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CONSTITUTIONAL RIGHT TO ENTREPRENEURIAL ACTIVITY: THEORETICAL AND LEGAL ASPECT

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Abstract

The purpose of the article is theoretical-legal research of the constitutional right to entrepreneurial activity in order to clarify its essence, subject and object composition, to identify the peculiarities of implementation and guarantees of this right.

Methods. To achieve the research goal, dialectical, formal-legal, comparative-legal, system-structural, logical-semantic and other methods of scientific cognition have been used.

Results. The essence and content of the constitutional right to entrepreneurial activity have been analysed. The content of this right is defined as the totality of an entrepreneur's powers that are necessary for his/her achieving a specific goal – certain economic and social results and obtaining profit.

The subject composition of the constitutional right to entrepreneurial activity has been examined. The shortcomings of establishing this right in Section II of the Constitution of Ukraine have been identified. The expediency of further development of the constitutional provision on subjects of the right to entrepreneurial activity in the framework of the Commercial Code of Ukraine has been emphasized.

The concept and attributes of entrepreneurship as an object of the right to entrepreneurial activity have been elucidated.

New ways of developing the institution of entrepreneurship and means of effectively ensuring the exercise of the constitutional right to entrepreneurial activity have been proposed.

The role of guarantees of the constitutional right to entrepreneurial activity has been studied to ensure its effective enforcement.

Conclusion. The introduction of amendments to the Constitution of Ukraine regarding the right to entrepreneurial activity is proved to be unreasonable. In order to ensure the stability of the legal status of an entrepreneur, instead of updating the constitutional regulations, it has been proposed to improve practical guarantees, methods and mechanisms of implementing the right to entrepreneurial activity within the framework of the Commercial Code of Ukraine.

The significance of the Constitutional Court of Ukraine has been substantiated for ensuring the understanding of the content and peculiarities of the implementation of the constitutional right to entrepreneurial activity and further development of legislative regulation in accordance with the constitutional principles.

The main factors that hinder the development of entrepreneurship in Ukraine in the current conditions have been singled out as follows:

- the infringement by state and local authorities of the guarantees of the constitutional right to entrepreneurial activity enshrined in the Constitution of Ukraine and legislation;

- excessive administrative pressure on business entities;

- poor economic incentives for the effective development of the entrepreneurial institution;

- insufficient attention to the issues of preparing for entrepreneurial activities in educational institutions.

The necessity to conduct further scientific research in the direction of minimizing the harmful impact of these factors on the development of entrepreneurship in Ukraine has been substantiated.

Key words: Constitution of Ukraine, entrepreneur, entrepreneurship, legal form of organization, Constitutional Court of Ukraine, Commercial Code of Ukraine.

1. Introduction

Problem statement. Among the rights of individuals defined by the Constitution of Ukraine, the right to entrepreneurial activity has a special place since entrepreneurship is the fundamental basis and driving force of the economy, as well as one of the factors of socio-economic progress of society.

However, the absence of a long-term strategy for the economic development in Ukraine impels the "turbo mode" of law-making, and in its turn increases the economic and legal uncertainty for business.

To become a nation of entrepreneurs, Ukrainians need to change two things: their attitude to the Constitution of Ukraine and to entrepreneurship. The Ukrainian Constitution should be perceived as a dynamic system of values, principles and norms having supreme legal force and due to this, citizens can change the development of any public or private institution, including entrepreneurship in the right direction (Kampo, 2020).

Under these conditions, the understanding of the constitutional human right to entrepreneurial activity acquires relevance.

Degree of problem development. To a greater or lesser extent, the issues of the constitutional human right to entrepreneurial activity have been studied by many representatives of legal science, including O. V. Bezukh, Yu. M. Bysaha, O. V. Bihnyak, D. V. Zadykhaylo, V. M. Kampo, L. O. Nikitenko, S. V. Riznyk, M. V. Savchyn, Yu. M. Todyka, N. H. Shuklina etc.

The available research findings of the mentioned and other scholars will form an important basis for our research. Herewith, it should be noted that the previously published works do not always take into account the latest changes in legislation as well as new realities of social and economic development of the state. The issues of the constitutional right to entrepreneurial activity in the works of the aforementioned researchers were considered mainly in a fragmented manner. Theoretical elaborations on the issues of defining the essence of the constitutional right to entrepreneurial activity, its content, subjective and objective composition, implementation remain insufficient, which significantly affects the efficiency of its use in practice. In this regard, the scientific analysis of the constitutional right to entrepreneurial activity receives particular attention.

According to Article 42 of the Constitution of Ukraine, everyone shall have the right to entrepreneurial activity that is not prohibited by law (The Constitution of Ukraine, 1996).

The establishment of the right of a person and a citizen to entrepreneurial activity (in particular private entrepreneurial activity) in the Constitution of Ukraine of 1996 has historical institutional significance for the Ukrainian legislation and public life, despite the fact that the right to entrepreneurial activity has long acquired a mandatory element of the block of economic rights and freedoms of a person in the world experience of constitutional law-making and international legal practice of establishing human rights standards (Tatsii at al. 2011, p. 308).

The right to entrepreneurial activity belongs to a group of economic rights in the Fundamental Law of Ukraine, including the right to utilise the natural objects of the people's right of property (Art. 13), the right to private property (Art. 42). In the group of economic rights and freedoms, the right to entrepreneurial activity

occupies an independent position and as part of this system has its own characteristics, subject and object composition.

Establishing the right to entrepreneurial activity in the Fundamental Law of Ukraine, the legislator does not provide its definition. There is no legal definition in other normative and legal acts. The legislator's approach is inconsistent with the principle of legal certainty as a constituent principle of the rule of law guaranteed by Part 1 Article 8 of the Constitution of Ukraine.

The scholars' opinions differ regarding the necessity to clarify the constitutional and legal norm concerning the right to entrepreneurial activity and other norms of the Constitution of Ukraine. Some researchers emphasize the need to disclose the concept and content of the right to entrepreneurial activity in the Fundamental Law, while others consider it unreasonable to constantly review constitutional provisions.

In this regard, V. Kampo rightly notes that Ukrainian politicians and scholars, due to the traditional formal-dogmatic understanding of the Constitution of Ukraine, are often eager to constantly change it instead of ensuring the formation of new precedents and practices based on it (through the Constitutional Court of Ukraine, the ordinary courts). Due to the domination of this type of legal understanding, the role of the Fundamental Law of the state is actually reduced to an ordinary legislative act which has lost its constitutional functions (Kampo, 2020).

Legal literature considers the right to entrepreneurial activity as a basic economic right and a legitimate form of freedom in economic relations (Ishchuk, 2014, c. 35).

C. V. Reznik defines the constitutional right to entrepreneurial activity as the right of a person and a citizen approved by the Constitution of Ukraine to direct or indirect, independent, initiative, systematic, own-risk activities aimed at achieving economic and social results and generating profit (Riznyk, 2008, p. 5-6). The disadvantage of the above-mentioned definition is the limitation of the subject composition of the constitutional law under consideration, since a significant number of business entities – economic organizations – are left without attention.

A more successful definition is suggested by O.V. Bihnyak. The scholar defines the right to entrepreneurial activity as the right to pursue independent, initiative, innovative, professional and systematic activity with the aim of achieving economic and social results and generating profit under conditions of risk, observing the rights and legitimate interests of other individuals, and the responsibility for the results of such activity of its subjects (Bihnyak, 2007, p. 3).

The content of the mentioned right is not disclosed in Article 42 and other constitutional and legal norms as well. It seems reasonable to disclose the content of the constitutional right to entrepreneurial activity through its constituent elements, the unity and interrelation of which manifest the analyzed right.

The content of the constitutional right to entrepreneurial activity may be defined as a complex of entrepreneurial authorities that are necessary for an entrepreneur to achieve a certain goal – certain economic and social results and obtaining profit.

The right to entrepreneurial activity is characterized by the following scope of authorities: the right to action, the right to claim, the right to utilise. Each of these authorities may be disclosed based on the analysis of the current legislation.

The right to action includes an entrepreneur's ability to: independently produce and sell products, perform work or provide services; choose types of entrepreneurial activity, suppliers and consumers of products; freely hire employees to perform external economic activity independently; set prices for manufactured products, performed work and provided services in accordance with the law.

The right to claim extends to the entrepreneur's ability to claim: compensation for losses incurred by him/her as a result of violation of his/her property rights by citizens or legal entities, state authorities or local self-government bodies; commission by authorized bodies of actions stipulated by law (for example, state registration, issuance of a license); abstain from commission by authorized bodies of actions prohibited by law (for example, inducement by state bodies to boycott or discriminate against an entrepreneur, dissemination of misleading information, etc.).

The right to utilise includes the possibility for the entrepreneur to use material, technical,

financial, labour, information, natural and other resources for entrepreneurial activity.

2. Subjects of the constitutional right to entrepreneurial activity

It is essential from both theoretical and practical perspectives to elucidate precisely the subject of the constitutional right to entrepreneurial activity. The issue of the subject composition of the holders of the constitutional right to entrepreneurial activity has been a focus of lengthy scholarly discussions.

Nowadays, the legal basis for the ability of each individual to implement an entrepreneurial initiative is a body of normative and legal acts regulating various organizational and legal forms of entrepreneurial activity (Nikitenko, 2013, p. 120).

By using the term "each" in the Fundamental Law, the state grants this right to all individuals, regardless of whether they have Ukrainian citizenship.

Herewith, as D.V. Zadykhaylo rightly notes, the fixation of the right for entrepreneurial activity only in Section II of the Constitution of Ukraine "Rights, Freedoms and Duties of a Person and a Citizen" extremely restricts the sphere of its regulation, limiting its effect only to subjects – physical entities. Therefore, entrepreneurs – legal entities and entrepreneurship as an institution of market economic relations are virtually excluded from the direct constitutional and legal support under this approach. It should be added that according to the provisions of Article 13 of the Constitution of Ukraine, "the State ensures the protection of the rights of all subjects of the right of property and economic management", but at the same time the right to entrepreneurial activity of some subjects is enshrined at the level of constitutional and legal regulation, and another category of subjects is left to the current legislation, which in itself creates unequal opportunities for legal protection (Tatsii, at al. 2011, p. 313).

Further development of the constitutional provision on the subjects of entrepreneurial right finds its manifestation in the norms of the Economic (hereinafter – the EC of Ukraine) (Economic Code of Ukraine, 2003) and the Civil (hereinafter – the CC of Ukraine) Codes of Ukraine (Civil Code of Ukraine, 2003). This approach of the legislator is stipulated by the fact that the Constitution of Ukraine as the main source of the national legal system is also the basis of the current legislation; it provides an opportunity to regulate certain social relations at the level of laws that concretize the provisions enshrined in the Fundamental Law of Ukraine (paragraph 1, subparagraph 3.1, item 3 of the motivational part of the Constitutional Court of Ukraine Resolution dated 12 February 2002 No. 3-rp / 2002) (Constitutional Court of Ukraine, 2002).

Thus, Article 45 of the Economic Code of Ukraine stipulates that entrepreneurship in Ukraine shall be conducted in any organizational forms, envisaged by the law, at entrepreneur's discretion. The answer to the question concerning the legal form of organization is found in the Decree of the State Committee of Ukraine for Technical Regulation and Consumer Policy dated May 28, 2004 № 97, according to the provisions of which it is defined as a form of economic (in particular, entrepreneurial) activity with the appropriate legal basis, which determines the nature of relations between the founders (participants), the mode of property liability for the obligations of the enterprise (organization), the procedure for creation, reorganization, liquidation, management, distribution of received income, possible sources of financing of activity etc (Order on approval of national standards of Ukraine, state classifiers of Ukraine, national changes to interstate standards, amending the Order of the State Committee for Standardization of Ukraine dated March 31, 2004 No. 59 and the abolition of regulatory document, 2004).

The academic literature offers various approaches to the definition of legal form of entrepreneurship, in particular, this concept is considered as a complex of certain attributes or legal parameters, a set of legal rules, types of relations, a totality of methods for production organization. It appears that the most complete description of the legal form of management can be presented in its consideration as a certain legal model. Considering the philosophical and theoretical-legal provisions concerning the model and based on the definition of the legal model as an ideal image reproduced in the norms of law, represents a complete system of legal features and characteristics of a physical object or phenomenon, the legal form of organ-

ization acts as a legal model. Proceeding from this, N. H. Avetisyan suggested defining the legal and organizational form of entrepreneurship as a legal model of economic activity, the contents of which comprise interrelated organizational and property elements (Avetysian, 2019, c. 7).

Specific organizational-legal forms of management in which the entrepreneurial activity may be carried out, are disclosed in the provisions of the Economic Code of Ukraine.

The entrepreneur chooses the organizational form at his/her discretion. The basic organizational-legal forms of management include: enterprises, economic societies, cooperatives, associations of enterprises, physical person-entrepreneur etc. Enshrining the entrepreneur's right to choose the legal form of organization as the general principle, the legislator in some cases establishes restrictions associated with the need to adopt additional measures to protect the interests of participants in the economic activity (Bobkova at al., 2008).

3. The object of the constitutional right to entrepreneurial activity

The object of Article 42 of the Constitution of Ukraine is entrepreneurial activity. The legal definition of "entrepreneurial activity", or rather its synonym "entrepreneurship" is provided in Article 42 of the Economic Code of Ukraine.

Entrepreneurship, to be understood as a separate, initiative, systematic, own-risk economic activity, carried out by business entities (entrepreneurs) with the purpose of achieving economic and social results, and generating profit.

The analysis of the presented normative definition enables distinguishing normative features of entrepreneurial activity.

The first feature of entrepreneurial activity is the entrepreneur's independence, which accompanies this activity. An entrepreneur must organize his/her entrepreneurial activity independently of other individuals.

The legal literature classifies the independence of business entities into proprietary and economic ones. Proprietary independence is the presence of certain property of subjects, which forms the economic basis of their activity (Laptev , 1997, p.19). Economic independence entails the ability to make independent decisions in the course of entrepreneurial activity. The scope of this independence is also related to the form of ownership on the basis of which the business entity operates. Thus, private entrepreneurs enjoy greater independence in comparison with state enterprises (Lyamceva, 2000, p.62-63). At the same time, independence as an underlying feature of entrepreneurial activity should not be understood in a simplified manner. There is no absolute freedom of manufacturers in the economics. The entrepreneur is absolutely free in the sense that there is no authority over him/her, which determines what he/she should do or produce and to what extent. However, he/she is not able to dissociate themselves from the tough market conditions and impose their own conditions. Therefore, it is possible to consider independence only to some extent (Kashanina, 1999, p.75).

An inseparable feature of entrepreneurial activity is initiative.

In connection with the constitutional enshrinement of the right to entrepreneurial activity, an individual has a real opportunity to ensure a decent life. However, under the market economy conditions, the well-being of an entrepreneur is largely determined by how socially active he/she will be, showing initiative in the sphere of entrepreneurship.

Entrepreneur's initiative as a feature of entrepreneurship may be characterized as entrepreneurial attitude, the ability to undertake independent active measures. Only by displaying initiative in the process of entrepreneurial activity the entrepreneur is able to achieve the intended results, ensure competitiveness in the market of products, works or services.

A proactive life position, creativity in the process of conducting business activities, development of skills to generate original and new approaches to decision making as a result form the entrepreneur's specific type of entrepreneurial thinking.

The next feature of entrepreneurial activity is consistency.

Consistency in the legal literature is associated with the idea of regularity, repeatability of any actions (Popov, 1997, p.5). At the same time, when defining consistency as a feature of entrepreneurial activity, it is impossible to proceed only from the time criterion of continuous

performance of a certain activity, but also from other circumstances (Suchoža, 1998, p.116). The prevailing view is that the main feature of consistency is a certain maintenance of the professional level of this activity, which has the character of vocation and is tied to long-term ownership of entrepreneurship and compliance with certain material and qualification conditions for this type of activity. Therefore, speaking of consistency, it is not necessarily a matter of continuous and long-term activity.

Thus, the entrepreneurial activity may be exercised seasonally (e.g., sugar production activity), at certain events (e.g., fairs, exhibitions, sports events) or with certain breaks (e.g., the entrepreneur will go for an internship for two months and will continue his/her activity upon return). However, in any case, entrepreneurial activity is not considered to be a non-recurring activity, performed in exceptional cases.

The next conceptual feature of entrepreneurial activity is risk-taking.

Risk constantly accompanies entrepreneurship and forms a special way of thinking and behavior, the psychology of the entrepreneur. Entrepreneurial risk is considered in the academic literature as possible adverse property consequences of the enterprise's activity, not caused by any missed opportunities on its part. An entrepreneur is responsible for the results of entrepreneurial activity by his/her property. But not only property. There may be additional losses affecting his/her status on the labor and capital markets, including competitiveness, professional reputation, psychological assessment, etc (Kashanina, 1999, p.76; Siryi & Farenyk, 2000, p.69-76).

One of the main features is the achievement of economic and social results and profit generation, which are regarded as the purpose of conducting entrepreneurial activity. Profit is a product of a specific human resource – entrepreneurial skills. Accordingly, the profit earned by an entrepreneur can essentially be regarded as a payment for labor in business management. This work is not easy and includes, firstly, the manifestation of an initiative to unite material and human factors for the production of goods and services, secondly, the adoption of extraordinary decisions on business management, labor organization, and thirdly, the introduction of innovations by producing a new type of product or a radical change in the production process. All this provides the grounds for regarding economic commercial activity as a professional activity aimed at generating profit. However, profit only for the sake of maximum possible profit is the purpose of entrepreneurial activity only in conditions of an underdeveloped market. Therefore, when considering profit generation as the main motive for entrepreneurial activity, it is necessary to highlight the achievement of social effect and certain economic and social results as one of its directions. The principle of personal economic interest is in close unity with the purpose of entrepreneurship – gaining profit. Personal gain is a leading factor in entrepreneurship. In the conditions of commodity manufacture the subject of management, pursuing his/her own interests, at the same time works for the society (Kashanina, 1999, p.75).

At the same time, it is necessary for Ukrainians to understand entrepreneurial activity as the main source of material wealth of the country, and therefore it should be treated as a public value, which deserves respect and support, except for cases when this activity is illegal and is detrimental to the interests of people and society. The state should comprehensively develop the entrepreneurial activities of citizens in order to increase the prosperity of the country and to ensure their welfare (Kampo, 2020).

In other words, there should be a unity of two goals in entrepreneurial activity, whereby the first goal is not to generate profit, but rather to create a product capable of meeting the economic and social needs of society, and only on this basis to obtain profit.

The mentioned normative feature of entrepreneurial activity corresponds with such feature as a socially responsible character. Taking into account the social orientation of the economy proclaimed in the Constitution of Ukraine (Article 13) and the Economic Code of Ukraine, entrepreneurial activity is characterized by social responsibility. Social responsibility is understood as public responsibility, i.e. the expectation that entrepreneurs should act in the public interest and contribute to resolving public and social issues (Harahonych & Bysaha, 2005, p. 76).

A feature that is not enshrined in the legislation, but is essential, has recently acquired

special significance. It is the professional nature of conducting entrepreneurial activity.

The entrepreneur's professionalism involves: conducting these activities by people who have certain qualifications or information necessary for the adoption and implementation of decisions. At the same time, in one case the availability of professional training is considered as a necessary condition for carrying out activities (e.g., medical, banking, audit), otherwise there is no need for a certain entrepreneur's professional level, but he/she must have the information necessary for conducting entrepreneurial commercial activities; conducting commercial activities according to certain rules and methods, which are most often stipulated in the form of the rules for providing services, trade, performance of work or customary business practices; compliance of the activity results with certain requirements that have a regulatory nature, such as certification and standardization of goods, works and services; accountability of activity to the state bodies authorized to perform socially necessary functions in the interests of consumers, persons engaged in the process of production, entrepreneurs themselves, society as a whole; availability of state guarantees of activity (Harahonych, 2007, p. 259).

Summing up the consideration of the features of entrepreneurial activity, it should be noted that when considering any activity to be recognized as an entrepreneurial one, one should bear in mind that none of the features analyzed above can be absolutized. Only their totality allows considering a certain activity as an entrepreneurial one.

4. Implementation of the constitutional right to entrepreneurial activity

The right to entrepreneurial activity, as well as any other right, is exercised through legally significant actions of empowered entities – owners of this right, but the choice of methods and conditions for the exercise of the right depends not only on the subject but also on the specific content of the right, which is stipulated by the state (Nikitenko, 2011, p. 559).

The legislator's mission is to guarantee the implementation of certain rights and freedoms in the Constitution of Ukraine, having enshrined them. However, the implementation of the constitutional right to entrepreneurial activity is characterized by certain features, which are determined both by the legal nature of entrepreneurship and its socio-economic component.

The implementation of the constitutional right to entrepreneurial activity consists in the exercise of powers (capabilities) by the authorized person, which are covered by the content of such right.

At the same time, whereas the implementation of certain constitutional rights (to life, to personal inviolability, to confidentiality of correspondence, etc.), does not require a person's entering any legal relations, the right to entrepreneurial activity may be implemented only by entering into specific legal relations.

It should also be remembered that the existence of a constitutional right to entrepreneurial activity does not depend on the exercise or non-realization of this right by a person. This constitutional right shall not disappear also in case of making an entry in the Unified State Register on the termination of entrepreneurial activity. The preservation of constitutional rights and freedoms, including the right to entrepreneurial activity, is intended to ensure the stability of its legal status.

The legislator, enshrining the right to entrepreneurial activity for each individual in the Constitution of Ukraine, also establishes appropriate conditions, the so-called obligations with the observance of which the said right may be exercised.

For instance, in accordance with Art. 50 of the Civil Code of Ukraine, a natural person with full legal capability shall have the right to the entrepreneurial activity not prohibited by the law. The restriction of a natural person's right to the entrepreneurial activity shall be established by the Constitution of Ukraine and the law.

In its turn, in accordance with Part 6 of Art. 128 of the Economic Code of Ukraine, a citizen-entrepreneur is obliged: to obtain the license for performing certain types of economic activity in cases and according to the procedure established by the law; to inform state registration authorities of a change of address indicated in the registration documents, subject of activity, other essential terms of his/her entrepreneurial activity subject to specification in the registration documents; to

comply with rights and lawful interests of consumers, secure proper quality of products (works, services) manufactured by him/her, observe the rules of mandatory product certification established by the law; not to allow unfair competition, other violations of antimonopoly and competition legislation; to keep records of the results of entrepreneurial activity in compliance with legislative requirements; to provide to tax authorities in timely manner income statements, other required documents for charging taxes and other obligatory payments; pay taxes and other obligatory payments in keeping with the procedure and in sizes established by the law.

In addition to stipulating in the legislation the conditions under which the constitutional right to entrepreneurial activity is exercised, the very individual should be ready for such realization. Unfortunately, it must be stated that despite the 24-year period of the constitutional enshrinement of the right to entrepreneurial activity, the level of citizens' preparation for the professional implementation of entrepreneurship in Ukraine remains extremely low.

In such conditions, in addition to the active participation of the entrepreneur's personality in the implementation of the right to entrepreneurial activity, it is necessary to have a purposeful state influence on the sphere of entrepreneurship through the formation of legal and economic conditions that provide an opportunity for such activity.

Previously, I. M. Plotnikova noted that to ensure the effective implementation of the right to entrepreneurial activity, it is necessary to create a relationship in which the state is not a passive observer, indifferent to the actual situation of citizens who have entered the free market and are engaged in entrepreneurship. The issue at stake should not be state interference in economic processes (since there is a large number of claims related to unreasonable administrative pressure in entrepreneurship in general, and in small businesses in particular), but rather state assistance in the development of entrepreneurship and market relations, the optimal normative regulation of entrepreneurs' rights, their provision and protection (Plotnikova, 2002, c. 11).

As practice demonstrates, the modern system of formation and planning of entrepreneurship development in Ukraine does not meet public needs. The matter here is not only the need to reduce administrative pressure on entrepreneurs, although it is important. This system provides very few economic incentives for the effective development of the institution of entrepreneurship and many administrative and bureaucratic levers of influencing it.

Given such difficult conditions, it is necessary to search for new ways to develop the institution of entrepreneurship, rather than solve purely economic problems. One of the least involved areas in its development is education, which has significant potential for the formation of a young entrepreneurial class. The basis for the formation of this class exists already in secondary schools as well as in higher education institutions. As it is well-known, the right to engage in entrepreneurial activity is a natural human right, which is also enshrined in the legislature and means not only starting a private business at one's own risk, but also includes, in particular, the right to public educational services on the fundamentals of entrepreneurship, as well as access to other human rights, which are essential or relevant to entrepreneurship. Entrepreneurship and IT technologies should be taught to students starting from the first grade to the last one in the secondary school. Why shouldn't the Ukrainian secondary school attempt to do this? The IT sector could help to provide personnel for training students in the basics of IT technologies, and the government could provide textbooks etc. It will be necessary to involve banks, financial and other institutions and organizations in the implementation of school entrepreneurship programs. Special attention should be paid to the formation of an entrepreneurial class in higher education institutions. In order to bring the entrepreneurial spirit to these institutions, the lectures on fundamentals of entrepreneurship should be delivered at all non-economic specialties without exception (Kampo, 2020).

Reducing excessive interference of authorities in the entrepreneurs' activity together with active participation of the education system in the formation of a young entrepreneurial class could give a powerful impetus to the development of entrepreneurship and attraction of significant strata of the population into this sphere.

5. Guarantees of the constitutional right to entrepreneurial activity

The indications on legal possibilities of a human being are necessary in the constitutional text not only for informing citizens about the existence of such rights, but also for granting such rights the force of being generally mandatory for the state prescriptions, reveals the circle of possible requirements of a person to the state as to the subject obliged to guarantee their realization in life (Afanaseva at al., 2017, p. 125).

Separate guarantees of the constitutional right to entrepreneurial activity are stipulated in the Constitution of Ukraine, which envisages that:

- the legal principles and guarantees of entrepreneurship are determined exclusively by the laws of Ukraine (p. 8, part 1, Art. 92);

- constitutional human and citizens' rights and freedoms shall not be restricted, except in cases envisaged by the Constitution of Ukraine (part 1, Art. 64).

- all people are free and equal in their dignity and rights (Art. 21);

- constitutional rights and freedoms are guaranteed and shall not be abolished (part 2, Art. 22);

- the content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws or in the amendment of laws that are in force (part 3, Art. 22);

- citizens have equal constitutional rights and freedoms and are equal before the law. There shall be no privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics (Art. 24).

An important role in ensuring the implementation of the right to entrepreneurial activity is assigned to the legal positions of the Constitutional Court of Ukraine, among which the following should be specifically emphasized:

- the constitutional principle of a state governed by the rule of law stipulates that it must refrain from restricting the universally recognized rights and freedoms of a human being and a citizen, and also envisages the establishment of the rule of law, which must guarantee each individual the assertion and enforcement of rights and freedoms. The constitutional principles of equality and fairness require certainty, clarity and unambiguity of legal norm, since otherwise cannot ensure its uniform application, does not exclude unlimited interpretation of law enforcement practice and inevitably leads to arbitrariness (para. 1 p. 5.3, para. 1 and para. 2 p. 5.4 part 5 of the motivational part of the Constitutional Court of Ukraine Resolution dated 22 September 2005 No. 5-rp / 2005) (Constitutional Court of Ukraine, 2005);

- the imposition of restrictions on human and civil rights and freedoms is permissible only if such restriction is commensurate (proportionate) and socially necessary (para. 6 p. 3.3 part 3 of the motivational part of the Constitutional Court of Ukraine Resolution dated October 19, 2009 № 26-rp / 2009) (Constitutional Court of Ukraine, 2009);

- one of the elements of the rule of law is the principle of legal certainty, which states that restrictions on fundamental human and civil rights and the implementation of such restrictions in practice are only permissible if the predictability of the legal norms established by such restrictions is ensured. In other words, the restriction of any right should be based on the criteria that will allow a person to separate the lawful from the unlawful behavior, to foresee the legal consequences of his or her behavior (para. 3 p. 3.1 part 3 of the motivational part of the Constitutional Court of Ukraine Resolution dated October 29, 2010 № 17-rp/2010) (Constitutional Court of Ukraine, 2010);

- restrictions on the exercise of constitutional rights and freedoms shall not be arbitrary and unfair, they shall be established exclusively by the Constitution and laws of Ukraine, to pursue a legitimate goal, to be conditioned by the public need to achieve this goal, proportional and justified, in case of limitation of a constitutional right or freedom, a legislator is obliged to introduce such legal regulation that shall enable the optimal achievement of a legitimate goal with minimal interference with the realization of that right or freedom and shall not violate the essence of such right (para. 3 p. 2.1 part 2 of the motivational part of the Constitutional Court of Ukraine Resolution dated June 1, 2016 № 2-rp/2016) (Constitutional Court of Ukraine, 2016).

Provisions on guarantees of the constitutional right to entrepreneurial activity are gaining considerable development in the industry legislation, first of all in the economic sphere, which is rapidly developing nowadays.

Thus, general guarantees of entrepreneurs' rights are defined by Art. 47 of the Economic Code of Ukraine, which stipulates that the state shall guarantee to all entrepreneurs irrespective of their organizational forms of entrepreneurial activity, equal rights and opportunities for attraction and use of material and technical, financial, labor, informational, natural and other resources; the inviolability of property and ensure protection of property rights of the entrepreneur; losses suffered by the entrepreneur in the result of violation by individuals or legal entities, state authorities or local governments of his/her property rights, shall be reimbursed to the entrepreneur pursuant to the present Code and other laws etc.

In addition, the Economic Code of Ukraine envisages that restrictions to carrying out entrepreneurial activity, as well as the list of types of activities, wherein entrepreneurship is banned shall be established by the Constitution of Ukraine and the law (p. 4 Art. 12).

The issue of guaranteeing the right to entrepreneurial activity in Ukraine is particularly acute in connection with the establishment and implementation of restrictions as part of preventing the spread of COVID-19.

The establishment and implementation of restrictions on fundamental human rights in a democratic, social, legal state and civil society within the framework of preventing the spread of COVID-19 must meet the criteria of legitimacy (compliance of the content and procedure of restrictive measures with the Constitution and laws of Ukraine, international human rights standards), feasibility (real antiepidemic goals), proportionality (prevalence of the interests of national health protection over the rights of a particular person) and time limits (enforcement for the minimum required period of time). Balancing the interests of national health with respect for civil and political human rights requires the establishment of additional effective guarantees for their realization in the context of the COVID-19 pandemic and the measures introduced to prevent its spread (Zozulia, 2020, p. 16).

6. Conclusions

It appears unreasonable and premature to discuss amendments to the Constitution of Ukraine regarding the right to entrepreneurial activity in the present conditions. In fact, the legislative methods of developing legal support for the implementation of the constitutional right to entrepreneurial activity in Ukraine have not yet exhausted their potential. To ensure the stability of the legal status of the entrepreneur instead of updating the constitutional regulations should improve the practical guarantees, methods and mechanisms for the implementation of the right to entrepreneurial activity within the Economic Code of Ukraine. The recodification of Ukrainian legislation could contribute to the effective exercise of entrepreneurial authorities.

An important role in ensuring understanding of the content and peculiarities of implementing the constitutional right to entrepreneurial activity and further development of legislative regulation in accordance with constitutional principles should be performed by the Constitutional Court of Ukraine.

The main factors that hinder the development of entrepreneurship in Ukraine in the current circumstances are the following:

- violation by state and local authorities of the guarantees of the constitutional right to entrepreneurial activity stipulated in the Constitution of Ukraine and the laws;

- excessive administrative pressure on business entities;

- low level of economic incentives for effective development of the institution of entrepreneurship;

- insufficient attention to the issues of training in educational institutions for engaging in entrepreneurial activity.

Further scientific research should be performed in the direction of minimizing the harmful impact of these factors on the development of national entrepreneurship.

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КОНСТИТУЦІЙНЕ ПРАВО НА ПІДПРИЄМНИЦЬКУ ДІЯЛЬНІСТЬ: ТЕОРЕТИКО-ПРАВОВИЙ АСПЕКТ

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Анотація

Мета статті. Теоретико-правове дослідження конституційного права на підприємницьку діяльність для з'ясування його сутності, суб'єктного та об'єктного складу, виявлення особливостей реалізації та гарантій такого права.

Методи. Для досягнення мети дослідження використані діалектичний, формально-юридичний, порівняльно-правовий, системно-структурний, логіко-семантичний та інші методи наукового пізнання.

Результати. Проаналізовано сутність та зміст конституційного права на підприємницьку діяльність. Зміст такого права визначено як сукупність правомочностей підприємця, які йому необхідні для досягнення визначеної ним мети – певних економічних і соціальних результатів та одержання прибутку.

Досліджено суб'єктний склад конституційного права на підприємницьку діяльність. Виявлені недоліки фіксації такого права у розділі II Конституції України. Наголошено на доцільності подальшого розвитку конституційного положення щодо суб'єктів права на підприємництво у рамках Господарського кодексу України.

З'ясовано поняття та ознаки підприємництва як об'єкта права на підприємницьку діяльність.

Запропоновані нові шляхи розвитку інституту підприємництва та засоби ефективного забезпечення реалізації конституційного права на підприємницьку діяльність.

Досліджено роль гарантій конституційного права на підприємницьку діяльність для забезпечення ефективної його реалізації.

Висновки. Обґрунтовано недоцільність внесення змін до Конституції України щодо права на підприємницьку діяльність. Запропоновано для забезпечення стабільності правового статусу підприємця замість оновлення конституційної регламентації вдосконалювати практичні гарантії, способи і механізми реалізації права на підприємницьку діяльність у рамках Господарського кодексу України.

Аргументовано важливість Конституційного Суду України для забезпечення розуміння змісту та особливостей реалізації конституційного права на підприємницьку діяльність і подальшого розвитку законодавчого регулювання відповідно до конституційних принципів.

Виділено головні чинники, які заважають розвитку підприємництва в Україні в сучасних умовах, а саме:

- порушення органами державної влади та місцевого самоврядування гарантій конституційного права на підприємницьку діяльність, закладених в Конституції України і законах;

- надмірний адміністративний тиск на суб'єктів господарювання;

- низький рівень економічних стимулів для ефективного розвитку інституту підприємництва;

- недостатня увага до питань підготовки у закладах освіти до зайняття підприємницькою діяльністю.

Обґрунтовано необхідність здійснення подальших наукових досліджень у напрямку мінімізації шкідливого впливу зазначених чинників на розвиток підприємництва в Україні.

Ключові слова: *Конституція України, підприємець, підприємництво, організаційно правова форма, Конституційний Суд України, Господарський кодекс України.*