

To The Problem of Law-Making Errors: A General Theoretical Aspect

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Abstract:

The article examines the problems of law-making legal errors. Particular attention is paid to the subjective side of the law-making error, as well as the legal consequences of their commission. The article also draws attention to the consequences of law-making errors that affect the interests of the population, causing corruption and disrespect for the law. From the author's point of view, law-making errors should be differentiated from doctrinal (conceptual) errors.

Keywords:

Law-making error, lawmaking, intent, negligence, illegality, legal liability

I. Introduction

Lawmaking errors are a type of legal error in general, which exist alongside law-enforcement, interpretational and doctrinal errors. Perhaps, in legal literature, lawmaking errors are given more attention than other legal errors.

II. Research Methods

When preparing a scientific article, the following methods were used:

General Philosophical

General philosophical (dialectical-materialistic), which is used in all social sciences;

1. General scientific (analysis and synthesis, logical and historical, comparisons, abstractions, etc.), which are used not only by the theory of state and law, but also by other social sciences;
2. Special methods (philological, cybernetic, psychological, etc.), developed by special sciences and widely used for the knowledge of state and legal phenomena;
3. Private scientific (formal legal, interpretation of law, etc.), which are developed by the theory of state and law.

III. Result and Discussion

3.1 The Concept of "Lawmaking Error"

The concept of "lawmaking error" in jurisprudence is still controversial. The positions of scientists on this issue are differentiated in different assessments of the subjective attitude of the lawmaking body towards them. Thus, Vladimir Mikhailovich Baranov defined an error in lawmaking as incorrect actions of a lawmaking body, committed due to a bona fide mistake, which entailed unfavorable social and legal consequences [1].

A broader concept in lawmaking is proposed by Alexander Borisovich Lisutkin, according to whom, an error in lawmaking is a negative result caused by intentional or

unintentional actions of the subject of lawmaking, which prevents its effective work and the adoption of a high-quality normative act [2]. Assessing the above approaches to understanding a law-making error, Tatyana Vasilyevna Kashanina draws attention to the fact that if Vladimir Mikhailovich Baranov associates it only with careless guilt, then Alexander Borisovich Lisytkina, on the one hand, is not alien to the position of objective imputation, since unintentionality can also be interpreted as an accident. On the other hand, if we understand intentionality as intent, then the category of error will also include actions that are essentially gross offenses [3]. Another approach to understanding a law-making error, in particular, is defended by Lyudmila Aleksandrovna Morozova, interpreting a law-making error as a negative result of subjects of law-making activity, names the following signs of the first; firstly, the unintentionality of the error. The subject of law-making activity who made the error proceeded from the assumption of the correctness of his actions, i.e. the error arose as a result of an honest mistake. In this case, there was no intent, no purpose to commit an error, no neglect of duties on the part of the subject of lawmaking. An error excludes guilt, since it arose accidentally, without prior conscious intent; secondly, since there is no guilt in committing a lawmaking error, the subject who made it cannot bear legal responsibility; thirdly, a lawmaking error always causes a negative result: it hinders the implementation of rights, freedoms of the individual, interests protected by law, worsens the situation of subjects, etc.; fourthly, the subject of a lawmaking error can only be an agency or official to whom the state has assigned the right to lawmaking or to whom this right has been delegated (local government bodies, subjects of local lawmaking); fifthly, a lawmaking error must be officially recognized, and a certain procedure must be established for its correction[4].

One should agree with Tatyana Nikolaevna Moskalkova that “the consequences of law-making errors are large-scale, affect the interests of the broadest sections of the population, destroy the system of guarantees of the rights and interests of man and citizen, and in their extreme forms lead to social explosions, overturn the main guidelines: faith in goodness and justice” [5].

Oleg Kazbekovich Biktasov and Galina Valerievna Eliseeva, recognizing that “irresponsibility in the sphere of law-making is socially dangerous, since it provokes such phenomena as abuse of power, corruption, lobbying, legal nihilism, and contributes to the formation of a disrespectful attitude towards the law in the public consciousness and practice”, nevertheless believe that “legal responsibility for law-making errors ... should not be applied to representative bodies of state and municipal power, as well as deputies participating in their work” [6]. Tatyana Vasilyevna Kashanina rightly writes that “the position of Vladimir Mikhailovich Baranov is preferable, first of all, because it is based on the widespread public understanding of a mistake as an oversight, a behavioral error that could have been avoided if the subject had been more attentive and careful” [3]. A somewhat different emphasis in the definition of a law-making error is contained in the work of Vladimir Mikhailovich Syrykh, according to whom a law-making error is “such a deviation from the requirements of legislative technique, the provisions of legal science, logic or grammar, which reduces the quality of legal norms, causes difficulties in their interpretation and implementation in specific legal relations” [7].

3.2 Signs of Legislative Errors

Sergey Yuryevich Bolonin notes that an important feature of legislative errors is that they do not follow directly from the text of the law and are revealed only in the process of execution and application of the law. Such errors cannot be neutralized even at the stage of drafting a bill, since they are based on the assumptions of the legislator and are not conditioned by proper empirical experience [8].

The position of Nikolay Nikolaevich Voplenko deserves attention, who believes that the identification in scientific literature of such signs of a legislative error as "the good faith of the error of its subject" [1], "violation of the rules of legal technique, logic, grammar" [9], "lack of material and other resources" [10], should be considered as special types of errors, and not their signs [11]. The scientist identifies and consistently characterizes the following common and most generalized features of law-making errors: 1) the evaluative nature of a law-making error is based on the fact that ideas about it in the public and individual consciousness are initially formed in the form of opinions, judgments expressing doubt or confirmation of the value, usefulness of the process and the result of any law-making activity. The evaluative nature of an error appears as its immanent property to be an object of evaluation through correlation with the most important ideas of law: equality, freedom and justice. It is these ideals that create the possibility of a legal-conscious evaluation of the activity of the creator of legal norms through the prism of its compliance or non-compliance with the basic criteria and rules of law-making work. As a result, a semantic field of legal texts is formed in the public consciousness, carrying within itself an idea of the shortcomings, miscalculations, mistakes and other imperfections of the current legislation; 2) the social harmfulness of a law-making error is one of its fundamental properties that determine the social significance and the need to respond to such phenomena on the part of society and the state. This means that as a result of the erroneous activities of creators of legal norms, significant harm is caused to social development and legal regulation in the form of unfavorable consequences of a personal, property, moral or political nature. A legislative error undermines or distorts the effectiveness of long-term social regulation, contributes to the failure to achieve the strategic goals of social development, and a legislative error, when implemented in practice, gives rise to injustice and social tension, entails other negative socio-political, economic, financial consequences, reduces the level of guarantees of the rights and interests of the individual, the effectiveness of law enforcement, undermines the foundations of national security, destroys the principles of building a democratic society and the management system [10]; 3) the creation of legal obstacles to the progressive legal development of society. The existence of errors in the current legislation refers to the phenomena that legally legitimize the deformation of the sources of law. They create the problem of the impossibility of acting in contradiction with erroneous norms or acts, to look for "workarounds" and means of coordinating legality and expediency, the legal correctness of the implementation of the norm and social justice; 4) authoritative statement of an error in a special legal act of a competent state body. This means that the process of logical formalization of ideas about the existence of an error ends with a legal procedure for its identification and elimination. A law-making error, in the proper sense of the word, is a legal fact established by a competent body within the framework of a special legal procedure and expressed in a special legal act, which entails the emergence of legal relations to eliminate the consequences of incorrect law-making [11].

3.3 Law-Making Error and Measures of State and Legal Coercion

Scientists have different approaches to the issue of measures of state and legal coercion for committing law-making errors. This is largely determined by the position of the authors, who interpret the latter in one way or another. Thus, Lyudmila Aleksandrovna Morozova, convinced that in the presence of a law-making error "there is no question of the responsibility of persons who committed law-making errors, since this would mean an objective imputation of guilt", believes that here "... the so-called law-making under duress can play a major role. This can include not only the recognition of a specific act as unconstitutional and the obligation of the author of this act to adopt a new act or make changes and additions to the relevant act within the established period, but also the recognition of a normative legal act as invalid in the order of judicial rule-making" [12]. While recognizing that not all flaws in legislation are due to unintentionality, the complexity of the cognitive process, and other circumstances that exclude

guilt, and, consequently, the possibility of bringing to legal responsibility, Aleksey Yuryevich Kalinin and Stanislav Ivanovich Kirillov are nevertheless skeptical not only about the possibility, but also about the very expediency of applying measures of legal responsibility in this area. In their opinion, here we can only talk about positive legal responsibility, while the application of retrospective responsibility will inevitably contribute to the infringement of the principle of a free parliamentary mandate and the principle of separation of powers. Raising the question of the possibility and expediency of retrospective legal responsibility will be appropriate only after a clear procedure for recognizing a particular defect as a defect caused by the guilty behavior of the legislator appears [13].

On the contrary, many legal theorists are convinced of the need to establish legal liability for law-making errors. Thus, Andrei Petrovich Mazurenko, stating that the liability measures in the sphere of law-making fixed in the current legislation are almost never applied in practice, believes that for such law-making errors as violations in the laws of the subjects of the Federation and regulatory acts of local government bodies of the current Constitution of the Russian Federation and federal laws, there could be constitutional, administrative or criminal liability [14]. It should be agreed that the liability measures in the sphere of law-making fixed in the current legislation are almost never applied in practice [15]. We believe that a law-making error can be the basis for legal liability.

Thus, Nikolai Nikolaevich Voplenko notes that the main criteria for establishing and implementing legal liability for law-making errors should be the signs of an offense: social harmfulness of the act, guilt and illegality. The last circumstance (illegality) should be especially emphasized, because the legislator and other lawmakers, as a rule, do not specifically seek to establish for themselves measures of responsibility for possible errors. And this requires a critical assessment and revision of all regulatory acts that enshrine the law-making competence of representative and executive authorities from the point of view of formulating measures of responsibility for erroneous work in the sphere of law-making activity" [11]. The scientist says that a law-making error, as a rule, acts as a conscientious mistake of the creator of the law, but it can also be the result of abuse of power and official position. In this latter sense, it can and should be considered an offense [11]. It seems that the deliberate guilt of the law-making body is unlikely to correspond to the concept of an error, including a law-making one, because "... can one really call a negative result, to which the subject of law-making so purposefully aspired, an error" [3]. Vladimir Nikolaevich Kartashov, drawing attention to such an essential feature of erroneous law-making activity as its illegality, believes that it consists in the fact that it violates not only the norms and principles of law, but also other legal prescriptions contained in regulatory legal acts (legal formulas, definitions and other non-standard generally binding orders), acts of official legal interpretation, etc. The author emphasizes that a law-making error is associated with causing harm, which is sometimes insignificant and significant, moral and material, expressed in the violation of law and order, the normal development of social relations, in the ineffective implementation of federal and regional projects and programs, "far-fetched" projects of regulatory legal acts capable of bringing chaos to certain spheres of society. Moreover, the scientist believes that erroneous law-making activity has a certain danger, when establishing the level of which "it is necessary to take into account all its qualitative and quantitative parameters, namely: the rudeness and prevalence of this activity, the degree of material, moral and other harm, the nature of the violated relations, rights and legitimate interests of people, their groups and organizations" [16].

From the position of Aleksey Gennadyevich Samusevich, a law-making violation, which is the basis for the emergence and implementation of constitutional responsibility, can be

considered as “an unlawful act (action or inaction) of the subject of law-making, which by its nature is socially dangerous behavior that violates the requirements of constitutional provisions and entails the adoption of an erroneous normative legal act that causes damage (harm) to the fundamental foundations of the constitutional system and the basic rights and freedoms of man and citizen” [15].

IV. Conclusion

It seems that the content of this article shows quite clearly that the problem of law-making errors is not only widely discussed, but also controversial. In particular, without going into detail about the problem of the relationship between doctrinal and law-making errors, distinguishing them, we emphasize that, firstly, the former may arise at the stage of the process of cognition of objective laws that lie outside the law-making process; secondly, that doctrinal errors are a prerequisite for law-making errors.

References

- Baranov Vladimir Mikhailovich, Pshenichnov M.A. Law-making errors as a factor of disharmony in legal development (based on the materials of the International scientific and practical round table "Law-making errors: concept, types, practice and technique of elimination in post-Soviet states" (Nizhny Novgorod, May 29-30, 2008) (end of review) // Legal technique. 2009. № 3. P. 571.
- Baranov Vladimir Mikhailovich, Pshenichnov Mikhail Aleksandrovich. Legislative errors as a factor of disharmony of legal development (based on the materials of the International scientific and practical round table “Law-making errors: concept, types, practice and technique of elimination in post-Soviet states” (Nizhny Novgorod, May 29-30, 2008)// Legal technique. 2008.№2. P.179.
- Baranov Vladimir Mikhailovich. The Truth of the Norms of Soviet Law. The Problem of Theory and Practice: Monograph / edited by Mikhail Iosifovich Baitin. Saratov: Saratov State University, 1989. P. 357.
- Biktasov Oleg Kazbekovich, Eliseeva Galina Valerievna. The concept of law-making errors and ways of their elimination // Bulletin of the Siberian Institute of Business and Information Technology. 2016.№4. P. 69.
- Bolonin Sergey Yuryevich. Some technical and legal aspects of legal interpretation errors in normative legal regulation// Business in law. 2009.№1. P.69.
- Kalinin Aleksey Yuryevich, Kirillov Stanislav Ivanovich. Defects of law formation from the standpoint of the structural-functional approach // Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia. 2012. № 5. P. 24-25.
- Kashanina Tatyana Vasilyevna. Legal Technique: Textbook. Moscow: Eksmo, 2008. P. 149.
- Lisyutkin Alexander Borisovich. Legal Significance of the Category "Error": Theoretical and Methodological Aspect: Monograph. Saratov: Saratov State Academy of Law, 2001. P. 199.
- Malko Alexander Vasilievich. Law-making policy as a means of preventing and eliminating errors in legislation // Law-making errors: concept, type, practice and technique of elimination in post-Soviet states: materials of the International scientific and practical round table (Nizhny Novgorod, May 29-30, 2008) / edited by Vladimir Mikhailovich Baranov and Igor Mikhailovich Mitskevich. Moscow, 2006. P. 27.
- Mazurenko Andrey Petrovich. On the issue of legal liability for law-making errors // "Black holes" in Russian legislation. 2009. № 2. P. 41.

- Morozova Lyudmila Aleksandrovna. Law-making Errors and Procedural Means of Their Elimination // State and Law. 2010. №1. Pp. 5-6.
- Moskalkova Tatyana Nikolaevna Legislative errors: concept, types and ways of counteracting // Law-making errors: concept, type, practice and technique of elimination in post-Soviet states: materials of the International scientific and practical round table (May 29-30, 2008) / edited by Vladimir Mikhailovich Baranov and Igor Mikhailovich Mitskevich. Moscow, 2006. P. 18-19.
- Moskalkova Tatyana Nikolaevna. Law-making errors: concept, types and ways of counteraction//<https://www.zakia.ru>...(date of access: 2.03. 2024)
- Samusevich Aleksey Gennadyevich. Legislative error as a basis for bringing to legal responsibility// Legal technique. 2015. №9. P.677-678.
- Syrykh Vladimir Mikhailovich. Logical foundations of the general theory of law in 2 volumes. Moscow: Yustitsinform, 2004. Vol. 2. P. 205/
- Voplenko Nikolay Nikolaevich. Concept and signs of legal error// Bulletin of the Volgograd State University. Jurisprudence. 2010. No. 1 (2). P. 16-18, 20-21.