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## THE TEMPORAL EFFECT OF LEGAL NORMS AND CASE LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

**Keywords:** temporal effect of legal norms, principles of intertemporality, principle of protection of legitimate expectations, principle of good legislation, case law of the Constitutional Court of the Republic of Latvia

### Summary

This article deals with the issue of the temporal effect of a legal norm from the perspective of the general principles of law – the principle of good legislation and the principle of the protection of legitimate expectations. The practical aspects of the identifying possible retroactive effect of a legal norm which as agreed by legal doctrine is one of the most difficult legal methods to be applied are analysed on the basis of the recent case law of the Constitutional Court of the Republic of Latvia. All three examples show that first of all the temporal effect of a contested legal norm has to be detected; and in a case if it is immediate or retroactive effect, the existence of legitimate expectations has to be identified; and following, if reasonable transitional period to a new regulation or appropriate compensation is provided by a legislator. Moreover, when determining the period for the transition to a new legal regulation or appropriate compensation, legislator according to the principle of good legislation has to ascertain fully and in a comprehensive manner the impact of a contested norm on the already existing – pending (or even more – on finished) legal relations.

### Introduction

The aim of this article is to analyse the issue of the temporal effect of a legal norm taking into account such general principles of law as the principle of good legislation and the principle of the protection of legitimate expectations. The identifying of possible retroactive effect of a legal norm is one of the most difficult legal methods to be applied in the process of the application of a legal norm. The application of this method is analysed on the basis of the recent case

law of the Constitutional Court of the Republic of Latvia. The conclusion could be made and the analyses of all three examples show that in order to check the constitutionality of a contested legal norm from the perspective of its temporal effect, first of all the temporal effect of a contested legal norm has to be detected; and in a case if it is immediate or retroactive effect, the existence of legitimate expectations is to be identified; and following, if reasonable transitional period to a new regulation or appropriate compensation is provided by a legislator. Moreover, when determining the period for the transition to a new legal regulation or appropriate compensation, the legislator according to the principle of good legislation has to ascertain fully and in a comprehensive manner the impact of a contested norm on the already existing – pending (or even more – on finished) legal relations. In the given cases, no retroactive effect of contested legal norms was detected, as none of them affected the finished legal relations, nor pending legal relations in a way that the temporal effect of a legal norm would have started before its formal validity. No acquired rights were taken away, either.

## 1. Theoretical background of intertemporality in law

According to the national doctrine of the (national) sources of law in Latvia<sup>1</sup>, there are three types of independent sources of law which have generally binding force, and where legal norms could be found, namely: general principles of law (as unwritten legal norms), normative legal acts and customary law (as unwritten legal norms in civil and commercial fields of law).

The temporal effect of the legal norms is to be established during the third stage of the process of application of legal norms – applying the legal methods of lower and higher critique – where the question whether the legal norm is in force (valid) or has lost its validity, and respectively if it is valid law is it applicable to the given factual composition as being legitimate (in compliance with a constitution) arises. At the same time, it has to be noted that validity of a legal norm is not the same as applicability of a legal norm which means that a formally valid legal norm may not be applicable and *vice versa* – an invalid legal norm may be applicable. This, in turn, is the question of the intertemporality of the written legal norms<sup>2</sup> which arises in the situations when the legislator has decided to adopt a new legal norm which regulates the same legal relations as the old legal norm.

The temporal effect of a legal norm (force of a legal norm) can be manifested in time as: 1) future force, 2) immediate force, and 3) retroactive force. In turn

<sup>1</sup> See more on this: Rezevska D. Nacionālās tiesību avotu doktrīnas attīstība gadsimta laikā [The Development of the National Doctrine of Sources of Law During the Last Century]. In: Tiesības un tiesību vide mainīgos apstākļos [Collection of research papers of the 79<sup>th</sup> International Scientific Conference of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 281.–288. lpp.

<sup>2</sup> On intertemporality issues of unwritten legal norms (rules of customary international law) see: Wheatley S. Revisiting the Doctrine of Intertemporal Law. *Oxford Journal of Legal Studies*, 2021, Vol. 41, No. 2, pp. 484–509.

legal facts can be: 1) past facts (*facta praetaria*) – facts started and ended before the new norm entered into force, 2) pending facts (*facta pendentia*) – facts started before the new norm entered into force and still continuing after its entry into force, and 3) further facts (*facta futura*) – facts started after the new norm had entered into force.<sup>3</sup> According to the principles of intertemporality, the legislator is always free to determine further temporal effect for the legal norm which then will be applicable to the future facts. It is when the legislator decides to determine the immediate or even – retroactive – temporal effect to the new legal norm the issue of the compliance of this decision with the principle of protection of legitimate expectations arises. This question is the question of constitutionality of a legal norm based on its temporal effect and as such could be brought before the constitutional court.

## 2. Intertemporality principles and protection of legitimate expectations

According to the general principles of intertemporality, retroactive temporal effect of the legal norm always is an exception either in public or private law, while immediate effect is rather an exception in private law. What does it imply from a perspective of the principles of good legislation and protection of the legitimate expectations? It means that the burden of arguments given and discussed by the legislator during the legislation process is directly connected with the decision to determine the immediate or retroactive temporal effect to the new legal norm.<sup>4</sup>

Indeed, intertemporal law involves two sets of rules: basic rules and constitutional rules. The basic rules are used to determine whether the legislator wanted the new legal norm to be applied retroactively while constitutional rules implicated by the intertemporal law set limitations on the power of the legislator to impose retroactive effect.<sup>5</sup>

Thus, the exceptional character of the retroactive effect of a new legal norm does not mean that legislator will never be able to set this effect for a legal norm, but it means that legislator is obliged according to the principle of good legislation to state reasonable and well-grounded arguments to justify such a decision from the perspective of the principle of protection of the legitimate expectations including as well as the reasonable transitional period and compensatory mechanism.

<sup>3</sup> See also on this: Kalniņš E. Tiesību normas spēkā esamība un intertemporālā piemērojamība [Validity and Intertemporal Application of Legal Norm]. *Likums un Tiesības*, 2000, Nr. 7(11), 214.–220. lpp.; Onževs M. Tiesību normu laika aspekti tiesiskā un demokrātiskā valstī [Temporal Aspects of Legal Norms in Rule of Law Based and Democratic State]. Rīga: Latvijas Vēstnesis, 2016, 38.–39. lpp.

<sup>4</sup> Regarding this, see also: Onževs M. Atpakaļejoša un tūlītēja spēka nošķiršana praksē [Separation of Retroactive and Immediate Force in Practice]. *Jurista Vārds*, 2021, Nr. 30.

<sup>5</sup> McCreary J. M. Retroactivity of Laws: An Illustration of Intertemporal Conflicts Law Issues Through the Revised Civil Code Articles on Disinheritance. *Louisiana Law Review*, 2002, Vol. 62, No. 4. Available: <https://digitalcommons.law.lsu.edu/lalrev/vol62/iss4/16> [viewed 07.11.2021.].

The same applies regarding the immediate temporal effect for the legal norm with only difference in the amount of necessary justification which largely is connected with the assessment of principle of proportionality. The ultimate issue though is the complexity of the identifying of retroactive effect of a legal norm which in legal doctrine is widely recognised as one of the most complex legal methods. Retroactive effect can be identified by: 1) the doctrine of the retroactive effect of legal consequences, 2) the doctrine of finished legal relations, and 3) the doctrine of acquired rights.<sup>6</sup> The next chapter will look into the practical aspects of the identifying possible retroactive effect of a legal norm in the recent case law of the Constitutional Court of the Republic of Latvia (henceforth – the Constitutional Court or the Court) analysing how the Court applied the abovementioned doctrines to detect the temporal effect of contested norms.

### **3. Intertemporality issues resolved in the recent case law of the Constitutional Court**

In a recent year, the Constitutional Court has faced the problem of the temporal effect of a contested legal norm in deciding on its constitutionality in several cases. This article will look into the application of the legal methods for detecting the possible retroactive effect of a legal norm in three of the Court's judgments.

**3.1.** The first example is the judgment of the Court of 5 March, 2021 in Case No. 2020-30-01<sup>7</sup> where the applicant contested the constitutionality of the legal norm included in the transitional provisions of the law on Compensation for Damage Caused in Criminal and Administrative Violations Proceedings. The norm stated that a person who was entitled to compensation for damage caused to him or her by an unlawful or unreasonable action of an institution, prosecutor's office or court before the entry into force of this Law and for which no legal proceedings are opened in the courts of general jurisdiction had the right to submit an application for compensation for damage within six months from the moment of occurrence of the legal basis for compensation for damage.

The applicant argued that according to the old norm he had the right to claim compensation for non-pecuniary damage within the 10-year limitation period, while now the term in his case was reduced to around the time frame of four months. The Court started its assessment by determining the type of the temporal effect of the contested norm and stated that it has an immediate temporal effect, and at the same time concluded that legislator has the right to adopt amendments in the laws that have immediate effect. Consequently, it is permissible to extend the adopted legal regulation also to such legal relations which were pending

<sup>6</sup> Onževs M. 2016, 147.–184. lpp.

<sup>7</sup> Judgement of the Constitutional Court of the Republic of Latvia of 5 March 2021 in Case No. 2020-30-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-30-01\\_spriedums.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-30-01_spriedums.pdf#search=) [viewed 15.11.2021].

(*facta pendentia*). However, the Court stressed that when adopting a legal norm, the legislator must always ascertain its impact on the existing legal relations. It is essential that in such a case the legislator provides for a lenient transition period or appropriate compensation – these are preconditions set for a legal norm with immediate temporal effect (but even more – for a legal norm with a retroactive effect) which arise from the principle of the protection of legitimate expectations.

The Court further concluded that the applicant had legitimate expectations according to the old norm and that it does not follow from the legislative materials and the content of the contested norm that the legislator would have assessed, in relation to non-pecuniary damage, how long a reasonable transition period should be for a person to reschedule his actions from a 10-year period to a much shorter period. Thus, the Court concluded that the legislator, when determining the period for the transition to the new legal regulation, has not comprehensively and fully ascertained the impact of the contested norm on the already existing – pending legal relations. Thus, this regulation does not comply with the principle of protection of legitimate expectations and does not ensure the protection of a person's right to adequate compensation for non-pecuniary damage.

The Court further stated that the situation when a person's legal position is deteriorated without appropriate justification or assessment does not ensure the principle of protection of legitimate expectations and does not ensure a reasonable transition to the new legal regulation. Such a situation is not justified by the public interest in ensuring legal stability.

From the perspective of the application of legal method of identifying whether the retroactive effect of a contested legal norm can be detected, the Court has not found in this situation that contested legal norm would either had retroactive effect of legal consequences, nor that it would have intervened the finished legal relations, nor has taken away any acquired rights. Namely, the period of formal validity of the contested norm coincides with the period of its temporal effect (force over time).

**3.2.** The second example is the Case No. 2020-49-01, where the Court adopted the judgment on 27 May 2021.<sup>8</sup> The applicant has turned to the Constitutional Court because he is of the opinion that the procedure, established by the contested norms of the Business Support Control Law, which denies his right as a creditor of subordinated liabilities to receive the principal amount of the loan, restricts his right to property. The contested norms are said to violate also the principle of legitimate expectations because they had been adopted after the credit agreement had been concluded, without establishing a lenient transition to the new regulation or compensation.

Assessing the applicant's legitimate expectations within the framework of the contested norms with the immediate temporal effect, the Constitutional Court

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<sup>8</sup> Judgement of the Constitutional Court of the Republic of Latvia of 27 May 2021 in Case No. 2020-49-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/09/2020\\_49\\_01\\_Spriedums.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/09/2020_49_01_Spriedums.pdf#search=) [viewed 15.11.2021.].

concluded that the applicant could not have legitimate, justified and reasonable expectations in the invariability of the legal regulation. The financial difficulties, potential insolvency and liquidation of JSC “Parex banka” in 2008 created an unprecedented situation in Latvia, which required the involvement of the state in rescuing this bank and providing aid. Consequently, changes in regulatory enactments were also required. In these circumstances, the applicant could not reasonably expect that the legal norms regarding the performance of the Term Deposit Agreement and control of support will not be changed, and that their amendments will not affect the legal relationship between JSC “Parex banka” (later JSC “Reverta”) and the applicant. The fact that for some time after the start of the aid to JSC “Parex banka”, there was no such national legal regulation that would restrict the use of state aid contrary to its objectives, does not mean that the applicant could reasonably have relied on these shortcomings. The Court also concluded that contested norms regarding the liquidation procedure had further effect in relation to the applicant. Consequently, at the time of the commencement of the liquidation of JSC “Reverta”, the applicant already knew what the consequences would be and he could count on these consequences.

This example of the application of the methods for the identifying of the retroactive effect of legal norms shows, that, first, regarding the Term Deposit Agreement the contested norms had an immediate effect – no retroactive effect was detected neither by retroactive effect of legal consequences, nor by intervention into the finished legal relations, nor by taking away any acquired rights. As it is concluded also in the legal doctrine although in civil law, by concluding a contract, the parties definitively and completely “acquire the right” to request an action from the other party, the rights acquired in constitutional law are only those which arise from an already performed or completed legal relationship.<sup>9</sup> Regarding the immediate effect of these contested norms the Court additionally explained that in this particular situation, when the aid was granted to a company in financial difficulties, it was a serious signal to its creditors, including the subordinated creditors, that the company was unable to meet its obligations. In those circumstances, the fact that no transitional period was laid down for the application of the contested norms is irrelevant as the legitimate expectations were not established. Secondly, regarding the contested norms on the procedure of the liquidation of the company, the Court detected the further effect as the legal norms were adopted and promulgated, and became valid before the liquidation procedure of the company was started.

**3.3.** The third example is the judgment of the Court in Case No. 2021-12-03 adopted on 3 December 2021.<sup>10</sup> The case was initiated on the basis of an application filed by the Administrative District Court. The applicant was hearing

<sup>9</sup> Onževs M. 2021.

<sup>10</sup> Judgement of the Constitutional Court of the Republic of Latvia of 3 December 2021 in Case No. 2021-12-03. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/04/2021-12-03\\_Spriedums.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/04/2021-12-03_Spriedums.pdf#search=) [viewed 15.11.2021].

an administrative case concerning cancellation of the administrative act by which the real estate tax to be paid by the claimant – a legal entity – was recalculated for the period from February 2020 to December 2020. The claimant received real estate tax benefits in 2018, as it was performing works to renovate and illuminate the façade of the building. On the basis of the previous regulation included in the binding regulations of the Riga City Council this relief was granted to the claimant for five years. On 30 January 2020, the contested provision came into effect, stipulating that the amount of the respective benefits may not exceed 10 000 euro per tax year. The applicant was of opinion that the contested provision of the binding regulations of the Riga City Council unjustifiably restricted the right to property for those individuals who had invested resources in restoration of buildings and, based on the previous regulation, developed legitimate expectations that they would be receiving the respective real estate tax benefits for five years.

The Court concluded that the rules governing tax relief are an expression of favouritism or support for certain individuals because of their situation or specific conduct. However, even when adopting legal norms that determine tax relief, the issuer of these norms must observe the general principles of law and other norms of the *Satversme* (Constitution of the Republic of Latvia).

On the basis of the contested norm, the real estate tax was recalculated in a manner unfavourable to the claimant from the moment the contested norm came into force. The Court detected the immediate effect of the contested norms, as the contested norm did not affect the already concluded relations, but had effect on the previously established – pending – legal relations. The Court also concluded that the protection of the legitimate expectations is in play as the legal framework for the real estate tax relief in question was fixed and in force for more than six years, and the persons had already benefited from the relief for several years. In addition, the relief was granted on the basis of certain criteria, namely the renovation and lighting of buildings and their façades, and was limited in time from the outset to five years.

In this judgment, the Court once again paid close attention to the legislative procedure where the issuer of the contested norm in the case where legitimate expectations are established and the contested norm has an immediate effect has to present reasonable and convincing arguments according to the principle of good legislation. Analysing the materials of adoption of the contested norm, the Constitutional Court concluded that it was not adopted with the aim to ensure the increase of tax relief applicable to other persons. Also, the Riga City Council did not find out what is the financial benefit created by the contested norm, which would allow to promote the welfare of the society. Finally, it was not considered which persons would be affected by such a provision and in what way. Thus, the Riga City Council did not fully ascertain the impact of the contested norm on the already existing legal relations. Consequently, the contested norm does not comply with the principle of protection of legitimate expectations.

## Conclusion

1. Legislator is always free to determine further temporal effect for the legal norm which then will be applicable to the future facts. It is when the legislator decides to determine the immediate or retroactive temporal effect to the new legal norm the issue of the compliance of this decision with the principle of protection of legitimate expectations arises. This question is the question of constitutionality of a legal norm based on its temporal effect and as such could be brought before the constitutional court.
2. The exceptional character of the retroactive or immediate effect of a new legal norm doesn't mean that legislator will never be able to set this effect for a legal norm, but it means that legislator, according to the principle of good legislation, is obliged to state reasonable and well-grounded arguments to justify such a decision from the perspective of the principle of protection of the legitimate expectations, also including the reasonable transitional period and compensatory mechanism.
3. Determining the constitutionality of a contested norm on a basis of its temporal effect, first of all, the temporal effect of the contested legal norm has to be detected; and in a case the temporal effect is of immediate or retroactive effect, the existence of the legitimate expectations is to be identified; then, if reasonable transitional period to a new regulation or appropriate compensation is provided by a legislator. Moreover, when determining the period for the transition to a new legal regulation or appropriate compensation, the legislator, according to the principle of good legislation, has to ascertain fully and in a comprehensive manner the impact of a contested norm on the already existing – pending (or even more – on finished) legal relations.
4. The Court had not detected the retroactive effect of contested legal norms in any of the cases mentioned, as none of them affected the finished legal relations, nor pending legal relations in a way that the temporal effect of a legal norm would have started before its formal validity. No acquired rights were taken away, either.

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