Temporary Legislation: Theoretical and Practical Aspects

1. Introduction

Present dynamic development of the social relations (on both global and national levels) requires revision of the temporal criteria for legal issues by theorists of law and lawyers (practitioners). One of the legal categories which requires in-depth research is the action of legal acts in time. Basically law in general and the legal acts in particular are closely connected in terms of time: change of social relations and their development demand changes in legal regulation; synchronously law or any other regulative act also exists in time objectively (in terms of time it is developed, considered by the legislative organ and adopted, entering into action and subsequently loses its force and action proceeding).

Jean-Louis Bergel, the French theorist of law, states that “despite its unresolved nature, the problem of application of law in time is a classical issue.” It is classical because the reflection on the connection between the law and its temporal features dates back to the times of Aristotle.

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3 Here and subsequently in this article the term “the law” is used in a broad sense, as a regulatory act.
who advocated reasonable approach for amending the laws\(^4\) and to Cicero who first mentioned the principle of retroactivity in law\(^5\). At the same time, this problem remains unresolved mainly because for almost two millennia, since the times Cicero and later late Roman Empire, research on the temporal action of law (the action of law in time) in jurisprudence has largely been limited to applications of the the principle *lex ad praeteriam non valet*. Different scholars identified this research phenomena in the states of various forms of government and legal systems\(^6\).

The contemporary world increasingly requires non-standard approaches, including lawmaking. Practically, lawmakers either too hasten to implement new regulation or change current regulations without an appropriate introductory or transitional period or, on the contrary, do not have enough time to catch up with new political, legal, social and technical (sometimes – innovative) transformations to regulate legal relations promptly.

Current practical challenges which face lawmaking practice allow identifying a number of directions in new research which can be considered as a challenge to traditional approaches. In the scope of the temporal characteristics of law the following aspects are to be indicated:

1) application of the principle *lex ad praeteriam non valet* in the context of balance between urgent and prospective action of law in time: research aimed to search for an equilibrium between legislator’s intention to change the legal regulation as soon as possible

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and a need for the legal certainty within stability and amending of regulation⁷;

2) differentiation between the institutes of law entering into force and its coming into effect: research addressing scholarly and practical study of distinction of the moments of entering the law into force and the introduction of new regulations, as the necessity of this distinction is needed to implement some preparatory organizational and legal actions, required by public authorities for the appropriate implementation of new regulation⁸;

3) application of the temporal regulation (including experimental): research aimed at the study of basis and limits of temporal legislation (including experimental) to resolve practical issues which require urgent legislative regulation.

Resolution of the political and legal conflicts, implementation of the experimental economic assistance for certain branch or region, implementation of a new regulation for innovative production or implementing of the new instruments of regulation for the current one – this is not a full list of cases when the temporary legal regulation enable resolving a problem more or less promptly.

Analogically as the start of innovative products usually requires testing and correction at the initial stage of launch, the introduction of a test period for innovative legal regulation can diminish political, economic and social risks while implementing such regulation. The very factor of temporary (experimental) regulation, which is implementing, signals to society, on the one hand, the ability of government to address urgent challenges

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and, on the other hand, it sends a signal that that the temporality of the introduced regulation is a kind of the policy test period chosen for a certain time. Thus temporary regulation allows shifting the “frozen” cases when timely legal regulation is restricted due to excessive hesitation of the legislator searching for the “ideal” option and in situations of unpreparedness to implement experimental or innovative approaches in regulation.

This article aims to analyze the significance of temporary legislation (including experimental) for regulation of social relations and to discuss the practical issues of its implementation.

2. Central Aspects of Scholarly Research on Temporary Legislation

Studying the question of temporary legislation (in particular experimental), John E. Finn remarks that despite novelty of this topic, the examples of such legislation can be found in the ancient Greece, in the colonies of Great Britain of the 17th century (in American among others)\(^9\). In the present times the topic of temporary legislation became the object of research for law scholars quite recently\(^10\).

According to Frank Fagan, deficiency of the research interest to the topic of temporary (experimental) legislation for a long time is caused by critical doubts on this institution\(^11\). In general there is distrust to such a tool as temporary (experimental) legislation among the researchers. It is based on concerns that such practice could open a way for unpredictable rules, unprincipled legislative compromise and threaten fundamental principle of the rule of law\(^12\).

Moreover, temporary legislation (noticeably experimental) challenges such stable principle as long-term certainty of law concept\(^13\). While usu-

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\(^13\) According to the concept of longevity of law developed by the Romans, law can-
ally laws must have long-term action, to be predictable and non-discriminatory, temporary legislation has limited validity (albeit predetermined) and is often based on exceptions to the general legislation.

According to Antonis Chanos, temporary (experimental) legislation is interpreted as an internal contradiction from the point of view of traditional legal approach\(^\text{14}\). There are several perspectives from which this statements seems to be based on.

Firstly, as it was mentioned above there is a contradiction in the very fact of temporality (literally – fixed in time) of legal regulation because usually the legislation is perceived as a source of stability and consistency. According to general approaches, achieving this stability requires ensuring the succession of laws and limiting number of amendments to them. It means that legislators should act as if they already know all possible circumstances of implementation of the law at the time of its preparation. Jointly to the hypotheses that citizens must clearly understand what the law demands, which opportunities it grants to fulfill their rights\(^\text{15}\), such a classical approach provides a sense of legal certainty. However, in terms of the consistency of the legislation this argument “crashes” into reality of numerous changes in legal regulation which exists today. However, concerns regarding heredity activates a significant issue: to be in line with the rule of law the legislator, introducing temporary legislation (in particular experimental), must immediately predict and design the transition from such regulation after the end of its temporary effect.

Secondly, the area of possible implication of temporary legislation is quite broad and quite often introduced on the the by-laws level (secondary legislation). Generally, such temporary secondary regulation embraces limited scope of actors and reveals in diversion from a number of legislative provisions or standards to test new legal approaches and regulate new products or services. As a result, on the one hand, the legislators have possibility to obtain more information about consequences


of certain legal norms implementation with minimal influence on a society\textsuperscript{16}, on the other hand, the legislators can be criticized for non-compliance with the principles of formal legitimacy and non-discrimination.

Before going in this article to the analysis of the potential of the temporary regulation, it should be indicated that the very notions of “temporary legislation” and “experimental legislation” are often used as synonyms. Typically the term “experimental legislation” has been used recently more and more frequently to avoid certain illusory nature of regulation in case of its temporary essence. However, according to character of such institution application, it would be more correct to divide the temporary legislation into experimental and transitional – examples of each type are demonstrated later in this article.

In the most general and broad terms temporary legislation is regarded as laws (or provisions of legislation in laws) which are active during definite time after which they shall expire if not extended. Temporary legislation usually contains an indication of the expiration date or the term of effect that limits their period of validity\textsuperscript{17}. Typically such provisions declare that the law or part of it expires on a specific day or after a certain period\textsuperscript{18}. However, there are alternative ways to give temporary action to laws – to limit their application to certain events, actions or circumstances that occur during a fixed period of time. For instance, the law may presuppose that it will be applied only until the next parliamentary elections, during certain term of the legislative body or until introduction of a specific law that enables permanent regulation.

Indication of the expiration date (sunset clause) is a disposition regarding the expiration date of law or any normative act in frames of a predetermined period – distinctly defines the specific moment when a renewal or extension of its validity requires additional decision of the authorized body. This is one of the central differences from the permanent legislation which, on the contrary, demands separate decision on


the termination of laws or the cancellation of an entire legal act. In this case the experimental legislation presupposes the assessment of the regulatory provision impact after the end of experiment on the basis of which a decision can be made to extend the validity of the chosen approach as an ordinary legislation. In practice it would be appropriate to accomplish such assessment some time before the end of “experiment” to make it permanent (in case this is needed).

The advocates of the temporary legislation state that it is “an important instrument to assure retrospective evaluation on a regular basis,” regarded as the principal instrument to refine the legislation as it is quite difficult to cancel active legal issues which have negative influence on the social relations. Short-term, step-by-step, information-oriented nature of temporary legislation presupposes that it interacts with experiments in public administration, enables better lawmaking and more effective regulation. Besides, the implementation of temporary laws can be useful in assessing the main risks of new policy. In this context warning on the expiry date can be used as a preventive tool to assess the implications of a new approach and identify social, political, economic, environmental and other risks. However, this approach will work only in the case of a consistent state policy on monitoring such legislation.

Overall, acceptability, expediency and effectiveness of the temporary legislation application as an instrument of temporary regulation depend on the completion of legal model of both the introduction and completion of such regulation. Applying such approaches, it can be said that the application of temporary regulation will be entirely correspondent to the principle of rule of law, maintaining the standards of justice, stability, awareness and predictability.

Among the factors, which determine the interest in the institution of temporary legislation, are the following:

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1) development of information and communication technologies due to which certain products and services that require legislative regulation appear quickly;
2) search for new forms of public administration (development of concepts of appropriate governance, regulatory state, new public administration, multilevel governance, deregulation, etc.)\(^{22}\);
3) need for immediate response to substantial threats to life and health of citizens (terrorism\(^{23}\), armed conflicts, pandemics, etc.);
4) support of regional integration which anticipates the delegation of the part of state sovereignty to supranational bodies;
5) implementation of temporary economic regimes for certain industries, subjects of legal relations or territories;
6) implementation of temporary moratorium on the application of legislation.

In each specific case, as it was mentioned, temporary legislation can be experimental or transitional.

### 3. International Experience in the Implementation of Temporary Legislation

Despite the above mentioned advantages of temporary regulation, it should be addressed that it has not become widespread practice in the majority of legislative systems. Temporary regulation (legislation containing an instruction to terminate action by law) embraces a small part of the legislation adopted in Anglo-Saxon and continental legal systems, e.g. in Great

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Britain, Israel, Spain\(^{24}\), the Netherlands, USA, France\(^{25}\), Switzerland\(^{26}\), and it is also used at the level of European Union. The practice of these countries and the EU legislation include different examples of such legislative instruments but temporary legislation was never applied systematically.

In the USA experimental legislation is regarded as a driver of innovation and the tool for further federalization. In 1932 Judge Brandeis in the New State Ice Co. v. Liebmann case noted that “the power of states and nation is changing our economic practices and institutions through experiments to meet changing social and economic needs.”\(^{27}\) In the USA experimental legislation is the old tradition and some examples of it can be found in the laws banning child labor in the early 20th century.

In the 1970s guidelines on the period of termination were used primarily at the state level to counteract the dominance of federal agencies\(^{28}\) and in the 21st century they were applied at the national level (i.e., acts to combat terrorism\(^{29}\), in particular the Patriotic Act of the USA\(^{30}\)). However, according to Zachary Gubler’s study, US federal agencies rarely introduce experimental rules during recent decades: such acts consist about 1% of all normative acts which entered into force\(^{31}\). At the same

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time significant number of federal programs aimed at increasing investment in research and development include instructions on the period of termination. Generally, most experiments on laws are still conducted at the level of particular state by waiving some rules (the states can apply to waive a number of federal regulations, experimenting with political and legislative decisions that meet their socioeconomic conditions).

In Germany experimental legislation is traditionally introduced in the context of municipal law. Although in the 1990s experimental legislation and other types of temporary legislation raised doubt about their constitutionality, it has been an important tool in the process of the public administration modernization in the last decade. For the past two decades a number of experimental laws have been introduced to regulate spheres of innovations to ensure that the law meets current requirements. Typically in Germany the guidelines on the expiration of legislation are used as a tool to overcome excessive bureaucratic and regulatory pressure and also to combat terrorism effectively.

The Netherlands does not have considerable experience in the application of experimental legislation and the most legislators are unfamiliar with experimental tools. Between 1985 and 2009, only 85 laws contained warnings on time. The state parliament usually delegates the right to “experiment” with a number of legislative provisions to executive power with regulatory powers.

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In *Israel* temporary legislation has become more prevalent in recent years\textsuperscript{38} but no systematic research on this issue has been conducted.

At the level of *European Union*, the example of experimental legislation can be considered the greenhouse gas emissions trading scheme\textsuperscript{39} that combats climate change. This system can be viewed as the world’s first large-scale experiment on carbon trading\textsuperscript{40}. Simultaneously there is policy diffusion due to which the EU countries are involved in the process of improving the legal framework through rationalization, increasing the efficiency of legislative procedures that allows developing high-quality legislation and regulations\textsuperscript{41}. These programs emphasize the importance of information-based and so-called evidence-based lawmaking, involving important tools such as *ex-ante* impact assessment, consultation, transparency, study of alternative regulatory projects, and *ex post facto* assessment\textsuperscript{42}.

In *Ukraine* the application of temporary legislation at the scholarly and practical levels is still sufficiently biased and unsystematic. However, the range of its function is quite wide. Ukrainian legislation demonstrates the examples of the introduction of temporary regulation, e.g. the application of temporary regulation for period of anti-terrorist operation\textsuperscript{43},


\textsuperscript{42} Voermans, W. (2016). Beating about the bush in “better regulation”. In B. Steunenberg, W. Voermans & S. Van den Bogaert (Eds.), Fit for the future? Reflections from Leiden on the functioning of the EU (pp. 69–88). The Hague: Eleven international publishing.

\textsuperscript{43} Zakon Ukrainy “Pro tymchasovi zakhody na period provedennia antyterorystych-
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on military and civilian administrations\(^{44}\); introduction of experimental legislative regulation to stimulate mining and metallurgical complex\(^{45}\), shipbuilding industry\(^{46}\), car production\(^{47}\); application of temporary regulation in preparation for the European Football Championship 2012\(^{48}\); temporary suspension of the Government resolution on state regulation of prices for socially significant goods (before its cancellation in 2017)\(^{49}\) and renewal of such regulation during a pandemic\(^{50}\).


\(^{50}\) Postanova Kabinetu Ministriv Ukrainy vid 22 kvitnia 2020 roku no. 341 “Pro zakhody shchodo stabilizatsii tsn na tovary, shcho maiut sotsialnu znachushchist, tovary protyepidemicchnoho pryznachennia” vid 22 kvitnia 2020 roku no. 341 [Resolution of
The topical examples of temporary regulation in Ukraine include legislation aimed at combating the pandemic caused by coronavirus infection SARS-CoV-2; parliamentary initiatives to stimulate investment projects with significant investments, in terms of establishing tax benefits until 2035 as well as experimental legislation on setting requirements to obtain Doctor of Philosophy degree. However, in Ukraine the potential of temporary (in particular experimental), legislation is much broader in the sphere of improving the investment climate and implementing other reforms. According to the author of this article, the experimental legislation would allow overcoming the deadlock over a significant part of the legislation in de-shadowing of economy and the introduction of regulation of new institutions. The examples involve long-term discussions on the legislative regulation of the car-hailing market and matters of taxation while purchasing fruit and berry products from the population.

4. Conclusions

Temporary legislation, which contains clear guidelines on the period of its termination, is a multifunctional legislative instrument. Although it is used more often to solve temporary problems or make decisions in conditions of uncertainty, its scope is quite wide, including both the introduction of temporary (intermediate) legislation and experimental regulation.

Temporary legislation (including experimental) widens the possibilities to achieve political and legal consensus or compromise and is one of the means to reach social or political agreement. However, despite the temporality of action, its application (as well as modeling its implementation) requires systematic and comprehensive approaches to withdraw such regulation after its expiration.

The capability of temporary legislation embraces:
1) prompt response to temporary topical issues;
2) decision-making in the situation of unpredictability or unpreparedness of politicians or society to radical changes;

3) more dynamic regulation of innovation processes (including legal relations in the context of dynamic development of the innovative technologies);
4) transformation of law-making process into process of modeling the influence of legal regulation on the subjects of legal relations and work on the results of the analysis of such influence.

Thus considering temporary legislation as an effective, efficient and prospective tool of legislative regulation, it is important to develop principles, methods and restrictions of its application in the future. On the one hand, this will make possible to apply temporary regulation more in practice and, on the other hand, prevent excessive abuse of this institution in the cases when classical approaches to legislative regulation are more sufficient and justified.

References


Postanovka Kabinetu Ministriv Ukrainy vid 7 chervnia 2017 roku no. 294 “Pro vnesennia zmin u dodatok do postanovy Kabinetu Ministriv vid 25 hrudnia 1996 roku no. 1548 ta vyznannia takymy, shcho vтратyly chynnist, deiakykh postanov Kabinetu Ministriv Ukrainy” [Resolution of the Cabinet of Ministers of Ukraine “On amendments to the sup-


Tille, A.A. (1965). Vremya, prostranstvo, zakon. Dejstvie sovetskogo za-
kona vo vremeni i prostranstve [Time, space, law. The action of Soviet law in time and space]. Moscow: Yuridicheskaya literatura. [in Russian].


Summary
This article is devoted to the temporary legislation issues as multifunctional legislative instruments, which can be efficiently used in the current dynamic of social, political, information, communication and economic processes. The author regards main scholarly advantages and drawbacks of the introduction of temporary legislation in lawmaking, particularly in the context of stability and predictability of legal regulation, equality of participants in the legal relations. The factors determining the practical necessity of temporary regulation (particularly, innovative products, introduction of new public regulation or economic regimes political or military crises, pandemic) are systematized in this article. It also introduces the review of international experience of application of a temporary regulation in the countries with different legal systems, which shows ways of practical usage of this instrument and lack of systemized approaches for it. The author suggests distinguishing between two main types of temporary regulation – temporary (transitional) and experimental – and identifying potential areas of practical application of such regulation, in particular: rapid response to temporary topical problems, decision-making in highly unpredictable situations, more dynamic regulation of innovation and development. At the same time the systematic modeling of introduction and expiration date of temporary regulation is indicated as the main requirement for the effective implementation of such regulation in compliance with the principle of rule of law. Overall, the author concludes that to be effective, efficient and prospective tool of
regulation temporal regulation has to be based on the principles, methods and restrictions of its application, which in turn have to be developed by lawyers.

**Keywords:** action of legal acts in time, experimental legislation, temporary regulation, sunset clause, Ukraine