

The Prohibition of Retroactive Effect in German and Hungarian Constitutional Law

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ABSTRACT: The aim of this study is to reconstruct the doctrine of the prohibition of retroactive effect and to conduct a comparative analysis of German and Hungarian constitutional court practice. The central question of the study is how the retrospective reassessment of legal situations that have already been concluded can be distinguished from future amendments to existing legal relationships, and what role legal certainty, the protection of legitimate expectations and proportionality play in this. The research employs normative, case-law-based and functional comparative methods; analysing landmark decisions of the German Federal Constitutional Court and the Hungarian Constitutional Court. The findings indicate that German law attaches different presumptions and burdens of proof to genuine and non-genuine retroactivity, whilst Hungarian practice applies the same substantive criteria within a less uniform conceptual framework. The study proposes a four-step test based on the sequence of historical connection, the finality of the legal situation, the disadvantage, protected reliance and provability. It concludes that the development of Hungarian legal doctrine requires not the mechanical adoption of German terminology, but rather a transparent and verifiable systematisation of the existing criteria for assessment.

KEYWORDS: retroactive effect; legal certainty; protection of legitimate expectations; constitutional adjudication; comparative constitutional law

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Introduction

The topicality and significance of the subject

The prohibition of retroactive effect is one of the fundamental safeguards of legal certainty under the rule of law: it ensures that legal persons can assess in advance the consequences of their decisions taken in accordance with the law in force, and that the legislature does not retrospectively and arbitrarily reassess circumstances that have already been concluded. At the same time, however, this prohibition cannot preclude the legal system from adapting to social and economic changes. The central question in constitutional analysis is therefore what scope legal certainty affords to the legislature's freedom to shape the law for the future, and where the boundary lies beyond which intervention by the legislature – or, during the temporal application of a new rule, by those applying the law – constitutes a breach of legal certainty.²

This conflict becomes particularly acute in tax law, in the regulation of social benefits and the pension system, and in times of crisis. The German Federal Constitutional Court has developed a differentiated standard by distinguishing between 'echte' and 'unechte' Rückwirkung; this doctrine has also had a significant influence on the case law of the Hungarian Constitutional Court. The examination of this topic is therefore both a matter of legal doctrine and a question of comparative constitutional law.³

The study does not extend to an independent philosophical justification of the prohibition of retroactive effect; it focuses on the specific dogmatics of constitutional law and on a comparative analysis of German and Hungarian constitutional court practice.

The aim of the study

The aim of this study is to reconstruct the doctrine of the prohibition of retroactive effect and to provide a comparative analysis of German and Hungarian approaches. It first defines the concepts of genuine and non-genuine retroactive effect, then presents the various constitutionality tests developed by the BVerfG, with particular regard to the intensity of the protection of legitimate expectations and the limits of exceptions. It subsequently examines how the German approaches have been reflected and adapted in Hungarian constitutional court practice.

2 See BVerfGE 13, 261 (271–272); BVerfGE 30, 272 (285); BVerfGE 72, 200 (242, 257–258).

3 For a classic systematisation of German constitutional doctrine, see BVerfGE 72, 200 (241–243); BVerfGE 97, 67 (78–80).

Methodology

The study employs normative, case-law-based and comparative methods. In addition to specific constitutional provisions, it primarily analyses the landmark decisions of the BVerfG and the Hungarian Constitutional Court, as the content of the prohibition has been shaped predominantly by case law. The comparison does not merely seek terminological correspondences, but compares the structure of the applied standards, the burden of proof and the effect of all these on the actual limits of the legislature's discretion.

The conceptual and doctrinal foundations of the prohibition on retroactive effect

The concept of retroactive effect

We speak of retroactive legislation when a new provision attaches legal effects to facts or legal relationships that existed prior to its entry into force. From a constitutional law perspective, however, not every connection to the past carries the same weight. The decisive question is whether the new rule alters legal consequences that have already arisen, or whether it regulates the future development of a legal relationship that was commenced earlier but has not yet come into being.

The former constitutes genuine retroactive effect (*echte Rückwirkung*; *Rückbewirkung von Rechtsfolgen*), whilst the latter constitutes non-genuine retroactive effect (*unechte Rückwirkung*; *tatbestandliche Rückanknüpfung*). This distinction is not merely a descriptive technique: it is intended to define the starting point for the constitutional review. As a general rule, genuine retroactivity is prohibited, whilst non-genuine retroactivity requires an assessment of the protection of legitimate expectations and proportionality.⁴

The prohibition primarily protects against disadvantageous *ex post* legal consequences. The retroactive application of favourable rules, however, does not generally undermine legal certainty, but may affect the rights of third parties, equality or other constitutional requirements. When assessing the matter, therefore, the actual nature and timing of the legal consequence in question must always be examined.

⁴ For terminology and demarcation, see BVerfGE 63, 343 (353–357); BVerfGE 72, 200 (241–243, 256–257); BVerfGE 127, 1 (16–20).

The relationship between the rule of law and legal certainty

German constitutional law derives this prohibition — in addition to the specific prohibition on retroactive criminal law under Article 103(2) of the Basic Law — from the rule of law clause in Article 20(3) of the Basic Law. The objective requirement of legal certainty safeguards the reliability of the legal order, whilst its subjective aspect protects the legitimate expectations of legal persons. The protection of legitimate expectations does not require the immutability of the law, but demands that changes to the law do not arbitrarily render situations established under the law in force null and void.⁵

The extent of this protection depends on the finality of the legal situation, the severity of the detriment and the reversibility of the provisions in question. The mere hope that the law will not change in the future is a weak basis; by contrast, a financial position that has already been acquired and consolidated, an investment based on targeted state incentives, or a legal relationship that has been definitively concluded can create a strong position of legitimate expectation. ‘Acquired rights’ are therefore not an independent, absolute category, but rather a circumstance that increases the weight of the protection of legitimate expectations.⁶

The subjective function of the prohibition, which serves to protect legitimate expectations, is to safeguard a legal person’s freedom of self-determination and planning: the addressee can only bring their decisions into line with the law if they are able to ascertain their legal consequences in advance. This protection is directed not at the individual’s actual internal expectations, but at the objectively justifiable confidence in a given legal situation and the provisions of the based on that confidence. This must be reconciled with the legislature’s freedom to shape the law and its duty to adapt the legal system to changed circumstances.

Types of retroactive effect

The doctrine of the BVerfG distinguishes between cases of ‘echte’ and ‘unechte’ Rückwirkung on the basis of when the legal consequence arises. The boundary between the categories is not always clear-cut: in the case of complex regulations, the focus of the provision must be examined; in tax law, the statutory date on which the obligation arises must be considered. However, formal classification does not replace a substantive analysis of the protection of legitimate expectations.⁷

5 BVerfGE 13, 261 (271–272); BVerfGE 30, 272 (285); BVerfGE 72, 200 (242). On the specific prohibition under criminal law: Art. 103(2) GG.

6 On the distinction between a mere expectation of continuity and trust deserving of special protection, see BVerfGE 97, 67 (78–80); BVerfGE 105, 17 (37–40); BVerfGE 127, 1 (17–22).

7 BVerfGE 72, 200 (241–243, 256–257). In the case of complex regulations, see *ibid.* (256–257) regarding the focus of the Gesamtregelung.

Genuine retroactive effect

Genuine retroactive effect exists where a new provision retroactively and adversely alters the legal consequences of a set of facts that had already been finalised prior to its promulgation. Owing to the finality of the facts, the legal entity's legitimate expectations generally take precedence; a departure from this is possible only on exceptional grounds, whilst respecting the fundamental rights concerned. The detailed criteria for this category are discussed in section 4.2.1.⁸

Non-genuine retroactive effect

In the case of non-genuine retroactive effect, the legal consequence arises after the promulgation of the new provision, but the facts of the case are based on a process that began earlier or on an existing legal relationship. In such cases, there is no general prohibition, as this would paralyse the legislature's ability to regulate with a view to the future. However, the legitimate expectations of those affected may be protected if specific circumstances — such as a specific provision, state incentives or a financial position that has already become objectively established — make those expectations stronger than the general expectation of stability. The detailed proportionality test is set out in section 4.2.2.⁹

The prohibition of retroactive effect in German constitutional law

The Grundgesetz does not expressly mention a general prohibition on retroactive effect. The BVerfG has derived this from the rule of law under Article 20(3) of the GG, the requirements of legal certainty and the protection of legitimate expectations, as well as from the context of the fundamental rights concerned. In criminal law, by contrast, Article 103(2) of the GG contains an explicit and stricter guarantee.¹⁰

8 BVerfGE 72, 200 (257–260); BVerfGE 127, 1 (16–20).

9 BVerfGE 63, 343 (356–357); BVerfGE 105, 17 (37–40); BVerfGE 127, 1 (17–20).

10 For the reasoning regarding the rule of law, see BVerfGE 13, 261 (271); BVerfGE 72, 200 (242). From the commentary literature: Hans D. Jarass – Martin Kment – Bodo Pieroth, Grundgesetz für die Bundesrepublik Deutschland, 18th ed., C.H. Beck, Munich, 2024, commentary on Article 20 of the Basic Law; Michael Sachs – Christian von Coelln – Thomas Mann (eds.), Grundgesetz: Kommentar, 10th ed., C.H. Beck, Munich, 2024, commentary on Article 20 of the Basic Law.

The role of the principle of the rule of law

The principle of the rule of law safeguards the predictability of the legal order and the conditions for the autonomous decision-making of legal persons. The prohibition therefore does not operate in isolation, but in conjunction with the general freedom of action under Article 2(1) of the Basic Law and the specific fundamental rights at stake in the particular case — above all, the protection of property under Article 14 of the Basic Law.¹¹

The constitutional basis of the prohibition on retroactive effect

The constitutional standard is based on two complementary principles. On the one hand, a retrospective alteration of a settled legal situation can only be justified in exceptional cases. On the other hand, a legal change directed towards the future must not disregard positions of trust established in the past which are particularly worthy of protection. These two categories define different constitutional starting points: genuine retroactive effect is, as a general rule, prohibited, whilst non-genuine retroactive effect is, as a general rule, permitted. The latter, however, does not automatically imply constitutionality; the relationship between legal certainty, the fundamental rights concerned and the public interest justifying the change in the law must be examined in both cases.

The development of the BVerfG's case law

The BVerfG's early decisions on tax law were based on the general requirements of legal certainty and the protection of legitimate expectations. Subsequent case law refined this approach with categories linked to the point in time at which the legal consequence arose; a classic summary of this was provided in BVerfGE 72, 200.

The 'Investitionshilfe' judgment and early case law

The Investitionshilfe decision (BVerfGE 13, 261) is one of the cornerstones of the prohibition: on the basis of the protection of legitimate expectations derived from the rule of law, it restricted the retrospective imposition of burdens on past economic situations, whilst also outlining the exceptional cases. BVerfGE 30, 272 further clarified the distinction between legal relationships that have been concluded and those that are still in force. This line of development was

¹¹ BVerfGE 72, 200 (242, 257–258); BVerfGE 127, 1 (16–20); BVerfGE 156, 354 (404–406).

systematised in BVerfGE 72, 200, and subsequently reinforced – in particular by applying a substantive proportionality test – in BVerfGE 127, 1.¹²

The doctrines of ‘echte Rückwirkung’ and ‘unechte Rückwirkung’

Classification into one of these two categories determines which constitutionality test must be applied. In the case of ‘echte Rückwirkung’, the starting point is the prohibition and its narrow exceptions; in the case of ‘unechte Rückwirkung’, it is a proportionality assessment tailored to the intensity of the protection of legitimate expectations. However, formal classification cannot decide the case in advance: even ‘unechte Rückwirkung’ may come close to ‘echte Rückwirkung’ if it devalues a legal or financial position that has already been established.¹³

Genuine retroactive effect

Genuine retroactive effect exists where the adverse legal consequence of the provision relates to a set of facts that had already been finalised prior to its promulgation. According to BVerfGE 72, 200, this is, as a general rule, incompatible with the rule of law derived from Article 20(3) of the Basic Law. The reason for the prohibition is not merely the fact that it affects the past, but the particular weight attached to the trust placed in a legal situation that has become final.¹⁴

The dogmatic structure of the exception to the prohibition

Decision No. BVerfGE 72, 200 did indeed proceed from the premise that the prohibition on genuine retroactive effect is not absolute. However, this finding cannot be interpreted to mean that the retrospective reassessment of facts in cases that have already been concluded is subject to the legislature’s discretion in balancing legislative intent and legal certainty. The decision establishes a reverse standard: due to the finality of the case, the legal entity’s legitimate expectations take precedence as a general rule, and the legislature must demonstrate particularly serious, exceptional grounds which render a breach of the prohibition constitutionally acceptable. According to the BVerfG, only compelling reasons of the public good (zwingende Gründe des gemeinen Wohls), or the absence or cessation of an individual’s trust deserving of protection, may

12 BVerfGE 13, 261 (271–272); BVerfGE 30, 272 (285–287); BVerfGE 72, 200 (241–243).

13 On the preliminary, but not mechanical, significance of the categories, see BVerfGE 127, 1 (18–20).

14 BVerfGE 72, 200 (257–258); BVerfGE 97, 67 (78–79).

justify, and in certain cases even require, retroactive intervention (BVerfGE 72, 200 [257–260]).¹⁵

The exceptions are therefore not independent, isolated authorisations, but rather standardised manifestations of a single underlying principle. The decisive question is whether, at the time the retroactive effect took effect, the person concerned could objectively and in a constitutionally defensible manner have relied on the finality of the existing legal situation. If so, a legitimate or even significant public interest is not sufficient to justify the change: what is required is a public interest of such weight that it takes precedence over legal certainty, rendering the retroactive adjustment not merely expedient but constitutionally indispensable. If, on the other hand, the trust to be protected could not have arisen in the first place, the prohibition loses the basis of trust on which it rests; yet even then, the legislation is not exempt from an independent examination of the fundamental rights concerned.

Typical cases of a lack of legitimate expectations

The first category comprises a previous legal situation that was so unclear and convoluted that legal persons had to rely on the legislature to provide clarification. It is not sufficient, however, that a provision is open to multiple interpretations, is the subject of legal dispute, or that there is specific uncertainty in case law. According to subsequent case law, there must be general and significant legal uncertainty which causes a wide range of those affected to doubt what constitutes the law in force. The legislature's characterisation of a provision as 'interpretative' or 'clarifying' is not in itself decisive: if there is no general and significant legal uncertainty regarding the regulation of the legal relationships in question, and the Act merely resolves, with retroactive effect, a previously open question of interpretation, this constitutes genuine retroactive legislation, and a comprehensive examination of the exceptional conditions is required (BVerfGE 135, 1 [21–23], 1 BvL 5/08).¹⁶

In the second scenario, the previous regulation is so alien to the system and so unfair that serious doubts had already been raised as to its constitutionality. Precise wording is essential here. It is not necessary in every case for the Federal Constitutional Court (BVerfG) to have already formally annulled the previous provision, but it is not sufficient for the legislature to subsequently characterise it as flawed, unjust or politically misguided. The inconsistency with the system and the unfairness must reach a level that objectively undermines the basis of confidence in the rule's continued constitutional vali-

15 BVerfGE 72, 200 (257–260), in particular (258): a breach of the prohibition may only be justified by compelling reasons of public interest or by the absence or cessation of the trust to be protected.

16 BVerfGE 13, 261 (272); BVerfGE 30, 367 (388–389); BVerfGE 135, 1 (21–23, paras. 61–64). On the constitutive nature of legislative 'clarification', see BVerfGE 135, 1 (15–26).

dity. BVerfGE 72, 200 did not accept this argument because both the previous tax exemption and the rule that the tax deducted definitively settled the tax liability were unambiguous; moreover, the previous legislation was not constitutionally objectionable (BVerfGE 72, 200 [259–260]).¹⁷

This is to be distinguished from the case of a legal appearance created by an invalid provision. In such cases, the question is not whether the previous legislation generally appeared to be unconstitutional, but whether the legal person could, under the given circumstances, rely on the appearance created by the invalid provision. The exception therefore does not confer a general authorisation to ‘rectify’ unconstitutional law retrospectively. In particular, it does not permit the legislature to automatically shift the cost of its own previous breach of the Constitution onto those who relied in good faith on the law as promulgated and applied. The exclusion of such reliance always requires an objective justification, projected back to the starting point of the retroactive effect.¹⁸

The third case, which is particularly important from a temporal perspective, is where the trust to be protected has since ceased to exist. In BVerfGE 72, 200, the Federal Constitutional Court generally regarded the Bundestag’s final legislative decision as the turning point from which those affected must take the new rule into account even before its promulgation and entry into force. Prior to this threshold, the government’s intention, the tabling of a bill, a political announcement, a press report or even a high degree of probability of a change in the law do not, as a rule, negate the protectable nature of that reliance. The court specifically insisted on a final parliamentary resolution because, until then, neither the ‘how’ nor the ‘whether’ of the new rule could be regarded as sufficiently established (BVerfGE 72, 200 [260–262]).¹⁹

Nor is this time limit mechanical. In BVerfGE 97, 67, in view of the specific nature of the time-bound provisions relating to the targeted tax relief, accepted that transactions concluded after an unambiguous government announcement of the abolition of the relief—but which, for tax law purposes, only took effect following a subsequent legislative resolution—should not be allowed to frustrate the legislature’s objective. However, the decision did not generally override the temporal threshold set out in BVerfGE 72, 200: a tax concession designed to incentivise behaviour and aimed at a narrow group of addressees, the targeted provisions for the addressees of the regulation, and the subsequent occurrence of the tax effect together justified the deviation. A general aut-

17 BVerfGE 13, 215 (224); BVerfGE 30, 367 (388); BVerfGE 72, 200 (259–260); BVerfGE 135, 1 (22, para. 62).

18 On the legal appearance created by an invalid provision, see BVerfGE 13, 261 (272); BVerfGE 50, 177 (193–194); BVerfGE 135, 1 (22, para. 62); BVerfGE 156, 354 (406–407).

19 BVerfGE 72, 200 (260–262). According to the BVerfG, the legislative initiative and its public nature do not, as a general rule, yet remove the protectable nature of confidence; the turning point is usually the Bundestag’s final legislative resolution.

horisation for genuine retroactive effect cannot therefore be inferred from the legislative announcement alone.²⁰

The de minimis exception and overriding public interest

The ‘de minimis’ exception (Bagatellvorbehalt) constitutes a distinct exception: genuine retroactive effect may be permitted if the objectively justified amendment causes no disadvantage at all, or only a wholly insignificant disadvantage, to those affected. This exception must be interpreted narrowly. It is not sufficient that the burden is minor in relation to the budget as a whole, that the group of those affected is small, or that the individual loss is, in the legislature’s view, tolerable. The actual disadvantage suffered by the legal person must be negligible. BVerfGE 72, 200 expressly ruled out the application of this reservation in cases where the tax burden in question is of a significant magnitude (BVerfGE 72, 200 [258–259]).²¹

The most far-reaching exception is that of overriding public interest (überragende Belange des Gemeinwohls), which takes precedence over legal certainty. The application of this exception is particularly risky because it could, on the face of it, transform the general rule into a general discretionary clause. BVerfGE 72, 200, however, provides a strict negative example: the restoration of equality in the sharing of the public burden, the enforcement of tax law in accordance with the social rule of law, the avoidance of a minor shortfall in tax revenue resulting from the absence of retroactive application, and the full and prompt implementation of the new legislation did not, in themselves, constitute compelling public interests justifying retroactive effect. The court also examined whether the legislature’s objective could essentially have been achieved without retroactive effect; since this was the case, it annulled the tax liability extending to the period prior to the final parliamentary resolution of 22 June 1972 (BVerfGE 72, 200 [260–263]).²²

The true extent of the public interest exception is illustrated by the decision on the confiscation of assets in BVerfGE 156, 354. In that case, the BVerfG accepted genuine retroactive effect extending as far back as thirty years for the confiscation of assets derived from offences for which the limitation period had already expired. The exception was not based on budgetary considerations, nor on the technical simplification of legislation, but on the overriding constitutional interest in ensuring that the legal system does not permanently recognise the increase in assets generated by criminal activity, and

20 BVerfGE 97, 67 (78–83). The specific facts of the case concerned a targeted, time-limited tax subsidy and transitional provisions capable of circumventing the legislature’s objective.

21 BVerfGE 30, 367 (389); BVerfGE 72, 200 (258–259); BVerfGE 101, 239 (263–264); BVerfGE 135, 1 (22–23, para. 62).

22 BVerfGE 13, 261 (272); BVerfGE 72, 200 (258, 260–263); BVerfGE 156, 354 (406–410).

in strengthening reparation for victims and the community's respect for the law. Even in this case, it was decisive that the measure was classified not as a penalty but as a specific legal consequence relating to the distribution of assets; had the prohibition under Article 103(2) of the Basic Law been applicable, this scope for discretion would not have been available (BVerfGE 156, 354 [401–414]).²³

External limits on the exception

The existence of grounds for an exception is merely a necessary but not a sufficient condition. BVerfGE 72, 200 expressly held that retroactive effect must not lead to an infringement of the fundamental rights protecting the living conditions of those affected. The legislature cannot, for example, circumvent the limits on the protection of property laid down in Article 14 of the Basic Law by formulating the intervention as a temporal rule. The regulation set out in must be appropriate and necessary; it may extend in time, in terms of the persons concerned and in scope only for as long as the justifying reason actually exists, and the burden on the individual must not be disproportionate to the constitutional objective to be achieved. The absence of a transitional provision, a leniency clause or partial compensation may therefore lead to unconstitutionality even where grounds for an exception exist.²⁴

A further absolute external constraint is provided by those specific constitutional guarantees which themselves make a definitive choice in favour of legal certainty. Under Article 103(2) of the Basic Law, no retroactive, onerous criminal offence or penalty may be established; in this context, the general retroactivity assessment invoking the public interest does not apply. Similarly, due to the *ne bis in idem* guarantee in Article 103(3) of the Basic Law, a review of a final acquittal based on new evidence to the detriment of the accused cannot be justified solely on the grounds of substantive justice or the interest in prosecuting the most serious criminal offences (BVerfG, 2 BvR 900/22, 31 October 2023). In addition to these provisions, the constitutional core of human dignity, *res judicata* and property may also constitute a boundary which cannot be breached even by the exceptions recognised in BVerfGE 72, 200.²⁵

23 BVerfGE 156, 354 (401–414), in particular (409–413). The court classified the confiscation of property not as a punishment but as a specific measure of property regulation; it therefore applied the general prohibition on retroactive effect rather than Article 103(2) of the Basic Law.

24 BVerfGE 72, 200 (258): even the existence of grounds for an exception does not permit the circumvention of the fundamental rights protecting the living conditions of those concerned; in particular, the limitations set out in Article 14 of the Basic Law remain applicable to property rights.

25 On the absolute prohibition on retroactive criminal law provisions under Article 103(2) of the Basic Law, see BVerfGE 25, 269 (286–291). On the priority of legal certainty under Article 103(3) of the Basic Law: BVerfG, Judgment of 31 October 2023 – 2 BvR 900/22 –, paras. 88–110.

On this basis, the criteria limiting the legislature's scope for action can be summarised as follows. The more definitive the previous legal situation, the more severe and personal the subsequent burden, the clearer the old rule was, and the more it was based on specific provisions, the less conceivable a constitutional breach becomes. Greater scope for action arises only if trust was objectively lacking or had already ceased to exist, or if the disadvantage is truly trivial in nature, or if the retroactive effect is rendered indispensable by such an exceptional public interest that milder regulation, applicable only prospectively, is incapable of effectively safeguarding it. 'Fiscal interests', policy errors recognised retrospectively, the general restoration of equality, the simplification of the application of the law, or political urgency usually remain below this threshold even in such cases.

The doctrinal message of Decision No. BVerfGE 72, 200 is therefore not that genuine retroactive effect can be considered in a broad sense, but rather that overcoming this threshold requires a multi-stage and exceptional justification. Firstly, the facts of the case, which have been concluded, and the starting point of the retroactive effect must be precisely defined; secondly, the existence of a narrowly interpreted exceptional ground must be demonstrated; thirdly, the rule's purpose, necessity and temporal limitation must be verified; and finally, the fundamental rights concerned and the specific constitutional prohibitions must be examined independently. Only if all these conditions are met can confidence in the established legal situation be restored.

Subsequent case law – in particular the decisions BVerfGE 97, 67, 127, 1, 135, 1 and 156, 354 – has not undermined this framework, but rather clarified it. Genuine retroactive effect thus remains an independent category of constitutional law, the essence of which lies not merely in the consideration of past facts, but in the retrospective, burdensome re-evaluation of a legal situation that has already been concluded, and the permissibility of which can only remain an extremely exceptional circumstance.²⁶

Non-genuine retroactivity

There is no genuine retroactive effect – *tatbestandliche Rückanknüpfung* – where the adverse legal consequences of the new provision arise only after its promulgation, whilst its factual basis is founded on a process or ongoing legal relationship that began earlier and has not yet been concluded. As a general rule, such legislation is not prohibited: the protection of complete immutability would paralyse the legislature, which is responsible for the public good, and would disproportionately restrict the adaptability of the legal system (BVerfGE 127, 1 [17–18]).²⁷

26 See BVerfGE 97, 67 (78–83); BVerfGE 127, 1 (16–25); BVerfGE 135, 1 (21–26); BVerfGE 156, 354 (404–414).

27 BVerfGE 63, 343 (356–357); BVerfGE 105, 17 (37–40); BVerfGE 127, 1 (17–18).

This starting point does not imply a presumption of constitutionality in favour of every intervention with future legal effect. According to BVerfGE 127, 1, ‘*unechte Rückwirkung*’ is compatible with the protection of legitimate expectations under the rule of law and fundamental rights only if the provision is suitable and necessary for promoting the legislature’s objective, and, following a comprehensive weighing up of the gravity of the disappointed trust against the gravity and urgency of the reasons justifying the change in the law, the burden on the person concerned does not exceed the limit of what is reasonable (*Zumutbarkeitsgrenze*; BVerfGE 127, 1 [18–20]).²⁸

Determining the weight of the expectation

The first question in this assessment is whether the affected party’s expectation went beyond the general expectation of legal certainty. This assessment is objective and categorical: it is not the individual’s internal motivation that is decisive, but rather the content of the previous provision, the degree of finality of the legal relationship, the measures taken, their reversibility and any state incentives. A time-bound investment based on a targeted tax concession may foster greater confidence than the mere possibility of future tax-free profits (BVerfGE 97, 67 [78–80]; BVerfGE 127, 1 [20–21]).²⁹

Confidence is weaker if the area of law is already heavily regulated and subject to change, the provision is of a transitional nature, the legislature has indicated that a review is forthcoming, or a specific reform process has been underway for some time. However, a general awareness that legislation is subject to amendment does not in itself deprive a party of protection. The significance of a draft bill or political announcement always depends on how specific the new rule was, and on when the provision in question took effect and the legal consequence arose.

Consolidated positions and proximity to ‘echte Rückwirkung’

Within the context of *unechte Rückwirkung*, enhanced protection is afforded to legal or financial positions that have already become objectively established. Decision BVerfGE 127, 1 regarded the capital gain that could be realised tax-free

28 BVerfGE 127, 1 (18–20): retroactive effect is permissible if it is appropriate and necessary, and provided that, following a comprehensive weighing up of the disappointed trust and the gravity and urgency of the reasons justifying the change in the law, the burden on the person concerned does not exceed the limits of what is reasonable.

29 For an objective, categorical assessment of the situation of legitimate expectation and the significance of the targeted state incentive, see BVerfGE 97, 67 (78–83); on the mere hope of future tax exemption, see BVerfGE 127, 1 (20–21).

after the expiry of the two-year holding period (the so-called ‘Spekulationsfrist’) required for the tax-free sale of property as such a concretised financial position. The extension of the holding period to ten years applied to future sales; formally, therefore, it constituted ‘*unechte Rückwirkung*’ (non-genuine retroactive effect); however, the retrospective taxation of capital gains that had already become tax-exempt approximated ‘*echte Rückwirkung*’ (genuine retroactive effect) and was found to be unconstitutional (BVerfGE 127, 1 [21–25]).³⁰

It follows from this that the legislature cannot rely solely on the formal date on which the legal consequence arises. It must be examined whether the new rule devalues a value, a fulfilled condition or an irreversible provision that was already economically and legally distinct at the time of its promulgation. The closer the situation is to being finalised, the more specific the public interest justifying the application of the new rule to past facts must be, and the more lenient the transitional provision must be.

Assessment of public interest and proportionality

On the public interest side, it is not only the legitimacy of the objective that matters, but also its weight and urgency. General legal policy, fiscal or administrative objectives may be sufficient in a situation of low public confidence, but they do not automatically justify the withdrawal of established entitlements. Decision BVerfGE 127, 1 found that the extension of the holding period required for tax-free sales, which had not yet expired, could be justified on the grounds of tax equality and the financing of the reform; however, these same general objectives were no longer sufficient to justify the retrospective taxation of capital gains that could already be realised tax-free.

The necessity test must also extend to temporal regulation. The legislator must weigh up the options of application with effect solely from the future, the separation of earlier and later periods, a transitional period, a ‘grandfathering’ arrangement, partial compensation or other leniency provisions. If the legislator’s objective can be substantially achieved by means that are less likely to undermine confidence, linking the new rule to earlier factual circumstances without transitional or leniency provisions cannot be regarded as necessary.

In the proportionality test in the narrower sense, the gravity of the breach of the position of trust must be weighed against the gravity and urgency of the public interest justifying the legislative change. In this context, the following factors are of significance: the extent of the loss incurred, the irreversibility of the provisions in question, the vulnerability of the group concerned, the time

30 BVerfGE 127, 1 (21–25). The court regarded the capital gain arising after the expiry of the two-year taxable holding period from the date of acquisition of the property – which could be realised tax-free until then – as a concretised financial position, the retrospective taxation of which was not justified by general fiscal and equity objectives.

available to prepare for the legislative change, and the manner in which the legislature has distributed the burdens arising from the new legislation. The more specific the position of legitimate expectation affected by the legislation is, and the more strongly it is protected by fundamental rights, the greater the public interest required to justify its infringement.

Tax periods and the date of promulgation

In tax law, the BVerfG generally bases its assessment on the point at which the obligation to pay arises under the law. Due to the income tax liability arising at the end of the relevant year, an amendment extending back to the beginning of the ongoing tax assessment period is usually considered *unechte Rückwirkung*. However, this may come close to genuine retroactivity; consequently, the BVerfG applied heightened requirements regarding the protection of legitimate expectations and proportionality in its judgments BVerfGE 127, 1, 127, 31, 127, 61 and 132, 302.

The date of promulgation is the point in time up to which a legal person may, as a general rule, rely on the law in force. In the case of provisions adopted following a final legislative decision by the Bundestag, the level of reliance is generally considerably weaker, as the content of the new rule has already been sufficiently specified. However, a mere legislative initiative or press report does not generally undermine confidence in existing law to the same extent. An exception was the specific case examined in Decision BVerfGE 97, 67, in which the State encouraged legal entities to enter into specific transactions by means of a targeted tax concession.

The scope of ‘*unechte Rückwirkung*’ is therefore broader, but not unlimited. The legislator may modify the future effects of existing legal relationships if the connection to the past can be specifically demonstrated, assesses the position of trust on a case-by-case basis, and, where necessary, provides transitional protection. However, it may not, on the basis of a purely formal temporal argument, render taxable or void that which had objectively become established by the time of promulgation, or that to which the legal person had irreversibly adapted on the basis of targeted encouragement from the state.

The role of the protection of legitimate expectations in assessing the constitutionality of retroactive effect

The protection of legitimate expectations forms the core of German legal doctrine, but its role differs in the two categories. In the case of genuine retroactivity, the principle of finality generally resolves the conflict in favour of the legal person, and only narrow exceptions permit legislative intervention. In cases of non-genuine retroactivity, there is no such presumption against

retroactivity; however, the legislator must specifically justify why the new rule extends to factual situations or legal relationships that were commenced previously but have not yet been concluded, and must ensure that the intervention is proportionate.

The categories are therefore not mechanical. The decisive substantive question is to what extent the situation established under the previous law has objectively become final, and to what extent the new provision results in a loss of self-determination or fundamental rights. This approach ensures both the stability and the adaptability of the legal order, and this provides the starting point for a comparative analysis of Hungarian constitutional law.

Partial summary

German constitutional law does not codify the prohibition on retroactive effect in a single, rigid rule, but rather through two tests for the protection of legitimate expectations, each based on a different premise. In the case of genuine retroactive effect, the trust associated with a settled legal situation generally takes precedence; a breach of this trust requires a lack or cessation of trust, a trivial infringement, or an exceptional public interest that takes precedence over legal certainty. In the case of non-genuine retroactive effect, the possibility of legislative amendment is the starting point, but the link to the past must be appropriate, necessary and proportionate to the weight of the position of reliance concerned.³¹

The German categories can be used as a framework for comparison in the analysis of Hungarian practice, rather than as concepts to be adopted unchanged. The following chapter therefore examines how the Hungarian Constitutional Court, in its own terminology, distinguishes between the retrospective reassessment of concluded situations and the future modification of existing legal relationships, and what level of legal certainty it attaches to each.³²

31 For a summary, see BVerfGE 72, 200 (241–243, 257–263); BVerfGE 127, 1 (16–25); BVerfGE 156, 354 (404–414).

32 For the functional comparison of German categories, see sections 4.2–4.4 of this study. For the specific criteria applied in Hungarian practice, see in particular Constitutional Court Decision No. 10/2014 (4 April), Reasoning [14]–[21]; Constitutional Court Decision No. 8/2020 (13 May), Reasoning [50]–[61]; Constitutional Court Decision No. 2/2025 (8 May), Reasoning [20]–[26].

The prohibition of retroactive effect in Hungarian constitutional law

The normative foundations of the prohibition and constitutional continuity

In Hungarian constitutional law, the prohibition on retroactive effect rests on a dual normative basis. Its constitutional basis is the rule of law as declared in Article B(1) of the Fundamental Law, from which the Constitutional Court derives the requirement of legal certainty, and within that, the requirement of a foreseeable and predictable legal environment. At the statutory level, Section 2(2) of Act CXXX of 2010 on Legislation prohibits legislation from imposing or increasing obligations, depriving or restricting rights, or declaring conduct unlawful in respect of the period prior to its entry into force. The wording of the Act provides an important point of reference, but the subject of the constitutional review is not an independent breach of the Act on the Protection of Personal Data, but rather whether the legislation infringes the legal certainty arising from Article B(1).^{33 34}

Prior to the entry into force of the Fundamental Law on 1 January 2012, the basis of the Hungarian constitutional order was Act XX of 1949 on the Constitution of the Republic of Hungary, which had been comprehensively amended in 1989 (hereinafter: the former Constitution). Section 2(1) of that Act stipulated that ‘the Republic of Hungary is an independent, democratic state governed by the rule of law’. The Constitutional Court derived from this provision the requirement of legal certainty and, within that, the prohibition on retroactive effect to the detriment of the individual. References to the former Constitution therefore constitute the normative basis for the Constitutional Court’s case law prior to 2012.³⁵

The classic principle underpinning this prohibition was set out in Constitutional Court Decision No. 11/1992 (III. 5.). The decision did not restrict the principle of legality in criminal law to the statutory elements of an offence and the penalty, but extended it to the entire system of criminal liability, including the statute of limitations. A state governed by the rule of law may not retrospectively alter the limits of the state’s punitive power as defined by law to the detriment of the person concerned; neither a change in criminal policy nor an

33 Constitutional Court Decision No. 10/2014 (4 April), Reasons [13]–[18]; Constitutional Court Decision No. 3021/2020 (10 February), Reasons [34]–[36].

34 Article B(1) of the Fundamental Law of Hungary; Section 2(2) of Act CXXX of 2010 on Legislation.

35 Act XX of 1949 on the Constitution of the Republic of Hungary, Section 2(1). The text of the constitution establishing a democratic state governed by the rule of law was formulated by Act XXXI of 1989; the Constitution remained in force until 31 December 2011.

omission on the part of the authorities can justify a more severe retrospective assessment. This principle is significant beyond the scope of criminal law: the object of protection under legal certainty is not merely the formal scope of the provision, but the possibility for a legal person to align their decisions with the law as it stood at the time of the act.³⁶

The entry into force of the Fundamental Law did not automatically disrupt the line of case law established under the previous Constitution. According to Constitutional Court Decision No. 13/2013 (17 June), the arguments and legal principles developed in earlier decisions may be relied upon where this is permitted by the substantive consistency between the relevant provisions of the Fundamental Law and the previous Constitution, the context of the Fundamental Law as a whole, and the specific case. With regard to retroactive effect, this continuity has been expressly confirmed by subsequent case law. Decision No. 10/2014. (IV. 4.) AB held that the rule of law clause set out in Article B(1) of the Fundamental Law is, in its wording, identical to Section 2(1) of the previous Constitution; it therefore regarded the previous Constitutional Court doctrine on the prohibition of retroactive effect as authoritative.^{37 38}

However, a constitutional complaint based on Article B(1) is exceptional. According to the Constitutional Court's consistent practice regarding the admissibility of complaints, the rule of law clause does not, in itself, generally constitute a right guaranteed to the complainant under the Fundamental Law; the basis for a direct complaint may primarily be legislation or the application of the law with retroactive effect, or the lack of sufficient time to prepare. These three issues share a common root in legal certainty, but their criteria differ. Retroactive effect raises the question of whether the new provision attaches adverse legal consequences to a relevant fact occurring prior to its promulgation or entry into force; whilst adequate preparation time asks whether there remains a genuine opportunity to adapt to the new requirements that will apply in the future. The two intersect particularly in relation to existing legal relationships, but they are not interchangeable.³⁹

36 Constitutional Court Decision No. 11/1992 (5 March), ABH 1992, 77, 86–87; in particular Parts IV–V of the decision. See also Constitutional Court Decision No. 16/2014 (22 May), Reasoning [29]–[32].

37 Constitutional Court Decision No. 10/2014 (4 April), Reasons [14]–[17], with reference to Constitutional Court Decision No. 57/1994 (17 November) and Constitutional Court Decision No. 3062/2012 (26 July).

38 Constitutional Court Decision No. 13/2013 (17 June), Reasoning [27]–[34]; for the application of the provision with retroactive effect, see Constitutional Court Decision No. 16/2014 (22 May), Reasoning [29]–[32].

39 Constitutional Court Decision No. 2/2025 (8 May), Reasoning [16]; Constitutional Court Decision No. 3387/2024 (8 November), Reasoning [18].

Categories of retroactive effect in Hungarian law

According to a central tenet of Hungarian practice, two elements must be present for a breach of the prohibition to occur: the new provision must relate to a fact, event or legal relationship that existed prior to its entry into force, and it must place the legal person in a less favourable position than under the previous law. Constitutional Court Decision No. 2/2025 (8 May) explicitly formulated this as a conjunctive condition. Classification therefore depends not on the title of the legislation or the wording of its entry into force, but on the relationship between the relevant fact and the altered legal consequence.⁴⁰

Classical retroactive effect

In the most straightforward case, the legislator formally stipulates that the new provision is to apply to events occurring prior to its entry into force. However, this category also includes cases where the provision only comes into force in the future, but expressly provides for its application to facts or legal relationships that arose previously, thereby creating or aggravating an obligation, depriving a right, or attaching a new disadvantage to past conduct. In Decision No. 10/2014. (IV. 4.) AB, the new telecommunications regulation restricted the ability of property owners affected by previously installed antennas to enforce their rights under the law of neighbours. The Constitutional Court first examined the retroactive application and then, separately, the detrimental content, and annulled the provision only on the basis of the combined existence of both.⁴¹

The condition of detriment simultaneously defines the negative boundary of the prohibition. Retroactive regulation is not in itself unconstitutional: the legislature may grant new rights retrospectively, extend an existing ‘ ‘ right, or lift a restriction. The prohibition is therefore not a rule of temporal neutrality, but a limit on changes in the law that are ‘ad malam partem’.⁴² It also follows from this that actual economic loss is not sufficient in itself; the new provision must adversely alter a legal position recognised by the previous law.

A recent and, from a doctrinal perspective, particularly clear example of the classic retroactive effect is Constitutional Court Decision No. 2/2025 (8 May). The complainant submitted an application for the connection of a small-scale domestic solar power plant in accordance with the rules in force at the time; subsequently, a decree promulgated later set the cut-off date for entitlement to net metering as the day preceding the date of the application. According to the decision, the application did not merely create a hope: it defined the technical and economic scope of the investment, bound the parties, and thereby gran-

40 Constitutional Court Decision No. 2/2025 (8 May), Reasons [22]–[26].

41 Constitutional Court Decision No. 10/2014 (4 April), Reasons [15]–[21].

42 Constitutional Court Decision No. 10/2014 (4 April), Reasoning [18].

ted the legal entity the right to opt for net metering. The subsequent gross settlement replaced this already exercised right with a more onerous system. The ruling thus linked the transformation of mere anticipation into a legally protected position to a specific act.⁴³

Modification of the future effects of existing legal relationships

It is more difficult to determine the legal classification if the legal relationship is still in existence when the new provision comes into force, and the altered legal consequences only take effect thereafter. No general right to the continued existence of existing legal relationships can be inferred from Hungarian practice. As a general rule, the legislature may amend the future terms of a long-standing legal relationship and may take past facts into account when determining future legal consequences. However, taking a past fact into account is not the same as its retrospective reclassification. The decisive question is whether the past fact had already produced an independent substantive legal effect under the old law, or whether it was merely one element of a set of facts that would only become complete at a later date.

Constitutional Court Decision No. 3021/2020 (10 February) examined a change in the funding conditions for a higher education programme that had already commenced. Although the student's legal status had been established before the new rule came into force, the third and fourth semesters, which formed the basis for the reclassification, fell entirely within the period following the rule's entry into force on 1 September 2017. The new requirement was therefore applied exclusively to academic results achieved after the rule came into force; consequently, the facts relevant to the reclassification only became complete after that date. The Constitutional Court therefore did not find any prohibited retroactive effect. At the same time, it also examined whether the student had had sufficient time to become aware of the new requirement and to adapt to it. The case thus clearly illustrates that the future shaping of an existing legal relationship, the prohibition on retroactive effect and the requirement for sufficient preparation time are interrelated but distinct constitutional issues.⁴⁴

Decision No. 8/2020 (13 May) of the Constitutional Court reached the opposite conclusion. In the case of the recovery of local authority grants, the legislature retrospectively excluded the authority's discretion and ordered that the new rule be applied to ongoing proceedings as well. According to the Constitutional Court, a transitional rule relating to a pending case is also incompatible with the rule of law () if it adversely alters the substantive legal consequences of a factual situation that already existed at the time of its entry into force.

43 Constitutional Court Decision No. 2/2025 (8 May), Reasons [23]–[27].

44 Constitutional Court Decision No. 3021/2020 (10 February), Reasons [31]–[39], [45]–[55], [57]–[62].

‘Pending proceedings’ are therefore not a neutral touchstone that would automatically permit legislative intervention: a distinction must be drawn between the immediate amendment of procedural rules and the substantive reassessment of past conduct.⁴⁵

Constitutional Court Decision 34/2014 (14 November), which examined the laws concerning foreign currency borrowers, highlighted another distinction. In the case of a new rule governing contracts concluded previously, it must be examined whether the law actually creates a new and disadvantageous legal environment compared to the correctly interpreted content of the previous law. If it merely summarises and makes explicit existing requirements of good faith, its effect is declaratory; if, on the other hand, it establishes a new standard of nullity, it constitutively transforms past contractual positions. The majority accepted the former characterisation, whilst the dissenting opinions emphasised the retrospective normative reclassification. The debate shows that the assessment of retroactivity is often determined by the reconstructed content of the ‘old law’.⁴⁶

The application of the law with retroactive effect

The protection arising from Article B(1) is not limited to the review of the legislature’s temporal provisions. It may also become a matter of constitutional law if an authority or court applies a later provision to earlier facts, or attributes a new meaning to an earlier provision which the legal person could not have taken into account at the time of the act. However, a finding of retroactive application of the law is exceptional, as the determination of the applicable law and the timing of the facts of the case is, as a general rule, a matter of technical legal interpretation.

In Constitutional Court Decision No. 3069/2021 (24 February), the complainant challenged the application of the VAT rules in force from 2015, citing economic transactions dating from 2014. The Constitutional Court identified the fact giving rise to the legal consequence not on the basis of the underlying transaction, but on the basis of the subsequent cancellation of the tax registration number and the valid exercise of the right to deduct tax. As the previous tax return was incorrect, the complainant had not validly exercised that right before the new provision came into force; therefore, the application of the subsequent rule was not deemed to be retroactive. This is not merely a technical choice of timing: it reflects the principle that only a properly established subs-

45 Constitutional Court Decision No. 8/2020 (13 May), Reasoning [50]–[61], in particular [61]; operative part, points 1–2.

46 Constitutional Court Decision No. 34/2014 (14 November), Reasons [71]–[78], in particular [74]–[76]; for the dissenting opinion based on constitutive effect, see the separate opinion of Dr László Kiss, Reasons [264]–[291].

tantive legal position can link a subsequent legal consequence to the past in a constitutionally relevant manner.⁴⁷

Constitutional Court Decision No. 16/2014 (22 May) examined the same issue from the perspective of the limitation period for the enforcement of sentences. According to the majority, in the case of a limitation period that is still ongoing and has not yet expired, no subjective right can be based on the expiry of the limitation period under the previous rule. Therefore, its extension, or the interpretation of this in the interests of legal uniformity, did not constitute the retrospective reopening of a closed case; a distinction was drawn between the subsequent consideration of a past event and the genuine retroactive application of a later rule. The dissenting opinion, by contrast, emphasised the imposition of the risk of the limitation period on the state and the subsequent aggravation of the sentence to the detriment of the convicted person. This difference of opinion once again indicates that at the heart of the categorisation lies the substantive understanding of finality.⁴⁸

The substantive limits of the prohibition: disadvantage, finality and the protection of legitimate expectations

The requirement of a disadvantageous legal consequence

The most thoroughly developed element of the Hungarian standard is the assessment of detriment. The list set out in the Act on the Constitutional Court — the imposition or intensification of an obligation, the deprivation or restriction of a right, or the declaration of conduct as unlawful — is also reflected in the Constitutional Court's test. However, the list is not exhaustive: a disadvantage may also consist of a substantive restriction on the enforcement of claims, the removal of discretion, or the withdrawal of a right of choice already exercised. The decisive factor is whether the new provision reduces the legal scope of action available under the old law; the mere failure of economic expectations is not sufficient in itself.⁴⁹

The disadvantage must be assessed in relation to the regulatory situation as a whole. The fact that a specific provision is more onerous is not decisive if the new system, taken as a whole, extends entitlements; however, the general public interest objective does not render the retroactive forfeiture of rights im-

47 Constitutional Court Decision No. 3069/2021 (24 February), Reasons [38]–[43] and [47]–[52].

48 Constitutional Court Decision No. 16/2014 (22 May), Reasoning [29]–[43]; for the separate opinion, see Reasoning [54]–[73].

49 On the application of Section 2(2) of the Jat. as a test: Constitutional Court Decision No. 35/2019 (31 December), Reasoning [27]; Constitutional Court Decision No. 8/2020 (13 May), Reasoning [58]–[59].

sed on a limited group of persons neutral. Accordingly, Constitutional Court Decision No. 2/2025 (8 May) protected not the expected return on investment, but the right to settlement already acquired by the submission of the claim.⁵⁰

The concluded set of facts, the acquired right and the expectation

The most difficult issue in applying the prohibition is determining when a past situation becomes constitutionally protected. The creation of the legal relationship is neither a necessary nor a sufficient connecting factor in itself. It is necessary to examine whether the statutory conditions have been met, whether the legal effect has taken place, the role of any administrative or judicial decision, the irrevocable disposition by the legal person, and whether an independently enforceable entitlement has arisen. Pending proceedings do not, in themselves, expose a substantive legal situation that has already been finalised to subsequent, adverse re-evaluation.⁵¹

An expectation lies between an acquired right and mere hope. Its protection is all the stronger the more automated the acquisition of the right is, the fewer conditions remain to be fulfilled, and the more significant the provision made by the legal entity in response to the regulatory incentive. Constitutional Court Decision No. 2/2025 (8 May) classified the notification of a claim as an act already giving rise to legal effects; this brought Hungarian practice closer to examining the degree of specificity of the position of reliance.⁵²

The role of the protection of legitimate expectations

Compared with German law, Hungarian reasoning documents less frequently cite the protection of legitimate expectations as an independent criterion. Its function is nevertheless recognisable in the examination of foreseeability, acquired rights, a concluded legal relationship, the exercise of rights and the possibility of adaptation. Protected reliance is not the same as a subjective expectation that legislation will remain unchanged. It is stronger where the legal rule links a right to the fulfilment of clearly defined conditions; where the legal person has fulfilled these conditions or has acted irrevocably in reliance on them; or where the state itself has encouraged the decision. This reliance is weaker in a volatile, heavily regulated field, within a conditional support scheme, or where the event triggering the legal consequence has not yet occurred.

50 Constitutional Court Decision No. 2/2025 of 8 May, Reasons [23]–[26].

51 Constitutional Court Decision No. 4/2020 (29 January), Reasoning [40]; Constitutional Court Decision No. 8/2020 (13 May), Reasoning [60]–[61].

52 Constitutional Court Decision No. 2/2025 (8 May), Reasons [24]–[26].

These considerations are mostly implicit in the decisions examined. A conditional status, subject to periodic review, and a right not yet validly exercised may be weak, whilst a position linked to a fulfilled condition, a legally binding declaration or a significant investment decision may establish strong trust. The direction of development in Hungarian legal doctrine is therefore not the adoption of new categories, but the open and consistent weighing up of these factors.⁵³

Public interest, proportionality and transitional provisions

The Hungarian prohibition on genuine retroactive effect is generally expressed in categorical terms in the language of the decisions: where both past application and the ‘ad malam partem’ effect are present, the Constitutional Court has not established a catalogue of exceptions similar to the German ones. The public interest plays a role rather in assessing the establishment of the protected position, the novelty of the normative content and the legal consequences of unconstitutionality; neither the digital transition nor budgetary discipline, in and of themselves, justified the retrospective restriction of an already established substantive legal situation.⁵⁴

In the grey area of non-genuine retroactivity, however, it would be justified to apply a structured proportionality test. This must cover the specificity and urgency of the public interest, the severity of the loss, the foreseeability of the change, as well as the rule affecting the future, the transitional period, the exception and the possibility of compensation. Interim relief becomes particularly significant where the legal person is no longer able to amend its previous decision, but its position has not yet been fully finalised.

Legal certainty is not only the basis for the prohibition, but must also be taken into account when determining the legal consequences of unconstitutionality. Decision No. 2/2025. (8 May) AB left scope for the targeted regularisation of the group of persons concerned and avoided the automatic restructuring of legal relationships not affected by the constitutional defect. Appropriate transitional safeguards are therefore required, alongside the substantive criteria, to ensure that existing legal relationships can be amended in the future.⁵⁵

53 Constitutional Court Decision No. 3021/2020 (10 February), Reasoning [45]–[55]; Constitutional Court Decision No. 3069/2021 (24 February), Reasons [39]–[43], [47]–[52]; Constitutional Court Decision No. 2/2025 (8 May), Reasons [23]–[26].

54 Constitutional Court Decision No. 10/2014 (4 April), Reasons [16]–[21]; Constitutional Court Decision No. 8/2020 (13 May), Reasons [61]–[66].

55 Constitutional Court Decision No. 2/2025 (8 May), Reasons [28]–[31].

The ultimate limits of legislative intervention

The first limit that can be definitively inferred from current Hungarian Constitutional Court case-law is the prohibition on the retrospective, detrimental reassessment of legal effects that have already taken place and of rights that can be enforced independently. This protection is particularly strong in cases where a situation has been concluded by a final decision, where the statutory elements of an offence have been fulfilled, or where a right has already been exercised. Ongoing proceedings do not permit the underlying substantive legal situation to be rewritten; indeed, taking a past, concluded fact into account is only permitted insofar as it does not entail a new loss of rights or burden compared with the previous legal position.⁵⁶

The prohibition on retroactive criminal penalties constitutes an absolute external constraint. A criminal claim that has already become time-barred cannot be revived, and the conditions for criminal liability applicable at the time the offence was committed cannot be altered retrospectively to the detriment of the person concerned. In this context, the weight of the public interest does not open the door to general discretion. The general reopening of cases that have become final, as well as the withdrawal of rights already acquired and exercised purely for fiscal or administrative convenience, also fall outside the legislature's normal scope of discretion.⁵⁷

In the case of existing legal relationships, the legislature's scope for action is broader, but not unlimited. The intervention comes all the closer to the constitutionally impermissible limit the less foreseeable the change was, the more significant and irreversible the provision made by the legal person under the old law, the more strongly the State itself encouraged this decision, and the more severe the loss. The limit is usually exceeded by legislation where its objective could be substantially achieved even by a provision taking effect only in the future, yet the legislature links the new, disadvantageous legal consequence to past facts or legal relationships and unjustifiably omits a transitional period, personal or material exemptions, or compensation.⁵⁸

It remains an open question whether the Hungarian prohibition on genuine retroactive effect can, in exceptional cases, be overridden outside the sphere of criminal law. It is not possible to reconstruct from the Constitutional Court's case law a general catalogue of exceptions similar to that in Germany; there-

56 Constitutional Court Decision No. 10/2014 (4 April), Reasons [14]–[21]; Constitutional Court Decision No. 8/2020 (13 May), Reasons [50]–[61]; Constitutional Court Decision No. 2/2025 (8 May), Reasons [22]–[27].

57 Constitutional Court Decision No. 11/1992 (5 March), ABH 1992, 77, 86–87; Constitutional Court Decision No. 16/2014 (22 May), Reasons [29]–[43]. For further details on the protection of res judicata, see also Constitutional Court Decision No. 4/2020 (29 January), Reasoning [40].

58 Constitutional Court Decision No. 2021/2020 (10 February), Reasoning [45]–[62]; Constitutional Court Decision No. 8/2020 (13 May), Reasons [60]–[66]; Constitutional Court Decision No. 2/2025 (8 May), Reasons [23]–[31].

fore, the unconstitutionality of the previous law or the existence of an overriding public interest cannot, in itself, be regarded as a valid ground for override under Hungarian law. According to the normative position of this study, a narrow exception may be envisaged at most where the protected reliance was objectively lacking, or where the overriding constitutional interest cannot be realised without retroactive regulation. In such cases, the legislature bears an increased burden of justification: it must demonstrate the specific necessity of the exception, its temporal, material and personal limitations, and that no less onerous, future-oriented or transitional solution is available.⁵⁹

The Hungarian standard thus has a two-tiered structure. In cases where the situation is definitively concluded, the presumption of prohibition takes precedence, and current case law does not recognise a general exemption in the public interest. In the case of legal relationships that are still in force, however, a test of necessity and proportionality—which becomes stricter in proportion to the intensity of the protected reliance—is warranted. The transition between the two categories is determined not by the formal existence of the legal relationship, but by the specificity of the legal position and the irreversibility of the previous decision.⁶⁰

A critical assessment of Hungarian practice

Hungarian Constitutional Court practice delineates the material scope of the prohibition relatively precisely; however, it does not provide a uniform doctrinal test for the examination of borderline cases. The conjunctive test of past connection and detriment is clear; however, the relationship between finality, acquired rights, legitimate expectations, protection of legitimate expectations and sufficient time to prepare remains fragmented.⁶¹

The outcome of a case therefore often depends on which event the Constitutional Court regards as the relevant fact triggering the legal consequence, and whether it reconstructs the content of the previous provision in a declaratory or constitutive manner. The burden of justification for this choice is not always met with the same level of detail.

In particular, there is a lack of an independent, transparent test for non-genuine retroactivity. When it comes to future amendments to existing legal

59 For a categorical formulation of Hungarian practice: Decision No. 10/2014 (4 April) of the Constitutional Court, Reasons [14]–[21]; Decision No. 2/2025 (8 May) of the Constitutional Court, Reasons [22]–[27]. For the comparative basis of the normative proposal: BVerfGE 72, 200 (257–263); BVerfGE 135, 1 (21–23); BVerfGE 156, 354 (404–414).

60 See Constitutional Court Decision No. 8/2020 (13 May), Reasoning [50]–[61]; Constitutional Court Decision No. 3021/2020 (10 February), Reasoning [45]–[62]; BVerfGE 127, 1 (18–25).

61 In summary: Constitutional Court Decision No. 10/2014 (4 April), Reasons [14]–[21]; Constitutional Court Decision No. 8/2020 (13 May), Reasons [50]–[61]; Constitutional Court Decision No. 3069/2021 (24 February), Reasons [38]–[43].

relationships, Hungarian practice correctly does not recognise a general requirement of immutability, but it does not define in a uniform manner when a legal person's legitimate expectations take precedence over the legislature's discretion. Predictability, the specific provision of the legal entity, state incentives, the severity of the loss and the existence of transitional rules are, for the most part, only taken into account implicitly. This reduces the predictability of case law and allows issues of identical substance to be treated sometimes as matters of retroactive effect, sometimes as matters relating to the period of preparation, and sometimes merely as technical legal questions.

On the other hand, a contrasting problem can be seen with regard to genuine retroactivity: the Hungarian wording is more categorical than the German, but the boundaries of the absolute prohibition have not been fully mapped out. Strictness is justified within the framework of criminal law guarantees under the rule of law; however, in other areas of law, extreme situations may arise where it is necessary to remedy the unconstitutionality of previous legislation or to safeguard an overriding constitutional public interest. In such cases, what is required is not the adoption of a broad public interest clause, but a narrow standard of exception, defined by the burden of proof and a proportionality test. The exception is only acceptable if the lack of protected legitimate expectations or the constitutional interest rendering the retroactive effect unavoidable is specifically substantiated, and no less onerous – future-oriented or transitional – solution is available.⁶²

On this basis, Hungarian practice cannot be regarded as inconsistent, but it is dogmatically under-structured. The decisions reveal a functioning system of protection, but its elements do not constitute a test to be applied in a specific order that would indicate in advance to the legislator, the ordinary courts and the petitioner the relevant issues of proof and reasoning. , therefore, requires not the accumulation of further categories, but the organisation of the existing criteria into a sequence.

Comparative conclusions between the German and Hungarian approaches

The main difference between the German and Hungarian approaches lies not in the results achieved, but in the structure of the analysis. German legal doctrine attaches different initial presumptions and burdens of proof to genuine and non-genuine repercussions; Hungarian practice recognises this distinction in functional terms, but does not subject borderline cases to two similarly distinct tests.

62 On the narrow scope of the German exception test, see BVerfGE 72, 200 (257–263); BVerfGE 135, 1 (21–23); BVerfGE 156, 354 (404–414). On the categorical formulation of Hungarian practice: Constitutional Court Decision No. 10/2014 (4 April), Reasoning [14]–[21]; Constitutional Court Decision No. 2/2025 (8 May), Reasoning [22]–[27].

The advantage of the German system lies in the transparency of its reasoning structure; the risk lies in formal categorisation and an overly broad interpretation of the public interest exception. The Hungarian approach allows for greater flexibility in addressing the specific legal position, but renders the thresholds for finality and protected reliance less certain. Therefore, rather than adopting either system in its entirety, it is appropriate to combine the Hungarian prohibition of prejudice with a structured balancing test for the protection of reliance.⁶³

Proposed four-step test

The following analytical framework is not a description of the test currently applied in Hungarian constitutional court practice, but rather a normative proposal developed from the analysed decisions and German legal doctrine.

As a first step, the temporal trigger must be identified: precisely which fact, legal declaration, administrative act or period gives rise to the new legal consequence, and whether this occurred before or after the promulgation or entry into force of the provision. Merely taking past events into account is not sufficient; it must be justified why that particular fact carries the substantive legal effect.

The second step is to assess the legal situation. If the conditions under the old law have been met, the legal consequence has taken effect, or the right has become independently enforceable, the situation is to be regarded as concluded. If the legal relationship continues to exist, further conditions must be met, or the legal consequence will only arise in the future, the regulation falls within the scope of non-genuine retroactivity. The ongoing proceedings do not in themselves determine either classification.

As a third step, the detriment and the strength of the position of trust must be determined. It must be examined whether the new provision creates or exacerbates an obligation, whether it deprives the legal person of a right or the possibility of enforcing a substantive claim, and whether the legal person has made a significant or irreversible provision based on the old law. Particular weight is given to a clear promise or incentive from the state, a condition that has already been fulfilled, and a right of choice that has been acquired; mere expectations of continuity, by contrast, are not sufficient.

The fourth step is to examine justifiability. A disadvantageous reassessment of a settled situation is acceptable only in exceptional cases, on the basis of an objective lack of protected reliance or an overriding constitutional interest that renders a retroactive effect unavoidable. In the case of an existing legal relationship, a structured proportionality assessment is required: the weight

63 For the German tests, see BVerfGE 72, 200 (241–243, 257–263); BVerfGE 127, 1 (16–25). For a summary of the Hungarian standard, see Decision No. 2/2025 (8 May) of the Constitutional Court, Reasons [20]–[26]; Decision No. 3387/2024 (8 November) of the Constitutional Court, Reasons [18].

and urgency of the objective, the intensity of the disadvantage, the foreseeability of the change, as well as the rule affecting the future, the transitional period, the exception and compensation as a less onerous measure must all be assessed. The burden of justification is all the stricter the closer the legal position is to being final.⁶⁴

Concluding remarks

The prohibition on retroactive effect does not require the immutability of the law, but rather the temporal fairness of legal change. Genuine retroactivity is, as a general rule, prohibited because the retrospective reassessment of a situation that has already been concluded deprives the law of its function as a guide to conduct. Non-genuine retroactivity, by contrast, is a necessary consequence of democratic law-making, but it must not render worthless the positions of trust established by the state and consolidated by the provisions of the legal entity.

German constitutional law has organised the presumptions and exceptions relating to these two situations into a detailed dogmatic system. The case law of the Hungarian Constitutional Court recognises many of the substantive elements of this system, but applies them primarily in individual cases, within different conceptual frameworks. The thesis of this study is therefore that, in order to strengthen the Hungarian protection, what is required is not the mechanical adoption of German terminology, but a verifiable examination, in sequence, of the historical connection, finality, disadvantage, protected reliance and justifiability.

This approach simultaneously maintains strong protection for settled legal situations and the modifiability of existing legal relationships. At the same time, it makes it clear that the public interest does not constitute a retrospective exemption at the expense of legal certainty: only a precisely defined objective, proven necessity and appropriate transitional safeguards can justify legislative intervention that imposes a burden in the present. The ultimate test of the prohibition on retroactive effect is thus whether the legal system preserves its constitutional credibility in the face of its own previous promises and decisions reasonably based on them.

⁶⁴ The proposed test links the criteria that can be reconstructed from the analysed Hungarian decisions with the BVerfG's distinct framework of justification for genuine and non-genuine retroactive effect; cf. in particular BVerfGE 72, 200 (257–263); BVerfGE 127, 1 (18–25); Constitutional Court Decision No. 8/2020 (13 May), Reasoning [50]–[61]; Constitutional Court Decision No. 2/2025 (8 May), Reasoning [22]–[27].

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