Розділ 1

Теорія та історія держави і права; історія політичних та правових учень. Конституційне право; муніципальне право. Філософія права

UDC 340.12:342.51

A. Frantsuz
Honored Lawyer of Ukraine,
Doctor of Law,
Professor, Head of the Department of State and legal disciplines
"KROK" University

Theoretical-legal aspects and legal prerequisites for the implementation of legal norms by executive authorities

The article discusses the theoretical and legal aspects of the legal profession and the practice of the implementation of the rule of legal norms by the executive authorities.

Keywords: *executive authorities, practice, legal activities, legal norms.*

А.И. Француз
д. ю. н., профессор
заведующий кафедрой государственно-правовых дисциплин
Заслуженный юрист Украины, Герой Украины
Университет экономики и права «КРОК»

Теоретико-правовые аспекты юридической деятельности и предпосылки реализации правовых норм органами исполнительной власти

В статье рассматриваются теоретико-правовые аспекты юридической деятельности и практики реализации правовых норм органами исполнительной власти.

Ключевые слова: *органы исполнительной власти, практика, юридическая деятельность, правовые нормы.*

А.Й. Француз
доктор юридичних наук, професор
завідуючий кафедрою державно-правових дисциплін
Заслужений юрист України, Герой України
Університет економіки та права «КРОК»

Теоретико-правові аспекти юридичної діяльності і причини реалізації правових норм органами виконавчої влади

У статті розглядаються теоретико-правові аспекти юридичної діяльності і практики реалізації правових норм органами виконавчої влади.

Ключові слова: *органи виконавчої влади, практика, юридична діяльність, правові норми.*

Challenge problem

The term of "legal practice" is widely used both in domestic and in foreign legal literature, but still not enough attention was paid to the concept of the practice of application of the law by the executive authorities, ways of its improvement.

A review of recent studies and papers

The study of law or legal practice has not been given due attention by the representatives of the philosophical sciences. Mainly scientists of the general theory of state and law have studied this concept. At different times the legal practice or its specific forms – for example, judicial, law enforcement and interpretive practice was studied by such scholars as S. S. Alekseev, M. S. Bratus, A. B. Vengerov, M. N. Voplenko, M. A. Gurvich, I. Y. Duriagin, V. M. Kartashov, V. I. Lieushin, V. P. Reutov. B. V. Savaneli. Meanwhile comprehensive monographic works devoted to legal practice in the plane of generalized, general theoretical studies were relatively new and limited to a small number of them. So, the monograph of V. I. Lieushin "Practice of Law in the system of socialist social relations" was published in 1987 [1] and in 1989 the monograph by V. M. Kartashov "Legal activity: concept, structure and value" was published [2]. Almost textbook and in its own way "cult" among domestic lawyers, the collective monograph under the editorship of S. M. Bratus "Judicial practice in the Soviet legal system" was published in 1975 [3].

Remaining challenges

Despite on a broad study of the concept of the legal practice, there is a need for a fundamental study of the practice of application of the law by the executive authorities.

Draw the objectives of research

The purpose of the article is a study of the concept of the practice of application of the law by executive authorities.

Discussion

Many scientific papers are dedicated to the study of the problems of the legal practice. V. M. Kartashov singled out three traditional approaches to the understanding of the legal practice [2, p. 30]. The authors of the first approach (I. Y. Duriagìn, A. Gerloh, V. Knapp) identify the legal practice with a legal activity [4, p. 345; 5, p. 10-11]. Supporters of the second approach (S. S. Alekseev, S. I. Vilniansky), on the contrary, distinguish the legal practice and legal activity; they have considered the outcome, the result of the legal activity to practice of law [6, p. 340-341; 7, p. 71]. The founders of the third approach (S. M. Bratus, V. K. Babaev, M. N. Voplenko, V. M. Kartashov. V. I. Lieushin, V. P. Reutov) propose to consider the practice of law as an indistinguishable unity of "the legal activities and socio-legal expertise formed on its basis" [3, p. 321; 8, p. 145; 9, p. 27; 3, p. 31;

1, p. 26; 10, p. 114-117]. The fallacy of the first two approaches: in the first approach such an important element as legal experience is excluded from the practice; and the second approach excludes legal activity.

Under legal activity V. M. Kartashov proposes to understand "implied the right of labor, management, state and institutional activity of competent authorities, which aims to perform public tasks and functions (making laws, administering justice, concretization of law, etc.) and satisfaction by this the general social, group and individual needs and interests" [2, p. 31]. Practice of legal activity in this concept is in the intersection. V. M. Kartashov emphasizes "the fact that the content of the legal practice includes only material and transforming legal party activities methodologically is very important" [2, p. 36]. Thus, legal activity is seen as a form of social activity, as ordered, purposeful, subject, selective, systemic and systematic interaction of individuals in lawmaking and application of the law. The essential subject of this activity is the state organ or official. These activities are legally regulated, and by the purpose and tasks facing it – positive and normative-approved, and, moreover, aimed at transforming social reality with the requirements of the law.

Have to agree with V. I. Lieushin point of view who defines legal practice as an activity of the subject of decision-making legal content, without limiting the practice only with activity. He points out that the legal practice is the unity of the legal and objectified experience of this activity, which arises where a person receives externally marked, documented decisions on the rights and duties [1, p. 26-27]. Legal practice is a form of the social practice, in which there is an indirect effect of the practice on the objects of the material world. Subjects affect each other and only end up on the phenomena of the material world, and changing the phenomena themselves and gaining new qualities. Legal practice is the part of the legal activity, the unity of the legal activities and results that accumulate on the procedural stages of this activity. Bases of legal practice are legal relations. Exploring the concept of the legal practice should identify its essential characteristics. First of all, an activity, although the term "activity" includes not only the practice but the theory, are more voluminous category [11, p. 34]. Secondly, practice is a combination of two components – a subject and an object, the relationship of subject and object, in which the subject turns the objective world, but in the process of the bilateral interaction is changing the subject itself. Thirdly, "Practice is the primary ascending relation of man to the world" [11, p. 34.]. Fourthly, the practice is not just the activity, and conscious activity that has its ultimate goal. Fifthly, the practice is always social in nature.

It seems that the problem of the definition of the concept of law application practices is different: the severity of the dispute and the polarity of the thoughts of scientists explained the various installations and initial tasks of socio-legal studies. Scientists who are guided by the knowledge of private, intra-industry legal laws tend to focus on the understanding of law enforcement practices through its "activity" line. Scientists, exploring mainly theoretical, socio-legal laws, global interaction phenomena of the legal system, mainly pay attention to the total experience, the result of the activity. Finally, the problem of the "activity approach" to the notion of law application practices partially artificial because the practice in its initial philosophical sense is quite long and large in space-time limits activity. Its essence is the dialectical combination of statics and dynamics, i.e. a discrete process. It is on the one hand, permanent, fluid, continuous, but, on the other hand, enables to identify its parts, stages, turn, milestones, etc. Moreover, what is considered the final experience, in turn, is a prerequisite for the accumulation of other experience and involved in activities as its element, not the result. Thus, enforcement activities, patterns of flow, changes, and so on can be cognized by us only based on its relative results.

The practice of law application by executive authorities – a kind of legal practice, which mediates the accumulation of social and legal experience in powerful individual regulation of social relations. The practice of law application is defined by K. M. Ga-

rapshyn as "an organic unity of the real application of the law and experience directly involved in the transformation, the change of social relations connected with application of norms of the law" [12, p. 14]. The author notes that the practice of application of the law acts as an experience that covers relationships, trends, techniques, methods of enforcement activity. It is not only the final result, but intermediate results. Thus, the practice of law application by executive authorities is a legal phenomenon that accumulates the experience of State-judicial competent authority of material and procedural norms [12, p. 14]. We believe that we should consider the practice of application of the law of the executive authorities in the both senses broad and narrow. In a broad sense, it is the activity of executive authorities on implementation of the laws in specific subjects, the results of such activities and the implementation of managerial authority. In a narrow sense, it is gained experience in a process of the application of the law by the executive authorities in the form of law that brings an element of novelty in the legal regulation. The experience accumulated in the process of application of the law by the executive authorities is content of this kind of social practices. Most scholars (S. S. Alekseev, V. M. Kartashov, V. I. Lieushin, M. N. Voplenko, M. S. Bratus, A. B. Vengerov) indicate only a rewarding experience, which accumulates in the process of application of the law by the executive authorities. However, we do not agree with this interpretation, since drawing attention to the statistics of the application of the law by the executive authorities in Ukraine, we can find out many cases the accumulation of negative experiences, which also has a significant impact on the practice of application of the law by the executive authorities.

The evolution of views of S. S. Alekseeva on causes of the practice of application of the law is interesting. In earlier work, he pointed to this feature of the law as high standard, what motivates the need for specification of normative prescriptions in the process of their application. In addition, the author indicated the presence of gaps in the law. In order to eliminate them there is a legal practice. Today S. S. Alekseev believes that the practice is determined by the imperfection of the legal norms of the current law. Together with the institution of the application of the law by analogy is able to provide a dynamic law, which is the condition in which law as a system of stable rules (not changing in content) is able to account to some extent the changing conditions of social life. [6, p. 59]. S. M. Bratus indicates that the contents of the practice application are the process of concretization of legal norms [3, p. 79]. According to M. S. Studinikina in the application of the law by the executive authorities the need for such activities arises in connection with the creative nature of control or imperfection of legal norms [13, p. 154]. The executive authorities generally apply the disposition of legal norms. Terms under which this disposition is used in the hypothesis indicated in general terms, and not closed. This is a manifestation of the creative nature of the practice of application of the law by executive bodies. In cases where theory lags behind the practice due to imperfections in legal regulation is no rule of law that can regulate a particular relationship, then on the application is obliged to enforce, which performs the function of the right replenishment, according to I. Y. Duryagin. [4, p. 128]. As pointed out by Y. V. Burlai, the social norm is always fixed by people in one form or another sample of already achieved in the activities, a reflection of the social experience. It is necessary to identify factors influencing the emergence of the practice of application of the law by the executive authorities. Firstly, the unresolved legal norms arising in social practice situations that fundamentally require legal mediation (non-publication legal standard if social relationship arose again, the immutability of the legal standard if social relationship to their mediation practice arose there, but eventually changed, although the relevance of legal regulation not disappeared, and there was a need to change the content of the regulation). Secondly, it is not abolished legal norm, although social relations on the influence of time are excluded from the scope of legal regulation. Thirdly "qualified silence", when the legislator does not regulate individual relationships,

in connection with their newevent, novelty, the role of the practice of application and is reflected in the research and forecasting for the future. Fourthly, the "error of law", which means "not a manifestation of the legislative will, which should be reflected in the regulations" [14, p. 89]. Considering the issues of practical application of the law of the Executive authorities should stop their attention on the functions of law enforcement practices. V. I. Lieushin talking about the functions of legal practice does not relates to the criteria, and says only that the practice of law enforcement performs a number of functions: standardizes law enforcement activities, acts as an additional basis of enforcement of decisions, ensures the uniform application and interpretation of the law, ensures the correct and precise identification of the will of the people, contributes to the improvement of the legislation [1, p. 28]. The functions of the legal practice is a relatively isolated homogeneous directions impact on objective and subjective reality, which reflects and elaborates on its nature, creative, and transformative role in the social and legal purpose in society [15, p. 61]. S. S. Alekseev considers functions of legal practice from the point of view of its role in the legal regulation and the results of their list. That is law-specifying, law-informational, and the law-guiding (directing) [6, p. 340- 341]. V. M. Kartashov has different approaches to the classification of the functions of legal practice. He offers to split the functions of legal practice into two large blocks: general-social and specially-legal. One of the most important classification criteria is one or other sphere of public life that is being affected by the legal action. On this basis, he breaks the general-social functions of legal activities on the economic, political, social, environmental, ideological, educational, and others. Among general-social functions of the legal activity, according to the scientist, a leading place is occupied by economic function [2, p. 45].

By the nature of the committed by the subject of action (changes to the actual reality), you can select the registrating and identifying, law-specifying, law-enforcement, law-explanatory, law-creating, law-changing, law-stopping and control functions. Each of which consists of the relevant subfunctions. The functions of the legal practice are relatively isolated areas of homogeneous impact on the surrounding reality, in which manifest its role and purpose in society. It should be remembered that the functions are relatively isolated from one another and therefore can exist in different systems. They all have the right to exist. Legal practice is part of our culture, on the basis thereof occurs, develops and operates the legal system of the society. It is through legal practice provides communication law with real life. It stands for the unifying category because it allows to simultaneously illuminating the processes of law enforcement and the law-making process.

Conclusions

Exploring questions of legal practice, we came to the conclusion that the legal practice: first, is a kind of social practice; second, this is part of the legal activities that includes not only the activity itself, but also the experience that accumulates on all procedural stages; third, there is the normative and individual regulation of social relations; fourth, the basis for the existence of the practice of law are legal relations that, however, does not exclude the classification practice experience (outcomes, results) of the so called direct the implementation of legal norms. Law enforcement bodies of executive power is not a homogenous kind of the legal profession, which is mediated by the legal means of public relations, in which there is an accumulation of social and legal experience. The experience accumulated in the process of application of the law is valuable to the effectiveness of law enforcement. Enforcement in its form and content is a legal activity that is regulated by a special group of procedural legal rules is intended to maintain the implementation of material legal norms; however this activity should allocate a block of non-legal elements (organizational, intellectual, mental, technical, operational) that are defined by law, but exhaustively it has not been resolved. Before incarnate in the actual human behavior, legal norms and the entire rich arsenal of legal means must be mediated by conscious-

ness. As pointed out by M. N. Voplenko, "the world of legal reality, presented in the form of legal norms, relationships, responsibility, law, order, justice, etc., is perceived by the people through a specific form, or type, of social consciousness, the so-called justice" [9, p. 27]. But we should not exaggerate the influence of non-legal factors in the practice of law enforcement of the Executive authorities, first of all, this phenomenon is purely legal, which accumulates the experience of application of state power, by the competent authority legal, both material and procedural rules. As a result, you should set the main strategic directions in the field of law enforcement practice of the Executive authorities, they boil down to, to raise to a qualitatively new level the work of the state authorities to substantially strengthen their activities for the protection of the interests of the individual.

References:

1 Леушин В.И. Юридическая практика в системе социалистических общественных отношений / В. И. Леушин. – Красноярск : Изд-во Краснояр. ун-та, 1987. – 156 с.

2 Карташов В.Н. Юридическая деятельность: понятие, структура, ценность. / В. Н. Карташов. – Саратов : Изд-во Сарат. ун-та, 1989. – 218 с.

3 Братусь С. Н. Судебная практика в советской правовой системе / Под ред. С. Н. Братуся. – М. : Юрид. лит., 1975. – 328 с.

4. И. Я. Дюрягин. Применение норм советского права. / И. Я. Дюрягин, В. М. Горшенев, Ю. И. Мельников. – Свердловск, 1973. – 247 с.

5. Кнап В., Герлох А. Логика в правовом сознании. Перевод с чешского / Герлох А., Кнапп В.; Под ред. и со вступ, ст.: Венгерова А. Б. – М.: Прогресс, 1987. – 312 с.

6 Алексеев С. С. Проблемы теории права. Т. 2. / С. С. Алексеев. – М: Юридическая литература, 1985. – 498 с.

7 Вильнянский С. И. К вопросу об источнике советского права / С. И. Вильнянский // Проблемы социалистического права. – М.,1939. – № 4/5. – С. 62-71.

8. Бабаев В. К. Теория современного советского права. Фрагменты лекций, схемы / В. К. Бабаев. – Новгород : Нижегород. ВШ МВД РСФСР, 1991. – 155 с.

9. Вопленко Н. Н. Реализация права: Учеб. пособие. / Н. Н. Вопленко. – Волгоград, 2001. – С. 27.

10. Реутов В. П. Стадии воздействия юридической практики на развитие законодательства. / В. П. Реутов// Правоведение. – 1970. – № 3. – С. 114-117.

11. Крапивенский С. Э. Социальная философия: Учебник для гуманит.-соц. специальностей высших учебных заведений. 3-е изд., исправленное и дополненное. / С. Э. Крапивенский. – Волгоград: Комитет по печати, 1996. – 352 с.

12. Гарапшин К. М. Правоприменительная практика в советском общенародном государстве: автореферат дис. ... канд. юрид. наук: 12.00.01 / Камиль Мухаметханович Гарапшин. – Казань, 1985. – 17 с.

13. Студиникина М. С. Правоприменение в Советском государстве / М. С. Студиникина, Е. В. Болдырев, С. Н. Братусь, А. Б.Венгеров, Л. Д. Воеводин и др.; Отв. ред.: Кузнецов И. Н., Самощенко И. С. – М.: Юрид. лит., 1985. – 304 с.

14. Бурлай Е. В. Нормы права и правоотношения в социалистическом обществе / Бурлай Е. В. – К.: Наукова думка, 1987. – 92 с.

15. Карташов В. Н. Обобщение юридической практики. Учебное пособие. / В.Н. Карташов. – Ярославль: Издательство Ярославского государственного университета, 1991. – 64 с.