

УДК 342

DOI: 10.32342/2709-6408-2024-1-8-3

ALONA BILA,

Lecturer of the Department of Law, Alfred Nobel University (Dnipro, Ukraine)

ORCID: 0000-0002-8271-8539

JUDICIAL EXPERTISE IN THE CONTEXT OF THE PROTECTION OF CONSTITUTIONAL RIGHTS AND FREEDOMS: LINGUISTIC EXPERTISE OF SPEECH AS A MEANS OF EVIDENCE IN COURT CASES IN UKRAINE

Стаття присвячена дослідженню лінгвістичної експертизи мовлення як засобу доказування у судових справах в Україні в контексті захисту конституційних прав і свобод. Предметом правового регулювання є суспільні відносини, які, регулюючись правовими нормами, набувають форми правовідносин. Судову експертизу можна визначити через систему правових (процесуальних) відносин, які складаються в процесі призначення, проведення та оцінки результатів експертизи (висновку експерта). Норми, які передбачають вирішення спорів, зокрема поновлення порушеного права, не можуть суперечити принципу рівності всіх перед законом і судом і у зв'язку з цим обмежувати право на судовий захист. Справедливість за своєю суттю визнається такою лише за умови, що вона відповідає вимогам справедливості та забезпечує ефективне поновлення прав. А саме висновок експерта є доказом у судовій справі.

Судова експертиза в цивільному процесі - це спеціальне дослідження, яке проводиться досвідченою особою за визначенням суду (судді) за наявності відповідних підстав з метою отримання судових доказів у формі висновку експерта. До окремих видів лінгвістичних досліджень належать лінгвістичні дослідження: встановлення правопису імен, по батькові, прізвищ; з'ясування тотожності імен (по батькові, прізвищ), написаних по-різному в документах; встановлення етимології (походження) імені (прізвища); написання власних географічних назв (населених пунктів, річок, гір, вулиць); з'ясування тотожності топонімів, записаних по-різному в документах; встановлення етимології топонімів; нормативне утворення оттопонімічних прикметників; встановлення етимології слів української мови та іншомовних запозичень; встановлення значень коренів слів і походження слів, словосполучень тощо; тлумачення часто вживаних і конотативних (додаткових) значень слів і виразів, тлумачення текстів документів для їх розуміння, тлумачення значень словосполучень, фразеологізмів, словесних елементів товарних знаків, рекламних текстів, тлумачення змістовної спрямованості окрему частину тексту. Водночас правильне застосування експертизи відкриває широкі можливості для вирішення цілого комплексу питань, пов'язаних з розглядом конкретних справ і виконанням завдань, які стоять перед правосуддям у цивільних справах.

Ключові слова: судова експертиза, захист конституційних прав і свобод, суб'єкти судово-експертної діяльності, лінгвістична експертиза мовлення, висновок експерта, докази.

Problem statement. The issue of human rights, the possibility of their implementation, and their protection have remained one of the most pressing issues throughout the existence of mankind. Affirmation, provision, and implementation of human rights are important indicators that indicate the democratic and social nature of the state, as well as the fact that such a state is legal.

State of research. At the current stage of the development of legal science, more and more attention of scientists is paid to the perfect study of legal expertise in the prism of protection of the rights and freedoms of a person and a citizen in the midst of significant development of scientific and technical progress and with the constant development of innovations.

The purpose of the article is to consider in detail the forensic examination in the context of the protection of constitutional rights and freedoms, as well as to analyze the linguistic examination of speech as a means of proof in court cases in Ukraine.

Presenting main material. At the same time, guarantees of observance of human rights and their protection are enshrined in both national and international normative acts. Thus, according to Part 5 of Article 55 of the Constitution of Ukraine (hereinafter the Constitution) as the Basic Law of our state, everyone is guaranteed the protection of their rights, freedoms, and interests from violations and illegal encroachments by any means not prohibited by law [1]. This approach corresponds to manifestations of the rule of law, which is not limited to legislation but also includes other social regulators such as moral norms, traditions, customs, etc.

The right of citizens to judicial protection is enshrined in Article 10 of the Universal Declaration of Human Rights, according to which it is reflected in the first part of Article 55 of the Constitution of Ukraine [1; 2]. Everyone is guaranteed the right to appeal court decisions, actions or inaction of state authorities, local self-government bodies, officials, and officials. According to Article 124 of the Constitution of Ukraine, justice in Ukraine is administered exclusively by courts. Delegation of court functions and the appropriation of these functions by other bodies or officials are not allowed.

After using all national means of legal protection, everyone can apply for the protection of their rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organizations of which Ukraine is a member or participant.

The judicial mechanism for the protection of the rights and freedoms of a person and a citizen is of considerable importance.

Judicial protection of the rights and freedoms of a person and a citizen must be considered a type of state protection of the rights and freedoms of a person and a citizen. And it is the state that undertakes such an obligation in accordance with the second part of Article 55 of the Constitution of Ukraine [1].

The Constitution of Ukraine guarantees everyone judicial protection of their rights within the framework of the constitutional, civil, economic, administrative, and criminal justice system of Ukraine. In order to apply to the court, it is necessary to file a claim or other statement provided for by the current procedural legislation, provide the court with relevant evidence, and pay a court fee. The claim must meet the requirements established by the procedural legislation. A person can prepare documents for a court appeal on his own or ask for legal assistance, including free of charge.

In addition, the norms that provide for the resolution of disputes, in particular the restoration of the violated right, cannot contradict the principle of equality of all before the law and the court and, in this connection, limit the right to judicial protection. Justice in its essence is recognized as such only on the condition that it meets the requirements of justice and ensures effective restoration of rights.

Therefore, the court is a priority, but far from the only, body for the protection of human and citizen rights and freedoms, which are directly addressed in the Constitution [1].

According to Article 92 of the Constitution of Ukraine, the principles of forensic expertise are determined exclusively by the laws of Ukraine [1].

The term "forensic expertise" means that it does not look like any other expertises and is used only in court proceedings. In other words, it is one of the types of research that has special features

described in the procedural law. Thus, a characteristic feature of forensic expertise is its procedural form. In the scientific literature, one can find several approaches to defining the concept of forensic expertise. Scientists define this as a study conducted by experts based on special knowledge; a special procedural action; or an institution of evidentiary law.

There is no contradiction between these approaches, since the differences in wording are caused by the emphasis on certain aspects of the same phenomenon, factors that are equally important and necessary for understanding the essence of forensic expertise. It is possible to identify the peculiarities of the institute of forensic expertise by defining the subject of regulation.

The subject of legal regulation is social relations, which, being regulated by legal norms, take the form of legal relations. Thus, forensic expertise can be defined through the system of legal (procedural) relations that are formed in the process of appointment, conduct, and evaluation of the results of the expertise (the expert's opinion). Namely, the expert's opinion is evidence in a court case.

Legal facts, namely, procedural actions, are the basis for the emergence of legal relations regarding expertise.

The main one is the court's decision on the appointment of a forensic examiner. Outside of the process, it is impossible to obtain an expert's opinion as court evidence in the case.

Moreover, even within the framework of the process, the violation of procedural norms during the appointment, research, and judicial evaluation of the conclusion disavows the probative force of the latter.

Therefore, the expert's opinion as independent judicial evidence is the result of only forensic expertise, appointed and conducted in accordance with the strict rules of civil procedural legislation.

At the same time, the definition of forensic expertise only as a legal institution or a complex of procedural actions does not fully reveal the essence of this phenomenon.

In accordance with Article 1 of the Law of Ukraine "On Forensic Expertise", it is determined that forensic expertise is a study based on special knowledge in the fields of science, technology, art, craft, etc. of objects, phenomena, and processes with the aim of providing a conclusion on issues that are or will be subject to legal proceedings [3].

Each forensic expertise is conducted by an expert using special knowledge by a person who performs the functions of an expert (Article 10 of the Law of Ukraine "On Forensic Expertise ") [3].

The expert applies his professional knowledge and skills related to the relevant field of human activity (science, art, technology, or craft) to solve the tasks. In this expertise, such knowledge is applied only in the first part of the study. The research ensures obtaining such factual data that were not known before and that cannot be established by any other method or other procedural costs. In other words, the expertise is aimed at filling in factual data that can confirm or deny facts of legal significance and giving them a competent (professional) assessment. Establishing the presence or suspicion of the facts itself is within the competence of the court.

Forensic expertise includes the following mandatory components:

- targeted: obtaining new data in the case in the form of an expert's opinion, which is independent court evidence;
- special: the need to apply special knowledge in the form of research;
- legal: availability of a civil procedural form (compliance with the procedure).

So, forensic expertise in civil proceedings is a special study conducted by an experienced person as determined by the court (judge) in the presence of appropriate grounds (special: the need to research factual data through the application of special knowledge and procedural: compliance with the procedural form) in order to obtain judicial evidence in the form of an expert opinion. At the same time, the correct use of expertise opens up great opportunities for solving a whole range of issues related to the consideration of specific cases and the implementation of tasks facing justice in civil cases.

Let's consider the main classifications of expertise, taking into account their significance for the theory of civil procedural law and judicial practice. Depending on whose initiative the expertise is conducted, what is its procedure, and what is its purpose, the following are distinguished: forensic

expertise; non-judicial (departmental) expertise at the request of a natural person. As noted, forensic expertise in civil proceedings is only appointed by the court (judge) and is conducted in accordance with the procedure established by the current procedural law.

According to Article 69 of the Criminal Procedure Code of Ukraine, Article 53 of the Civil Procedure Code of Ukraine, Article 66 of the Code of Administrative Procedure of Ukraine, and Article 41 of the Economic Procedure Code of Ukraine, a person who meets the requirements established by the Law of Ukraine "On Forensic Expertise" can be engaged as an expert.

Based on the provisions of Articles 242, 243, and 244 of the Criminal Procedure Code of Ukraine, Article 144 of the Civil Procedure Code of Ukraine, Article 81 of the Code of Administrative Procedure of Ukraine, and Article 41 of the Commercial Procedure Code of Ukraine, the expertise may be entrusted to a relevant expert institution or a specific expert(s).

Thus, the list of subjects of forensic expert activity is determined by Article 7 of the Law of Ukraine "On Forensic Expertise". In particular, forensic expert activity is carried out by state-specialized institutions and, in the cases and under the conditions specified by this Law, forensic experts who are not employees of the specified institutions [3; 5].

The second part of the specified article defines an exhaustive list of state-specialized institutions that are subordinate to the relevant central bodies of executive power.

State-sponsored specialized institutions include:

- research institutes of forensic expertise of the Ministry of Justice of Ukraine;
- scientific research institutions of forensic expertises, forensic medical, and forensic psychiatric institutions of the Ministry of Health of Ukraine;
- expert services of the Ministry of Internal Affairs of Ukraine, the Ministry of Defense of Ukraine, the Security Service of Ukraine, and the State Border Service of Ukraine [3; 5].

State-specialized institutions operate in accordance with their statutes and/or regulations, one of the main tasks of which is to conduct forensic expertise for law enforcement agencies and courts.

Currently, the following types of expertises are conducted by the expert institutions of the Ministry of Justice: forensic: handwriting; linguistic expertise of speech; technical expertise of documents; expertise of weapons and traces and circumstances of their use; traceological (except for studies of traces of damage to clothing associated with the simultaneous infliction of physical injuries, which are carried out in the bureau of forensic medical expertise); photo technical, portrait; expertise of holograms; video and sound recording; explosive; materials, substances and products (paint materials and coatings; polymeric materials; fibrous materials; oil products and fuel and lubricants; glass, ceramics; narcotic drugs, psychotropic substances, their analogues and precursors; alcohol-containing mixtures; soils; metals and alloys; presence of harmful substances in the environment; substances of chemical production and special chemicals; food products; potent and poisonous substances); biological; environmental, engineering and transport (automotive, transport and route, railway and transport); road engineering; construction and technical; assessment and construction; land engineering; valuation and land; land management expertise; fire engineering; life safety; mining; engineering and environmental; electrical engineering; computer and technical; telecommunication; economic; military; commodity science: machinery, equipment, raw materials and consumer goods; automotive industry; transport and commodity science; military property, equipment and weapons; art history; psychological and others, numbering more than 80 expert specialties.

The list of expert specialties for which forensic expert activity is carried out by specialists who are not employees of state-specialized institutions is defined in Appendix 7 to the Regulation on Expert Qualification Commissions and Attestation of Forensic Experts, approved by the order of the Ministry of Justice of Ukraine dated March 3, 2015, No. 301/5.

Linguistic expertise of written speech is one of the most complex and responsible studies, and at the same time it is one of the most demanded.

Linguistic expertise consists in the study by experts of texts of a different nature and the author of the text in order to resolve questions about the presence in them of statements that discredit honor and dignity, business reputation, having signs of slander, threats, extremism, attitudes towards

religion, etc.

Depending on the tasks set, linguistic expertise can be divided into:

- 1) semantic-textual, the essence of which is the interpretation of the objective content of the text (which can be useful in cases of protecting dignity, honor, and business reputation; libel; extremism; identifying signs of a threat; propaganda; identifying illegal borrowing of text materials; eliminating discrepancies (mistakes) when writing surnames, names, and patronymics in various kinds of official documents, etc.).

Linguistic studies belong to certain types of linguistic research: establishing the spelling of names, patronymics, and surnames; clarification of the identity of names (patronymics, surnames) written differently in documents; establishing the etymology (origin) of the name (surname); spelling of own geographical names (settlements, rivers, mountains, streets); finding out the identity of toponyms written differently in documents; establishing the etymology of toponyms; normative formation of toponymic adjectives; establishing the etymology of the words of the Ukrainian language and foreign borrowings; establishing the meanings of the roots of words and the origin of words, phrases, etc.; interpretation of frequently used and connotative (additional) meanings of words and expressions, interpretation of texts of documents for their understanding, interpretation of the meanings of phrases, phraseological units, verbal elements of trademarks, advertising texts, and interpretation of the content direction of a particular part of the text.

The issue of establishing the identity of first or last names arises when the translation of the first or last name in the passport does not match the birth certificate. This was due to the change in passports in connection with Ukraine's independence. As a result, there are cases when errors are detected in the spelling of names, surnames, or patronymics in title documents, powers of attorney, etc. Such errors are obstacles in the execution of documents by notaries, for example, when registering an inheritance or drawing up contracts of sale.

- 2) author studies, the main task of which is to establish the author of the text or the features of the socio-demographic portrait of the author of the text, as well as the state of the author at the time of the creation of the text, whether compiling the text independently or with the participation of other persons by dictation or rewriting, etc.

A word spoken or written under certain circumstances becomes an action that involves legal consequences [6, p. 8–15]. Each person's speech reflects the characteristics and individual characteristics of that person. The uniqueness, inimitability, and relative constancy of these signs, as well as the possibility of their detection and research, make it possible to solve a number of identification tasks. That is why the study of speech during criminal proceedings is of great practical importance.

Usually, the need for such research arises in connection with the need to search for a specific person or to reduce the number of persons among whom it is appropriate to search for a criminal or another person [7, p. 108–113].

Modern devices allow people to increasingly use technical devices to record various events in their lives. This also applies to criminals who, in the course of their activities, use them to maintain contacts and coordinate joint actions aimed at achieving illegal goals, namely, committing a crime or offense. In turn, these devices become almost the most important evidence, thanks to the ability to store and reproduce recorded information, and therefore there is a growing need for the application of the special knowledge of an expert in this field, namely, in conducting a linguistic expertise of oral speech.

It is quite expedient and effective to use the linguistic expertise of oral speech in the investigation of crimes against the foundations of national security, against public security, against public order, and against morality, with crimes against peace, human security, and international legal order, in order to establish the circumstances of the event, the circle of guilty persons, and their identification.

In accordance with the scientific and methodological recommendations on the preparation and appointment of forensic expertises and expert studies, approved by the Order of the Ministry of Justice

No. 53/5 dated October 8, 1998, the object of research in the linguistic expertise of oral speech is the product of a person's speech activity, reflected in oral form and recorded in a video or phonogram [8].

The main task of linguistic expertise is to diagnose the presence of the composition of a speech offense" in the text. This requires the judicial expert to confirm or deny the implementation of speech acts of "calling" or "propaganda" in this text, the content of which corresponds to the disposition of certain articles of the Criminal Code of Ukraine.

In cases of calls for war, overthrow of the constitutional system, violation of the territorial integrity of Ukraine, seizure of state power, changes in the borders of the territory or the state crown, the commission of terrorist acts, and other unlawful acts provided for by law, the expertise must establish, firstly, whether the speech act is implemented in the text call and, secondly, if so, what is its content; and in cases of propaganda for illegal actions, is the speech act of propaganda implemented in the text and what is its specific content [9, p. 412-475].

An example can be found in the conclusion of the forensic linguistic expertise, which was conducted by the Ukrainian Research Institute of Special Techniques and Forensic expertise of the Security Service of Ukraine No. 19/1 dated February 6, 2015, in criminal proceedings No. 1-кп/344/1/16 on the commission of treason, respectively, and in which, in the text of the transcript of the video clip "Internet action: "I refuse to mobilize", a certain person, fully aware of the criminal responsibility provided for by the current legislation of Ukraine, calls on Ukrainians both indirectly through a personal example and directly through a personal example, to refuse to mobilize,

Along with this, the text of the transcript of the video clip of the "Time will tell" program also contains his appeal to refuse mobilization, based on his full awareness of the criminal liability provided for by the current Ukrainian legislation for committing such actions. The mentioned calls to abandon mobilization are one of the forms of obstructing the legitimate activity of the Armed Forces of Ukraine and one of the forms of subversive activity against Ukraine to the detriment of its defense capability.

Although determining the presence of an appeal is one of the tasks of the linguistic expertise of oral speech, it is far from the only one, because in addition to semantic research, which can in itself represent a much wider range of research than the task of only identifying the presence of an appeal to criminal actions, identification and diagnostic studies of oral speech also take place within this type of expertise.

Thus, it can be summarized that the aspects of conducting a linguistic expertise by experts with special occupations are to apply already acquired linguistic knowledge and skills in the legal field and to use new available technologies to solve this issue. The argumentation of an expert linguist in many cases is a powerful means of strengthening the legal position of a legal practitioner, as it is evidence in the case.

Conclusions. An expert conducting linguistic research will try to offer new, non-standard approaches to solving a legal conflict in a case. At the same time, according to the current criminal procedural legislation of Ukraine, the expert's opinion as evidence has no advantages and is evaluated by the judge as a whole.

The role of this evidence in the search for justice in court proceedings is quite significant and often becomes the drop that plays a decisive role in the administration of justice. taking into account the specificity of this type of expertise and the resonance of the cases in which it is appropriate to apply the expertise described above. In turn, the progressiveness of the developed dissemination of information and the veracity of information on information channels will certainly contribute to the effectiveness of the investigation of the committed crime.

Bibliography

1. The Verkhovna Rada of Ukraine (1998), The Constitution of Ukraine. Available at: <https://zakon.rada.gov.ua/laws/show/4038-12#Text> (Accessed 10 June 2024).
2. United Nations Organization (1948), The Universal Declaration of Human Rights. Available at: https://zakon.rada.gov.ua/laws/show/995_015?lang=en#Text (Accessed 11 June 2024).
3. The Verkhovna Rada of Ukraine (1994), The Law of Ukraine. Available at:

<https://zakon.rada.gov.ua/laws/show/4038-12?lang=en#Text> (Accessed 10 June 2024).

4. *Subyekty sudovo-ekspertnoyi diyalnosti, yikh status ta povnovazhennya* [Subjects of forensic expert activities, their status and authorities]. The Ministry of Justice of Ukraine: web-site <https://minjust.gov.ua/m/subekti-sudovo-ekspertnoi-diyalnosti-ih-status-ta-povnovajennya-06082015> (Accessed 13 June 2024).

5. The Ministry of Justice of Ukraine (1998), The Instruction on appointment and conduct of forensic expertises and expert studies. Available at: <https://zakon.rada.gov.ua/laws/show/z0705-98#n180> (Accessed 10 June 2024).

6. Azhnyuk L.V. Linguistic expertise as a legal tool. *Magisterium*. Vol. 66: linguistic studies. Kyiv, 2017. P. 8-15.

7. Hora, I., Khodanovych, V. (2015), *Suchasni problemy ekspertnoho doslidzhennya movlennyevykh povidomlen, shcho mistyat informatsiyu ekstremist-skoho kharakteru* [Modern problems of expert research of speech messages containing information of an extremist nature. Historical and legal journal], no. 2 (6), pp. 108-113.

8. The Ministry of Justice of Ukraine (1998), Scientific and methodological recommendations on the preparation and appointment of forensic expertise and expert studies. Available at: <https://zakon.rada.gov.ua/laws/show/z0705-98#n180> (Accessed 17 June 2024)

9. Baranov A.N. (2010) Linguistic expertise of the text. Theoretical foundations and practice.

10. Unified State Register of Court Decisions of Ukraine: website. Available at: <https://reyestr.court.gov.ua/Review/57626315> (Accessed 10 June 2024).

JUDICIAL EXPERTISE IN THE CONTEXT OF THE PROTECTION OF CONSTITUTIONAL RIGHTS AND FREEDOMS: LINGUISTIC EXPERTISE OF SPEECH AS A MEANS OF EVIDENCE IN COURT CASES IN UKRAINE

Alona V. Bila, Lecturer, Department of Law, Alfred Nobel University, Forensic expert of the Dnipropetrovsk Research Institute of Forensic Expertise of the Ministry of Justice of Ukraine (Ukraine).

E-mail: bila.a@duan.edu.ua

DOI: 10.32342/2709-6408-2024-1-8-3

Key words: *forensic expertise, protection of constitutional rights and freedoms, subjects of forensic expert activity, linguistic expertise of speech, the expert's opinion, evidence.*

The subject of legal regulation is social relations, which, being regulated by legal norms, take the form of legal relations. Thus, forensic expertise can be defined through the system of legal (procedural) relations that are formed in the process of appointment, conduct, and evaluation of the results of the expertise (the expert's opinion). The norms that provide for the resolution of disputes, in particular the restoration of the violated right, cannot contradict the principle of equality of all before the law and the court and, in this connection, limit the right to judicial protection. Justice in its essence is recognized as such only on the condition that it meets the requirements of justice and ensures effective restoration of rights. Namely, the expert's opinion is evidence in a court case.

Forensic expertise in civil proceedings is a special study conducted by an experienced person as determined by the court (judge) in the presence of appropriate grounds in order to obtain judicial evidence in the form of an expert opinion. Linguistic studies belong to certain types of linguistic research: establishing the spelling of names, patronymics, and surnames; clarification of the identity of names (patronymics, surnames) written differently in documents; establishing the etymology (origin) of the name (surname); spelling of own geographical names (settlements, rivers, mountains, streets); finding out the identity of toponyms written differently in documents; establishing the etymology of toponyms; normative formation of ottoponymic adjectives; establishing the etymology of the words of the Ukrainian language and foreign borrowings; establishing the meanings of the roots of words and the origin of words, phrases, etc.; interpretation of frequently used and connotative

(additional) meanings of words and expressions, interpretation of texts of documents for their understanding, interpretation of the meanings of phrases, phraseological units, verbal elements of trademarks, advertising texts, and interpretation of the content direction of a particular part of the text. At the same time, the correct use of expertise opens up great opportunities for solving a whole range of issues related to the consideration of specific cases and the implementation of tasks facing justice in civil cases.

Одержано 03.06.2024.