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Improving the lawmaking activities of executive authorities

Lawmaking is the most important function of the executive authorities, through which their activity is manifested, aimed at the qualitative development of Kazakh society and the performance of all other functions of the state. The article examines the features of subordinate lawmaking, which are due to the multiplicity of the system of executive authorities. It is noted that the nature of subordination relations between them also affects the legal nature of the legal acts issued by them and the requirements imposed on them. The main goal of improving subordinate lawmaking is the creation and functioning of a unified, internally consistent, consistent system of legal norms. The main content of the article is to disclose the content of the concept of "legal monitoring" in relation to the law-making of executive authorities of different levels. The legal regulation of one of its most important tools, the analysis of regulatory impact, is critically investigated. The authors propose to introduce into the law-making terminology the categories "legal requirements for management acts" and "subjects of law formation" as components of the lawmaking process of executive authorities. This may become a new stage in the study of lawmaking processes, and also contributes to the emergence of new approaches to the study of the phenomenon of law education. The novelty of these approaches is due to the emergence of new regulatory instruments in the practice of domestic legal education that meet the needs of the lawmaking mechanism of modern Kazakhstan. This will allow us to reach a new level of lawmaking support for state policy, increase the level of legal culture and, in general, the rule of law.

Keywords: lawmaking, normative legal act, law, lawmaking principles, lawmaking mechanism, legal monitoring, regulatory impact analysis, public control, lawmaking relations, by-laws, lawmaking subjects, lawmaking expertise, public monitoring.

Introduction

Legal regulation of the adoption of subordinate normative legal acts is the basis of the norm-making powers of executive authorities. The diversity of types of subordinate legal acts and the diversity of executive authorities that issue these acts requires a special attitude to the law-making process in this area in order to harmonise them and ensure unity of approaches to the preparation of legal acts. Increasing the effectiveness of the normative and law-making function of executive authorities at all levels is largely related to the quality of preparation of draft normative and legal acts and leads to the creation of a regime of legality and law and order in the state.

Over the past two decades, lawmaking activities have significantly intensified in Kazakhstan. This is manifested in a significant increase in the number of legal acts in the most important areas of legal relations.

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In the absence of planned rule-making activities at various levels of government, the effectiveness of regulatory legal acts is reduced. The reasons for this phenomenon are often the low quality of legislative and law-making activities that affect the scope of by-laws. This should include the adoption of imperfect, contradictory regulatory legal acts, which leads to collisions and gaps in legal regulation. Amendments to legislation are very often and insufficiently justified. Specialists do not always show a high level of standard-setting techniques. All this is the reason for the uncertainty of legal formulations and negatively affects the quality of the legal field of the state.

Currently, work is underway to improve law-making activities, especially in the field of subordinate law-making. Subordinate lawmaking is of particular importance for the correct execution of laws, their understanding by all subjects of legal relations. An important role in the process of subordinate law-making is assigned to civil society and its institutions. Great importance is attached to the institution of citizens' participation in the discussion of draft laws and other legal acts, the activities of public councils. All this should ensure the high efficiency of the law-making process, law enforcement activities, raising the level of legal culture and the rule of law in general.

Materials and methods

General and special methods of cognition were used as the main methods of research: dialectical, historical, analysis and synthesis, comparative-legal, logical-legal, structural-functional, systemic, scientific interpretation and method of complex approach, method of empirical research, formal-descriptive, linguistic, systemic, concrete-sociological. The formal-legal method was used to analyse the legal nature of by-laws. The structural-functional method was used to identify structuring problems in the preparation of draft by-laws. With the help of comparative-legal and systemic methods the comparison of rules of preparation of by-laws contained in various legal acts of different legal nature was carried out.

Discussions

Subordinate lawmaking is a multi-subject process of formation and adoption of legal acts. Indeed, subordinate regulatory legal acts are not only a source (a form of external expression and objective existence) of administrative law, but also an important legal form of public administration. Through the publication of subordinate regulatory legal acts of executive bodies, the regulatory and social functions of the management of the executive power of the state are implemented. The social function helps to cope with another problem — the adopted legal acts must reflect public needs and interests. This makes the adoption of regulatory and legal regulations more motivated.

Analysis and conformity of social circumstances when making a decision on the preparation of a legal act is the most important condition for the creation of a high-quality legal act. The need to take into account objective and subjective circumstances was pointed out by Tikhomirov Yu.A. [1; 7]. For example, S.K. Alimkhanova, analyzing labor legislation in the EAEU countries, notes that “a huge amount of subordinate rulemaking due to the frequent use of reference norms in Labor Codes is the cause of labor law conflicts” [2; 49]. According to Gribanov D.V., the “connecting link” between the objective and the subjective in the process of lawmaking is “reasonableness” [3; 103].

Sokolova A.A. put forward the concept, according to which three stages are distinguished in the process of law formation. At the first stage the objective needs for legal regulation of social relations are determined, the possibility of adopting a real legal norm is determined. The second stage is the creation of legal norms, i.e. lawmaking itself. At the third stage there is a socialization of legal norms, i.e. awareness of the participants of social communication, potential legal relations of possible legal consequences [4; 80]. Without contact with the real social factors of specific life situations, the law cannot manifest its regulatory impact.

Subordinate legal acts appear as a result of the lawmaking activities of various state bodies and other entities. The existing array of subordinate regulatory legal acts shows that it is possible to identify several criteria for the classification of types of subordinate lawmaking activities. For the classification of types of law-making activity, the definition of lawmaking taken as a basis is also of great importance. Thus, it is possible to distinguish the lawmaking of the Government, the lawmaking of akims and the lawmaking of maslikhats and other subjects.

Each type of lawmaking bodies corresponds to a certain type of legal acts. Each legal act has legal characteristics created only for it and features identifying it among the entire array of legal acts of state bodies. This is defined in special provisions of constitutions, special laws, so the activity of the EU law-

making bodies is based on part 1 of Article 249 of the Community Treaty, which enshrined the principle of limited competence [5]. In accordance with this principle, the community's law-making bodies, namely, the Council, the Commission and the European Parliament, have the right to jointly issue normative acts provided for by the Treaty, i.e. they can act only in those areas in which the Treaty provides for the Union competence of the Community. As G. Gornig notes, the effect of the "principle of limited competence" is weakened by the presence of powers to eliminate gaps in the Agreement. If the activities of the Communities require the implementation of one of the goals within the framework of the common market, and the EU Treaty does not provide for the required powers, the Council issues the necessary regulations on the basis of unanimity. There are various forms of participation of the European Parliament in law-making. It can be either optional project hearings. In accordance with part 2 of Article 230 of the Treaty on Communities, non-compliance with the hearing procedure is a significant violation of one of the formal regulations [6; 61].

Usually, various types of lawmaking are distinguished in the legal literature. For example, Z.Ch. Chikeeva, depending on the significance of the subject of lawmaking, divides it into legislative, delegated and subordinate [7; 20].

Lawmaking is a multi-stage long-term process that has the property of cyclicity, which is expressed in successive interrelated actions of authorized bodies and state officials, and various public institutions also participate in the commission of certain actions. Speaking about the cyclical nature of law-making, Tikhomirov Yu.A. understands the cycles of law-making as "relatively stable temporary and substantial periods of development of the legal sphere, which are characterized by gradual and consistent actions of subjects to achieve a strategic goal. This goal determines new statuses and conditions of subjects of law and new characteristics of objects of legal regulation" [1; 7].

The procedure of subordinate lawmaking is characterised by its precise organization, in which there are no trifles. Ignoring the basic regularities and rules when creating a legal act leads to deterioration of its quality, reduces the effectiveness of legal regulation, sometimes leads to violation of the rights of citizens and, as a consequence, damages the state of law and order in the state. The peculiarity of a state governed by the rule of law is that in it all processes are subordinated to law and regulated by law. The process of creating subordinate legal acts is no exception. Constitutional legislation is devoted to this task. For example, not only the Constitution of the Republic of Kazakhstan, but also a number of laws on the supreme bodies of state power, which record, in particular, their law-making functions. Since relatively recently, the quality of law-making activity has significantly increased due to the adoption of a new version of the Law on Legal Acts, which details the entire law-making procedure. The law-making process consists of a number of consecutive stages, which are sometimes referred to as law-making actions. Observance of the sequence of these stages makes it possible to maintain the external framework of the movement of a legal act — from the origin of its idea to its adoption.

As we have already noted, in the Republic of Kazakhstan, the law-making procedure is regulated in detail in the law. Analyzing the law-making procedure enshrined in the Law on Legal Acts, we counted nine main stages of the law-making process. But we believe that the number of stages depends on a number of circumstances. Firstly, it depends on the type of legal act. The procedure for adopting a law differs significantly from the procedure for adopting a subordinate legal act. Secondly, it depends on the content of the legal act, i.e. the specific type, the sphere of public relations that the legal act is intended to regulate. For example, some legal acts need to be approved. The subject matter of other legal acts is such that it is impossible to do without mandatory environmental expertise. Thirdly, it depends on the level of the legal act, since the lower the level of the legal act, the more approvals it must pass. Therefore, we believe that in the process of research, for greater efficiency, it is worth dividing the stages of the law-making process into two types of stages: preparatory stages and legally significant stages. At the preparatory stages, as a rule, no legally authoritative actions are performed, these actions do not entail legally significant consequences. But the passage of the draft legal act of legally significant stages is associated with the implementation by authorized subjects of their power competencies, which gradually gives it the character of an authoritative prescription, the legal act seems to be "gaining" legal force.

If a draft resolution is being prepared that introduces a new regulatory instrument or provides for stricter regulation of the activities of business entities, then an analysis of the regulatory impact will be mandatory. The procedure for ARV in these cases is established by the authorized body in the field of entrepreneurship. The results of the ARV in relation to the proposed regulatory act are posted by the regulatory and authorized ministries on their Internet resources.

Regulatory impact analysis was first applied in the UK in 1985 during the regulatory reform. At that time, it was mainly aimed at identifying the inconsistency of the new regulations with the existing ones [8]. In the process of applying this legal instrument, it turned out that this did not simplify the system of legal regulation, but, on the contrary, significantly reduced its effectiveness. Scott Jacobs invented and developed this technique, but it is not a strictly established mechanism [9]. Unfortunately, in our country, so far the main sphere of action of the ARV is the sphere of entrepreneurship. Some authors believe that it makes sense to extend its application to all areas of public administration [10; 16]. The Republic of Kazakhstan has adopted Rules for Conducting and Using Regulatory Impact Analysis of Regulatory Instruments [11].

Analysis of the texts of legal acts of local executive authorities has shown that the content of the adopted rules, regulations, instructions almost always includes verbatim the texts of acts of higher executive authorities, in compliance with which they are adopted. Such duplication comes at the expense of more detailed legal regulation, taking into account the peculiarities of this administrative-territorial unit. Therefore, we consider it necessary to legislatively prohibit the duplication of the normative content of legislation as the main text to the text of the legal act of local government.

To improve the subordinate law-making of executive authorities in the Law on Legal Acts, it is necessary to take the following measures:

1) Regulate in detail the process of drafting and issuing by-laws of local executive authorities, establish the principles of issuing by-laws, as well as the requirements for the procedure for preparing by-laws.

2) At the regulatory level, establish the forms by which public organizations and citizens can make proposals on draft by-laws.

3) Territorial bodies of justice should have the right to file statements of claim with the court for recognition as not conforming to the legislation and invalid normative legal acts of the regional level. The procedure should be established in the Civil Procedure Code of the Republic of Kazakhstan.

Results

Improving the mechanism of law-making of executive authorities is an objective necessity in order to have an effective impact on economic, social, cultural and other processes in society. The most important tool of the law-making mechanism is the analysis of regulatory impact. It is necessary to create high-quality organizational and legal support for regulatory impact analysis. Regulatory impact analysis was initially applied to legal acts in the field of entrepreneurship. But its effectiveness has shown that it is advisable to extend it to the regulation of all types of public relations.

The peculiarities of the legal nature of subordinate legal acts are conditioned by their derivative character from laws. They include subordinate and systematic, heterogeneity, diversity of legal forms.

When creating subordinate legal acts, it is necessary to take into account the level of significance of the regulated public relations and, depending on this, to choose the form of a subordinate legal act, which will regulate these relations, as well as it is necessary to maintain a balance between legislative and subordinate legal regulation. Law-making bodies should adhere to the following rules: laws regulate the basic and most general issues of the life of the country. Subordinate acts of executive authorities should be aimed at the fullest, detailed implementation of legislative acts, i.e. are designed to ensure the fullest practical feasibility of the norms enshrined in the laws.

In the process of subordinate lawmaking it is necessary to observe the following rules: to determine the level of significance of public relations, in accordance with this to choose the form of a legal act, to strictly observe the balance between legislative and subordinate regulation, adoption of a subordinate act only in case of real necessity, avoiding excessive regulation and within the competence of the authorised body.

Lawmaking activity of local public administration bodies has a number of peculiarities conditioned by the nature and legal nature of the system of local public administration. The main peculiarity of law-making activity of local public administration bodies stems from the so-called dual nature of the system of local public administration in almost all countries, and consists in the fact that local governance is carried out by elected representative bodies, as well as by executive bodies representing the central government. The Republic of Kazakhstan is no exception in this matter.

The role of informatization in the process of systematization of subordinate legal acts is increasing. Modern digital technologies, on the one hand, significantly simplified the work on systematization, but on the other hand, required measures to improve the organizational support of informatization methods of systematization. In modern conditions, systematization has received another tool, which can be called legal informatization. In the State Programme “Digital Kazakhstan” legal informatization is defined as one of the

most important directions of digitalization of the current law of the Republic of Kazakhstan, which significantly facilitates and makes more convenient the search and use of normative legal material, as well as its record keeping. Today it is necessary to unify the methods of record keeping and incorporation of normative legal acts, standardise the digital technologies used, integrate among themselves various databases and data banks of legal acts, uniting them into a common information and legal space.

Conclusion

The analysis of normative acts on legal monitoring shows that the consequences of monitoring are not clearly defined in relation to acts of central executive authorities. So, according to these Rules, the monitoring applies so far only to draft by-laws. In practice, it happens that the scope of legal monitoring does not include the current by-laws. Therefore, we believe that the text of part 4 of paragraph 18 of the Rules should be changed by making additions concerning the state registration of regulatory legal acts, in respect of which subsequent monitoring was applied and shortcomings were identified that led to amendments and additions to it.

Subordinate normative acts are the most numerous and daily demanded group of legal acts, with the help of which not only the rights of participants of public relations are realised, but also regulate the activity of competent executive authorities on realization of rights and freedoms of citizens and observance of rights of legal entities in everyday management activity. Therefore, special requirements should be imposed on the quality of subordinate legal acts. In order to achieve a high culture of subordinate lawmaking, it is necessary to introduce into legal circulation the concept of "legal requirements for subordinate legal acts of management".

Regulatory impact analysis will play an increasingly important role in the process of lawmaking and therefore needs more thorough legal and procedural regulation. For this purpose it is advisable to supplement the Law on Legal Acts with a special chapter "Regulatory Impact Analysis".

The grounds for the issuance of local by-laws should be regulated in detail in the normative order, and the requirement of obligatory indication of the act in pursuance of which act this act is issued should be introduced. It is necessary to clearly define the subjects of by-law regulation by fixing the range of issues on which by-laws may be adopted. The law should establish the general competence framework for law-making activities of local executive authorities, while the decision on subordinate legislation should be made in accordance with the direct indication of the legal norm or in case of the need to implement specific functions.

Limitations should be set in the area of subordinate lawmaking in order to overcome the tendency to issue excessive subordinate acts of executive authorities of the highest, central and local levels. The need for consistent harmonization of the content of norms of by-laws with the norms of other normative legal acts in order to avoid duplication and contradictions, to ensure the preparation and approval of by-laws of executive authorities only in cases of real need for their issuance, when the task at hand cannot be solved by other means, to determine the competence of executive authorities when issuing by-laws. The right to issue a by-law in the absence of a law should be fixed by law and only in cases of importance of public relations and with its subsequent legislative regulation.

Improving the law-making activities of executive authorities is one of the legal problems of equal scientific and practical importance. Its timely solution is a necessary condition for improving the quality of by-laws as the main results of law-making.

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Н.С. Ахметова, А.И. Бірманова

Атқарушы билік органдарының құқықшығармашылық қызметін жетілдіру

Құқықшығармашылық атқарушы билік органдарының маңызды функциясы болып саналады, сол арқылы олардың қазақстандық қоғамды сапалы дамытуға және мемлекеттің барлық басқа функцияларын орындауға бағытталған белсенділігі көрінеді. Мақалада атқарушы билік органдары жүйесінің көптігіне байланысты заңға тәуелді құқықшығармашылығының ерекшеліктері зерттелген. Атап өткендей, олардың арасындағы субординациялық қатынастардың сипаты олар шығаратын құқықтық актілердің заңдық табиғатына және оларға қойылатын талаптарға да әсер етеді. Заңға тәуелді құқықшығармашылығын жетілдірудің негізгі мақсаты құқықтық нормалардың бірыңғай, ішкі келісілген, дәйекті жүйесін құру және оның жұмыс істеуі болып табылады. Мақаланың негізгі мазмұны әртүрлі деңгейдегі атқарушы билік органдарының құқықшығармашылығына қатысты «құқықтық мониторинг» ұғымының мазмұнын ашу. Құқықтық реттеуді сыни тұрғыдан зерттеудің маңызды құралдарының бірі — реттеушілік әсерді талдау. Авторлар құқықшығармашылық терминологияға атқарушы билік органдарының құқықшығармашылық процесінің құрамдас бөліктері ретінде «басқару актілеріне қойылатын заңдық талаптар» және «құқықты қалыптастыру объектілері» санаттарын енгізуді ұсынады. Бұл құқықшығару процестерін зерттеудің жаңа кезеңі болуы мүмкін, сондай-ақ құқық құру феноменін зерттеудің жаңа тәсілдерінің пайда болуына ықпал етеді. Осы тәсілдердің жаңалығы отандық құқық құру практикасында қазіргі Қазақстанның құқықшығармашылық тетігінің қажеттіліктеріне сәйкес келетін жаңа реттеуші құралдардың пайда болуымен байланысты. Сонымен қатар мемлекеттік саясатты құқықшығармашылықпен қамтамасыз етудің жаңа деңгейіне шығуға, құқықтық мәдениет деңгейін және жалпы құқықтық тәртіпті арттыруға мүмкіндік береді.

Кілт сөздер: құқықшығармашылық, нормативтік құқықтық акт, құқық, құқықшығармашылық принциптері, құқықшығармашылық тетігі, құқықтық мониторинг, реттеушілік әсерді талдау, қоғамдық бақылау, құқықшығармашылық қатынастары, заңға тәуелді актілер, құқықшығармашылық субъектілері, құқықшығармашылық сараптамасы, қоғамдық мониторинг.

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Совершенствование правотворческой деятельности органов исполнительной власти

Правотворчество является важнейшей функцией органов исполнительной власти, через которую проявляется их активность, направленная на качественное развитие казахстанского общества и выполнение всех других функций государства. В статье исследованы особенности подзаконного правотворчества, которые обусловлены множественностью системы органов исполнительной власти. Отмечено, что характер субординационных отношений между ними влияет и на юридическую природу издаваемых ими правовых актов и предъявляемые к ним требования. Основной целью совершенствования подзаконного правотворчества является создание и функционирование единой, внутренне согласованной, непротиворечивой системы правовых норм. Основное содержание статьи заключается в раскрытии содержания понятия «правовой мониторинг» применительно к правотворчеству органов исполнительной власти разных уровней. Критически исследовано правовое регулирование одного из важнейших его инструментов — анализа регуляторного воздействия. Авторы предлагают ввести в правотворческую терминологию категории «юридические требования к актам управления» и «субъекты формирования права» в качестве составных частей правотворческого процесса органов исполнительной вла-

сти. Это может стать новым этапом в исследовании процессов правотворчества, а также будет способствовать появлениию новых подходов к изучению феномена правообразования. Новизна этих подходов обусловлена появлением в практике отечественного правообразования новых регуляторных инструментов, соответствующих потребностям правотворческого механизма современного Казахстана. Это позволит выйти на новый уровень правотворческого обеспечения государственной политики и повысит уровень правовой культуры и, в целом, правопорядка.

Ключевые слова: правотворчество, нормативный правовой акт, право, принципы правотворчества, механизм правотворчества, правовой мониторинг, анализ регуляторного воздействия, общественный контроль, правотворческие отношения, подзаконные акты, субъекты правотворчества, правотворческая экспертиза, общественый мониторинг.

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