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Modern challenges to the legal examination regulations

Новітні виклики правовій експертизі нормативно-правових актів

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Abstract

The article is devoted to the consideration of problems of legal expert examination of legal acts.

One of the criteria for the effectiveness of a normative legal act as a basic element of legislation is its legal correctness. The dramatic changes that have taken place in Ukraine in recent years have significantly increased the role of legal means and mechanisms in the social and political life of the country. The effectiveness of transformations in the country aimed at forming civil society and the rule of law, strengthening the law and order depends on the perfection of the existing legal acts, their projects and the adoption of correct and legally justified decisions.

Ensuring compliance with this criterion avoids inconsistencies in legislation and, as a consequence, ensures the unity of legal space. That is why legal expertise is a full-fledged tool for ensuring legal correctness and overcoming rulemaking, which requires a comprehensive analysis and comprehensive examination of the essence of legal expertise in the mechanism of legal regulation. The tasks that need to be addressed in the process of research on this issue can be attributed to: the study of the concept and features of legal expertise of draft normative legal acts, both in the legal literature, and the current and prospective legislation of Ukraine.

Анотація

Статтю присвячено розгляду проблем проведення правової експертизи нормативно-правових актів.

Одним із критеріїв ефективності нормативного правового акту як основного елементу законодавства є його права коректність. Кардинальні зміни, які відбулися в Україні за останні роки, значно підвищили роль правових засобів і механізмів в суспільно політичному та економічному житті країни. Ефективність здійснюваних в країні перетворень, направлених на формування громадянського суспільства та правової держави, зміцнення законності і правопорядку, залежить від того, наскільки досконалими є діючі нормативні правові акти, їх проекти та ухвалюються правильні і обгрунтовані з правової точки зору рішення.

Забезпечення відповідності даним критерієм дозволяє уникнути неузгодженості у законодавстві, і, як наслідок, забезпечити єдність правового простору. Саме тому права експертиза є повноцінним інструментом забезпечення правової коректності та подолання нормотворчих помилок, який потребує комплексного аналізу та усестороннього дослідження сутності правової експертизи в механізмі правового регулювання. До завдань, що потребують свого вирішення в процесі дослідження цього питання можна віднести: дослідження поняття та ознак правової експертизи проектів нормативно правових актів, як у юридичній

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Keywords: legal expertise, regulations, mechanism of legal regulation, improvement of legislation, expert support for lawmaking.

Introduction

Carrying out legal examination of normative-legal acts is one of the legal forms of activity of executive bodies in ensuring the implementation of state legal policy. However, legal expertise of legal acts contributes not only to the implementation of good state legal policy, but also an integral protection of human rights and freedoms. Today, the legislative regulation of the need for such expertise is clearly defined by such legislative acts as the Presidential Decree “On State Registration of Regulatory Acts of Ministries and Other Executive Bodies” and the Decree of the Cabinet of Ministers of Ukraine “On Approving the Regulation on State Registration of Normative Legal Acts other bodies of executive power”, according to which all regulatory and legal issues are subject to obligatory state registration and legal examination of executive agencies affecting the rights, freedoms and legitimate interests of citizens or having interdepartmental character.

It should be noted that the development of Ukrainian legislation is impossible without scientific substantiation of law-making decisions. The quality of the legal norm is a reflection of human behavior, so this quality is ensured by the correct legal construction of the norm of behavior in the text of the legal act. Preparatory work on the development of a regulatory act is a complex and responsible task, where both theoretical and practical skills are applied. And the direct role of science in lawmaking is a prerequisite for improving the quality and effectiveness of regulatory acts adopted in Ukraine.

The intensification of law-making activities and the growing interest in its improvement entails the increase of problematic issues, the solution of which requires the carrying out of special researches using the appropriate knowledge. Legal expertise is becoming more and more widely used in the lawmaking process as one of the most important forms of using specialized knowledge, as the involvement of experts enables the full and complete study of the draft

літературі, так і чинному та перспективному законодавстві України.

Ключові слова: правова експертиза, нормативно-правові акти, механізм правового регулювання, вдосконалення законодавства, експертне забезпечення правотворчості.

legal act and the development of recommendations for its improvement.

Methodology

The methodological basis of this article is the analytical method that allowed to investigate the problems posed in the work in their interrelation, unity and development. Taking into account the set goals and tasks in the course of the study, such methods as comparative-legal method, systematic method of research, formal-legal, structural-functional method and other methods were used, which allowed to carry out scientifically grounded analysis of legal expertise of normative-legal acts as one of the legal forms of activity of executive authorities in ensuring the implementation of the state legal policy and to identify its impact on the quality and effectiveness of regulatory acts adopted in Ukraine.

Results and discussion

Legal examination of legal acts can be considered as one of the forms of improvement of legislation. The study of scientific views on the position of legal expertise allows us to clarify its content and improve its legal regulation. It should be noted that the development of theoretical approaches to the understanding of legal expertise can be traced in the works of representatives of legal science, who studied the subject in lawmaking, rulemaking, legal technology, etc. Gradually, a position was formed, according to which the examination of draft regulatory acts is determined as a necessary component of improving the quality of regulatory project activity as a whole, and therefore, organizational measures are introduced to carry out project expertise. Scientific and significant issues related to legal expertise have been partially addressed in the works of both domestic and foreign scientists. Scientists often emphasize the need and expediency of expert examination of legal acts. The necessity of conducting expert examination at the stage of law-making is substantiated. It is

also noted that the prepared project should be sent for examination by qualified specialists who did not participate in its preparation. Obtained comments and suggestions of experts are taken into account by the developers of the draft regulatory act as necessary. The project approved and approved by the developers is submitted to the law-making body.

Scientists support the position on the need for scientific expert support for law-making. It is about expertise when the members of law-making are involved by experts-experts who carry out expert work of the current development of a draft normative-legal act, which has an advisory value (Scientific Foundations of Soviet Law-Making, 1981).

Other researchers have stressed the need for scientific expertise as one of the important steps in preparing a bill for submission to parliament. The need for legislative consolidation of the Government's examination of all bills submitted by the People's Deputies of Ukraine is justified, providing that all of them are sent to the Verkhovna Rada of Ukraine only if the results of the examination of the Cabinet of Ministers of Ukraine and the relevant opinion of the Parliamentary Committee are available.

It should be noted that some scholars do not use the concept of "legal expertise" and instead use the concept of "peer review" or do not apply any term to this type of activity. Scientists consider the forms of discussion of the draft normative act and expert peer review of the project by well-known research and educational institutions, obtaining the opinions and conclusions of international independent experts (Skakun O.F. Theory of State and Law, 2001).

In their research, scientists pay attention to the fact that the norm-designer himself has to send the project for the conclusion to all interested institutions and only after taking into account all the received comments to send it to the law-making body (Pigolkin A.S. Preparation of draft normative acts, 1968).

However, other scholars do not call the legal expertise the process of approving a draft regulatory act, the content of which is to obtain an appropriate visa or proposals for improvement of the project from interested institutions that are not directly involved in the development of the project (Abdullayev M.I. Problems of State and Law Theory, 2003).

Scientists propose to consider legal expertise of legal acts as an activity carried out by independent experts in the field of law in order to evaluate the legal acts for their compliance with a certain legal quality criterion, the result of which is a substantiated expert opinion in accordance with the tasks (Rybikova G.V. Legal examination of legal acts in Ukraine, 2017).

Quite often, the term "legal expertise" is applied to one of the stages of lawmaking. Within this approach, there is a debate about the definition of the term "legal expertise", the role of its place in the lawmaking process. Thus, Stepanian V.V. considers legal expertise of normative-legal acts as a means of improving law-making work in the context of the phenomenon of law-making. Nadeev R.K. proposes to define legal expertise as a special study conducted to assess the conformity of the draft law, its compatibility with the current legislation and internationally ratified treaties and to establish the quality of the draft law in terms of the application of the rules of legislative technology (Nadeev R.K. Legal support of the legislative activity of the State Duma, 1997). Eisman A.A., by legal expertise, means the means of establishing an evidence base as to the correctness or incorrectness of certain clauses (statements) (Eisman A. A. Expert opinion (structure and scientific justification), 1967). In turn, Zakharova V.I. defines legal expertise as a mechanism of control, on the one hand, a tool that prevents the adoption of incorrect, incompetent decisions, on the other (Zakharova V.I. Public examination of bills (sociological analysis), 2005). Vasilyev M.A. narrows the concept of legal expertise to the function of the apparatus of the representative body, the content of which is the use of legal knowledge in working with drafts of legal documents in order to prevent contradictions of its provisions (Vasiliev M. A. Legal linguistic examination of draft acts of local government, 2002). In turn, Raldugin N.V. believes that legal expertise is the conduct of a specialist (a group of specialists or a special institution) to study a specific subject using professional knowledge in the relevant field, which concludes with the conclusion of the conclusion, which contains the results of such research and answers to the questions posed. Butenko O.V. defines legal expertise of legal documents as an independent stage of the law-making process, the content of which is the evaluation by authorized subjects of a draft legal document on the likelihood of effective influence of its legal norms on social relations and achievement of the relevant social legal effect in case of its adoption (Butenko O.V. The concept and essence of legal expertise of

legal documents, 2009). Chervonyuk V.I. identifies the legal expertise of the bill as a separate stage in the discussion stage, the content of which is to involve the appropriate specialist or specialists to work on the project with a view to its final correction and preparation of the final version (Chervonyuk V. I. Theory of the State and Rights, 2006). Significant contribution to the understanding of legal expertise of legal acts was made by V. Lytvyn, who characterizes the legal expertise of the draft law as an objective and complete study of the draft law submitted for consideration in accordance with the subject of the expert examination, based on the public and national interests, the principles of legal construction. systems; compliance with the state's constitutional obligation to promote and uphold human rights and freedoms. The dictionary separately defines the scientific legal expertise of the law, which is a separate type of expertise. In the legal literature, the examination of draft regulatory acts over time is defined as a necessary condition for improving the quality of lawmaking activities, methodological materials are developed and organizational measures are introduced at the theoretical level to carry out project expertise. Oliynyk A.S., Selivanov A. pay attention to the scientific support of law-making work, which includes carrying out examination of regulatory legal acts. If we summarize the positions of scientists, we can conclude that they occupy two main positions: legal expertise is either an independent stage of the law-making process, or a separate stage of one of the stages (Selivanov A. Problematic aspects of the lawmaking process and their reflection in the decisions of the Constitutional Court of Ukraine, 2004) (Oliynyk A.S. Organizational and legal issues of legislative activity in Ukraine, 1998).

Also, the scientific literature reflects the tendency to cover legal expertise as an integral part of legal monitoring of lawmaking and enforcement. In the structure of legal monitoring as a complex concept, which is new enough for the national scientific opinion, distinguish the legal expertise of an existing regulatory act on the basis of materials on its practical application. By the way, as an example of the use of financial monitoring in Ukraine today are trying to create a so-called financial qualification for potential participants of the election race, which in turn can be described as an attempt to turn the will into an elitist club for the super-rich political forces. Given the changes made to the regulations, such decisions can lead to complete monopolization of power through a financial requirement, which makes financial monitoring a very vulnerable "not for all" instrument and, as a

consequence, leads to an in-depth study of this method (Constitutional Regulation and Financing of Elections, 2020).

An analysis of the practice will allow you to determine the effectiveness of a legal act, identify gaps in legal regulation, legal conflicts that have not been noticed before, answer questions - whether the goal of legal regulation is achieved, etc. The conclusion of such an examination will be the basis for a possible subject of law-making by the subject of amendments to a normative legal act.

Legal expertise, acting as the examination of a draft regulatory act, has the following specific features:

- 1) special subject of research - the admissibility and legitimacy of the adoption of a potential normative legal act, taking into account the current system of forms of law;
- 2) a certain set of research methods (formal-legal, systemic, logical, comparative-legal);
- 3) the presence of special entities authorized to carry out its conduct;
- 4) the special nature of the expert opinion, which contains the result of the analysis conducted by expert lawyers.

Taking into account the opinion of expert lawyers helps to avoid rulemaking, to increase the legal correctness of the adopted normative legal acts, and consequently their quality as regulators of social relations. Regulatory consolidation of the single rules for drawing a conclusion on the results of legal examination, as well as the implementation of expert research, which should be based on the results of legal examination of the introductory, main and final parts.

It should also be noted that legal expertise at some stages of the lawmaking process should be mandatory, and at some stages the issue of its conduct should have a dispositive character, usually at the discretion of the relevant competent legal entity. Today, the Ministry of Justice of Ukraine quite often deals with unlawful regulatory acts whose legislative enactment is in one way or another a violation of the current legislation of Ukraine.

As an example, in 2003, every tenth legal act submitted for registration to the Ministry of Justice of Ukraine contained illegal legal norms. And during the 8 months of 2010, according to the results of legal examination of normative

legal acts, the Ministry of Justice and territorial bodies of justice prevented the adoption of about 900 illegal legal norms. Despite this, some regulations remained aimed at enforcing violations of the legislation on state registration of legal acts discovered during inspections, despite the fact that unregistered legal acts revealed during inspections are subject to immediate revocation. In addition, it was unlawful practice at that time to adopt the normative formulation of guidelines, which in substance were normative legal acts, since they contained legal norms that affected the rights and legitimate interests of citizens and had an interdepartmental nature. Although methodological recommendations are not legal in nature, they do not have to set legal rules, they can only be advisory, explanatory and informative.

Therefore, for the purpose of introducing monthly control over the implementation of the laws of the state on the registration of normative legal acts by the subjects and ensuring the prompt response of the bodies of justice to the cases of sending the entities of the lawmaking to the implementation of the legal acts that have not passed the state registration procedure and have not been published in the procedure established by law, and as a consequence of the abolition of defective regulatory acts, the Ministry of Justice was developed, and the Cabinet of Ministers adopted the resolution "On Amending Paragraph 2 of the Cabinet of Ministers of Ukraine Decree No. 731 of December 28, 1992", which introduced a mechanism for carrying out visa-free inspections of the entities of norm-making on the basis of the lists of administrative documents submitted for the relevant period. Due to these changes, the situation surrounding such a significant number of unlawful acts, which are assigned by the Ministry of Justice's legal expertise, has changed somewhat today.

Although the changes that have taken place in Ukraine in recent years have been largely positive, not all legislative acts that go through all stages of reviewing compliance with existing legal standards can be considered legitimate. Some of the legal acts are still subject to state registration and are not even assigned to legal expertise. A striking example of this is the recently passed in first reading the Draft Law on Amendments to the Land Code of Ukraine and other legislative acts on improvement of the system of management and deregulation in the field of land relations and the Draft Law on Amendments to some Legislative Acts of Ukraine on the Circulation of Agricultural Lands

the possibility of acquisition of agricultural land on the territory of Ukraine by foreign legal and natural persons is indicated, although these norms are directly opposite to the statute those 13 and 14 of the Constitution of Ukraine, the Basic Law of Ukraine, on the basis of which all the normative legal acts of our state are built. Such large-scale changes in the agricultural sector of the country should be brought to the level of the referendum, however, questions on the verification of this bill for compliance with the current legislation in the bodies authorized for it have not arisen, and accordingly, the state registration is no longer subject to refusal.

Nevertheless, the analysis of the refusals of state registration of normative legal acts shows that the basis for such refusals is the inconsistency of such an act not only with the Constitution and laws of Ukraine, but also with other acts of legislation, the Convention on the Protection of Human Rights and Fundamental Freedoms 1950 and the protocols thereto, the international treaties of Ukraine, the consent of which was granted by the Verkhovna Rada of Ukraine, and the *acquis Communautaire*; issuing it in violation of the requirements of the law or without regard to the practice of the European Court of Human Rights, in particular the act: violates or restricts the rights, freedoms and legitimate interests of citizens, enterprises, institutions and organizations, or imposes no obligations on them by law; goes beyond the competence of the issuing authority.

With regard to the types of legal expertise, depending on the number of experts involved in it, it may be one-person or group-based. One-person expertise has certain disadvantages, where there is a likelihood of subjectivism, the assumption of errors due to the lack of third-party control in the process. However, such expertise may have advantages over time, especially with regard to a small document. A group examination involves the conduct of a group of qualified specialists. It is advisable to bring in a group of lawyers of different specialization and experience. Group legal expertise allows for a more comprehensive and objective assessment of a draft legal act, but difficulties may arise during its conduct with the formulation of the expert opinion.

On the grounds of the examination may be preliminary, primary, repeated, additional and control. Preliminary examination is conducted in order to find out the conformity of the formal features of the object of examination, the established norms and requirements. This type of

expertise is mainly carried out by the clients of the examination by their specialized units or through the involvement of independent experts. Primary examination involves taking all the necessary steps in the process of preparing a reasoned opinion on the objects of examination, which are passed on to interested individuals and legal entities by the clients of the examination for analysis and evaluation by expert organizations, institutions, experts or teams of experts. Repeated legal examination may be considered as being conducted for the second time within the scope of the primary examination or in accordance with a new subject, if the purchaser of the examination has substantiated observations regarding the conclusion of the primary examination, or if the expert opinion has expired, if it has been determined. Additional legal expertise is carried out in the case of entering into the draft regulatory act in the process of its finalization of significant changes and additions, obtaining information that needs expert evaluation, as well as in the case of changes in socio-economic relations that are the subject of legal regulation of the project, ie when new circumstances arise. In case the customer disputes the conclusions of the previously conducted examinations, the existence of significant differences between the conclusions of the primary and re-examination on the draft regulatory act, as well as the detection during the control over the observance of the methodology of examination or significant deviations from the procedure of primary, repeated or additional examination be assigned a control expertise. The control examination can be carried out at the initiative of the customer, the organizer to check the conclusions of the initial examination or at the initiative of individuals or legal entities interested in refuting certain provisions, parts or the whole conclusions of the previously conducted examinations.

Depending on the object, an examination may be conducted on the concept of a legal act, a draft law, normative legal acts of the parliament, the head of state, government, central executive bodies, bodies of regional power, etc.

On the initiative, the examination may be compulsory or voluntary. We believe that the list of law-makers whose draft laws are subject to mandatory examination should be established by law. Accordingly, these two types of examination should differ in the subjects of its conduct and the legal force of the conclusions of the examination.

According to the customer conducting the examination, it is possible to distinguish the expertise, which is initiated by the authorities, organizations, citizens. Russian scientists provide official and unofficial examination of the bill. At the same time, the official examination is conducted on the basis of an appeal to the expert organization of the authorized bodies of Parliament. Unofficial examination may be conducted on the basis of an appeal by an unauthorized body of Parliament, as well as on a draft law that has not received the status of a draft law.

Depending on the stage of lawmaking, it is possible to distinguish the expertise, which is carried out at the stage of appraisal of a regulatory act or the examination that is performed at the stage of registration of a legal act.

According to the subjects of legal examination concerning draft legal acts of the current national and European legislation, V. Korosty distinguishes two types of legal expertise: internal and external.

Based on the above, to improve the legal expertise of regulatory acts, it is necessary to at least determine the obligation to conduct legal examination as one of the stages of preparation of a legal act, to conduct a legal examination of the concepts of the most socially important legal acts, taking into account the peculiarities of its object. , to determine the most authoritative and qualified legal structures for professional and independent legal expertise, to initiate legal expert evaluation of the existing normative legal acts on the basis of materials on their practical application.

Fulfillment of the aforementioned can be the basis for a significant increase in the effectiveness of lawmaking, strengthening its regulatory framework, improving the activity of public authorities and management in the adoption of legal acts, which will contribute to the full development of the national system of law and the construction of the rule of law.

Conclusions

Thus, generalizing different approaches in the scientific literature on legal expertise of legal acts, we can note different views on the place and role of legal expertise of legal acts in the process of lawmaking and law enforcement, namely: conducting expert examination at the stage of lawmaking, not distinguishing separately legal

expertise; scientific expert support of law-making work; the use of the term "peer review" or the avoidance of any term for such activity; lack of stage of examination or any verification of the draft regulatory act in the process of lawmaking; legal expertise is an independent stage of the lawmaking process or a separate stage of one of the stages; Legal expertise is an integral part of legal monitoring of lawmaking and enforcement.

It can also be concluded that legal expertise at some stages of the law-making process is, or should be, obligatory, and at some stages the issue of its conduct has a dispositive character, at the discretion of the competent subject of law-making. Legal examination of normative legal acts should be carried out in the first stage precisely when preparing the draft regulatory act, and in the second - when the subject of law-making makes such a decision. For some types of legal acts, legal expertise is conducted in the process of their state registration. Moreover, the list of cases of legal examination should not be limited to the adoption of a legal act. Legal expertise should also be applied to existing legal acts based on materials on their practical application, or to those which are in the process of being adopted, as is currently underway with the Bill amending the Land Code of Ukraine and other legislative acts of Ukraine on the circulation of agricultural land. An analysis of such practices will help to determine the effectiveness of a legal act, identify gaps in legal regulation, legal conflicts that have not been noticed before and answer questions - whether the goal of legal regulation is achieved. The conclusion of such examination may be the basis for a possible subject of law-making by the subject of amendments to such normative legal act and preventing the consideration of such normative legal acts in the future.

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