amman: Dar Al-Thaqafa, 2001), 68 .

Therefore, it can be said that whenever unnatural sex is carried out by a husband on his wife without her consent which results in damaging or tearing her body tissues, this act is considered premeditated harm, as long as there is no legal provision enacted for unnatural sex. Even punishment of such a crime is lenient; it is no more than one year of incarceration or a fine of one hundred Jordanian dinars[1].

It is worth mentioning that criminal conciliation courts consider anal sex with a non-consenting woman premeditated harm[2].

3.1 Researchers' views on the criminal characterization of unnatural sex

Before plunging into researchers' views on criminal characterization of unnatural sex, the following points should be noted:

First, A man may catch his wife in the act of anal sex with another man, or the wife and the man with whom she had anal sex may admit the act.

Second: A woman may catch her husband in the act of anal sex with another woman; the husband and the woman he had sex with may admit having unnatural sex, with him as well.

Third: A virgin, widow, or divorcee may be caught in the act of having anal sex.

In this case, from a legal perspective, the husband cannot prosecute his wife or the man with whom she engaged in anal unlawful sex , since it is not considered as such; as the unlawful only be

[1] See Article 2 of the Jordanian Penal Code.

[2] Article 334 of the Penal Code.

applicable in their case if the penetration was genital, i.e., through the vagina not the anus.

The same goes for the wife, in that whenever her husband has anal sex with a woman other than her, she cannot prosecute them for unlawful sex, as their actions are not legally regarded so. The husband also cannot prosecute whoever has unnatural sex with his consenting wife for sexual molestation, rape, or breaching the marital bond, especially if the wife was over eighteen years of age, not suffering from any physical, psychological or mental impairment or disability, and was penetrated with her full consent. This is because the elements of rape, sexual molestation and breaching of the marital bond do not apply at all to unnatural sex.

Moreover, due to the lack of legal provisions allowing him or her to do so, the guardian of a virgin, widow or divorcee cannot prosecute her or the man who had anal sex with her if she is over eighteen years of age and does not suffer from any physical, psychological or mental impairment or disability, as the act was done with her full consent.

Fourth: It is not reasonable to view vaginal sex between a wife and a man other than her husband as a defilement of marriage and adultery on her part, whereas anal sex with a man other than her husband isn't either. The same applies to the husband whenever he engages in this act with a woman other than his wife.

We do not see much difference between vaginal and anal unlawful sex: both entail moral decay.

Fifth: It is unreasonable that it is not a defamation of a guardian's honor if a woman under his or her care engages into unnatural sex, whereas, if she has vaginal sex, it is.

Sixth: Is it unlikely that a woman may have anal sex with a man other than her husband to escape punishment, as her actions cannot be regarded as unlawful? The same goes for a man who does it with a woman other than his wife, and for girls who are of age, widows, and divorcees.

Seventh: Is it, fair and compassionate that a husband who has anal sex with his wife without her consent receives a trivial penalty (i.e., a minor punishment of no more than one year and no less than one week jail, or the judge may only charge him a fine of five to one hundred Jordanian dinars.

Eighth: Viewing the current state of criminal conciliation courts in the Hashemite Kingdom of Jordan, it is rare for the final medico-legal report to include a period of incapacitation that exceeds ten days for a wife who was penetrated anally. Consequently, the judge does not take into account the obscenity and gravity of this act; he only abides by the period of incapacitation. If this period is fewer than ten days, it is inconceivable to have him sentence the husband to more than one-week imprisonment or charge of not more than ten Jordanian dinars[1].

On this subject, the researchers wish to mention that the established penalty of premeditated harm does not achieve the purposes behind punishing the act of unnatural sex.

Ninth: Even though the punishment for unnatural sex is not effective, it is still preferable to leave it unpunishable.

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[1] The non-publication of the conciliation court rulings and the private nature of unnatural sex among spouses prevented the obtainment of these rulings and the referencing of their numbers, but this is the situation we currently experience in these courts.

Tenth: In light of the absence of legal provisions that regard unnatural sex an independent, stand-alone crime, it must be regarded a premeditated harm.

Based on all the above, the researchers urge the legislator to:

Deem unnatural sex as an independent, stand-alone crime that can be perpetrated by a husband whenever he does it with his wife against her will , without her consent, or with a woman other than his wife. It can also be perpetrated by a wife who does it with a man other than her husband, and any virgin, divorcee, or widow over eighteen years of age. The punishment for this crime has to be deterrent and preferably the molesters should be imprisoned for not less than three years.

4.0 Conclusion

This study addressed the topic of unnatural sex and came up to the following conclusions:

1. **Anal sex is the penetration of a woman through her anus, with or without her consent, by her husband or otherwise.**
2. **Unnatural sex, i.e., anal penetration has various harmful health impacts.**
3. **Islamic ruling on unnatural sex is that it is prohibited and considered one of the grievous sins. Whoever commits it must repent, ask for God's forgiveness and resolve not to repeat it.**
4. **Unnatural sex is not considered rape, sexual molestation, unlawful sex, or a breach of the marital bond. Taking into**

account the current lack of proper legislation, it can be regarded premeditated harm.

5. When a wife has consensual unnatural sex with a man other than her husband, the latter cannot prosecute either of them. When a husband has consensual anal sex with a woman other than his wife, she cannot prosecute either of them. When a consenting woman over eighteen years of age, be she virgin, widow, or divorcee, gets anally penetrated, her guardian cannot prosecute her or the man who did the act ,due to the absence of a legal text criminalizing such an act.

5.0 Recommendations:

The penal legislator is urged to criminalize the act of unnatural sex in distinct independent provisions. These provisions shall define this concept, explain that the crime applies to: a husband who engages with his wife against her will, or with a consenting woman other than his wife, or a wife who does it willingly with any female who carries out this act consensually giving the right to her guardian to prosecute her. The punishment should deter perpetrators of such kind of sex not less than three years in jail . Finally, filed complaints for this act should be accepted and given ruling within three months, but rejected if two years elapsed.

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