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Formulating provisions of an act on its entry into force in connection with the Act on COVID-19

Abstract

The principle of non-retroactivity is not recognised by doctrine or the Constitutional Tribunal as a mandatory directive. Such a situation occurred in the case of adopting amendments to the Act of 2 March 2020, referred to as "COVID-19". In these circumstances, a schedule of deviations from the principle of non-retroactivity was identified, and it therefore became necessary to assess the relevance of the retroactive implementation of the norms for each specific case governed by the Act under consideration. In these cases, the legislator was guided by the need to safeguard social and economic freedoms and interests.

Key words: principle of non-retroactivity, principles of legal drafting, Constitutional Tribunal, legislative process

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The principle of non-retroactivity is not recognised by doctrine or the Constitutional Tribunal as a mandatory directive[1]. As early as in its first judgement on the issue of the retroactivity of laws, the Constitutional Tribunal stated that "exceptionally, and for very important reasons", law may have retroactive effect[2]. Therefore, what are the reasons and circumstances for derogating from the principle of *lex retro non agit*? This question can be answered by stating that this departure from the principle of non-retroactivity was made in an exceptional situation, which was justified by specific circumstances[3].

This premise relates to the social impact of the legal norm, and is defined by a general clause. This was the case when the amendments to the Act of 2 March 2020 on the special arrangements for preventing, counteracting, and combating COVID-19, other infectious diseases, and the crisis situations caused by them, were adopted (hereinafter "COVID-19")[4]. In these circumstances, a schedule of deviations from the principle of non-retroactivity was identified, and it therefore became necessary to assess the relevance of the retroactive implementation of the norms for each specific case governed by the Act under consideration. It has been repeatedly stressed in the case law of the Constitutional Tribunal that it is not possible to designate a general rule to define situations of this kind. When addressing such an issue, reference is made to exceptional situations, in which, for objective reasons, there is a need to give priority to a specific protected value, or one based on the provisions of the Constitution. However, this principle is considered to be more important than the value protected by the prohibition of retroactivity, and its implementation is not possible without the retroactive effect of law. The principle of non-retroactivity should be as mandatory as possible, because any infringements, including those justified by circumstances, have a negative impact on citizens' confidence in the State and law. Any departure from the principle of non-retroactivity should, therefore, be applied only as a last resort.

The prohibition of *lex retro non agit* is mandatory in respect of the entry into force of legal provisions, but optional in respect of intertemporal legal

1 T. Zalasiński, *Zasady prawidłowej legislacji w poglądach Trybunału Konstytucyjnego*, Warszawa 2008, s. 71.

2 Wyrok TK z dnia 28 maja 1986 r., U 1/86 OTK 1986, nr 1, poz. 2.

3 K. Działocha, *Komentarz do art. 88*, [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, red. L. Garlicki, Warszawa 1999, s. 6.

4 Dz.U. 2020, poz. 374, z późn. zm.

measures[5]. Unfortunately, although such a conclusion is confirmed by Article 88 (1) of the Constitution, in the actual Polish practice of drafting final provisions, the entry into force of measures may be applied retroactively[6]. This practice is based on Article 5 of the Act on the Promulgation of Normative Acts and Other Legal Acts[7], and on § 51 (1) of the Regulation of the Prime Minister of 20 June 2002 on the Principles of Legal Drafting, which not only explicitly allow the possibility of applying such a provision, but also set out its model.

In accordance with the acts amending the COVID-19 Act, the articles on *vacatio legis* put into effect the clause prescribing that the provisions, firstly, enter into force ..., with effect from ..., and, secondly, that the provisions enter into force ..., except that Article ... with effect from ...

The Act under consideration has retroactive effect, and this is how the consequences of an Act of law take effect before its entry into force can be assessed according to the Act. If it is possible to give retroactive effect to a legislative act containing mandatory provisions, this is all the more so in the case of the COVID-19 Act, which contains such provisions due to the existing epidemic situation. Since the aforementioned Article 5 of the Act on the Promulgation of Normative Acts and Other Legal Acts, allows a normative act to be given retroactive effect, but only if the principles of the democratic rule of law do not prevent this, it is the duty of the authorities, when applying this legal concept, to provide factual and legal justification for, despite its retroactive effect, the normative Act's implementing the principles of the democratic rule of law[8]. Retroactive legal effect should only involve the granting of rights[9]. However, the possibility of applying this norm to the imposition of obligations should be excluded in the strongest possible terms[10]. Even in the case of giving retroactive effect to more favourable provisions, due to the exceptional nature of such a procedure, the interests of all legal entities, and, therefore, the persons to whom the norms are addressed, should be borne in mind. It is said that the principle of retroactivity is also opposite in this case to the ethic of fair legislation and the rule of law. Citizens should not be surprised by the public authorities' imposing, through regulations, any economic burdens and

5 S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej z dnia 20 czerwca 2002 r.*, Warszawa 2012, s. 133.
6 G. Wierczyński, *Urzędowe ogłoszenie aktu normatywnego*, Warszawa 2009, s. 115.
7 Tekst jednolity Dz.U. 2019, poz. 1461.
8 Wyrok WSA z dnia 19 kwietnia 2012 r., I SA/Ke 109/12, LEX nr 1143501.
9 B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, s. 443.
10 Wyrok NSA z dnia 19 listopada 2010 r., II FSK 1272/09, LEX nr 745594.

obligations on them with retroactive effect. The situation under consideration seems to be different from what has been perceived so far. Everything has become a matter of helping the persons to whom the norms are addressed.

The situation which arose triggered the right to shorten the 14-day *vacatio legis*, and apply retroactive effect. The Act's taking effect amounts to its entry into force. The Act entered into force, became effective, and was also effective before its entry into force[11]. The scope of the terms "entry into force" and "effective" is the same, and they are used to indicate the point on the timeline from which the legislative qualification of social relations takes place through the prism of the legislation adopted. The giving of retroactive effect by an act comes down to cases in which the act contains regulations more favourable to those to whom it is addressed. By giving retroactive effect to an act, it is necessary to justify the case, and to indicate an important interest of the State, as well as to clarify the absence of any conflict with the principles of the democratic rule of law. It is more difficult to accept the idea that, in the practice of implementing an act, it is possible to indicate retroactive effect in the Act if the principles of the democratic rule of law do not prevent this. Article 5 of the Act under consideration undermines and calls into question the purpose of the entire Act, the essence of promulgating normative acts, and the ancient Roman democratic principle *lex retro non agit*. The provisions of the COVID-19 Act devalue the principles of acts in general, because they contradict the essence of the democratic rule of law.

With regard to important interests, it should be stressed that it is not about any other interests than the important interests of the State. Disregarding *vacatio legis*, and giving retroactive effect to law, cannot be justified by the interests of those to whom the act is addressed, or by any practical interests. However, this was not the case in this situation, resulting as it did from the circumstances of the pandemic and the lockdown of society in general. The application of such a legal mechanism required evidence of the important interests of those to whom the Act was addressed, supporting the need for such regulation.

It is, of course, worth emphasising that giving retroactive effect to provisions must be an absolute exception[12]. Indeed, the principle of citizens' confidence in the State requires that measures which govern citizens' rights and obligations,

11 W. Lang, *Obowiązywanie prawa*, Warszawa 1962, s. 222.

12 G. Wierczyński, *Komentarz do § 51*, [w:] *Zasady techniki prawodawczej. Komentarz do rozporządzenia*, red. J. Warylewski, Warszawa 2003, s. 244.

and worsen their legal situation, should not be given retroactive effect. If the legislator orders the qualification, according to the new norms, of any events occurring before these new norms enter into force, then these norms are laid down retroactively (and are given retroactive effect). A new norm does not have retroactive effect if it is used to influence events which occur after its entry into force. When determining the legal consequences of the events which had occurred under the old norms, but which emerged at the time when the new norm entered into force, it is necessary, in accordance with the *lex retro non agit* principle, to predict those consequences on the basis of the old norms, but only until the new norms enter into force. The consequences of such actions by the legislator are not relevant for defining retroactivity[13]. They might, however, be relevant for assessing the admissibility of deviations from the principle of non-retroactivity, as it is easier to constitutionally replace retroactivity which is favourable to the citizen. Even in this case, however, the fact of acting in favour cannot be the only basis for allowing a deviation from the principle of non-retroactivity.

Therefore, the present case concerns retroactivity. The question we are dealing with, in this context, is about an order to apply the amended legal norms to the so-called modified situation, which was fully established under the earlier legislation. This case involves an order to apply the new law to a legal situation in which, although it was established under the earlier legislation, at that time not all the relevant elements of this relationship had been implemented yet. Such a position taken by the legislator might, on the one hand, mean excessive freedom of action for the legislature in shaping and amending the law, while, on the other hand, it results from adapting changes in the law to the evolving social situation.

Thus, the principle of non-retroactivity is an important element in the principle of citizens' confidence in the State, and "an Act shall have retroactive effect when the beginning of its application, in terms of time, is fixed at a point in time earlier than the Act became applicable. (It has not only been enacted, but has also been correctly published in an official publication)"[14].

The consequences of the legal events occurring under the legislation in question must also be assessed according to such legislation, but when these consequences continue, they must be assessed according to the rules

13 Wyrok TK z dnia 31 marca 1998 r., K 24/97, OTK ZU 1998, nr 2, poz. 13.

14 S. Wronkowska, *Publikacja aktów normatywnych. Przyczynek do dyskusji o państwie prawnym*, [w:] *Prawo w zmieniającym się społeczeństwie*, red. G. Skąpska, Kraków 1992, s. 337.

established by the new act for this new period of time. Therefore, while the events initiated under the legislation in question are continuous and permanent in nature, the new provisions of the COVID-19 Act under consideration impinge on these events. This was due to the specific circumstances which were considered to constitute an emergency, for objective reasons, and there was a need to give priority to a certain protected value, or one based on other provisions. The retroactive effect of the norms established by the COVID-19 Act was given when the legislator ordered their qualification according to the norms of new events which had occurred before those norms entered into force. This leads to the conclusion that this solution is legally unacceptable. The legislator has neither the power nor the right to require retroactively the observance and application of the legal norms it has established. The above conclusion, however, does not mean that in this Act it would not be possible to order the application of the norms it lays down to assess the events which occurred in the past. It only means that the entry into force of such provisions could be used to resolve these issues[15].

Thus, the legislator allows an act to be given retroactive effect, and this admissibility is based on the assumption that this is a matter of periods of the regulation of social relations in a crisis. It is, therefore, a matter of a provision with a *pro futuro* effect, requiring certain norms to be applied to assess events which occurred in the past, or to assess the effects of such events. It should be stressed that an unjustified violation of the prohibition of retroactivity in an act means that a given provision conflicts with Article 2 of the Constitution, because it clearly violates the principle, belonging to the standard of the rule of law, which prohibits giving retroactive effect to law, and such a provision is also inconsistent with Article 88 (1) of the Constitution, as well as with Article 42 (1) of the Constitution.

The analysis of legislative practice indicates that when this Act was passed, the dynamics of the process of the changes made in connection with the epidemic was of great importance, both for the understanding of the principle of non-retroactivity and for determining the admissibility of such regulations. It was, therefore, difficult to avoid situations in which retroactive legislation became necessary, and this was thus considered to be the best solution to the problem, and became constitutionally legitimate. In these cases, the legislator was guided by the need to safeguard social and economic freedoms

15 Wyrok TK z dnia 10 października 2001 r., K 28/01, OTK ZU 2001, nr 7, poz. 212.

and interests. This does not mean that the process is irreversible. This was due to the destabilisation of the legal system; and the interpretation of the admissibility of deviations from the principle of non-retroactivity could, and even should, be liberalised in this situation.

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Formułowanie przepisów ustawy o jej wejściu w życie w związku z ustawą COVID-19

Streszczenie

Zasada niedziałania prawa wstecz nie jest przez doktrynę i Trybunał Konstytucyjny uznawana za dyrektywę obowiązującą bezwzględnie. Taka sytuacja nastąpiła w przypadku uchwalenia zmian do ustawy z dnia 2 marca 2020 roku zwanej „COVID-19". W tych okolicznościach wskazano katalog odstępstw od zasady niedziałania prawa wstecz, konieczne stało się zatem dokonanie oceny zasadności wprowadzenia norm w życie z mocą wsteczną w odniesieniu do każdego konkretnego przypadku regulowanego w omawianej ustawie. Ustawodawca kierował się w tych przypadkach potrzebą zabezpieczenia swobód i interesów społecznych, ekonomicznych i gospodarczych.

Słowa kluczowe: zasada niedziałania prawa wstecz, zasady techniki prawodawczej, Trybunał Konstytucyjny, proces legislacyjny