**Decision 23/2022 (X. 19.) AB**

**on establishing a violation of the Fundamental Law, the annulment and ordering the prohibition of the application of section 2 of the Government Decree No. 22/2019 (II. 25.) on the repeal of the Government Decree 449/2013 (XI. 28.) on the procedure for the return of cultural property of disputed ownership held in public collections and on the transitional provisions related thereto**

On the basis of a judicial initiative seeking the establishment of a violation of the Fundamental Law by legislation, the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that section 2 of the Government Decree No. 22/2019 (II. 25.) on the repeal of the Government Decree 449/2013 (XI. 28.) on the procedure for the return of cultural property of disputed ownership held in public collections and on the transitional provisions related thereto is contrary to the Fundamental Law – it violates Article B (1) of the Fundamental Law – therefore annuls it.

2. Section 2 of the Government Decree No. 22/2019 (II. 25.) on the repeal of the Government Decree 449/2013 (XI. 28.) on the procedure for the return of cultural property of disputed ownership held in public collections and on the transitional provisions related thereto may not be applied in the case No. Kfv.IV.37.144/2022 pending before the Curia.

This decision of the Constitutional Court shall be published in the Hungarian Official Gazette.

Reasoning

I

[1] 1 The review panel of the Curia (hereinafter: "petitioner"), in the lawsuit No. Kfv.IV.37.144/2022. pending before it for the judicial review of an administrative decision, stayed the proceedings ex officio pursuant to section 126 (1) (b) of the Act

CXXX of 2016 on Civil Procedure, and on the basis of section 34 (b) of the Act I of 2017 on the Code of Administrative Procedure initiated that, pursuant to Article 24 (2) (b) of the Fundamental Law and section 25 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), the Constitutional Court establish that section 2 of the Government Decree No. 22/2019 (II. 25.) (hereinafter: "Decree2") on the repeal of the Government Decree 449/2013 (XI. 28.) on the procedure for the return of cultural property of disputed ownership held in public collections and on the transitional provisions related thereto (hereinafter: "Decree1") is contrary to the Fundamental Law and annul it, as well as declare that it may not be applied in the case No. Kfv.IV.37.144/2022 pending before the Curia.

[2] Furthermore, the petitioner submitted that if the Constitutional Court does not agree with the petition for the annulment of section 2 of Decree2, it should consider – pursuant to section 46 (3) of the ACC – the establishment of a constitutional requirement in the application of section 2 of Decree2, that the challenged provision is not applicable if the restitution proceedings were under way at the time of the entry into force of Decree2 because the authority exceeded the time limit for the administration of the case in the administrative procedure.

[3] 2 The substance of the case and the content of the relevant legislation can be summarised as follows.

[4] 2.1 The plaintiffs of first, second and third degrees in the main proceedings (hereinafter collectively: "plaintiffs") are private individuals who, pursuant to Decree1, on 26 September 2018, submitted an application to the Hungarian National Asset Management Limited Liability Company (hereinafter: "MNV Zrt.") for the release of two panel paintings belonging to the collection of the Museum of Fine Arts (hereinafter: "Museum"). The defendant in the main proceedings is the Minister for Construction and Investment, responsible for the management of State property.

[5] At the time the application was submitted, according to section 4/A of the Act CXL of 1997 on Museum Institutions, Public Library Supply and Community Culture (hereinafter: "Act on Culture"), "any cultural property kept in a public collection maintained by the State or local government, the State ownership of which cannot be proven beyond reasonable doubt, shall be released free of charge, as a result of the procedure laid down in the government decree issued on the basis of the authorisation of this Act, to the person who has established a reasonable probability of ownership of the object in question."

[6] Decree1 contained detailed rules for the return of disputed cultural property held in public collections, as an implementing regulation of the Act on Culture. Section 4 (4) and (6) of Decree1 provided the details of section 4/A of the Act on Culture. The former laid down the conditions for a decision in favour of the claimant: "If it is established on

the basis of the summary that, according to the available data and other evidence, the ownership of the property has not been lawfully acquired by the State or that the acquisition of State ownership cannot be proven beyond reasonable doubt, the Minister shall, in accordance with the authorisation of the Minister responsible for the supervision of State property issued pursuant to section 3:405 (2) of the Act V of 2013 on the Civil Code, within 30 days, establish the absence of State ownership of the property and shall decide on the return of the property to the claimant." Paragraph (6) of this section, in turn, laid down the conditions for the rejection of the claim: "If it is established on the basis of the summary that, according to the available data and other evidence, the ownership of the property has been lawfully acquired by the State and it exists at the time of submitting the claim, the Minister shall, in accordance with the authorisation of the Minister responsible for the supervision of State property issued pursuant to section 3:405 (2) of the Act V of 2013 on the Civil Code, within 30 days, establish this, reject the claim and notify the party exercising State ownership."

[7] 2.2 The legislation governing the restitution procedure has changed during the proceedings by the defendant's legal predecessor:

[8] On 26 February 2019, Decree2, repealing Decree1 and containing the transitional provisions related to it entered into force, according to section 2 of which, the proceedings pending at the time of of Decree1 losing force and repeated proceedings shall be conducted according to sections 3 to 5 of Decree2. Among the provisions contained in these sections, section 3 (1) should be highlighted, according to which "the Hungarian National Asset Management Limited Liability Company (hereinafter referred to as the "party exercising State ownership") shall examine the documents and other evidence submitted by the claimant. In doing so, it shall take into account the facts and circumstances on the basis of which the ownership of the claimant can be proved beyond reasonable doubt." Section 4 (3) of Decree2 is also relevant to the main case, as it provides that "if it is established on the basis of the summary that the claimant's application for the claimed property is (a) well founded beyond reasonable doubt, the Minister shall decide within 15 days on the return of the property to the claimant, or (b) not well founded, the Minister shall decide on the rejection of the claim in accordance with the authorisation of the Minister responsible for the supervision of State property issued pursuant to section 3:405 (2) of the Act V of 2013 on the Civil Code."

[9] The Act LXIV of 2019 amending certain Acts relating to the protection of the built and natural environment and the protection of cultural heritage (hereinafter: "Amending Act") amended on 16 July 2019 section 4/A of the Act on Culture so that "cultural property reclaimed from the basic inventory of a public collection or museum institution maintained by the State or a local government may be returned in the event

of a claim to this effect, provided that the claimant proves its ownership beyond reasonable doubt".

[10] 2.3 By decision MHF/305/5 (2020) dated 14 July 2020, the defendant rejected the claim of the plaintiffs. In its reasoning, it stated that the plaintiffs' claim was not founded beyond reasonable doubt, it had not been proven that the panel paintings were owned by Iván Batthyány sen., nor had it been proven that the paintings had been placed as deposit in the museum, nor had the plaintiffs' status as heirs been proven.

[11] 2.3 In their application, the plaintiffs claimed that the defendant exceeded the time limits for the administration of the case, as laid down in sections 3 and 4 of the Decree1, by 1 year and 6 months in the case of one painting and by 1 year, 6 months and 3 days in the case of the other painting. Had the administrative deadlines under Decree1 been complied with, the decision would have had to have been taken under Decree1 before the entry into force of Decree2, i.e. 26 February 2019. The fact that the defendant significantly exceeded the time limit for the administration of the case is a material violation of procedural rules affecting the merits of the case, because it, together with the Decree2 applicable to pending cases and making it more difficult for them to enforce their claims, has made their litigation situation more burdensome.

[12] According to the defendant's defence, the plaintiffs' burden of proof was not increased by the entry into force of Decree2.

[13] The court of first instance dismissed the plaintiffs' action and held that, although the defendant had exceeded the time-limit, this did not affect the merits of the case because, due to the delay in the proceedings, the defendant had to adjudicate on the plaintiffs' restitution claim on the basis of Decree2, which was also applicable to pending proceedings, and could not base its decision on the rules of Decree1, which had been repealed in the meantime. It explained that the order of proof provided for in section 3 (1) of Decree2, by omitting the provision on the examination of the State's ownership, continued to require the examination of whether the plaintiffs' claim of ownership against the State was verifiable. According to the court of first instance, the application of Decree2 in the pending cases did not affect the plaintiffs' procedural position or make it more onerous, and therefore the fact that the time-limit was exceeded did not affect the merits of the case.

[14] 2.5 In their application for review of the final judgement, the plaintiffs complained that the reversal of the burden of proof had prejudiced their rights. They based this on the fact that the defendant had not decided on their application within the time limit and that, in the application of Decree2, it was no longer for the State but for the claimant to prove beyond reasonable doubt that it had acquired property in a lawful procedure, whereas under the rules of Decree1 it would have been sufficient to establish it as a probable case. They considered this as a reversal of the burden of proof.

[15] The defendant disputed that the entry into force of Decree2 would have increased the burden on the claimants because Decree1 also imposed a threefold burden of proof. In proceedings under Decree1, the plaintiffs had to prove their own ownership and, in comparison, the absence of State ownership had to be examined. Also in the procedure under Decree1, the property claimed by the plaintiffs could be released to them only if their ownership was proven. In its view, the plaintiffs are wrong to claim that the delay in the procedure would have made it more difficult for them to prove their case, because they were free to present their observations, attach documentary evidence and submit motions for evidence. With regard to the reversal of the burden of proof, it argued that the law-maker had expressly designed the rules under Decree1 with *ex gratia* nature, from the point of view of fairness, so that potential owners who had not brought a property action for their claim but who considered themselves to be the owners could initiate the taking of possession of disputed cultural property in public collections without a property action, without having their property claim adjudicated.

[16] 3 According to the petition, section 2 of Decree2 infringes the prohibition of retroactive legislation with adverse effect derived from Article B (1) of the Fundamental Law, and its application in the case No. Kfv.IV.37.144/2022 infringes Article XXIV (1) and Article XXVIII (1) of the Fundamental Law.

[17] 3.1 With regard to the prohibition of retroactive legislation, it is significant, according to the petition, that the rules of Decree2 are more burdensome for the claimant than the provisions of Decree1 were, because while previously the existence of State ownership had to be proven beyond reasonable doubt by the party exercising State ownership, under the new rules the claimants have to support their ownership with the same degree of certainty. Thus, unlike Decree1, Decree2, rather than requiring the probability of ownership – or heirship – to be established by evidence, requires that it be established beyond reasonable doubt in order for the claim to succeed. According to the petitioner, under ordinary judicial case-law, proof beyond reasonable doubt requires the same level of evidence as proof in criminal law. In the light of the foregoing, the petitioner concludes that the transitional provision in section 2 of Decree2 does not merely require the application of a procedural rule in pending cases, but requires the application of new substantive conditions in the proceedings, which are different from and are more onerous than those previously applicable.

[18] The petitioner also referred to the case-law of the Constitutional Court and pointed out that the existence of retroactive legislation can be established even if the enactment was not retroactive, but the provision nevertheless retroactively changes the assessment of legal relationships established in the past.

[19] Since the rules in force at the time when the restitution proceedings were opened were more favourable to the claimant than the rules in force at the time when the claim was assessed, the petitioner submits that the contested provision infringes the prohibition on retroactive legislation.

[20] According to the petition, it is also significant that the defendant took its decision by overly exceeding the time-limit for administration. In its view, the time-limit under Decree1 expired on 18 February 2019 in respect of one of the panel paintings and on 19 February 2019 in respect of the other. In fact, Decree2, which entered into force on 26 February 2019 and contains more onerous conditions for claimants, had to be applied in the main proceedings because the defendant had not complied with the statutory time-limit.

[21] 3.2 According to the petition, it is contrary to the right to a fair administrative procedure enshrined in Article XXIV (1) of the Fundamental Law to apply the provisions of Decree2 to pending cases in which the proceedings are still ongoing because the time limit for the administration of the case has been exceeded, since this would deprive the right to a reasonable decision, which is part of that fundamental right.

[22] 3.3 The petitioner alleged a violation of the right to a fair judicial procedure under Article XXVIII (1) of the Fundamental Law because, in his view, the challenged provision of the law deprives the court of the possibility to decide on the merits of the claims. In his interpretation, this requirement is infringed if the court has to apply a rule of law which is contrary to the prohibition of retroactive (adverse) legislation.

[23] 4 In an *amicus curiae* brief, the Minister of Justice presented a position on the regulatory environment and the petition. The Minister pointed out that the legislation in question is of *ex gratia* nature and that, under Article P of the Fundamental Law, the protection of cultural assets, which are part of national property, is a task of the State. The Minister also held that the new substantive legal framework did not make the situation of the claimants more burdensome.

II

[24] 1 The affected provisions of the Fundamental Law:

“Article B (1) Hungary shall be an independent and democratic State governed by the rule of law.”

“Article XXIV (1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act.”

"Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act."

[25] 2 The provision of the Act on Culture in force between the notification of the restitution claim and 15 July 2019:

"Section 4/A Any cultural property kept in a public collection maintained by the State or local government, the State ownership of which cannot be proven beyond reasonable doubt, shall be released free of charge, as a result of the procedure laid down in the government decree issued on the basis of the authorisation of this Act, to the person who has established a reasonable probability of ownership of the object in question."

[26] The relevant provision of the Act on Culture in force after 16 July 2019:

"Section 4/A The return of cultural property reclaimed from the basic inventory of a public collection or museum institution maintained by the State or local government may take place in the case of a claim filed in this regard, if the claimant proves his or her ownership beyond reasonable doubt."

[27] 3 The provisions of Decree1 in force between the date of filing the restitution claim and 19 February 2019:

"Section 1 (3) The claimant shall be deemed to have an existing right of ownership to the property if he or she proves the ownership of the property by the previous owner by means of appropriate evidence, provided that he or she also proves to be the legal successor of the previous owner by means of documentary evidence (judicial or notarial decision), in the absence of which he or she provides a reasonable probability of ownership."

"Section 3 (1) The acquisition of data pursuant to section 1 (1) shall cover the documents and other evidence submitted by the claimant and the data available to the public collection holding the property in question.

(2) Within 3 days of filing the claim, the party exercising State ownership shall contact the public collection concerned, which shall within 30 days provide a list of the items of property claimed and held in its custody, as well as the documents – held it in its custody or and obtained from another public collection, if the public collection is aware of the existence of additional evidence held by another public collection – verifying State ownership or relating to any other legal title of custody.

(3) If the claim is filed with the public collection, the public collection shall promptly send the claim and the evidence submitted by the claimant to the party exercising State

ownership and shall provide it with the information specified in paragraph (2) within 30 days of the receipt of the claim by the public collection."

"Section 4 (1) The party exercising State ownership shall establish the facts and circumstances that enable it to be determined whether it can be proved beyond reasonable doubt that the State's ownership of the property was established by due process of law and that the State's ownership continues to exist at the time of the filing claim or whether it was taken into the custody of the public collection under other legal title and circumstances.

(2) In the procedure provided for in section 1 (1), the party exercising State ownership shall prepare a summary of the data obtained under section 3 (1) and of the data processed by it, which shall be sent to the Minister responsible for the protection of cultural heritage (hereinafter: "Minister") within 63 days of receipt of the claim. The summary may also include, in addition to the information provided for in section 3 (1), any bibliographical data that may be available on the history of the property. If the public collection has not provided the data specified in section 3 (2) to the party exercising State ownership by the deadline for submission and it was therefore not possible to include them in the summary, the party exercising State ownership shall indicate this fact in the summary.

(3) If the Minister does not consider the summary to be suitable or sufficient to serve as a basis for decision-making, the Minister may, within a period of 15 days, require the data referred to in section 3 and in paragraphs (1) and (2) to be supplemented.

(4) If it is established on the basis of the summary that, according to the available data and other evidence, the ownership of the property has not been lawfully acquired by the State or that the acquisition of State ownership cannot be proven beyond reasonable doubt, the Minister shall, in accordance with the authorisation of the Minister responsible for the supervision of State property issued pursuant to section 3:405 (2) of the Act V of 2013 on the Civil Code, within 30 days, establish the absence of State ownership of the property and shall decide on the return of the property to the claimant.

(5) Restitution shall not result in deciding on the claim of ownership.

(6) If it is established on the basis of the summary that, according to the available data and other evidence, the ownership of the property has been lawfully acquired by the State and it exists at the time of submitting the claim, the Minister shall, in accordance with the authorisation of the Minister responsible for the supervision of State property issued pursuant to section 3:405 (2) of the Act V of 2013 on the Civil Code, within 30 days, establish this, reject the claim and notify the party exercising State ownership."

[28] 4 The provisions of Decree2 in force after 26 February 2019:

“Section 2 Procedures pending at the time when the Government Decree 449/2013 (XI.28) on the procedure for the return of cultural property of disputed ownership held in public collections has lost force and repeated procedures shall be conducted in accordance with sections 3 to 5.”

“Section 3 (1) The Hungarian National Asset Management Limited Liability Company (hereinafter referred to as the “party exercising State ownership”) shall examine the documents and other evidence submitted by the claimant. In doing so, it shall take into account the facts and circumstances on the basis of which the ownership of the claimant can be proved beyond reasonable doubt.

(2) Within 10 days of filing the claim, the party exercising State ownership shall contact the public collection concerned and the Hungarian National Archives, which shall within 30 days provide a list of the items of property claimed and held in its custody, as well as the documents – held it in its custody or and obtained from another public collection, if the public collection is aware of the existence of additional evidence held by another public collection – verifying State ownership or relating to any other legal title of custody.

(3) If during the procedure evidence emerges of the deprivation of citizenship and confiscation of property of the claimant, the party exercising State ownership shall also contact the competent government office in order to obtain the necessary documents.”

“Section 4 (1) The party exercising State ownership shall prepare a summary of the documents submitted by the claimant and other evidence, as well as the data obtained under section 3 (2) and (3) and of the data processed by it, which shall be sent to the Minister responsible for the protection of cultural heritage (hereinafter: “Minister”) within 100 days of receipt of the claim. The summary may also include, in addition to the information provided for in section 3, any bibliographical data that may be available on the history of the item of property. If the public collection has not provided the data specified in section 3 (2) to the party exercising State ownership by the deadline for submission and it was therefore not possible to include them in the summary, the party exercising State ownership shall indicate this fact in the summary.

(2) If the Minister does not consider the summary to be suitable or sufficient for decision-making, the Minister may, within a period of 30 days, require the data referred to in section 3 and in paragraph (1) to be supplemented.

(3) If it is established on the basis of the summary that the claimant's application in respect of the item of property claimed

(a) is well-founded beyond reasonable doubt, the Minister shall decide within 15 days whether to return the item of property to the claimant, or

(b) is not well-founded, the Minister shall decide to reject the claim

in accordance with the authorisation of the Minister responsible for the supervision of State property issued pursuant to section 3:405 (2) of the Act V of 2013 on the Civil Code.

(4) A return pursuant to paragraph (3) (a) shall not result in deciding on the claim of ownership.

(5) Following a decision under paragraph (3) (b), the item of property shall remain in the custody of the public collection. The rejection of the claim shall not prevent the claimant from bringing an action before the court to enforce his or her claim of ownership of the item of property and to have it released."

III

[29] 1 The cases falling within the jurisdiction of the Constitutional Court are listed in Article 24 (2) (a) to (g) of the Fundamental Law. In accordance with Article 24 (1) of the Fundamental Law, the Constitutional Court, as the supreme body for the protection of the Fundamental Law, fulfils its constitutional obligations by exercising its powers {Decision 3136/2013. (VII. 2.) AB, Reasoning [7]}. In doing so, it is obliged to examine not only the legal basis of the motions initiating its proceedings, but also whether the form and content of each motion complies with the standards of formality regulated in the Fundamental Law and the statutory conditions. {Ruling 3058/2015. (III.31.) AB (hereinafter: CCDec 1), Reasoning [9]}.

[30] 2 Therefore, the Constitutional Court first examined whether the judicial motion complied with the formal and substantive requirements of Article 24 (2) of the Fundamental Law, and under section 25 (1), section 51, section 52 (1), section 52 (1b) (a) to (f) and section 52 (4) to (6) of the ACC.

[31] 2.1 Pursuant to Article 24 (2) (b) of the Fundamental Law and section 25 (1) of the ACC, the Constitutional Court may, acting in its competence of the individual review of norms on the basis of a judicial initiative, examine a law's conflict with the Fundamental Law. That requirement is satisfied - having regard to Article T (2) of the Fundamental Law - by the petition brought against section 2 of Decree2.

[32] 2.2 Pursuant to section 25 (1) of the ACC, there are two further – interrelated – conditions for an individual norm control procedure: the factual basis of the judicial initiative must be an individual case pending before the judge, and the initiative must be aimed at examining the applicable law in this case {Decision 3112/2014. (IV.17.) AB, Reasoning [3]}. According to the consistent case-law of the Constitutional Court, "the judge acting in the case may thus only file a motion to declare a law or a provision of

the law be contrary to the Fundamental Law if it is (would be) expressly applicable in the specific case. Consequently, the direct link between the norm challenged and the specific pending case at issue is a fundamental condition. If the judicial initiative challenges before the Constitutional Court a law or a provision of law which has no connection with the case pending (suspended because of turning to the Constitutional Court) before the judge and which is manifestly not applicable in the course of adjudicating the case, there is no room for a constitutional examination on the merits [...]" (CCDec, Reasoning [22]).

[33] Pursuant to section 2 of Decree2, Decree2 is to be applied in the official proceedings pending at the time of its entry into force, therefore its consideration and application cannot be disregarded in the proceedings for review of an administrative decision and the related review proceedings. As the public authority phase of the main proceedings was pending at the time of the entry into force of Decree2, it was applied by the defendant's predecessor in title. The provision of the law challenged in the petition is a norm to be applied in the administrative action brought on the basis of a statement of claim against the decision of the defendant's predecessor in title and in the subsequent review proceedings.

[34] 3 According to section 52 (1) of the ACC, the petition should contain an explicit request. The petitioner has indicated the provision of the Fundamental Law (Article 24 (2) (b)) and the statutory provision (section 25 (1) of the ACC) that establish the competence of the Constitutional Court to rule on the petition (section 52 (1b) (a) of the ACC). The petitioner has stated the grounds for initiating the proceedings (section 52 (1b) (b) of the ACC). The petitioner indicated the provision of the law to be examined by the Constitutional Court [section 52 (1b) (c) of the ACC], and the allegedly violated provisions of the Fundamental Law [section 52 (1b) (d) of the ACC].

[35] According to section 52 (1b) (e) of the ACC, the petition should contain a reasoning about why the challenged provision of the law is in conflict with the indicated provisions of the Fundamental Law. The initiative meets this requirement, too.

[36] The Constitutional Court further held that the petition contains an explicit request regarding the content of the decision of the Constitutional Court [section 52 (1b) (f) of the ACC], since the petitioner requested the annulment of the challenged provisions and the declaration of an individual prohibition of application, as provided for in section 41 (1) of the ACC.

[37] In the light of the foregoing, the petition is suitable for adjudication on the merits.

[38] The judicial motion is well-founded, for the reasons set out hereunder.

[39] 1 According to the petitioner, the contested provision of the law infringes, among others, the prohibition of retroactive legislation, which is part of the principle of the rule of law enshrined in Article B (1) of the Fundamental Law, because it imposes on pending proceedings a rule which provided for the application of a more unfavourable set of conditions for the claimant than the legal environment in force at the time when the restitution claim was filed.

[40] 2 The primary question to be answered by the Constitutional Court is therefore whether in a pending administrative case initiated on request, a legislative intervention, which creates a more disadvantageous legal environment for the client, is contrary to Article B (1) of the Fundamental Law. This requires an overview of the Constitutional Court's case-law on the prohibition of retroactive legislation.

[41] 2.1 "The Constitutional Court derives the prohibition of retroactive legislation from the requirement of legal certainty, which is part of the principle of the rule of law enshrined in Article B (1) of the Fundamental Law, primarily interpreting it the way as section 2 (2) of the Act CXXX of 2010 on Legislation regulated this prohibition: » A law may not impose an obligation, make an obligation more onerous, withdraw or restrict a right, or declare a conduct unlawful, for a period prior to its entry into force.« {Decision 10/2014. (IV. 4.) AB, Reasoning [18]}

Thus, the Constitutional Court developed the following test in relation to the prohibition of retroactive legislation: do the challenged provisions »relate to legal relationships established before their entry into force and do they impose an obligation, increase the burden of an obligation, restrict or withdraw a right, or declare a conduct unlawful {Decision 13/2015. (V.14.) AB, Reasoning [56]}« Decision 35/2019. (XII.31.) AB, Reasoning [27]}. The test thus has two elements: the first relates to the time dimension of the regulation, the second to the effect of the regulation.

The first element of the test was refined by the case-law of the Constitutional Court, thus the Constitutional Court also stated that, in this respect, »a law may be considered to be in conflict with the prohibition of retroactive effect not only if the law was enacted retroactively by the law-maker, but also if the enactment did not take place retroactively, but also if the provisions of the law – according to an explicit provision to this effect – are also applicable to the legal relationships created before the entry into force of the legislation« {Decision 57/1994. (XI.17.) AB, ABH 1994, 316, 324; reinforced in: Decision 3331/2018. (X.26.) AB, Reasoning [18]}. It follows from the second element of the test that the prohibition of retroactivity applies only to legislation which makes the situation of the persons concerned more difficult (*ad malam partem*) {Decision 1/2016. (I.29.) AB, Reasoning [55]}" {Decision 3042/2021. (II.19.) AB, Reasoning [72] to [74]}.

[42] Decision 8/2022 (V.25.) AB (hereinafter: CCDec) defines the criteria for retroactive legislation in the same way as explained above: "The first question to be examined is whether the challenged rule is disadvantageous in relation to the previous one. If not, no *ad malam partem* retroactive legislation can exist *per definitonem*. If the rule is unfavourable, secondly it must be examined whether the rule was enacted retroactively. If the answer is in the affirmative, the regulation is contrary to the Fundamental Law. If the enactment is not retroactive, the third question to be examined is whether the provision nevertheless retroactively alters the assessment of legal relationships established in the past, which may already have been concluded. This, like retroactive enactment, constitutes genuine retroactive legislation and is contrary to the Fundamental Law. On the other hand, if the rule modifies a long-lasting legal relationship which arose in the past solely for the future (immediate or quasi retroactive effect) and if there is a justification for the intervention which is acceptable as constitutional, it may be constitutional in the case concerned." (Reasoning [19]).

[43] 3 Applying the above to the present case, the following can be stated.

[44] 3.1 Comparing the whole of the regulation under Decree1 and section 4/A of the Act on Culture in force at the time the claim for restitution was brought by the plaintiffs in the main proceedings with the regulation under Decree2 and section 4/A of the Act on Culture in force at the time the defendant in the main proceedings adopted its decision, it can be concluded that

- under the legislation in force when the restitution claim was brought (hereinafter: "the previous legislation"), it was sufficient for the claimant to establish the probability of his or her capacity as the owner or heir of the property in order for the claim to succeed, and the State's quasi proof to the contrary could lead to the rejection of the claim if it could prove beyond reasonable doubt that the State's ownership had been lawfully established;

- under the legislation in force when the restitution claim was examined (hereinafter: "the subsequent legislation"), the claimant had to prove beyond reasonable doubt that he or she was the owner or heir of the property in order for the claim to succeed.

[45] This is also supported by the following part of the general reasoning attached to the Act CXCV of 2013 amending certain acts in connection with the restitution of disputed cultural property in public collections, which introduced section 4/A of the Act on Culture under the previous legislation: "in the case of a claim to ownership of such property, the existence of State ownership must be examined in the first instance and, if there is doubt as to the existence of State ownership, this fact gives rise to an obligation to return the property. Therefore, it is a fundamental change in principle that the burden of proving beyond reasonable doubt that the State has acquired ownership lies with the party who claims this. The Act therefore promotes reparation of ownership

by providing that, where the State ownership of an object or a group of objects forming part of cultural assets held in public collections cannot be proven beyond reasonable doubt and the person claiming ownership of the object or group of objects duly establishes the probability of their ownership, the party exercising State ownership may establish the absence of State ownership and, in view of this, may release (return) the object or group of objects to the person who has verified his or her ownership with sufficient probability."

[46] Taking into account that probability is a lower degree of certainty than certainty beyond reasonable doubt, it necessarily puts the claimant in a more onerous position if he or she is required to provide proof beyond reasonable doubt rather than establish probability in order to obtain possession of the item of property. This is particularly true in restitution cases, which are the subject of the present proceedings, as they typically involve items of property of which the claimants' ancestors acquired ownership decades earlier in the past. In view of the inaccuracies and possible contradictions of past records, and the devastating storms of history which have seriously affected our country, often causing irreparable damage to or even the destruction of records which still exist, providing proof of ownership or heirship beyond reasonable doubt is a particularly difficult task compared with "ordinary" cases which do not have such a time span. It is therefore of decisive importance for the outcome of a case brought on the basis of a claim whether the State or the claimant should bear the adverse consequences of any failure to prove. It can be clearly established that the party on whom the legislator places the burden of proof is at a disadvantage. Since the earlier legislation imposed such a burden on the State and the subsequent legislation on the claimant, the subsequent legislation is more onerous to the claimant's legal position, and the *ad malam partem* element of the test regarding the prohibition of retroactivity is therefore considered to exist in the present case.

[47] 3.2 It should also be noted that Decree2 entered into force (26 February 2019) after its promulgation (25 February 2019), i.e. its entry into force was not retroactive. However, it is precisely section 2 of the contested Decree2 which provides that the subsequent legislation – Decree2 and, in connection with it, section 4/A of the Act on Culture as amended by the Amending Act – shall also be applied to pending cases. In this way, the law-maker has made the later regulation applicable to legal relationships established before the entry into force of the legislation, thus retroactively changing the assessment of legal relationships established in the past. The Constitutional Court emphasises that in the present case, the relationship between the State and the claimant is a legal relationship established by the claim application, and the law-maker has ordered the assessment of the well-foundedness of the claim to be made on the basis of new rules, that is to say, it has amended the substantive content of the legal relationship. Therefore, an infringement of the prohibition related to the temporal

element of the test developed in connection with retroactive legislation can also be found, consequently the contested section 2 of Decree2, which provides for the application of the more onerous test to pending cases, is contrary to Article B (1) of the Fundamental Law.

[48] 4 In the lawsuit, the defendant explained its position regarding the regulation of Decree1 and the Act on Culture in its previous state of time, which was favourable to claimants. Accordingly, the preferential provisions are to be interpreted as *ex gratia* benefits, which the State is not obliged to provide and is therefore free to decide whether to terminate such benefits. In this context, the Constitutional Court recalls its consistent position that *ex gratia* benefits "are characterised by the fact that the law-maker grants benefits on the basis of fairness and that no one has the right to receive a particular form of *ex gratia* benefit. Consequently, the law-maker enjoys a wide discretion in determining both the scope of entitlement and the amount and other conditions of the benefit, nevertheless the scope of entitlement, the degree of entitlement and other conditions should not be determined arbitrarily." {Decision 24/2019. (VII.23.) AB, Reasoning [73]}.

[49] Via the principle of legal certainty, the prohibition of retroactive legislation is part of the rule of law, which, according to the Constitutional Court's consistent interpretation, is one of the fundamental values of the Fundamental Law, and thus a law contrary to this can only be arbitrary in concept. The Constitutional Court emphasises that, as the above-mentioned CCDec. has also pointed out, it is not contrary to the prohibition on retroactive legislation and is not therefore arbitrary for the law-maker to abolish a benefit, in particular one granted *ex gratia*, but it can only do so with a view to the future, while respecting the existing legal relationships (Reasoning [30]).

[50] 5 Both the reasoning of the Amending Act and the *amicus curiae* submission emphasise that the constitutional problem raised by the present case also concerns the State's obligation to protect cultural heritage, and the Constitutional Court therefore examined whether the arguments in relation to Article P of the Fundamental Law affect the application of the prohibition of retroactive legislation.

[51] In its decision examining the conformity of the legislation on the restitution of cultural property with the Fundamental Law, the Constitutional Court stated that "according to the reasoning of the Amending Act, one of the grounds for the adoption of the legislation affected by the petition was the State's duty to protect institutions in the field of cultural heritage, which is based on Article P (1) of the Fundamental Law. Pursuant to this, »natural resources shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations«. In the context of the protection of cultural

heritage, the Constitutional Court held that »Article P (1) is a pillar of the institutional guarantees of the fundamental right to a healthy environment which establishes the protection, maintenance and preservation of the natural and built environment, the values of the common, natural and cultural heritage of the nation, as a general constitutional responsibility of the State and of all and makes it their duty deriving from the Fundamental Law« {Decision 3104/2017. (V.8.) AB, Reasoning [37]}. »The constitutional responsibility for the common heritage of the nation is general and universal in the Fundamental Law, but based on the case-law of the Constitutional Court in relation to the right to a healthy environment, the State is entitled and obliged to a kind of primacy within this general responsibility, since the coordinated enforcement of this responsibility through institutional protection guarantees, the creation, correction and enforcement of institutional protection is a direct and primary task of the State.« {Decision 3104/2017. (V.8.) AB, Reasoning [39]}" Decision 3042/2021. (II.19.) AB, Reasoning [92] to [93]} On this basis, in its decision cited above, the Constitutional Court recognised the conformity of the legislation with the public interest.

[52] Section 4/A of the Act on Culture, as amended by the Amending Act, and the regulatory concept of Decree2 result in a stricter enforcement of the State's protection of institutions – in this respect, a correction of the regulation – arising from Article P of the Fundamental Law, as compared to the previous regulation. This is also supported by the *amicus curiae*, according to which "[...] the State has a duty of protecting institutions of the highest importance in respect of works of art found in public collections maintained by the State or local governments. Accordingly, the State must adopt rules which, in line with the consistent case-law of the Constitutional Court, may allow the removal of works of art from the State's (local government's) custody only in exceptional cases, before their ownership has been clarified. In my view, the contested provision [of Decree2] is intended to give effect to that principle [...]."

[53] The law-maker clearly has the possibility to reassess aspects it considers important in the course of legislation, even by including other values contained in the Fundamental Law or even by omitting them in the absence of an obligation to include them. Having said that, however, the Constitutional Court lays down that Article P of the Fundamental Law cannot be interpreted in such a way as to allow the prohibition of retroactive legislation to be breached, even if the law-maker intends to strengthen the aspects of cultural heritage protection – that is to say to correct relevant structure of institution-protection – in respect of the obligation imposed on it by Article P. The corrective effort in relation to the structure of institutional protection can only be enforced by respecting the prohibition of retroactive legislation and ensuring the consistency of the two requirements.

[54] The Constitutional Court notes that the fact that the law-maker, with the text version of section 4/A of the Act on Culture after the entry into force of the Amending Act and with Decree2, gave greater weight to the specific historical justice aspects in favour of the obligation stemming from Article P of the Fundamental Law and the restitution of possession, does not imply that the previous legislation was or was not in compliance wit the Fundamental Law, and the assessment of this question is beyond the scope of the present proceedings.

[55] 6 The Constitutional Court, having found that the contested provision of law infringed Article B (1) of the Fundamental Law, did not examine, in accordance with its established case-law, other breaches of the Fundamental Law alleged by the petitioner, such as the violation of the right to a fair administrative procedure and the right to a fair trial {see for example: Decision 12/2017. (VI.19.) AB, Reasoning [69]; Decision 4/2018. (IV.27.) AB, Reasoning [57]}.

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[56] 1 On the basis of the foregoing, the Constitutional Court, upholding the petition, found that section 2 of Decree2 had caused a violation of Article B (1) of the Fundamental Law, and therefore annulled it pursuant to section 41 (1) of the ACC, as set out in the holdings of the decision, and found pursuant to section 45 (2) of the ACC that the annulled provision was not applicable in the case giving rise to the proceedings of the Constitutional Court.

[57] 2 Based on the first sentence of section 44 (1) of the ACC, this decision of the Constitutional Court shall be published in the Hungarian Official Gazette.

Budapest, 04 October 2022.

*Dr. Tamás Sulyok* head of the panel,
Justice of the Constitutional Court

*Dr. Ágnes Czine*, rapporteur Justice of the Constitutional Court

*Dr. Attila Horváth*, Justice of the Constitutional Court

*Dr. Tamás Sulyok* head of the panel, Justice of the Constitutional Court on behalf of Justice *dr. Imre Juhász* unable to sign

*Dr. Miklós Juhász*, rapporteur Justice of the Constitutional Court