

MAGYAR NYELVŐR

JOURNAL OF THE INTERNATIONAL SOCIETY
OF HUNGARIAN LANGUAGE AND CULTURE

NORM CLARITY



Editorial foreword (*Balázs Arató*)

Zoltán Tóth J.: Clarity of norms in the light of the content requirements of legislation, legislative errors and their consequences – in general and with particular regard to the legislative requirements in Hungary

Béla Pokol: Clarity of norms and legal history: historical paths of divergence from legal rules to general norms

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Ágnes Czine: Constitutional aspects of clarity of legal provisions

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Balázs Arató – Géza Balázs: The linguistic norm and norm of legal language

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SPECIAL ISSUE

EDITORIAL FOREWORD

A legal rule is necessarily subject to interpretation since by its nature it is nothing more than a human manifestation prohibiting or prescribing a conduct to which some meaning or significance must be attributed in order to comply with it.

Therefore, there is a fundamental interest in ensuring that citizens' compliance with the law is not hindered by the very laws which are intended to define and prescribe such conduct by reason of them being incomprehensible. The requirement of norm clarity arises in this context.

The present special issue of the scientific journal Magyar Nyelvőr aims at a multifaceted approach to the requirement of norm clarity. The authors invited are theoreticians and practitioners in the field of law and linguistics who are confronted on a daily basis with the disadvantages of imprecise drafting and who strive to enforce the requirements of clarity in their own field of activity in the interests of the rule of law and legal certainty.

Moreover, the unconcealed aim of the special issue is to highlight the fact that the requirement of clarity can only be met by mutual cooperation between lawyers and linguists including the codification process, and this requires the two disciplines to interact and jointly develop the principles that can be the guarantors of clarity in the legislative process.

The only goal, therefore, can be to establish a comprehensible, grammatically correct legal norm that also completely fulfils its function towards which the legislator is undoubtedly taking significant steps since there is already a noticeable trend towards the conscious simplification of legislative texts, the enrichment of the codification process with linguistic expertise and the formulation of principles that help in the interpretation of the specific norm.

However, the requirement of clarity should not only be limited to legislation and statutes, but it should also be applied to the relevance of the law. Consequently, it is a requirement that a judicial or administrative decision as an individual rule must also provide a clear, easily identifiable

and interpretable content for the addressees, otherwise the traceability of the rule will remain a vain hope even with the best intentions. In their studies, the authors examine the current issue from many different perspectives drawing conclusions and formulating proposals. In this way, we have perhaps succeeded in creating a synthesis which, while acknowledging the achievements to date, has the well-intentioned aim of further assisting the work of both legislators and practitioners.

Balázs Arató editor of the special issue “Norm clarity”

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CLARITY OF NORMS IN THE LIGHT OF THE CONTENT REQUIREMENTS OF LEGISLATION, LEGISLATIVE ERRORS AND THEIR CONSEQUENCES – IN GENERAL AND WITH PARTICULAR REGARD TO THE LEGISLATIVE REQUIREMENTS IN HUNGARY

Abstract

The content requirements of legal norms incorporated in laws can be of three types: semantic, syntactic and structural. The most important semantic requirements of laws (legal norms) are simplicity, clarity, consistency and that the addressee should always be clear from the wording. It is important to emphasise that general clauses, maxims and vague concepts should only be used by the legislator in exceptional circumstances, for example when it wishes to grant broad discretion. The most common consequences of legislative errors in the application of the law are the dysfunctionality of the law text, legal uncertainty resulting from legal loopholes, and divergent judicial practice. The most common legal consequence of legislative errors (affecting the validity, scope or legal applicability of the law) is review of legality.

1. Content requirements of laws (legal norms)

*The content requirements of legal norms incorporated in laws can be of **three types**: semantic, syntactic and structural requirements.*

- 1) **Semantic requirements** are requirements against the literal meaning of the legal norm proposition (the wording of the legal provision), with the aim of ensuring the clarity and intelligibility of the legal provisions and, through this, the highest possible level of compliance with the norm. In principle, it cannot be expected that the legal norm will be followed by the addressees if they are not aware of the meaning of the norm and the words and expressions contained therein, or if different addressees can interpret the legal provision in different ways even in good faith (without any intention

to circumvent the norm).¹ The semantic requirements are primarily *not* legal requirements, *not* normative propositions, but expectations that make the norms intelligible and thus applicable (though some of them are also included in the provisions of positive law on legislative procedure); the less these requirements are enforced in the drafting of norms, the less the norm proposition will be able to fulfil its declared purpose of influencing people's behaviour.

- 2) The **syntactic requirements** govern the sentence structure of the legal norm proposition, i.e. they regulate the correct placement of linguistic connectors and the relationships between the different elements of the text. These requirements are intended to ensure compliance with the rules of the language; if these requirements are not met, the text violates the rules of the language and becomes unintelligible, perhaps unintentionally ambiguous (and therefore unusable).
- 3) The **structural requirements** ensure that the norms are free from legal inconsistency, i.e. that the legal norm created does not conflict with other norms.

The most important **semantic requirements** of laws (legal norms) are as follows:

- 1) The **pursuit of simplicity** is an important desideratum, because simplicity is the key to ensuring (except at the expense of precision!) that the norm is understood by ordinary people, which is the ultimate and essential aim of any law. **Legislative drafting is not an exercise in style.**² Simplicity can be achieved by considering the following aspects:
 - *avoidance of over-complicated structures* wherever possible (in particular, the use of bureaucratic language should be avoided;

¹ For the theoretical issues of legal interpretation, see, eg.: Zoltan J. Toth: The Methods of Statutory Interpretation in the Practice of the High Courts of Hungary. *Annales Universitatis Mariae Curie-Sklodowska, Sectio M Balcaniensis et Carpathiensis*, Lublin – Polonia, Vol. 1., 2016, pp. 173–201. (<https://pdfs.semanticscholar.org/bacc/ce543d963697c02-d928e0757ca456cc3ce01.pdf>); for the constitutional interpretation, with special regard to the case of Central European constitutional courts, see: Zoltán J. Tóth (ed.): *Constitutional Reasoning and Constitutional Interpretation: Analysis on Certain Central European Countries*. Ferenc Mádl Institute of Comparative Law – Central European Academic Publishing, Budapest – Miskolc, 2021 (Internet: <http://real.mtak.hu/134538/>)

² As, for example, expressly stipulated in Hungary by Decree 61/2009 (14 December) of the Minister of Justice and Law Enforcement on legislative drafting (hereinafter: Jszt.) in its Section 2: “The draft legislation must be drafted in accordance with the rules of the Hungarian language, in a *clear, plain and unambiguous manner*.”

- simpler is usually more understandable and more elegant in linguistic terms, despite the common misconception that such expressions are the measure of literacy);
- *avoidance of the use of foreign words when there is a common mother-tongue word with the same meaning* [e.g. *in secret* should be used instead of *sub rosa* for the meaning ‘covertly, stealthily’, *copy* instead of *facsimile* for the meaning ‘duplicate, reproduction’, as the foreign words make the text difficult for many people to understand, while offering no tangible advantage over the use of common mother-tongue words (a legal text is not a scientific work; the use of such terms can be justified in the latter, but not in the former)];
 - *omitting lengthy phrases* (e.g. both *in the event that* and *in the case of* should be replaced with the simple *if*);
 - *avoidance of unnecessarily long detailed and exhaustive lists*; instead general umbrella terms should be used (e.g. “by car, bus, motorcycle, moped, tractor...” should be replaced with by “motor vehicle”), and regulate only the few remaining exceptions, if necessary;
 - *avoidance of old-fashioned, obsolete expressions* (e.g. ‘*thou*’, ‘*wherefore*’, ‘*puissance*’);
 - *avoidance of superfluous terms (fillers)* (a principle of legal interpretation is that no word is meaningless, so fillers cause confusion and also undermine legal certainty).
- 2) **Clarity** is key (at least for the specific addressees of the given legal stipulation and lawyers in general). It can be achieved through *precise, exact wording* (even at the cost of simplicity) with the aim of avoiding vagueness and ambiguity. (If a word or phrase has several meanings which may be equally meaningful in the given legal context, its meaning should be clarified until it is clear, or the same should be achieved by definitions (interpretative provisions), or another word or phrase should be chosen which has no other meaning in the given context.)
- 3) **Consistency** is essential in the drafting of legislation. As expressly mentioned in Jszzr. Section 4 (1): “Where, within a law and its implementing legislation, the same concept or provision may be expressed in several ways, the same wording shall be used for each occurrence of the concept or provision.” The obvious reason for this is that if synonyms were used, the applier of law would not be able to decide whether they meant the same thing or whether a word with the same meaning or a related meaning but a different form is used

because it has a specific meaning that is different from the previous word. This *ambiguity cannot be allowed in a norm text*. The above rule applies here as well: legislative drafting is not an exercise in style. While the use of synonyms in a work of fiction or a scientific work is elegant, in a law text it only creates ambiguity, which should be avoided at all costs. If the same word is to be written twenty times in a section because it means the same thing, then the same expression must be used all twenty (or however many) times.

- 4) **The addressee must always be clear from the wording.** (For example, the sentence „A border crosser cannot be stopped by a border guard without carrying a firearm.” is incorrect because it is not known whether the *border crosser* or the *border guard* is obliged to carry a firearm in order for the border crosser to be lawfully stopped by the border guard. A provision without a subject is also incorrect if the subject is not clear from the context.)
- 5) **General clauses, maxims and vague concepts** (e.g. “within a reasonable time”, “for important reasons”, “in a proper manner”, “with due care”, “usually considered of good quality in normal business”) **should only be used in exceptional** cases: firstly, when the applier of law is expressly given discretionary power, and secondly, when the variety of life circumstances means that the correct (just, moral, etc.) or legal policy-based result of the regulation can only be ensured in this way. (For example, Section 6:96 of the Civil Code of Hungary stipulates “A contract shall be null and void if it is manifestly in contradiction to good morals.” This is the correct use of the general clause, because the concept of “good morals” cannot be defined precisely, and it changes from time to time, so in this case it is impossible to define it precisely, and there are always cases that the legislator could not have foreseen.)
- 6) Semantic requirements also include **specific requirements for definitions** (i.e. interpretative provisions).
 - First of all, *if a word or phrase has more than one meaning and the intended meaning is not clear from the context, it must always be defined.*
 - *If the legal meaning of a word differs from its ordinary meaning or from the accepted meaning in the regulated profession (e.g. robbery, fruit, computer, drug), it must be defined unless the meaning of the word is established and generally accepted in law (e.g. jurisdiction, competence, presumption).*
 - *However, it is forbidden to define ordinary words with a clear meaning (e.g. delivery, requirement, president, submit, to have)*

because this would render the normative text long-winded, since each definition necessarily defines the meaning of a word by other words, which then also have to be defined, which is also only possible by other words, and so on (*regressus ad infinitum*).

- *In law*, a definition *can only* be a **nominal definition** (a definition of what is to be defined in other words), *not* a **real definition** (which only specifies a characteristic). E.g.: “*company* shall mean, unless otherwise provided by law, a legal entity which is formed by registration in the company register for the purpose of carrying on a business-like economic activity”.³ This is a valid nominal definition, which precisely defines the term *company*. By contrast, phrases such as “company is a business which” or “a company manages its finances” would be a real definition that would not distinguish a “company” from other “businesses” that are not companies or other entities that are or might otherwise be businesses.]
- The definition must not refer back to the thing to be defined (*no tautologies*), nor can different interpretative provisions refer to each other (*no circular reference*).

The most important **syntactic requirements** of laws (legal norms) are as follows:

- 1) The most basic and natural expectation is that **the wording should be in accordance with the rules of the given language**.
- 2) **The norm text should always consist of declarative sentences, although the content is an imperative.**⁴
- 3) In legal norms, conditional phrases (if ... then) are typical and can be replaced by other constructions (any person who ... shall).
- 4) Legal norms refer to groups, so **the use of the plural is generally unnecessary and should be avoided** (“the driver” instead of “those drivers”).⁵
- 5) The **style** of norm texts should be **impersonal** and emotionless.
- 6) It is a fundamental requirement **to be concise**, i.e. avoid unnecessary words; the written norm text should only contain what is necessary and sufficient for understanding and application.

³ Act V of 2006 on Company Registration, Court Proceedings and Winding-up, Section 2(1).

⁴ Eg., in Hungary, Js. [Section 3(2)] regulates: “In the draft legislation, the normative content must be expressed in the present tense by means of a declarative sentence in the third person singular.”

⁵ In Hungary, see also: Js. Section 3(2)

- 7) **Multiple compound sentences should be avoided wherever possible.** In practice, this is the most often overlooked requirement, as legislative drafters always understand the area they are regulating and are aware of their own intentions and objectives, so they can understand a text containing multiple complex sentences. However, such a text often appears over-complicated to the applier of law or to ordinary people as addressees, that is difficult or even impossible to understand. It must therefore be emphasised that the **text of laws must be comprehensible for the addressees** if they are to be expected to comply with the legal requirements; therefore, baroque circular sentences, while they may look good in a novel or an academic article, are not appropriate in the text of laws.
- 8) The wording should always make it clear whether the **list** in a hypothesis (or possibly a legal consequence) is **exhaustive or non-exhaustive (illustrative)**, i.e. whether or not other similar elements, in addition to those mentioned, are included in the scope of the regulation. This can *always* be achieved by choosing the right language, but unfortunately, legislative drafters often fail to do so.⁶
- 9) The wording should also **clarify the logical relationship (conjunction, alternation, disjunction) between the elements of the list.**

Among the **structural requirements of** legislation, i.e. the requirements to ensure the substantive and logical unity of the legal system, at least in the civil law systems, the following should be highlighted.

- 1) **A legal norm incorporated in a law shall not be contrary to**
 - **the Constitution** (neither in form nor in substance);
 - **a higher-level legal norm;**
 - usually, a **legal norm governed by an international convention** promulgated at least at the same level of legal source as the legal norm in question;
 - **EU law.**
- 2) The **legal norm** incorporated in the law **must not contradict other legal norms** (or, if it does, the legal norm must resolve this contradiction by amending or repealing other norms).
- 3) **The regulation of a given life relationship must cover all segments of the life relationship** (no unregulated areas, no loopholes).

⁶ The use of the words “including”, “among other things”, “especially”, etc., are examples of the non-exhaustive nature of the list; while “exclusively” and its synonyms make the list exhaustive (complete).

- 4) **Duplication of regulation** (imposing the same rights, obligations and prohibitions on the same addressees in different pieces of legislation) **should be avoided.**
- 5) The **implementing act shall not go beyond the subject matter and scope of the implementation.**
- 6) **The prohibition of retroactive effect** (except for rules that are more favourable to all addressees) **must be respected.**
- 7) **A law may not provide for its own validity or invalidity or for that of any other law.**⁷

2. The (practical) consequences of legislative errors in the application of law

The most common (practical) consequences of legislative errors in the application of law can be the following.

- 1) First and foremost, wrongly drafted legislation becomes *dysfunctional*, i.e. incapable of achieving the intended legislative/policy objective, and sometimes even *counterproductive*, i.e. achieving the opposite effect to the intended objective. For example, administrative decisions may contain an obligation which follows the letter of the law but is contrary to its purpose.
- 2) In the case of a legal loophole, the norm is *not applied* to certain cases that would otherwise be covered by the norm according to its purpose.
- 3) Due to the absence of sanctions or a legal loophole, the law is not enforced in practice (it is an *ineffective law*) or its application is delayed (due to the suspension of administrative procedures or the waiting for information, opinions, etc. from the ministries).
- 4) A wrongly drafted and thus wrongly interpreted and applied law *may give rise to an action* for damages caused in the exercise of administrative authority⁸ or in the exercise of judicial, prosecutorial, notarial and executive authority⁹.
- 5) Vague, incomplete or contradictory norms lead to *divergent judicial practice*, which, because of the unpredictable application of the law, undermines legal certainty, since the adjudication of a right or obligation depends on the jurisdiction of the court in question (i.e. in similar cases, certain courts, on the basis of a particular interpretation

⁷ See also: Jszr. Section 61

⁸ Hungarian Civil Code, Section 6:548

⁹ Hungarian Civil Code, Section 6:549

- of the law, decide differently from other courts with the same jurisdiction, on the basis of different interpretations of the law, which also undermines citizens' confidence in the law).
- 6) Laws that violate the semantic and syntactic content requirements *cannot be interpreted by its addressees* and are therefore ineffective in practice.
 - 7) If the rule is in conflict with a provision of EU law, it *cannot be applied* (any court has the right to establish this).

3. Legal consequences of legislative errors

The most common legal consequence of legislative errors in the civil law systems, with concentrated constitutional adjudication (affecting the validity, scope or legal applicability of the law), is the so-called **norm control**, which may result in *the annulment of the law or legal provision in question*, thus rendering it ineffective and/or inapplicable, and sometimes in the (subsequent) loss of the legal character of the law or legal provision in question, i.e., in the case of annulment with retroactive effect to the adoption of the law or legal provision, the loss of the validity of the law or legal provision.

Specifically in Hungary, for example, two bodies can review laws: in general, the *Constitutional Court* (except in the case of so-called public finance prohibitions¹⁰), and the *Curia*, that is, the *Supreme Court* (only in the case of a municipal decree that is in conflict with other laws).¹¹

¹⁰ In Hungary, Article 37(4) of the Hungarian Constitution (Fundamental Law) states: "As long as government debt exceeds half of the total gross domestic product, the Constitutional Court may, within its powers set out in Article 24 (2) b) to e), review the Acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights. The Constitutional Court shall have the unrestricted right to annul Acts having the above subject matters as well, if the procedural requirements laid down in the Fundamental Law for making and promulgating those Acts have not been met." Thus, the infringement of the Fundamental Law can be examined without limitation in the course of an ex-ante review of legality, and the infringement of an international treaty can also be examined without limitation; in other cases, however, a legal norm that is substantively contrary to the Fundamental Law cannot be examined in the first place, so the infringement of the Fundamental Law cannot be declared, and the given law or legal provision cannot be annulled. All this means that the legislator has prohibited substantive constitutional review in these cases by formal constitutional provisions.

¹¹ For more details on the powers of constitutional courts, see: 200. Tóth J., Zoltán: Constitutional Adjudication. In: Csink, Lóránt – Trócsányi, László (eds.): Comparative Constitu-

The reasons for a review of legality may include:

- 1–2) The norm (or the law incorporating it) was not adopted by the body empowered to do so or was not adopted in a due procedure, i.e. the law or legal provision is formally contrary to the Constitution (in Hungary: Fundamental Law).
- 3) The content of the norm is contrary to the Constitution (Fundamental Law).
- 4) The norm is contrary to international law (general rules of international law or a ratified international convention).
- 5) The norm is in conflict with a norm in another higher source of law (but not in the Constitution (Fundamental Law) or an international convention).

In the case of paragraphs 1) to 4), the Constitutional Court is responsible for the norm control; in the case of paragraph 5), the Curia is responsible for the ex post review in the event of a conflict of municipal regulations with other legislation (but not the Constitution itself), and the Constitutional Court for all other cases (i.e. in the event of a conflict of municipal regulations with other, higher-level laws).

There are basically two types of constitutional **review performed by the Constitutional Court**: abstract and concrete. **I.) The abstract norm control** means that the Constitutional Court examines the conformity of a norm with the Fundamental Law in a general way, independently of a specific case and procedure, upon the motion of the person entitled to do so, while **II)** in the case of the **concrete norm control**, there is a basic case (basic procedure) in which the unconstitutionality of a given law or legal provision arises.

Again, there are only two types of abstract reviews: ex-ante and ex-post. **I/1.) The ex-ante abstract review** takes place before the promulgation of the given law, which can be proposed by Parliament on the one hand, and by the President of the Republic if Parliament has not exercised this right; **I/2.) the ex-post abstract review**¹² is possible after the promulgation of

tionalism in Central Europe: Analysis on Certain Central and Eastern European Countries. Central European Academic Publishing, Miskolc – Budapest, 2022, pp. 361–383. (Internet: <http://real.mtak.hu/147531/>)

¹² In Hungary, the examination of the conformity of a law (including a municipal decree), a public law regulating instrument or a court decision with the Fundamental Law [Article 24(2)e) of the Fundamental Law, Sections 24 and 37 of the Act on the Constitutional Court (hereinafter: Abtv.)], the examination of the conflict of a law (including a municipal decree), a public law regulating instrument or a court decision with an international treaty [Article

the law. [As for Hungary, since the possibility to submit an application without legal interest (the so-called *actio popularis*) has been abolished as of 1 January 2012, persons who claim the unconstitutionality of a law or a legal provision without proving their own legal interest may no longer apply to the Constitutional Court themselves; however, they may report the suspicion of unconstitutionality to the Ombudsman, who, if he or she agrees, may propose the Constitutional Court to annul the given law or legal provision on his own behalf.]

However, those who have a legal interest of their own in establishing unconstitutionality still have a direct right to submit applications: through the specific review of legality.¹³ **There are three types of concrete norm control. II/1.)** The first is the “old” **constitutional complaint with constitutional review of norms**, by which anyone who, in a court case, believes that the court has applied a *law or legal regulation* that is contrary to the Fundamental Law and that a right guaranteed by the Constitution (Fundamental Law) has been violated as a result, may apply for a declaration that the law or legal provision on which the judgment or proceedings are based is contrary to the Fundamental Law and for the annulment of such judgment or proceedings, provided that they have exhausted their other ordinary legal remedies or have not (had not) been granted any other legal remedies. **II/2.)** The second is the **direct constitutional complaint**, which can be used if the application or effectiveness of a provision of a *law* that is contrary to the Fundamental Law has directly, without a judicial decision, resulted in a violation of (fundamental) rights. **II/3.)** The third is the **judicial initiative for a specific review procedure** (which cannot be initiated by the person concerned, but only by the court hearing the case).¹⁴

24(2)f), Abtv. Sections 32(1) and 37], and the ex-post examination of the Fundamental Law and amendments to the Fundamental Law [Article 24(5) of the Fundamental Law, Abtv. Section 24/A(1)] may be initiated only by the Government, one quarter of the Members of Parliament, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights in an abstract manner, i.e. independently of any specific case.

¹³ An exception to this is, of course, the judicial initiative for an individual review procedure, where, as the name of the legal instrument indicates, the judge (or the chamber of judges) acting in the case may initiate a review by the Constitutional Court; the person concerned may at most propose to the judge to suspend the procedure and refer the case to the Constitutional Court.

¹⁴ Since 1 January 2012, however, Hungary has also had a *new form of individual fundamental rights protection*, the so-called “real” **constitutional complaint** (Abtv. Section 27), the essence of which is that any person or organisation affected by an individual case may appeal to the Constitutional Court even if it is not the law applied by the court that it considers to be contrary to the Constitution (Fun-

The **annulment** of a law or a legal provision, which results in the norm ceasing to have effect, may be **ex nunc**, i.e. from the day following the promulgation of the decision of the Constitutional Court; **ex tunc**, i.e. with retroactive effect from the day of entry into force of the law (possibly exceptionally from the day of its promulgation); and **pro futuro**, i.e. from some future date (in which case the law must still be applied to legal relations arising up to that future date).

However, the **legal consequence** may not only be 1) *annulment*, but also the following: 2) *establishing the existence of an infringement of the Constitution (Fundamental Law) caused by the legislator's omission* (the Constitutional Court then calls upon the body which committed the omission to fulfil its duties, setting a time limit); 3) *declaring a prohibition of application* if it does not follow from the law; and 4) *establishing a constitutional requirement*, by which the Constitutional Court may determine for the courts and for everyone else the constitutional meaning of a law, i.e. its conformity with the Constitution (Fundamental Law), and the requirements which the application of the law by the courts or other bodies must meet. In addition, it is also possible to 5) *order a review of criminal proceedings* that have been concluded by a final decision on the basis of a law that is contrary to the Constitution (Fundamental Law), if the defendant has not yet been exonerated from the adverse consequences of the criminal record or the execution of the sentence imposed or the measure applied has not yet been completed or its enforceability has not yet ceased; or to 6) *order the review of a misdemeanor procedure* which has been terminated by a final decision on the basis of an unconstitutional law, if the execution of the sentence or measure imposed in the misdemeanor procedure ordered for review is in progress or the offender is registered in the register of misdemeanors for the case ordered for review. In the latter case, the prosecutor is obliged to submit a request for retrial *ex officio*.¹⁵

damental Law), but (in addition to recognising the constitutionality of the law) *the court decision itself* or the *court procedure* leading to the court decision.

¹⁵ It is equally true for a “real” constitutional complaint and for the “old” complaint under Abtv. Section 26(1) that the challenged judicial decision must be made on the merits of the case (an order of pre-trial detention or temporary involuntary medical treatment, for example, do not meet this condition), or must close the case (e.g. an order terminating the proceedings). A “genuine” complaint (as well as the other two types of complaint, which are specific reviews) may be submitted by the person concerned in an individual case; the person concerned may

The **review of legality by the Curia** is carried out by the *Local Government Council of the Curia*, which decides on the conflict with and annulment of a local government decree in the case of “indirect infringement of the Fundamental Law” under Article 32(3) of the Fundamental Law;¹⁶ it also decides on the finding of failure of a local government to fulfil its legislative obligation under the law^{17,18}. The list of **applicants** is clearly defined, i.e. these Curia procedures may be initiated by the metropolitan and county *government office* that exercises control over the legality of the given local government, the *Commissioner for Fundamental Rights (Ombudsman)*, and the *judge proceeding in the individual case*, if the local

be a private individual, a legal entity or an entity without legal personality (e.g. a condominium). The individual case itself can be either a contentious or a non-contentious procedure for both “old” and “genuine” constitutional complaints (in civil law proceedings). The complaint may be submitted on either of these grounds [Abtv. Sections 26(1) and 27] within sixty days of the notification of the decision complained of or, failing this, of the date of gaining knowledge of the decision or of the occurrence of the violation of the right guaranteed by the Fundamental Law, which is a procedural deadline, i.e. it is the date of service, not the date of receipt that matters. In the event of failure to comply with this deadline, an application for excuse may be submitted within an objective deadline of 15 days from the date of the cessation of the obstacle, but not more than 180 days from the date of notification of the decision or the date of the infringement of a right guaranteed by the Fundamental Law.

Similarly, both types of complaint (whether or not the main action is a contentious or a non-contentious procedure) can only be submitted after a final court decision (judgment or order), if the normal legal remedies have been exhausted or no remedy is available. (Of course, exhaustion of any ordinary remedies is also a condition for the third type of complaint, the direct complaint.) For all three types of complaint, there is a separate admissibility procedure and (if the complaint is admissible) a separate procedure for the examination on the merits, although it is possible to decide on admissibility in the decision on the merits itself, which the Constitutional Court sometimes does. According to the Rules of Procedure of the Constitutional Court, a decision on the admission must be taken within 120 days of the notification by the Secretary General of the opening of the procedure, and the first draft on the merits must be prepared within 180 days of the admission. However, there is neither a procedural nor a statutory time limit for making a decision on the merits: according to Abtv. Section 30(5), it must be made “within a reasonable period of time”.

¹⁶ Cf.: Section 24(1)f) of Act CLXI of 2011 on the organisation and administration of the courts (hereinafter: Bszi.).

¹⁷ Cf. Bszi. Section 24(1)g)

¹⁸ Based on the 7th Amendment to the Fundamental Law of Hungary, as from 1 January 2020 the newly established Supreme Administrative Court will be responsible for conducting procedures related to the review of local government regulations.

government's decree in question should be applied in the case pending before him. The possible **legal consequences** are as follows: if the Curia finds that a local government decree or one of its provisions is in conflict with another law, it will either 1) *annul* it (if it is still in force); or 2) *declare the annulled local government decree or its provision to be in conflict with another law* (in which case it will not apply in the individual case and in other pending individual cases); or 3) *declare that the local government decree or its provision that has been promulgated but has not yet entered into force will not enter into force*.

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**CLARITY OF NORMS AND LEGAL HISTORY: HISTORICAL PATHS OF
DIVERGENCE FROM LEGAL RULES TO GENERAL NORMS**

Abstract

If we look at the development of European law from the mature period of Roman law to the development of the law in recent decades, we can see that the pattern of legally binding behaviour has become increasingly distant from the behaviour in specific situations. In Roman law, even the legal norm itself was a norm tailored to specific cases, but by the 1500s the law in European countries was largely made up of rules formulated at a more general level or merely settled in customary law. In the Enlightenment of the 1700s, however, the often-experienced judicial arbitrariness in interpreting the law led to the goal of a law consisting of completely precise rules, and even the prohibition of judicial interpretation of the law was considered possible. In comparison, since the 1970s, we have seen, in the whole European civilisation, including the countries of the Americas and other continents, the practice of law fixed at the level of constitutional values and general principles of law, rather than at the level of law with precision, which is merely a legal declaration. In this process, although the law is laid down in the laws of representative assemblies, in accordance with the principle of democracy, the law that is actually in force in individual cases is pronounced by judges, in a way that is far removed from the literal meaning of the law.

As a more general theorem of legal theory, the conceptual scheme of the structure of the legal system can be described as a layer of legal doctrine above the text of the law, and a layer of judicial precedents below it, which give concrete form to the rules contained in the text. However, a deeper historical and theoretical analysis can also show these layers of law in a more disaggregated way. This will be done in the following analyses.

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1. *Regulae iuris* and Maxims

Roman law was essentially a collection of case decisions, and the great jurists of the classical period of this law adopted only subsidiarily some of the rules (*regulae iuris*) that had been emphasized by Greek philosophy in the century and a half before Christ. The real success of these rules came rather in the Late Classical period and after, in the period of massive legal work of the imperial apparatus, where the administrative and legal affairs of a vast empire had to be handled in simple formulas for the many small officials, rather than in the fine diction of the great classical jurists. This period also saw the beginning of the development of maxims to accompany the broader aspects of the rules. These were even simpler and shorter summaries of aspects that were often common and therefore inadequate in some cases where they overlapped with other normative aspects. Nevertheless, in the Roman imperial period, especially after the establishment of the Eastern Roman centre of gravity, maxims were also taken from ancient jurisprudence and incorporated into classical texts. The Justinianic summary of the *Digesta* of 533 and the other summary volumes contained this casuistic material, but the more comprehensive rules and maxims that became important during this period were summarized as the final title of the *Digesta* and thus bequeathed to posterity.

The revival of Roman law from 1100 onward in northern Italy and southern France continued its casuistic character, and serious systematization did not begin until around 1500, but the rules were highly valued from the beginning. In fact, according to Detlef Liebs, an expert on legal maxims, the development of Latin maxims, which emphasized the common core of many detailed rules, began in this period out of the traditional Roman legal heritage, initially for teaching purposes:

“The historical framework of Latin legal rules was thus, as a rule, neither classical Roman law nor a legal revelation before all time nor natural law (...) The main place of origin of Latin legal rules is rather the late medieval and early modern schoolroom”.¹

Of the second generation of glossators, Bulgarus, a student of Irnerius, had already written a gloss in 1140 that summarized the 17th title of the *Regulas* of *Digesta* in a separate work. These more comprehensive rules gradually spread beyond legal thought, so that in the second half of 1200 Dinus Mugellanus also prepared the rules for his summary of canon law, drawing on the rules of *Digesta* and revising and supplementing them. This transmission then, because of the essentially ecclesiastical character of medieval education, led to the gradual impact of these rules as part of the entire European cultural heritage. Let us look at this process in detail.

From normative individual case decisions to rules, the starting point for the Romans can be traced back to the end of the second of the second century B.C. when, for the first time, a generation of jurists appeared who not only compiled collections of case decisions, but also reflected more generally on emerging legal issues and dilemmas and expressed their views on them in legal treatises. We know from the fragments of Pomponius' *Digesta* that P. Mucius Scaevola, M. Junius Brutus, M. Manilius, and M. Porcius Cato were the most prominent members of this generation, and that they attempted to summarize specific areas of Roman law in a series of treatises. In the decades before their time, Greek philosophers began to come to Rome en masse from declining Greek cities to teach in the community, and the simplified ideas of Aristotle's logical works gradually spread among the jurists who wrote legal treatises. This Greek influence on the development of Roman legal thought in this period of Roman legal thought was the result of the extraction of common norms from the many individual cases and the replacement of the individual

¹ Liebs, Detlef (1983): 12: *Lateinische Rechtsregeln und Rechtssprichwörter*. (Dritte, überarbeitete Auflage.) Verlag C. H. Beck. München.

description by a more comprehensive classification of cases and, besides, a more comprehensive expression of the norm. In fact, this influence did not first appear in Rome in the jurists, but in the emerging linguistic thought, and the linguistic and logical knowledge of Rome began to influence the jurists, and the Roman jurists already absorbed these influences.

The first generalization from a mere ad hoc rule to a more comprehensive rule came from Cato, who formulated a more comprehensive rule in the area of testamentary disposition, namely the exclusion of the subsequent validity of an invalid will. In his time this was known as *sententia Catoniana*, but the Greek technique of generalizing ideas, which spread over a few decades, led to dozens of more comprehensive rules, and Cato's *sententia* became the

“*regula Catoniana*”. Q. Mucius Scaevola had already begun to elaborate comprehensive definitions of entire areas of law, drawing out commonalities from a variety of cases. “Q. Mucius not only made definitions, Pomponius (...) says that he was the first to arrange the law by genera (...) in a work of eighteen books. We know, for example, that he distinguished five genera of guardianship and that, in his opinion, there were as many genera of property as there were *causae* of acquiring the property of others”²

The Greek influence on Roman legal thought was the main impetus for the generalization of scattered cases that would become Cicero, who wanted to unify all of Roman law into a single system through generalizations and by emphasizing common concepts (“*ius civile in artem redactum*”), but this plan was not preserved for posterity.

In the first century of classical Roman law, beginning with the Principate, the first century A.D., there was a reluctance to abstract law, and generalisations were seen as distortions of jurisprudence. Although the more general legal norms established earlier, which went beyond the case, were retained, others were created during this period more for the purposes of legal education. For example, the *Institutions of Gaius*, intended as an introduction to law, also contained general rules and definitions for this purpose. In the Late Classical period, however, general normative material regained importance, and extensive collections of rules were produced:

“The first was Neratius Priscus, who was active during the reigns of Trajan and Hadrian. His *Regulae* are not only the earliest, but with fifteen books also the longest. From the middle of the second century come the works

² Stein, Peter (1966):39: *Regulae Iuris. From Juristic Rules to Legal Maxims*. Edinburgh: at University Press.

of Pomponius, Gaius and Cervidius Scaevola. Both Paul and Ulpian wrote *regulae*, and in the late antique period Marcian, Modestinus, and Licinius Rufinus all wrote in this literary genre”³

As early as the period of classical Roman law, controversy arose over the relationship between the rules, legal concepts, and legal principles emphasized by legal scholars, on the one hand, and the relationship between authority, the law established by the organs of state power on a case-by-case basis, on the other. The school later called Proculians, led by Labeo, held that general principles and rules of law or definitions taken from previous case decisions have a life of their own and can later be applied as a rule of law, unless an exception is made in a case to limit the general principle of law. In contrast, the Sabine school, cited by Sabinus, held that these amendments were merely a product of jurisprudence and not of law itself, and therefore had no binding character on subsequent case decisions. Not coincidentally, it was Neratius, the leading figure of the Proculians, who later wrote an extensive work of the *Regulae* in fifteen volumes. The renewed role of the *Regulae* in late antiquity is evidenced by the fact that Emperor Hadrian appointed Neratius to the Imperial Council, the supreme imperial judicial body, whose main task was to prepare an answer and a jurisprudence after asking the emperor for a decision on a difficult case in any part of the empire, which was sent back in a rescript, a tract. For local judges in all parts of the empire, only a simplified legal presentation and general points of view were understandable, so the emphasis on general legal points of view and their simplified formulation came to the fore. This explains the focus on legal norms during this period: “The subordinate officials in the offices had no time for the subtleties of legal discussion contained in such works. What they wanted was a guide that provided a shortcut to the official view of the law”.⁴

The earlier debate on the legal force of legal norms and principles, based on the results of the glossators’ works, finally ended in the first half of the thirteenth century with the compromise, as Bartolus put it, that they did not create law in already decided cases and extracted the legal norm in question as a general legal idea from the concrete case law on the subject. But for the future cases for which rules of jurisprudence have not yet been established,

³ Stein, Peter (1966):51: *Regulae Iuris*. From *Juristic Rules to Legal Maxims*. Edinburgh: at University Press.

⁴ Stein, Peter (1966): 81: *Regulae Iuris*. From *Juristic Rules to Legal Maxims*. Edinburgh: at University Press.

these rules constitute the law, and on the basis of these rules these cases are to be decided.⁵

The abstraction of law from case norms to rules has not stopped, however, and the same pressures that have led from elaborate, case-specific rules to simpler and more general normative foundations have produced an even more general legal fixation in the form of legal maxims. This process was particularly evident among authors of late antiquity. While the rules still contain more or less precisely the contours of the particular group of cases, and thus the applicability of the normative clues contained in them is not too much diluted, the generalization at the level of maxims fixes only a mere legal idea for a whole area:

“The *regulae*, with which we were concerned hitherto, were all rules whose scope of application was quite clear (...) In late antiquity the word *regula* was applied to propositions of a different kind, to maxims so abstract that no reference to a concrete situation is discernible”.⁶

While the *regula* can still be regarded as a rule, although its broad formulation often necessitates the introduction of exceptions-and thus the limitation of its scope-because other legal principles must limit its application, the maxim permeates entire areas of law without any case limitation. The brevity of the formulation does not offer any closer clue due to its broadness and memorability, so that in most cases the maxim can only be concretized by reference to other normative references and is not directly applicable. E.g., a maxim of Paul from Title 17: “Non omne quod licet honestum est. Not everything is fair that should be done”.⁷ Of course, those interested in the uncompromising application of a particular maxim in a particular case may proclaim it as the truth set in stone and label those who argue against it from a different normative standpoint as violators of the “noblest right”.

The maxim usually results from a generalization of a normative point of reference developed for a concrete case by freeing it from the words of the concrete case and formulating it in general terms. Such a maxim is known, for example, from the legal history of the regulation of the guardianship relationship, where there were several guardians and in many disputes of

⁵ Stein, Peter (1966): 155: *Regulae Iuris*. From *Juristic Rules to Legal Maxims*. Edinburgh: at University Press.

⁶ Stein, Peter (1966) 105: *Regulae Iuris*. From *Juristic Rules to Legal Maxims*. Edinburgh: at University Press.

⁷ Hamza Gábor/Kállay István (ford.) (1973): 35: *De diversis regulis iuris antiqui*. (A *Digesta* 50. 17. *regulái latinul és magyarul*). Budapest ELTE.

this kind the question arose as to which guardian had the right to decide on the situation of the ward and the ward's property. In response, Emperor Justinian issued an ad hoc rule in a decision that matters concerning the guardianship of any guardian could only be validly decided by the consensus of all guardians. This was then adopted by his code into medieval canon law as a general maxim: "Quod omnes tangit debet ab omnibus approbari" – "what concerns all must be approved by all" – without any restriction to the original guardianship situation.⁸ Later, this maxim became the main battle cry within the ecclesiastical hierarchy for those who wanted to put the head of a monastery in office with the consent of the monks of the monastery, and even more generally, with the common European culture of legal maxims in the Enlightenment, it became one of the main battle cries of modern democracy: what concerns all must be approved by all!

But this nature of maxims is illustrated by the summary of many rules of evidence in Roman trials in a single short phrase: "ei incumbit probatio qui dicit non qui negat", the one who asserts something must prove it, not the one who denies it.⁹ Originally, the detailed rules provided that while the plaintiff bore the general burden of proof, it was up to him to prove the defendant's allegations in his defence, and the many contentious issues in this area and the detailed rules that developed in response were then expressed in the brief maxim above. In this context, it is also worth mentioning the reformulation of the rule on inheritance disputes, originally intended as a maxim – and thus extended to all law – the context being that in the case of a disputed question that could not be clearly decided on the basis of the facts, the interpretation more favourable to the heir should be chosen. However, the desire of the authors of the *Digesta* for comprehensive maxims has now given this regulation a formulation that can be used as an argument in any area of law without restriction: "semper in dubiis benigniora praeferenda sunt" – in case of doubt, the more favorable interpretation is to be chosen!¹⁰ But this statement, abbreviated as a maxim, leaves open the question of who should choose the better option! In the original context, however, it was clear that the heir gets the preference. In other words, the creation of a more general usage, expanded as a maxim, also provides an ambiguous norm in a number of cases and only seems to clarify it.

And this problem was constantly present in the use of Roman law revived in the Middle Ages, because one of the main concerns in editing the volumes

⁸ Stein, Peter, (2005): 70: A római jog Európa történetében. Osiris. Budapest.

⁹ Stein, Peter (1966): 108: *Regulae Iuris*. From Juristic Rules to Legal Maxims. Edinburgh: at University Press.

¹⁰ Stein, Peter (1966): 119: *Regulae Iuris*. From Juristic Rules to Legal Maxims. Edinburgh: at University Press.

of the Justinianic collection was to extract those arguments that could be read out of the textual description of individual cases and used as a general legal argument beyond the case. This was called *notabilia*, and a subgenre of it was the collection of overarching arguments that provided arguments in polar opposite directions in deciding cases. These pairs of pro and con arguments were called *brocadicums* or *brocardas*, and the dangers associated with them were recognized by Cinus de Pistoia as early as the early thirteenth century, for they meant arbitrary application of the law by litigious lawyers and consulting jurists.¹¹

In the commentatorial era, Baldus continued his master Bartolus's views on the binding nature of legal rules as opposed to case law in individual disputes, arguing that the party who can invoke a general rule reverses the burden of proof on the issue at hand because he is in a more advantageous legal position and is closer to winning a case. However, if the opposing party can show that the general rule does not apply in the case in question because of other rules, he loses this advantageous position, and the special rules take the place of the rule:

“The successor of Bartolus, Baldus, emphasized that a litigant who can invoke a rule favourable to him is *prima facie* in the right. There is a presumption that his case is the stronger one, and therefore it must be decided in his favour unless the other party expressly proves that the rule does not apply”.¹²

With this caveat, and with only subordinate legal force, the rules of law could not supplant the detailed case rules of the *Digesta* and the other volumes of the Justinian codification, while at the same time bringing the maxims and rules of Roman law in use outside of court proceedings up to the level of the more general arguments of rhetoric and logic in the common European cultural heritage. The result is that while jurists were trained in the variegation of thousands of detailed cases of jurisprudence, the overlapping normative bases and the constant introduction of exceptions to reconcile them forced caution in the use of certain legal principles and maxims, while non-lawyers in the intellectual world were most concerned to make them the basis of their reasoning and judgments, especially as abstract-deductive systems thinking, starting from the French (Descartes, Pascal), took off in the second half of the 17th century. Century. Its absence in English and early American legal

¹¹ Lange, Hermann (1997): 142: *Römisches Recht im Mittelalter: Band I. Die Glossatoren*. C. H. Beck'sche Verlagsbuchhandlung, München.

¹² Stein, Peter (1966): 154: 108: *Regulae Iuris. From Juristic Rules to Legal Maxims*. Edinburgh: at University Press.

thought, which carried on their intellectual treasure, shaped differently the forms of abstraction of law in Anglo-American legal life, on the one hand, and in continental European legal life, on the other.

2. The role of legal maxims in pragmatic Anglo-American legal life

Although from 1300 onwards the English no longer adhered to Roman law, which became a common European law, the rules and maxims of Roman law that had been adopted by then became the inseparable basis of common law summaries. John Fortescue wrote a dialogue in 1469 in the form of “*De Laudibus Legum Angliae*”, in which he summarized the English common law of the time. He said to his pupil in his “Catalogue of the Law of England” that although it would take many years to learn the whole law, it could be done in a year at the level of the rules and maxims that underlie it: “The principles which the commentator (Aristotle) said were efficient causes are, moreover, certain universals which the scholars of the laws of England and the mathematicians alike call maxims”.¹³ According to Fortescue, already the chief justice Edward Coke in the beginning of the 16th century used the power of maxims in the sense of Aristotle’s first principles, axioms, which in his interpretation, as the ultimate foundations of law, no longer need proof and are necessarily, without exception, always applicable: “maxim, a sure foundation or ground of art is so certain and uncontrollable that it should not be questioned”.¹⁴ In parallel with Coke, Francis Bacon, who held the office of attorney general to Queen Elizabeth, his great rival, attempted to rationalize the entire body of English common law by attempting to give it the force of law in a collection of general maxims in 1597, emphasizing the basic principles of law, which, though not successfully, would lead subsequent authors, who then wrote more and more maxims, to present each part of the detailed common law as a bundle of general maxims. The Maxims of Equity by Richard Francis were published in 1727 and transferred to and published in the United States in 1823. According to several authors, however, the most comprehensive was Herbert Broom’s 1845 collection of maxims, which covered all of English law in five hundred maxims and listed dozens of maxims with examples of their meaning and relationships, separately for the organization of justice and jurisdiction, property law, inheritance law, contract law, constitutional law, criminal law, evidence, etc. Many of

¹³ McQuade, Stanly J. (1996) 77: Ancient Legal Maxims and Modern Human Rights. *Campbell Law Review*. (Vol. 18:75) 75–120.p.

¹⁴ quoted in Simpson 1981: 644

these were derived from Roman law and were either part of the rules or were extracted from them by glossators and commentators and created as *notabilia*, or, moreover, were modelled in English law and developed from detailed case rules into maxims that emphasized overarching legal ideas.¹⁵

In contrast to the restrained use of maxims in continental Europe, the English, and in their wake the Americans, gave a more prominent role to maxims, the overarching principles of law, and while Bartolus and later Baldus gave them primacy only in the initial stages of legal reasoning, against which they could be eclipsed by the exposition of more detailed rules for a particular situation, in Anglo-American legal life they were for a long time the undisputed and unchallengeable normative quantity.

In common law countries, however, this gradually came to an end from the middle of the 18th century. For even if legal dogmatics, as a tendentially narrow system of meaning, did not take centre stage in the regulation of individual areas of law as exclusively as it did in continental Europe – with the Germans in the lead – the English and especially the Americans also began to work on the law in systematic monographs, in contrast to the earlier open maxims of legal topics. The American *Joseph Story*, who later became a member of the Supreme Court, summarized the law in nine systematic monographs on specific topics of private law and procedural law in the first half of the 19th century, but a number of authors outside his own circle also summarized the law in such monographs. Against this background, the loose maxims, with their constantly overlapping effects and contradictions, lost their primary role in the specific case. The epigrammatic brevity that had earlier made them successful proved insufficient for the complex legal debates of life in modern industrial societies. By the beginning of the 20th century, maxims and their principled support at the level of legal principle had virtually faded into the background in jurisprudence, and the old legal maxims were used only as illustrations in legal arguments.

In this situation, constitutional jurisprudence based on fundamental constitutional rights, which became the focus of American law in the early 1960s, has brought about a turning point. To understand this, however, it is first necessary to take a closer look at the processes and tendencies toward the abstraction of law and morality on the European continent since 1700.

¹⁵ e.g., Edward Coke also developed two such maxims, using the concise Latin style of the Roman maxims for better effect, see Simpson 1981: 636

3. The parallel development of systematic legal dogmatics and human rights

I. In France, which became the centre of European intellectual life at the beginning of the 17th century, the medieval forms of case thinking were replaced by deductive thinking based on abstract principles, which in the following decades became known as “geometrical thinking” because it was applied for the first time. *René Descartes*, drawing on the earlier French works on logic, formulated with great influence the requirements of systems thinking, which proceeds deductively from abstract first principles, and the advantages of logical analysis based on common features rather than the details of many cases. Descriptions that search for common features based on necessarily true principles and deduce from them in a tight logical sequence of steps can yield real truths, and this allows us to arrive at certain truths beyond first certain principles. The basis of all this is the abstraction of details, and the theses thus obtained are reduced to certain first principles (axioms), and the middle-level theorems thus proved then provide a secure basis from which to derive order from the chaotic multiplicity of details by syllogistic logic in other areas as well.

This process of abstraction in law was continued from the 1660s onward by *Samuel Pufendorf*, who no longer emphasized more comprehensive concepts and principles merely in the form of short, mental maxims, but rather placed the individual concepts in a relationship free of contradiction, thus bringing the traditional material of Roman law into an abstract system. Following in the footsteps of the mathematician-theologian *Christian Wolff*, from the 1730s he placed the dogmatic concepts and dogmatic principles of private law and legal procedure in an even narrower logical order, which then culminated in the development of a system of individual legal dogmatic categories from the beginning of the 19th century in the conscious activity of Savigny, Puchta, and Anselm Feuerbach.¹⁶

As a result of these developments, in some countries of continental Europe in the 19th century the regulation of certain areas of law was laid down in codes of law, which contained a large number of dogmatically structured rules in private law, in criminal law, then in procedural law, and in newly emerging areas of law such as labour law. Here, in light of modern developments, law was anchored at the level of the abstractness of Roman

¹⁶ see extensively Hattenhauer 2000; in English Pokol Béla (2008) 117–152: *Középkori és újkori jogtudomány. Az európai jogi gondolkodás fejlődése. Dialóg Campus Kiadó. Budapest.*

legal rule (*regulae*), breaking with the ad hoc concreteness of Roman law, precisely because of the incentives that no longer permitted jurisprudence based on purely ad hoc norms, even in the era of complex administration of the late Roman Empire. But in modern times, dogmatically structured law has reached a higher level of abstraction that has given judges too much discretion in deciding individual cases, leading to legal uncertainty. Thus, in the course of the 19th century, although it was the most forbidding thesis of the Enlightenment, judge-made law developed as a new level of case-based legal stratum, from which the open statutory rules were constantly concretized and without which they could not function predictably. Abstract law, embodied in the text of the codes and in the conceptual level of legal dogmatics, could therefore provide an adequate legal service in continental Europe only in conjunction with the concretizing judicial level.

From 1800 onward, the dogmatics of legal concepts and the contradiction-free conceptual apparatus of a streamlined conceptual system prevailed throughout continental Europe, and the earlier legal maxims and legal principles were discarded as unsystematic and contradictory legal foundations. Parallel to this process of development, however, another process set in from the early 17th century onward, giving rise, first, to the idea of a secular natural law within law and, second, to the idea of human rights, which was brought into focus by moral philosophers and other intellectuals, mainly outside law. The starting point was the Dutchman *Hugo Grotius* with his work of 1625, in the wake of which the idea of a secular natural law that could be explored by reason began to spread, replacing the earlier Christian natural law. Within law, this also contributed to the emergence of the systematic legal dogmatics mentioned above; outside law, the creation of abstract catalogues of human rights by moral philosophers increasingly placed human rights at the centre of the ideological-political struggle. As we have seen above, abstract legal principles and maxims actually overlap in concrete application in most cases, but non-legal laymen have been enthusiastic supporters of the reasoned legal ideas contained in them since the beginning of modern times. Similarly, abstract human rights are only ever capable of providing a single point of reference and can only ever be appropriate in concrete cases through a series of interrelated limitations. However, in the ideological-political struggles that were dissatisfied with feudal conditions, they became inflammatory slogans and were emphasized as truly compelling first principles and absolute truths.

The abstract rationalism of the French Enlightenment produced judgments and social blueprints derived from abstract principles in everyday intellectual struggles, and when the French Revolution was carried out on the basis of

this intellectual movement and those considered enemies were relentlessly condemned on the basis of abstract principles and human rights, the abstract rationalism of the revolutionaries largely led to the mutual annihilation of the revolutionaries. (And then, eerily, the same thing was repeated with the Russian Bolshevik revolutionaries, who operated on the same principles and with the same style of thinking!) The terrible experience of judgments based on abstract principles led some of the contemporary English thinkers of the French Revolution to prefer pragmatic reasoning and always partial changes in the status quo to abstract rationalism and its erasure of all traditions.¹⁷

The French revolutionaries left their convictions along these lines in the Declaration of the Rights of Man of 1789, and while the terrible experiences of their revolution long left them ineffective in continental Europe, they were adopted as constitutional amendments in the newly constitutionalized and independent United States. These were essentially political liberties – freedom of speech, freedom of assembly, etc. – and some of the European constitutions drafted in the later political struggles of 1848 or even later also included them. However, at that time it was an exercise of the functions of the legislature rather than a right at the jurisdictional level. This did not change in the United States, where the Federal Supreme Court decided in 1803 to bind the laws of the Federation and its member states to the Constitution and to prohibit them for unconstitutionality if they exceeded the division of powers between the Federation and the member states established in the Constitution. This was the birth of constitutional adjudication in modern history, but at first it was only a jurisdiction limited to settling disputes between federal and state authorities. This began to change when, in the early 20th century, the Federal Supreme Court began to strike down laws for unconstitutionality, even beyond jurisdictional disputes based on fundamental constitutional rights and principles. In this way, constitutional adjudication became largely a form of fundamental rights adjudication and began to function as a competitor to the democratic will and legislation of Congress.

This change in character and the political opportunities it created led some of the major capital groups in the United States to attempt to gain dominance over competing social groups and other capital groups, not through mass elections and majorities in the legislature, but by gaining majorities in the judiciary and relying on constitutional judicial processes based on fundamental constitutional

¹⁷ see Sunstein 2007: 353–408 for an analysis of Edmund Burke’s thought on this point Sunstein, Cass R. (2007): *Burkean Minimalism*. Michigan Law Review. November, 2006. (Vol. 105) 353–408. p.

rights. This political strategy was developed beginning in the 1910s by large groups of commercial and banking capital, which, in contrast to the conservative American majority, sought to achieve general social domination and bring about social and political change in their favour by appropriating and exploiting the grievances of various minorities and marginalizing rival groups of productive capital and their social base in the governance of society. The largest banking groups founded the American Civil Liberties Union (ACLU) in the 1920s and, with its help, first championed the constitutional rights of the black minority by addressing their grievances-financially supporting its apex body, the NAACP-and then, beginning in the mid-1950s, created a majority for this technique of social control in the Supreme Court by successively launching the various human rights foundations and the fundamental rights movement. Later, as the demands of feminists, homosexual/lesbian minorities, and then immigrant minorities, the homeless, animal rights activists, the disabled, etc., were taken up, the once massive American conservative majority morphed into a collection of many small, opposing minorities, and politics became based on the protection of minorities and the attainment and maintenance of overall social supremacy by them.

“The American Fund for Public Service was founded in 1922 and for a short time supported important citizens’ rights efforts. Roger Baldwin, the director of the ACLU, also became the director of the new fund, and the original board was largely composed of the members of the ACLU’s national committee (...) the Fund supported a wide range of leftist causes in the 1920s and 1930s, and the Fund was the primary source of funding for ACLU-led court battles in the 1920s (...) The stock market crash of 1929 devastated the Fund, however, and as a result its support for litigation declined dramatically in the 1930s” (Epp 1998: 58).

Thus, alongside (or even above) the legislature, the constitutional adjudication has become the principal normative shaper, now not only controlling the legislature but also allowing direct constitutional challenges so that individual plaintiffs can choose whether to sue under the more detailed rules of common law or prefer to bring a constitutional challenge and ground their complaint in constitutional arguments. Thousands of U.S. law firms have adopted this litigation approach since the 1960s, developing techniques to litigate directly on the basis of fundamental rights, and fundamental rights movements have also taken advantage of this opportunity by establishing legal departments. “Cause lawyers” are the legal departments of a minority movement that

fight the movement's political goals in the courtroom by using fundamental constitutional rights to set precedents.¹⁸

Beginning in the second half of the 1960s, these developments led to new currents of legal theory that rehabilitated legal maxims and principles in American legal life, alongside or in place of legal dogmatic categories, and made them a central part of the law alongside the necessarily looser arguments of the fundamental rights argument.

4. The rehabilitation of legal principles and maxims: Dworkin's appearance

In the United States, the aforementioned turmoil over fundamental rights has led to a proliferation of constitutional cases based on loose and political value-based decisions derived from abstract legal principles, rather than the formerly more dogmatic and systematic jurisprudence based on statutes and precedents, and the re-emergence of discredited maxims and legal principles. The judges of the supreme courts are unable to develop clear legal concepts that cover entire areas of law without contradiction when deciding a case on the basis of loose fundamental rights. However, the large background of the banking circles in the intellectual sphere and in the media – in the neo-Gamscian sense: their organic intelligence – has provided them with broad intellectual and artistic support and its dissemination in public opinion. The whole was presented as a struggle for the “rights of man” against the laws of selfish politicians. This development rehabilitated thinking in terms of legal maxims and legal principles to a large extent in American intellectual life, and it was then Ronald Dworkin who, in the second half of the 1960s, as a theoretical summary of the process that had already taken place, took up the cause of legal principles as a higher level of law as opposed to rules.

Dworkin thus turned against the legal view of the English professor H.L.A. Hart from Oxford, who in 1960 had formulated a largely consensual view of modern law as a set of rules.¹⁹ Dworkin, on the other hand, pointed out that this meant a narrowing of the law, since the unwritten principles of customary law overshadowed the rule-based statutory provisions and these overshadowed the contradictory rule-based provisions in court decisions. It is clear from Dworkin's study that he raised this issue without any knowledge of the six hundred years of development and change in the field, using the example of an

¹⁸ see Scheingold 1998: 115–150 Sarat, Austin/S. Scheingold (ed.): *Cause Lawyering. Political Commitments and Professional Responsibilities*. New York. Oxford University Press. 1998 118–150 p.

¹⁹ cf. Hart, H. L. A. (1995): *A jog fogalma. Osiris*. (Ford. Takács Péter) Budapest.

1897 U.S. Supreme Court decision in which an inheritance matter—the decedent had murdered the testator in order to quickly obtain the inheritance—was decided by the court on the basis of a broad legal maxim, depriving the murderer of the inheritance, which was thus different from a judgment that would have considered only the norms of rule inheritance law. Based on this example, Dworkin’s overarching thesis was that law contains not only the body of law at the level of rules, but also the body of law at the level of principles, and that in the event of a conflict, the body of law at the level of principles is the superior body of law that takes precedence over the rules.²⁰ This is precisely what the English have professed since Chief Justice Coke and then the Americans—in contrast to the more modest role of principle in the laws of continental Europe—and it was relegated to the background before Dworkin. but it was still possible to find such legal reasoning and judgment in a U.S. Supreme Court decision, as Dworkin exceptionally did in 1897.²¹ However, they were relegated to the background in order to create a more rigorous law, and these legal principles and maxims could only be considered as an aid to argumentation alongside legal dogmatic concepts. Dworkin changed this neglected role as his main theoretical thesis.

A similar attempt to rehabilitate legal maxims in Germany was made by *Theodor Viehweg* in 1952 with the highlighting of legal topics and legal maxims in contrast to a legal dogmatics perceived as too rigid, but after careful discussion it affected only German and from there the rest of continental legal thought, that in the first stage of legal development there is room only for current maxims, and that in the second stage the norms thus developed must be incorporated into legal doctrine by concentrating on the conceptual system of the legal field in question. Thus, in this conception, the maxims of law remain subordinate to the dogmatics of law and to the rules-based norms of law – just as Bartolus decided this question six hundred years ago. Of course, legal maxims are also passed on to a greater or lesser extent to a narrower circle of younger generations of jurists in continental Europe, but they are seen more as a means of maintaining the prestige of the “profession” than as a means of fighting the rules in legal policy. For example, the German *Detlef Liebs*, mentioned above, published 1640 legal sayings in Latin together with a German translation in his 1983 book, some of which are still sometimes used by educated German jurists today.²²

²⁰ Dworkin, Ronald (1977): 65–89: Is Law the System of Rules? In: uő (szerk.): *The Philosophy of Law*. London. Oxford University Press. 65–89.p.

²¹ but actually fifty years before him Benjamin Cardozo, who introduced the role of legal principles in law in his book based on that very judgment, see Cardozo, Benjamin N. (1921): *The Nature of Juridical Process*. New Haven: Yale Univ. Press.

²² Liebs, Detlef (1983): *Lateinische Rechtsregeln und Rechtssprichwörter*. (Dritte, überarbeitete Auflage.) Verlag C. H. Beck. München.

It should be noted, however, that the strong push for fundamental rights in Europe in recent decades has given legal maxims enormous support from power relations beyond law, just as the rise of fundamental rights in America and the shift in social governance from congressional legislation to Supreme Court constitutional decisions has come about through a constellation of socio-political power relations since the 1960s. As a result of the general shift in political power, the idea of human rights and natural law was strongly supported by those in power here and became an important part of the definition of law, first in the United States and then, under pressure from the dominant political forces here, in European countries. After World War II, constitutionalisation under the control of the victorious American powers in Germany, Italy, and Austria introduced the institution of constitutional adjudication and incorporated the catalogue of human rights into the Constitution, bringing it to the level of concrete application of law. It is true that this “constitutionalisation” of law did not really achieve the same effect as it did here in the U.S. because of the infiltration of German, Austrian and Italian legal culture, but this process continued after the collapse of the Soviet power bloc by the U.S. in the 1990s. Here, too, constitutional courts with broad powers have been established, and here, too, there is no longer the resistant legal thinking in defence of rule law and legal dogmatics that would sufficiently ennoble the constitutionalisation of law. Moreover, since the 1990s, organizations have been established and strengthened at the pan-European level that use human rights as a central tool for monitoring the internal legal and political systems of individual countries. The Council of Europe and the Strasbourg Court of Human Rights, for example, can be mentioned here, through which the domestic law of individual states is reviewed and overruled. Although some critics in 2001 called the U.S.-led military strikes and occupations in Serbia “human rights imperialism” in the name of defending human rights, this is also the method of global control that we are now highlighting.

As a result, a legal dogmatic background can be observed in a number of legal areas, and certain provisions of private law, criminal law and procedural law can be reviewed in the light of human rights and natural law principles transformed into fundamental constitutional rights. The problem with these human rights and legal principles, however, is that while they represent overarching civilizational values, they are irreconcilably opposed to each other at a concrete level in the adjudication of a concrete case. It is worth quoting the Scotsman Neil MacCormick at length on this problem:

“Why don’t we just let the principles and values do their work, without the seemingly useless interposition of rules? (...) Why should we resign ourselves

to these detailed and complex rules and legal provisions, behind which we must always fall back on the underlying principles and values to solve our perennial problems of interpretation (...) Recourse to crude values and principles would thus have two defects (...) The establishment or concretization of a principle for a particular class of cases is neither a derivation from the principle nor a discovery of implicit meaning; it is the establishment of a more concrete and categorical requirement in the spirit of the principle, guided both by a sense of what is practically feasible (or enforceable) and by a recognition of the danger of conflict with other principles or values that have themselves been concretized by other determinations. Neither the delineation between duty and goal nor the achievement of balance or reconciliation of potentially conflicting values or principles is possible without some determination”²³

In other words, the rules of modern legal systems, dogmatically structured and characterized by the imposition of limits and compromises between the principles that govern them, are also bearers of fundamental values and legal principles, but it is precisely in the context of resolving their contradictions that they have acquired such content. Thus, by creating the possibility of directly invoking fundamental rights and legal principles – and these rules can be used not only to interpret them, insofar as they leave gaps and can be interpreted in a certain direction, but they can also be used to abrogate the rules based on them – we are, in effect, reintroducing the eliminated contradictions into the normative support of the judge. The judge will then give preference to one of the relevant fundamental rights and legal principles and be forced to relegate other fundamental rights and legal principles to the background or even leave them untouched in the background. At that point, the losing party’s lawyer – if he does his job well and is prepared with all the fundamental rights material available for the case – will appeal and ask the Supreme Court to rule differently, relying on the fundamental rights and legal principles that have been left in the background. In other words, the law becomes unforgivably open and undecidable in individual cases.

The American *Frederick Schauer* challenges the separation of rules and legal principles/norms into different levels from a different perspective. He argues that if the legislature chooses to regulate in an area at the level of more abstract norms, and avoids establishing more precise rules for narrower groups of cases within the area, and gives judges only abstract guidelines for judging the cases before them, then judicial practice will spontaneously begin to fill in the principles/norms with more precise rules for a narrower group of cases. If, on the other hand, the legislature avoids any abstract normative

²³ MacCormick, Neil (1990) 547–548: Reconstruction after Deconstruction: A Response to CLS. *Oxford Journal of Legal Studies*. (Vol. 10) 539–558.p.

support in a given area and decides all issues by more precise rules for each narrow group of cases, then judicial practice will begin to extract the more abstract normative support from the detailed rules in the many cases that arise, and after a while an abstract standard/principle level will be added to the body of rules to judge the cases. In other words: In the complexity of modern circumstances, judges take into account both the concrete set of rules and legal principles in their adjudication, and if the legislature creates only one, judges will develop the other themselves in their adjudication practice.

“I would like to point out that the choice between rules and norms, between specific and vague guidelines, does not make nearly as much difference as is commonly thought. And this is not because there is no difference between rules and norms, but because there is a difference, but also because the adaptive behaviour of rule interpreters and rule enforcers pushes rules toward norms and norms toward rules”²⁴

The false duality between rules and legal principles and the superimposition of rules and legal principles, broadly posited by Ronald Dworkin, merely provided a theoretical foundation for what the American “fundamental rights revolution” had already accomplished in the United States in the 1960s. While rules were indeed compromised forms of conflicting fundamental rights and legal principles, Dworkin viewed the level of rules and the level of legal principles as two independent sets of norms, and if one was dissatisfied with the norm at the level of rules, one could override it with “nobler” legal principles. In this theoretical form, the American fundamental rights revolution became exportable and, in particular, influenced legal thinking in the Central European countries of the former Soviet bloc from the 1990s onward. However, as we have seen, this is a theoretical fallacy. Rather, its effect is that social groups dissatisfied with parts of the existing law may take a stand against certain legislation on the basis of this legal ideology and seek to create a different set of legal norms based on “nobler” legal principles and fundamental rights.

Moreover, with the centrality of constitutional adjudication and the emergence of fundamental rights as a central component of law, the “fundamentalisation” of a number of parts of law has also begun. Since the Enlightenment, the catalogue of fundamental rights was limited to political freedoms, followed by economic and social rights in the late 1800s and cultural and informational rights in the 1970s, and so it has continued

²⁴ Schauer, Frederick (2003):305: The Convergence of Rules and Standards. *New Zealand Law Review*. 2003. 303–328.p.

ever since. For each part of the right can also take the form of a fundamental right, e.g., the important issue of environmental protection requires the development of thousands upon thousands of environmental regulations, and the development of these regulations among the many different interests and the many value considerations that occur in a political democracy gives rise to thousands of political debates and compromises. But an alternative to this democratic path is to define all environmental law as a basic constitutional right to a “healthy environment”, and when this is achieved, all that is needed is to push the Constitutional Court with a few members in the direction of relying on the specialized cadre of organic intellectuals from the intellectual and media spheres to specify the details of the basic right in specific areas of environmental issues through tests and standards appropriate to the dominant group. The end result will still be a normative set of hundreds of tests and yardsticks against the backdrop of a comprehensive fundamental right, but this will have been shaped not by hundreds of provisions of parliamentary laws but by fundamental rights jurisprudence. This alternative to democracy in the legislative and social spheres is in the interest of those social groups and their capitalist leadership circles that have greater control over the intellectual-media sphere but do not rely on the control of millions of citizens in elections and thus on their votes.

Ultimately, the “fundamental rights revolution” within the legal system of any country can be understood as a technique of legal change aimed at introducing a new body of law promoted by a group of moral philosophers and the media elite, as opposed to legislation and professional jurisprudence developed in light of legal dogmatic categories. In hundreds and thousands of decisions of the Constitutional Court on fundamental rights, norms and tests on abstract fundamental rights have been developed over time and concretized by focusing on one or another fundamental right and legal principle for a particular group of cases. In a few decades, a concrete body of law will be created in the same way as before, except that the regulating principles will be fundamental rights and their tests and standards, rather than legal dogmatic categories. But if a social group is dissatisfied with this, it will resort to the fundamental rights and constitutional principles, and in its abstraction will begin to overturn these tests and yardsticks and create a new concrete regulation more favourable to it. That is, abstract and contradictory fundamental rights and legal principles in themselves are incapable of providing a lasting legal service, and if we use them not only to interpret the rules that contain their compromises, but also to overturn them, we only begin another revolution through law.

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**CLARITY AND DEFINITENESS OF NORMS IN AUSTRIAN
CIVIL PROCEDURE LAW**

Abstract

The norms applicable to Austrian civil procedural law are found in various legal sources: In addition to the ZPO, the JN, the AußStrG, the EO, the IO, the GOG and the Geo 1. Instanz are authoritative. The multitude of legal sources can impair its clarity. Thus, procedural norms can also be found in legal acts in which they are not presumed. For example, the UWG requires the court, upon request or ex officio, to take precautions and measures to ensure that no party obtains new information about the trade secret at issue in the course of the proceedings that goes beyond their respective previous level of knowledge. This regulatory technique leads to the fact that regulations can be overlooked. The Austrian legislator is aware of the problem: For example, he unalteredly adopted the regulation on the use of technical devices for the transmission of words and images during the taking of evidence in civil court proceedings, which is standardised in section 91a GOG, into the ZPO. As reasoning, he states that by increasing the „visibility” of this provision, its application is promoted.

The original version of the Austrian Code of Civil Procedure dates back to 1895. Even if certain terms are outdated, the wording does not affect the clarity of the Code. In part, however, an adaptation of the norms to the interpretation by literature and jurisprudence seems sensible. For example, section 406 of the Code of Civil Procedure stipulates that an order for performance is only admissible if the maturity has already occurred at the time of the creation of the judgment. According to unanimous opinion, it is not the time of the creation of the judgment that is decisive, which cannot be determined objectively, but the conclusion of the oral proceedings of the first instance.

The clarity of determination can be affected by the deviations from European civil procedure law. This applies in particular to the area of jurisdiction. For example, according to section 92a JN, the place of action is decisive in actions for damages, however under Article 7 No. 2 Brussels Ia Regulation the place of action and success is decisive. The scope of application of the provisions differs despite their different objectives: Section 92a JN applies to contractual and tortious claims, Article 7 No.

2 Brussels Ia Regulation only to tortious claims. Section 92a JN is only applicable to disputes on compensation for damage resulting from the death or injury of one or more persons, from a deprivation of liberty or from damage to a physical object. Article 7 No. 2 Brussels Ia Regulation applies to all tort claims covered by the scope of the Regulation.

Clarity is affected by numerous references in the individual norms. For example, section 528 ZPO contains a total of more than 10 references to other provisions.

Despite the shortcomings pointed out, the ZPO has proven to be a well-functioning instrument that takes sufficient account of the clarity of norms and determinations.

According to the French philosopher *Voltaire* (1694–1778), “every law [...] should be *clear, uniform and exact; to interpret it is almost always to spoil it.*” This (especially the first half-sentence) must apply in particular to civil procedural norms. These require a particularly high degree of clarity and definiteness in order to ensure access to the courts and thus effective enforcement of claims. Only in this way can the fulfilment of an important task of civil procedure, namely the restoration and preservation of legal peace *inter partes* and for the legal community,¹ be ensured. In this article, examples are used to examine how precise and consistent the norms and provisions of Austrian civil procedure law are.

1. General – overview of Austrian civil procedure law

Austrian civil procedure law consists of a large number of different codified legal acts. The central source of law for civil proceedings is the Code of Civil Procedure (Zivilprozessordnung, ZPO),² whose provisions in labour and social law cases are supplemented and modified in particular by the Labour and Social Court Act (Arbeits- und Sozialgerichtsgesetz, ASGG)³. The Non-Contentious Proceedings Act (Außerstreitgesetz, AußStrG)⁴ is primarily

¹ *Fasching*, Lehrbuch des österreichischen Zivilprozessrechts² (1990) note 1 et seqq.; *G. Kodek/Mayr*, Zivilprozessrecht⁵ (2021) note 8 et seqq. and note 22; *Rechberger/Simotta*, Grundriss des Zivilprozessrechts⁹ (2017) note 20.

² Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung – ZPO), RGBl 1895/113 i.d.g.F.; Law of 1 August 1895, on judicial proceedings in civil disputes (Code of Civil Procedure – ZPO), RGBl 1895/113 as amended.

³ Bundesgesetz vom 7. März 1985 über die Arbeits- und Sozialgerichtsbarkeit (Arbeits- und Sozialgerichtsgesetz – ASGG), BGBl 1985/104 i.d.g.F.; Federal Act of 7 March 1985 on Labour and Social Jurisdiction (Labour and Social Court Act – ASGG), BGBl 1985/104 as amended.

⁴ Bundesgesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen (Außerstreitgesetz – AußStrG), BGBl I 2003/111 i.d.g.F.; Federal Act on Judicial

relevant for non-contentious proceedings. Since the non-contentious proceedings apply to numerous special matters⁵ – such as the keeping of the land register and the company register as well as the proceedings on the placement of mentally ill persons – special laws – such as the General Land Register Act (GBG),⁶ the Company Register Act (FBG),⁷ the Nursing Home Residence Act (HeimAufG⁸) and the Placement Act (UbG)⁹ – must also be observed. In principle, the general part of the AußStrG applies to these proceedings. In order to take into account the particularities of the respective proceedings, the special laws contain numerous deviations from the general part of the AußStrG.

The provisions of the Execution Code (EO)¹⁰ and the Introductory Act to the Execution Code (EGEO)¹¹ apply in particular to enforcement proceedings and interim legal protection proceedings, and the provisions of the Insolvency Code (IO),¹² also apply in particular to insolvency and restructuring proceedings, whereby special laws such as the Restructuring Code (ReO)¹³ must also be observed.

Proceedings in Non-Contentious Matters (Außerstreitgesetz – AußStrG), BGBl I 2003/111 as amended.

⁵ For an overview, see for example *G. Kodek in Gitschthaler/Höllwerth*, Kommentar zum AußStrG I² (2019) § 1 note 87; *Motal in Schneider/Verweijen*, AußStrG (2019) § 1 note 50.

⁶ Bundesgesetz vom 2. Feber 1955 über die Grundbücher (Allgemeines Grundbuchgesetz 1955 – GBG 1955), BGBl 1955/39 i.d.g.F.; Federal Act of 2 February 1955 on Land Registers (General Land Register Act 1955 – GBG 1955), BGBl 1955/39 as amended.

⁷ Firmenbuchgesetz (FBG), BGBl 1991/10 i.d.g.F.; Companies Register Act (FBG), BGBl 1991/10 as amended.

⁸ Bundesgesetz über den Schutz der persönlichen Freiheit während des Aufenthalts in Heimen und anderen Pflege- und Betreuungseinrichtungen (Heimaufenthaltsgesetz – HeimAufG), BGBl I 2004/11 i.d.g.F.; Federal Act on the Protection of Personal Freedom during Residence in Homes and Other Nursing and Care Facilities (Heimaufenthaltsgesetz – HeimAufG), BGBl I 2004/11 as amended.

⁹ Bundesgesetz vom 1. März 1990 über die Unterbringung psychisch Kranker in Krankenanstalten (Unterbringungsgesetz – UbG), BGBl 1990/155 i.d.g.F.; Federal Act of 1 March 1990 on the Placement of Mentally Ill Persons in Hospitals (Placement Act – UbG), BGBl 1990/155 as amended.

¹⁰ Gesetz vom 27. Mai 1896, über das Exekutions- und Sicherungsverfahren (Exekutionsordnung – EO), RGBl 1896/79 i.d.g.F.; Law of 27 May 1896 on execution and security proceedings (Exekutionsordnung – EO), RGBl 1896/79 as amended.

¹¹ Einführungsgesetz zur Exekutionsordnung (EGEO), BGBl 1953/6 i.d.g.F.; Law concerning the introduction of the Execution Code, BGBl 1953/6 as amended.

¹² Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung – IO), RGBl 1914/337 i.d.g.F.; Federal Act on Insolvency Proceedings (Insolvency Code – IO), RGBl 1914/337 as amended.

¹³ Bundesgesetz über die Restrukturierung von Unternehmen (Restrukturierungsordnung – ReO), BGBl I 2021/147 i.d.g.F.; Federal Act on the Restructuring of Companies

In addition, the Jurisdiction Standard (JN)¹⁴ contains regulations on the exercise of jurisdiction and the competence of the ordinary courts in civil law cases and is relevant for all civil proceedings. The provisions of the JN are supplemented by other special procedural provisions. For example, the JN does not contain any provisions on jurisdiction for compulsory enforcement proceedings, interim relief proceedings and insolvency proceedings; the relevant provisions in this regard are found in particular in the EO¹⁵ and the IO.¹⁶

At the same time as the JN and the ZPO, the Civil Procedure Introductory Act (EGZPO)¹⁷ and the Jurisdiction Introductory Act (EGJN)¹⁸ entered into force, which, in addition to adaptation and transitional provisions, also contain provisions that supplement the regulations of the ZPO and JN (see point 2.2.). For this reason, they are still relevant.

In addition, there are other legal acts that are relevant to civil proceedings. For example, service is regulated in a separate law – the Service of Documents Act (Zustellgesetz, ZustG)¹⁹ (see 2.4). Standards on the organisation and rules of procedure of the courts are contained in the Court Organization Act (Gerichtsorganisationsgesetz, GOG),²⁰ the Rules of Procedure for the

(Restructuring Ordinance – ReO), BGBl I 2021/147 as amended.

¹⁴ Gesetz vom 1. August 1895, über die Ausübung der Gerichtsbarkeit und die Zuständigkeit der ordentlichen Gerichte in bürgerlichen Rechtssachen (Jurisdiktionsnorm – JN), RGBl 1895/111 i.d.g.F.; Law of 1 August 1895, on the Exercise of Jurisdiction and the Jurisdiction of the Ordinary Courts in Civil Matters (Jurisdiktionsnorm – JN), RGBl 1895/111 as amended.

¹⁵ Jurisdiction in compulsory enforcement proceedings results, for example, from sections 3 et seqq. EO and for interim relief proceedings from section 387 EO. See in more detail *Neumayr/Nunner-Krautgasser*, Exekutionsrecht⁴ (2018) 336 et seq.; *Schneider in Mohr/Pimmer/Schneider*, EO¹⁷ (2021) § 3 and § 4 et seqq.

¹⁶ Jurisdiction in insolvency proceedings results from section 63 (1) IO and section 182 (1) IO. See in more detail *Dellinger/Oberhammer/Koller*, Insolvenzrecht⁴ (2018) note 40 et seqq.

¹⁷ Gesetz vom 1. August 1895, betreffend die Einführung des Gesetzes über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Civilprozessordnung), RGBl 1895/112 i.d.g.F.; Law of 1 August 1895, concerning the introduction of the law on judicial proceedings in civil disputes (Civilprozessordnung), RGBl 1895/112 as amended.

¹⁸ Gesetz vom 1. August 1895, betreffend die Einführung des Gesetzes über die Ausübung der Gerichtsbarkeit und die Zuständigkeit der ordentlichen Gerichte in bürgerlichen Rechtssachen (Jurisdiktionsnorm), RGBl 1895/110 i.d.g.F.; Law of 1 August 1895, concerning the introduction of the law on the exercise of jurisdiction and the jurisdiction of the ordinary courts in civil law cases (Jurisdiktionsnorm), RGBl 1895/110 i.d.g.F.

¹⁹ Bundesgesetz über die Zustellung behördlicher Dokumente (Zustellgesetz – ZustG), BGBl 1982/200 i.d.g.F.; Federal Act on the Service of Official Documents (Zustellgesetz – ZustG), BGBl 1982/200 as amended.

²⁰ Gesetz vom 27. November 1896, womit Vorschriften über die Besetzung, innere Einrichtung

Courts of First and Second Instance (Geschäftsordnung für die Gerichte I. und II. Instanz (Geo))²¹ and the Act on the Supreme Court (OGHG)²² (see 2.1). The professional law of lawyers and other court personnel is regulated in particular in the Judges and Public Prosecutors Service Act (RStDG),²³ the Legal Officers Act (RpflG),²⁴ the Experts and Interpreters Act (SDG),²⁵ the Lawyers' Act (RAO)²⁶ and the Notaries' Act (NO).²⁷

Important constitutional foundations of civil procedure law can be found in particular in the Federal Constitutional Law (B-VG),²⁸ such as Article 10 (1) No. 6 B-VG, according to which the Federal Government and therefore not the provinces are responsible for legislation and enforcement for civil law, official secrecy (Article 20 [3] B-VG), the right to the lawful judge (Article 83 B-VG) and the independence of judges (Article 87 B-VG), and in the European Convention on Human Rights (ECHR²⁹), which has constitutional status in Austria, such as the fundamental right to a fair trial (Article 6 ECHR) and to respect for private and family life (Article 8 ECHR).

und Geschäftsordnung der Gerichte erlassen werden (Gerichtsorganisationsgesetz – GOG), RGBI 1896/217 i.d.g.F.; Law of 27 November 1896 enacting provisions on the staffing, internal organisation and rules of procedure of the courts (Court Organisation Act – GOG), RGBI 1896/217 as amended.

²¹ Geschäftsordnung für die Gerichte I. und II. Instanz (Geo), BGBl 1951/264 i.d.g.F.; Rules of Procedure for the Courts of First and Second Instance, BGBl 1951/264 as amended.

²² Bundesgesetz vom 19. Juni 1968 über den Obersten Gerichtshof, BGBl 1968/328 i.d.g.F.; Federal Act of 19 June 1968 on the Supreme Court, BGBl 1968/328 as amended.

²³ Bundesgesetz über das Dienstverhältnis der Richterinnen und Richter, Staatsanwältinnen und Staatsanwälte und Richteramtsanwärterinnen und Richteramtsanwärter (Richter- und Staatsanwaltschaftsdienstgesetz – RStDG), BGBl 1961/305 i.d.g.F.; Federal Act on the Employment Relationship of Judges, Public Prosecutors and Trainee Judges (Judges and Public Prosecutors Service Act – RStDG), BGBl 1961/305 as amended.

²⁴ Bundesgesetz vom 12. Dezember 1985 betreffend die Besorgung gerichtlicher Geschäfte durch Rechtspfleger (Rechtspflegergesetz – RpflG), BGBl 1985/560 i.d.g.F.; Federal Act of 12 December 1985 on the Administration of Judicial Business by the Rechtspfleger (Rechtspflegergesetz – RpflG), BGBl 1985/560 as amended.

²⁵ Bundesgesetz über die allgemein beeideten und gerichtlich zertifizierten Sachverständigen und Dolmetscher (Sachverständigen- und Dolmetschergesetz – SDG), BGBl 1975/137 i.d.g.F.; Federal Act on Generally Sworn and Court-Certified Experts and Interpreters (Expert and Interpreter Act – SDG), BGBl 1975/137 as amended.

²⁶ Rechtsanwaltsordnung, RGBI 1868/96 i.d.g.F.; Lawyers' Act, RGBI 1868/96 as amended.

²⁷ Notariatsordnung, RGBI 1871/75 i.d.g.F.; Notarial Code, RGBI 1871/75 as amended.

²⁸ Bundes-Verfassungsgesetz, BGBl 1930/1 i.d.g.F.; Federal Constitutional Act, BGBl 1930/1 as amended.

²⁹ Konvention zum Schutze der Menschenrechte und Grundfreiheiten, BGBl 1958/210 i.d.g.F.; Convention for the Protection of Human Rights and Fundamental Freedoms, BGBl 1958/210 as amended.

In addition, EU legal acts concerning civil procedural law and various bilateral and multilateral treaties must be taken into account. These include for example the Brussels Ibis Regulation,³⁰ the Regulation No. 805/2004,³¹ the Brussels IIter Regulation,³² the Regulation No. 4/2009,³³ the Regulation No. 2016/1103,³⁴ the Regulation No. 2016/1104³⁵ and the Regulation No. 2015/848³⁶. They regulate certain aspects of the procedure – such as international jurisdiction, the consequences of multiple *lis pendens* and the recognition and enforcement of judgments. The Regulation No. 1896/2006³⁷ and the Regulation No. 861/2007³⁸ provide for European procedures. Both the European order for payment procedure and the European Small Claims Procedure are only an optional alternative to the procedures under national law so that it is up to the claimant to choose in which procedure he wants to enforce his claims.³⁹

The international treaties ratified by Austria or applicable in Austria include the Hague Procedural Convention,⁴⁰ the Hague Child Abduction

³⁰ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012 L 351/1 as amended.

³¹ Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ 2004 L 143/15.

³² Council Regulation (EU) 2019/1111 of 25 June 2019 concerning jurisdiction, recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility and on international child abduction, OJ 2019 L 178/1.

³³ Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009 L 7/1.

³⁴ Council Regulation (EC) 2016/1103 of 24 June 2016 implementing enhanced cooperation in matters of jurisdiction, applicable law and recognition and enforcement of decisions in matters concerning matrimonial property regimes, OJ 2016 L 183/1.

³⁵ Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in matters of jurisdiction, applicable law and recognition and enforcement of decisions in matters relating to matrimonial property regimes of registered partnerships, OJ 2016 L 183/30.

³⁶ Council Regulation (EU) No. 848/2015 of 20 May 2015 on insolvency proceedings (recast), OJ 2015 L 141/19.

³⁷ Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 2006 L 399/1.

³⁸ Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 2007 L 199/1.

³⁹ Cf. only *Garber in Angst/Oberhammer*; *Kommentar zur Exekutionsordnung*³ (2015) Vor § 79 note 338.

⁴⁰ Convention of 1 March 1954 on Civil Procedure, BGBl 1957/91 as amended.

Convention⁴¹ and the Hague Child Protection Convention.⁴² The numerous bilateral and multilateral recognition and enforcement treaties should also be noted.⁴³ Of particular importance – in addition to the Lugano Convention⁴⁴ – is the agreement with the neighbouring state of Liechtenstein,⁴⁵ because the Principality of Liechtenstein is not a contracting state of the Lugano Convention.

2. Impairment of the clarity of norms and determinations due to the multitude of legal acts and norms

2.1. General and impairment of the clarity of norms and determinations by the necessary demarcation between legal acts

It is questionable whether the multitude of different legal sources applicable in Austria counteracts the clarity of Austrian civil procedure law in general. The regulations of the individual proceedings in separate laws (ZPO, ASGG, AußStrG, EO and IO) do not impair the clarity; also the exclusion of areas that apply to individual parts of the proceedings – such as the regulation of jurisdiction in the JN or the regulations regarding service in the ZustG – does not cause significant legal uncertainty (see point 2.4.). Individual, closely related areas – such as the norms on the organization and the rules of procedure of the courts, which are currently contained in particular in the GOG, the Geo and the OGHG – could have been combined into a single body of law in order to take into account the postulate of clarity and thus legal certainty. There is no clear answer to the question of the form in which the legal basis for the progressive digitalization of court proceedings and the communication with the persons involved in court proceedings should be standardized. Here, too, a “*cross-procedural*” special law could possibly provide more clarity.

In any case, the multiplicity of legal sources means that the practitioner must first determine the relevant legal sources for the specific procedure or

⁴¹ Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Hague Child Abduction Convention, BGBl 1988/512 as amended.

⁴² Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, BGBl III 2011/49 as amended.

⁴³ For an overview, see *Garber in Angst/Oberhammer*, EO³ Vor § 79 note 4.

⁴⁴ Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007, OJ 2007 L 339/3.

⁴⁵ Agreement between the Republic of Austria and the Principality of Liechtenstein on the Recognition and Enforcement of Judgments, Arbitral Awards, Settlements and Authentic Instruments, BGBl 1975/114 as amended.

the specific stage of the procedure. The delimitation of the sources of law does not generally cause any difficulties.

This applies, for example, to the demarcation between contentious and non-contentious legal action and thus to the question of whether the provisions of the ZPO or those of the AußStrG are to be applied. According to section 1 AußStrG, for example, all civil law cases – unless otherwise ordered – belong to the contentious legal process. Thus, the Austrian legislator has opted for the primacy of contentious civil proceedings. It is not necessary that the applicability of the non-contentious legal process and thus of the AußStrG is expressly stipulated in the law;⁴⁶ rather, an undoubtedly conclusive⁴⁷ or clear allocation from the internal context of the asserted claim is sufficient.⁴⁸ According to the case law, the non-contentious procedure is always to be applied even if this results from the nature of the asserted claim and the legal relationship between the applicant and the court thereby established.⁴⁹ Although there is no demonstrative or even taxative enumeration in the civil procedure laws,⁵⁰ the demarcation between contentious and non-contentious legal action does not usually cause any difficulties in practice. Admittedly, problematic and doubtful cases remain: This applies, for example, to the area of company law proceedings.⁵¹ From section 120 (1) No. 2 JN, which (among other things) refers to section 166 UGB⁵², it can be inferred that the legislator assigns the court order of the balance sheet or other clarifications to be issued at the request of a limited partner as well as the presentation of

⁴⁶ *G. Kodek in Gitschthaler/Höllwerth*, AußStrG I² § 1 note 80.

⁴⁷ *Fucik/Rechberger in Rechberger/Klicka*, ZPO⁵ (2019) Art I EGZPO note 6; *G. Kodek in Gitschthaler/Höllwerth*, AußStrG I² § 1 note 80; *Rechberger/Klicka in Rechberger/Klicka*, AuStrG³ (2021) § 1 note 2 and 6; OGH 9 Ob 106/01f EFSIlg 98.756; OGH 1 Ob 219/01i MietSlg 53.816; OGH 1 Ob 202/00p MietSlg 52.821 = RZ 2001/14; OGH 7 Ob 97/00s EvBl 2000/200; OGH 5 Ob 61/98a MietSlg 50.280.

⁴⁸ *Fasching*, Lehrbuch² note 112; *G. Kodek in Gitschthaler/Höllwerth*, AußStrG I² § 1 note 80; *Rechberger/Klicka in Rechberger/Klicka*, AußStrG³ § 1 AußStrG note 6; OGH 5 Ob 163/86 SZ 60/18; cf. also OGH 7 Ob 26/87 VersRdSch 1988, 26; OGH 5 Ob 255/15h NZ 2016/153

⁴⁹ RIS-Justiz RS0005781; cf. also *Rechberger/Klicka in Rechberger/Klicka*, AußStrG³ § 1 AußStrG note 6.

⁵⁰ The demand for a “streamlining of the non-contentious matters” (*Mayr*, Grundlagen einer Reform des Außerstreitverfahrens, in *Rechberger*, Außerstreitreform – in der Zielgeraden, LBI XX [1999] 1 [24 et seqq.]) was not taken up by the legislator (ErläutRV zum AußStrG [224 BlgNR 22. GP] 17) out of political pragmatism.

⁵¹ *G. Kodek in Gitschthaler/Höllwerth*, AußStrG I² § 1 note 84.

⁵² Bundesgesetz über besondere zivilrechtliche Vorschriften für Unternehmen (Unternehmensgesetzbuch – UGB), dRGBI 1897/219; Federal Act on Special Civil Law Provisions for Companies (Unternehmensgesetzbuch – UGB), dRGBI 1897/219.

books and documents for the effective exercise of the control rights to the non-contentious proceedings. According to the prevailing view⁵³, this also applies to other book inspection proceedings. For the special audit according to §§ 45 et seqq. GmbHG⁵⁴ it results from the – in case of applicability of the ZPO unnecessary – cost reimbursement rule of section 47 (4) GmbHG that the legislator obviously assumes an allocation to the non-contentious proceedings here.⁵⁵ Overall, it can therefore be assumed that the legislator generally does not understand information and audit claims in company law as “*civil disputes assigned to the trial court*”.⁵⁶ In contrast, according to sections 117 and 127 UGB, decisions on the withdrawal of the management or representation authority of a shareholder of the advertising OG (KG, section 161 [2] UGB) as well as on the dismissal of a GmbH managing director in the advertising GmbH (§ 16 [2] GmbHG) are made in contentious proceedings.⁵⁷ The appointment or dismissal of liquidators in the liquidation stage is to be decided in non-contentious proceedings for the aforementioned legal forms according to the general opinion⁵⁸. In the area of family law, the classification of the proceedings for the appointment of a marriage estate (now endowment) within the scope of application of the AußStrG 1854⁵⁹ – the procedural code preceding the now applicable AußStrG – was particularly controversial. From the wording of § 1221 ABGB, according to which the determination of the marriage estate is to take place “*without strict investigation of the property status*”, the prevailing view⁶⁰ derived a conclusive referral to the non-contentious proceedings. Since the claim to marriage property or to

⁵³ *G. Kodek/G. Nowotny*, Das neue AußStrG und das Verfahren vor dem Firmenbuchgericht, NZ 2004, 257 (258 et seq.); *Rassi*, Verfahrensrechtliche Fragen der Bucheinsicht, ÖJZ 1997, 891.

⁵⁴ Gesetz vom 6. März 1906, über Gesellschaften mit beschränkter Haftung GmbH-Gesetz – GmbHG), RGBl 1906/58 i.d.g.F.; Law of 6 March 1906, on limited liability companies (GmbH-Gesetz – GmbHG), RGBl 1906/58 as amended.

⁵⁵ *G. Kodek in Gitschthaler/Höllwerth*, AußStrG I² § 1 note 84; OGH 6 Ob 314/03z RdW 2004/377.

⁵⁶ *G. Kodek/G. Nowotny*, NZ 2004, 257 (259).

⁵⁷ *G. Kodek in Gitschthaler/Höllwerth*, AußStrG I² § 1 note 85.

⁵⁸ *G. Kodek in Gitschthaler/Höllwerth*, AußStrG I² § 1 note 85.

⁵⁹ Gesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen, RGBl 1854/208 i.d.F. BGBl I 2001/131; Law on judicial proceedings in legal matters other than litigation, RGBl 1854/208 as amended by I 2001/131.

⁶⁰ *Rintelen*, Grundriß des Verfahrens außer Streitsachen (1914) 117; *Ott*, Geschichte und Grundlehren des Rechtsfürsorgeverfahrens (1906) 96 et seqq.; *Pfersmann*, ÖJZ 1987, 117 [note on judgement]; OGH 3 Ob 294/25 SZ 7/147; OGH 1 Ob 480/35 SZ 17/109; OGH 3 Ob 91/37 SZ 19/35; OGH 6 Ob 281/01v JBl 2003, 57 = ecollex 2002/342; RIS-Justiz RS0022224; different view *Frauenberger-Pfeiler*, JAP 2002/03, 111 (note on judgement).

equipment is to be qualified as a claim to maintenance⁶¹ and since the entry into force of the AußStrG maintenance claims between parents and children are generally referred to the non-contentious proceedings,⁶² the view also applies to the AußStrG.⁶³

The difficult demarcation between contentious and non-contentious legal action in individual cases is alleviated for those seeking legal protection by section 40a sentence 1 JN. According to this provision, the question in which proceedings a case is to be dealt with and settled does not depend on the designation by the party, but on the content of the claim and the party's submissions. If the applicant for legal protection chooses the wrong type of proceedings within the different branches of civil court proceedings, a request for legal protection is not rejected. If a request for legal protection is wrongly designated as a claim (to be dealt with in contentious proceedings) or as an application (to be dealt with in non-contentious proceedings), the court shall reinterpret the wrongly designated request for legal protection into the correct one and hear and decide on it in the procedure provided for by law.⁶⁴ The scope of application of the provision of section 40a JN is not limited to the demarcation between contentious and non-contentious proceedings, but is also relevant for the demarcation between other types of proceedings – such as for execution and non-contentious proceedings,⁶⁵ execution and contentious civil proceedings⁶⁶ as well as insolvency and contentious civil proceedings.⁶⁷

The question of which sources of civil procedural law are to be applied can also cause difficulties in relation to European civil procedural law. For example – as the numerous preliminary references of national courts to the ECJ show⁶⁸ – there are practical problems in qualifying a case as a civil or commercial case within the meaning of Article 1 Brussels Ibis Regulation.

⁶¹ OGH 1 Ob 61/03g NZ 2004/4.

⁶² Until the new version of the AußStrG came into force, the legal maintenance claims of minor children were to be decided in non-contentious proceedings, whereas those of adult children were to be decided in contentious proceedings (RIS-Justiz RS0116366; RS0119814).

⁶³ *G. Kodek in Gitschthaler/Höllwerth*, AußStrG I² § 1 note 86.

⁶⁴ On the procedure, see *Simotta*, Das Vergreifen in der Verfahrensart und seine Folgen, in *Festschrift Fasching* (1988) 463.

⁶⁵ OGH 3 Ob 52/92 NZ 1993, 44 concerning the land register procedure as well as OGH 6 Ob 209/03h RdW 2004, 599 concerning the company register procedure.

⁶⁶ RIS-Justiz RS000003.

⁶⁷ OGH 7 Ob 264/06h MietSlg 59.790; e. g. also in the reinterpretation of a (dunning) action into a claim filing, *Winkler Mahnverfahren und Konkurs*, ZIK 2001/127, 74.

⁶⁸ Cf. the examples in *Garber in Mayr*, *Handbuch des europäischen Zivilverfahrensrechts* (2017) note 3.71 et seqq.

The decisions of the ECJ are not always convincing and fit into the system developed by the ECJ.⁶⁹ For example, according to the decision of the ECJ in the case *Hellenic Republic v Kuhn*⁷⁰, actions against a state for fulfilment of the bond conditions or for damages for non-fulfilment of the bond conditions cannot be qualified as civil or commercial matters within the meaning of Article 1 Brussels Ibis Regulation, even though government bonds are not fundamentally different from bonds issued by private individuals.⁷¹

Uncertainties also arise from the lack of legal definitions. For example, the Brussels Ibis Regulation does not define the term “*marriage*” so that the question of whether same-sex marriages are also covered by the scope of application of the Regulation or whether the provisions of national law apply in this respect is judged differently.⁷² The reason for not providing a legal definition was probably the fear that otherwise the unanimity required for the enactment or amendment of this regulation (Article 81 [3] sentence 2 TFEU⁷³) could not have been achieved.⁷⁴ In contrast, less controversial issues were explicitly regulated. In the scope of application of the Brussels Ibis Regulation⁷⁵, the question of whether the concept of a child should be determined autonomously under Union law or according to the relevant personal statute was disputed.⁷⁶ The dispute was clarified by the inclusion of a legal definition of the term “*child*”. According to Article 2 (2) No. 6 Brussels Ibis Regulation, a child is a person under the age of 18. The provisions on international child abduction (Article 22 to 29 Brussels Ibis Regulation), however, only apply to children up to the age of 16, which does not result from the normative part of the

⁶⁹ On this system, see *Garber/Neumayr*; Zur grenzüberschreitenden Vollstreckung gerichtlicher Entscheidungen über Urlaubszuschläge nach dem BUAG. Ein Beitrag zur Auslegung des Art 1 LGVÜ 2007 und des Art 1 EuGVVO 2012, in *Festschrift 75 Jahre Bauarbeiter-Urlaubs- und Abfertigungskasse* (2021) 175.

⁷⁰ ECJ 15.11.2018, Case C-308/17, *Hellenic Republic v Kuhn*, ECLI:EU:C:2018:911.

⁷¹ On this subject, see in detail *Arnold/Garber*; Ein vermeintlicher Pyrrhussieg für Griechenland: Die Grenzen staatlicher Souveränität im Internationalen Zivilverfahrensrecht, *IPRax* 2019, 385.

⁷² On the state of opinion *Garber/Lugani*, Die neue Brüssel Iib-VO, *Zak* 2022/11, 204 and *Garber/Lugani*, Die Neufassung der Brüssel Iib-VO, *NJW* 2022, 2225 (2226).

⁷³ Treaty on the Functioning of the European Union, OJ 2012 C 326/47.

⁷⁴ *Garber*, Neuerungen im Ehe- und Familienrecht: Zur Revision der Brüssel Iia-VO und zu den Güterrechtsverordnungen, in *König/Mayr*, *Europäisches Zivilverfahrensrecht in Österreich V: Die Reformen gehen weiter* (2018) 109 (122).

⁷⁵ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ 2004 L 338/1.

⁷⁶ On the state of opinion *Garber* in *Gitschthaler*, *Internationales Familienrecht* (2019) Art 1 Brüssel Iia-VO note 63.

Regulation, but from Recital 17 to the Brussels IIter Regulation. For reasons of clarity, the exception should have been included in the legal definition of Article 2 (2) No. 6 Brussels IIter Regulation.⁷⁷

Difficulties may arise despite a legal definition. This applies in particular if they are not specific enough (cf. for example the definition of the term “court” in Article 2 No. 5 Regulation 1896/2006 [“court” means all authorities of the Member States that are competent for a European order for payment or any other related matter]; a similarly general definition can be found in Article 2 [2] No. 1 Brussels IIter Regulation).

The demarcation between the individual regulations – in particular between the Brussels Ibis Regulation and the Regulation No. 2015/848⁷⁸ – also causes considerable difficulties.

Practical difficulties are caused by the large number of special laws that affect non-contentious proceedings. In each concrete individual case, it must be examined whether a provision of the general part or a special provision is applicable.⁷⁹ The provisions of the general part are not already superseded if the special provisions contain a deviating provision, but only if this provision has a conclusive character, which must be determined on the basis of the teleology of the norm.⁸⁰ Although the special laws impair the clarity of civil procedural law, this ensures that the special features of the matter are taken into account.

As a result, it can be stated that the multitude of provisions and legal sources does not in principle impair the clarity of norms and determinations in Austrian civil procedure law – apart from exceptions. Frictions can also arise – apart from the examples already given – due to subsequent amendments and additions to the law that break through the previous system (see point 2.2.), due to a lack of coordination between the sources of law (see point 2.3.) as well as due to a lack of exclusivity of a law (see point 2.4.).

2.2. Impairment of the clarity of standards and determinations by subsequent amendments and additions to the law

The determination of the applicable legal norms or the applicable legal act may be affected by subsequent amendments and additions to the law if these break the existing structure and systematics.

⁷⁷ *Garber/Lugani*, NJW 2022, 2225 (2226).

⁷⁸ On the delimitation, see for example *Garber*, Zum Anwendungsbereich der EuInsVO 2015, in *Nunner-Krautgasser/Garber/Jaufer*, Grenzüberschreitende Insolvenzen im europäischen Binnenmarkt (2017) 21 (66 et seq.).

⁷⁹ *Motal* in *Schneider/Verweijen*, AußStrG § 1 note 61.

⁸⁰ *Motal* in *Schneider/Verweijen*, AußStrG § 1 note 61.

The EGZPO, which entered into force at the same time as the ZPO, already contains numerous provisions that supplement the special provisions of the ZPO. Particularly worth mentioning are the provisions on proceedings before the stock exchange arbitration courts (Article XIII to XXVII EGZPO), the obligation to declare assets on oath and its enforcement (manifestation action; Article XLII EGZPO) and the right of action to compel the production of a community document (Article XLIII EGZPO). It would have made sense to include the provisions directly in the ZPO. Finding the norms can cause difficulties, especially for persons who are not familiar with the ZPO.

The following example also shows that observing the structure and systematics is of particular importance: The Civil Procedure Amendment 2004⁸¹ introduced section 91a GOG, which regulates the use of technical devices for the transmission of words and images during the taking of evidence. With the Civil Procedure Amendment 2009⁸² the provision was transferred unchanged from the GOG to the ZPO. The justification given in

⁸¹ Bundesgesetz, mit dem die Jurisdiktionsnorm, die Zivilprozessordnung, das Außerstreitgesetz, die Exekutionsordnung, das Gerichtsorganisationsgesetz, die Rechtsanwaltsordnung, das Bundesgesetz zur Durchführung des Europäischen Übereinkommens vom 27. Jänner 1977 über die Übermittlung von Anträgen auf Verfahrenshilfe, das Grundbuchsumstellungsgesetz, das Firmenbuchgesetz, das Gerichtsgebührengesetz, das Gerichtliche Einbringungsgesetz 1962, das Rechtsanwaltsstarifgesetz, das Rechtsanwaltsprüfungsgesetz, das Disziplinarstatut für Rechtsanwälte und Rechtsanwaltsanwärter geändert werden (Zivilverfahrens-Novelle 2004), BGBl I 2004/128; Federal Act amending the Jurisdiction Standard, the Code of Civil Procedure, the Non-Contentious Proceedings Act, the Execution Code, the Court Organisation Act, the Lawyers' Act, the Federal Act implementing the European Convention of 27 January 1977 on the Transmission of Applications for Procedural Assistance. Jänner 1977 on the Transmission of Applications for Procedural Assistance, the Land Register Reorganisation Act, the Company Register Act, the Court Fees Act, the Judicial Collection Act 1962, the Lawyers' Fees Act, the Lawyers' Examination Act, the Disciplinary Statute for Lawyers and Trainee Lawyers (Civil Procedure Amendment 2004), BGBl I 2004/128.

⁸² Bundesgesetz, mit dem die Jurisdiktionsnorm, das Einführungsgesetz zur Zivilprozessordnung, die Zivilprozessordnung, das Arbeits- und Sozialgerichtsgesetz, das Außerstreitgesetz, die Exekutionsordnung, die Konkursordnung, das Gerichtsorganisationsgesetz, das Rechtspflegergesetz, das Gebührenanspruchsgesetz, das Sachverständigen- und Dolmetschergesetz, das Gerichtsgebührengesetz und das Mietrechtsgesetz geändert werden (Zivilverfahrens-Novelle 2009), BGBl I 2009/30; Federal Act amending the Jurisdiction Standard, the Introductory Act to the Code of Civil Procedure, the Code of Civil Procedure, the Labour and Social Court Act, the Non-Contentious Proceedings Act, the Execution Code, the Bankruptcy Code, the Court Organisation Act, the Rechtspfleger Act, the Fee Claim Act, the Expert Witness and Interpreter Act, the Court Fees Act and the Tenancy Law Act (Civil Procedure Amendment 2009), BGBl I 2009/30.

the materials is that this is also intended to achieve an “increased visibility” of this provision, which promotes its application.⁸³

An example of an unsuccessful amendment is section 26h UWG⁸⁴. The provision was created with the UWG amendment 2018⁸⁵. Section 26h UWG is intended to ensure the confidentiality of trade secrets in the course of court proceedings. The provision serves a relatively protected exploitation of trade secrets in court proceedings and is intended to enable the court to exploit confidential information without losing the protection of secrecy. The provision deviates from the basic rules of the evidence procedure of the ZPO (cf. sections 266 et seqq. ZPO).⁸⁶ The provision is therefore rightly described as a “paradigm shift”.⁸⁷ For this reason, it would have made more sense to include the provision in the ZPO – especially since the ZPO also contains rules on the protection of business secrets. Section 172 (2) ZPO stipulates that the court may exclude the public at the request of even one of the parties if business secrets have to be discussed and proven for the purpose of deciding the legal dispute. Pursuant to section 305 No. 4 ZPO, the production of documents may be refused in certain cases⁸⁸ if the party would violate a state-recognized duty of confidentiality, from which it has not been validly released, or a business secret by producing the document. Pursuant to section 321 (1) No. 5 ZPO, a witness may refuse to testify about questions that the witness cannot answer without disclosing a trade secret. The reason why the legislator did not include the provision in the ZPO may have been that the 2018 amendment to the UWG was intended to introduce a comprehensive package for the protection of confidential business information into the UWG – the package served to implement Directive (EU) 2016/943 on the protection of confidential know-how and confidential business information (trade secrets) against unlawful acquisition and unlawful use and disclosure⁸⁹ – and the

⁸³ Erläuterung zur ZVN 2009 (89 BlgNR 24. GP) 14.

⁸⁴ Bundesgesetz gegen den unlauteren Wettbewerb 1984 – UWG, BGBl 1984/448; Federal Act against Unfair Competition 1984, BGBl 1984/448.

⁸⁵ Bundesgesetz, mit dem das Bundesgesetz gegen den unlauteren Wettbewerb 1984, die Zivilprozessordnung und das Verbraucherbehörden-Kooperationsgesetz geändert werden (UWG-Novelle 2018), BGBl I 2019/109; Federal Act amending the Federal Unfair Competition Act 1984, the Code of Civil Procedure and the Consumer Authorities Cooperation Act (UWG Amendment 2018), BGBl I 2018/109.

⁸⁶ On the system before the provision came into force, see *Garber*, Der Schutz von Geschäfts- und Betriebsgeheimnissen im Zivilprozess – ein Überblick, ÖJZ 2012, 640.

⁸⁷ *Rassi*, Prozessualer Vertraulichkeitsschutz. Zur Umsetzung der GeschäftsgeheimnisRL im Verfahrensrecht, ipCompetence 2019 H 21, 28 (30).

⁸⁸ For the exceptions, see for example section 304 ZPO.

⁸⁹ OJ 2016 L 157/1.

legislator limited itself to amending the UWG. In order to take into account the postulate of clarity of legal norms, the ZPO should have at least referred to the norm. This would have increased visibility and strengthened the clarity of norms and determinations.

Due to the positioning of section 26h UWG and the lack of reference to the provision in the ZPO, it is questionable whether the scope of application of the provision is limited to the scope of application of the UWG. In our opinion, the provision must also be applied to other cases for reasons of equality, because there is no factual differentiation between trade secrets worthy of protection.

2.3. Impairment of the clarity of norms and determinations due to lack of coordination between the legal sources

The multiplicity of legal sources can impair legal certainty if they are not coordinated with each other, resulting in divergences that are not objectively justified. This is particularly evident in the demarcation between the existing cognisance procedures. According to Austrian civil procedure law, claims – as already explained – are to be enforced in contentious or in non-contentious proceedings. The central source of law for contentious proceedings is in particular the ZPO, for non-contentious proceedings the AußStrG. Due to the different objectives of the proceedings, there are numerous differences in the structure of the proceedings, which are also objectively justified. The non-contentious procedure differs from the contentious procedure in particular through

- the greater freedom of form, which is also expressed in the weakening of the principle of certainty (§ 9 AußStrG),
- the increased flexibility of the proceedings, which is expressed, for example, in the fact that the holding of a hearing is only optional (§ 18 AußStrG),⁹⁰
- the strengthened concept of welfare (§ 14 AußStrG), on the basis of which the court has a stronger duty to provide guidance,
- the principle of investigation – which is, of course, only gradually strengthened in comparison with the ZPO, which is in any case characterized by far-reaching powers to collect material for official purposes,⁹¹

⁹⁰ Cf. for example *Gaul*, Der Grundsatz der Öffentlichkeit im Verfahren der freiwilligen Gerichtsbarkeit, in *Festschrift Matscher* (1993) 111.

⁹¹ Instead of many *Neumayr*, *Außerstreitverfahren*⁶ (2017) 11.

- the taking of evidence and
- the partially envisaged initiation of proceedings by the authorities.⁹²
- In addition, there is the structural possibility of handling multi-party proceedings.

In contrast, certain aspects are regulated differently, although the factual justification for this is at least questionable. This applies, for example, to the qualitative division of the subject matter of the proceedings. In civil proceedings, it is permissible to issue a basic judgment under section 393 (1) ZPO, a basic judgment under section 393 (2) ZPO and an interim judgment on the statute of limitations under section 393a ZPO.⁹³ section 36 (2) AußStrG 2003 allows – in addition to a partial decision – according to the express wording only the issuance of an interim decision on the ground of the claim. A pedant to the basic judgement according to section 393 (2) ZPO and to the interim judgement on the statute of limitations according to section 393a ZPO does not expressly exist in non-contentious proceedings; in certain cases, however, there is a need for the qualitative division of the subject matter of the proceedings also in non-contentious proceedings by means of a decision corresponding to section 393 (2) or section 393a ZPO.⁹⁴

In order to emphasise its character as a separate procedural code independent of the contentious proceedings, the AußStrG does not contain a general reference to the norms of the ZPO.⁹⁵ Only in individual places reference is made to certain §s or norms of the ZPO, which are to be applied in non-contentious proceedings *mutatis mutandis* and taking into account

⁹² On the above principles see also *Deixler-Hübner*, *Außerstreitverfahrensrecht*² (2018) note 14 et seqq.; *Klicka/Oberhammer/Domej*, *Außerstreitverfahren*⁵ (2014) note 111; *Mayr/Fucik*, *Einführung in die Verfahren außer Streitsachen*² (2019) note 112; *Neumayr*, *Außerstreitverfahren*⁶ 6 et seqq.

⁹³ For the terms see *Rechberger/Simotta*, *Grundriss*⁹ note 906 et seqq.

⁹⁴ *Garber*, *Zur Zulässigkeit eines Zwischenbeschlusses zur Verjährung im außerstreitigen Verfahren – Betrachtungen de lege lata und de lege ferenda*, in *Festschrift P. Bydliński* (2022) 277; cf. also *Schrott*, *Anforderungen der Praxis an das außerstreitige Erkenntnisverfahren erster Instanz, Richterwoche 1995*, 245 (255 et seq.), according to which it is sometimes expedient or required by procedural economy in non-contentious proceedings to make a partial decision on a part of the asserted claim or an interim decision on the reason for the claim. It could require very extensive and time-consuming proceedings to clarify whether a certain asset was subject to post-marital division at all, and it could again be very lengthy and expensive to establish the value and finally to determine the form of division. An interim decision on the question of whether certain assets are subject to post-marital division is very practical and cost-saving in individual cases and should be considered when thinking about reform.

⁹⁵ *ErläutRV zum AußStrG 2003* (224 BlgNR 22. GP) 6.

the principles of the general part of the AußStrG⁹⁶. However, it does not follow from the absence of a general reference that existing gaps in the law may not be closed by analogous application of the ZPO or the EGZPO.⁹⁷ If the conditions for analogy are met, individual provisions of the ZPO and the EGZPO can be applied in non-contentious proceedings. Analogy can therefore only be considered if the „*situation of interests is comparable*”⁹⁸ and the lack of a suitable legal norm constitutes an “*unplanned regulatory gap*”.⁹⁹ The determination of these prerequisites can cause friction in individual cases and impair the clarity of procedural norms.¹⁰⁰

2.4. Impairment of the clarity of norms and determinations due to lack of exclusivity

Special laws exist for individual stages of proceedings. For example, the service of judicial documents is regulated in a separate law – the ZustG – but not conclusively. In addition to the ZustG, the GOG, the ZPO and the AußStrG, which also contain provisions on service, must also be taken into account for the proceedings for the recognition of judgments.

Pursuant to section 87 ZPO, service is to be effected ex officio pursuant to sections 89a et seqq. GOG, otherwise pursuant to the ZustG, unless the ZPO provides otherwise. Such other regulations contain in particular section 83 (1) ZPO and sections 87 to 121 ZPO, which partly supplement the ZustG, partly deviate from it. For non-contentious proceedings, the provisions of the Code of Civil Procedure on service and the ZustG are applicable pursuant to section 24 of the Austrian Non-Contentious Proceedings Act (AußStrG), unless otherwise provided. These provisions also supplement and modify the provisions of the ZPO and the ZustG.

In numerous other laws, there are deviating special provisions under service law that take precedence over the general rules. Such special provisions are constantly being created and can lead to great legal uncertainty.¹⁰¹ For reasons of legal certainty, it would have made sense to regulate service in a separate law.

⁹⁶ G. Kodek in *Gitschthaler/Höllwerth*, AußStrG I² § 1 note 20.

⁹⁷ Cf. the examples in *Motal* in *Schneider/Verweijen*, AußStrG § 1 note 53.

⁹⁸ OGH 4 Ob 193/06w RZ-EÜ 2007/182.

⁹⁹ F. Bydliński, *Juristische Methodenlehre und Rechtsbegriff*² (1991) 120 et seq., 237.

¹⁰⁰ See *Garber* in *Festschrift P. Bydliński* 277 (291 et seqq.).

¹⁰¹ *Stumvoll* in *Fasching/Konecny*, *Kommentar zu den Zivilprozessgesetzen II/2*³ (2016) § 87 ZPO note 2.

3. Impairment of the clarity of norms and determinations through non-adaptation of the norms to the established case law

According to Austrian law, the judgements of the civil courts do not have any binding effect beyond the individual case and do not create law (cf. section 12 ABGB).¹⁰² The precedent effect inherent in Anglo-Saxon case law, by which the courts are – in principle – bound by previous decisions made in similar cases, because previous court decisions create generally binding law, is alien to Austrian civil procedure law.¹⁰³ Nevertheless, a de facto effect of the precedents must not be overlooked; above all, the decisions of the Supreme Court have an important “*guiding function*”.¹⁰⁴ As a rule, the lower courts do not deviate from the established case law of the Supreme Court. In order to exclude contradictions between the individual senates of the Supreme Court as far as possible, there is the establishment of reinforced senates and their jurisdiction to resolve legal questions of fundamental importance (cf. section 8 OGHG).¹⁰⁵ Therefore, also according to the legal situation applicable in Austria, the continuity of jurisdiction is guaranteed, which is absolutely necessary for legal certainty and legal peace.¹⁰⁶

Despite the guiding function of the decisions of the Supreme Court, in some cases it appears useful to adapt norms to the interpretation made by the Supreme Court in terms of content or language in order to take into account the clarity of civil procedure law. In this way, the norms become understandable on their own, without having to resort to case law.

For example, section 406 sentence 1 ZPO provides that an order for performance is only admissible if the due date has already occurred at the time of the creation of the judgment. Since the facts of the case, which are

¹⁰² See for example *Rechberger/Simotta*, Grundriss⁹ note 1055.

¹⁰³ *Walter*; Die Funktion der Höchstinstanzen im Rechtsstaat Österreich, RZ 1999, 58.

¹⁰⁴ *Garber*; Zum Vorliegen einer Rechtsfrage von erheblicher Bedeutung: Ausgewählte Fragen und Entscheidungen, ÖBl 2018/26, 102 (107); *Rechberger/Simotta*, Grundriss⁹ note 1055. Cf. also OGH 5 Ob 519/91 SZ 64/35 = *ecolex* 1991, 383 = ÖBA 1992, 69 (*Rummel*), according to which a deviation from the case law of the Supreme Court in an individual case, which results from the fact that the interpretation by the court of appeal cannot be reconciled with the case law correctly cited per se, is of considerable importance for legal certainty if there is a risk that constantly judged principles are undermined by subsumption errors.

¹⁰⁵ *Feldner*; Verstärkte Senate beim Obersten Gerichtshof (2001); *Lovrek/Musger* in *Fasching/Konecny*, Kommentar IV/1³ (2019) Vor §§ 502 et seqq. ZPO note 52 et seqq.; on the preservation of uniformity of case law see also *Neumayr*, Die Judikaturdokumentation RIS-Justiz im österreichischen Rechtsinformationssystem, ZZPInt 20 (2015) 73 (81).

¹⁰⁶ *Klicka* in *Fasching/Konecny*, Kommentar III/2³ (2018) Vor § 411 ZPO note 2.

subject to judicial assessment, may be subject to constant change due to the passage of time, the relevant point in time for the law-creating facts must be determined. Section 406 ZPO bases the due date of the claim on the time of the creation of the judgment. According to settled case law¹⁰⁷ and general opinion in the doctrine¹⁰⁸, the provision is generally to be understood in such a way that the point in time to which the decision must refer must be the conclusion of the oral proceedings at first instance.¹⁰⁹ The point in time of the creation of the judgement cannot be objectively determined. Also, a reference to the actual issuance of the judgment outside the hearing would lead to different results depending on how quickly the issuance of the judgment takes place. Contrary to the wording, the provision is not only decisive for the due date of the claim, but for the entire legally generating facts.¹¹⁰

Another example of the failure to adapt a law to case law is sentence 2 of section 406 ZPO. Accordingly, in the case of claims for alimony, payments may also be ordered which only become due after the judgement has been issued. Case law qualifies as alimony periodic payments in cash or in kind, which legally and economically serve to satisfy – even if only partially – the current immediate needs of the entitled person.¹¹¹ As a further prerequisite – and probably to compensate for the broad interpretation of the term “*alimony*” – case law requires that the debtor has violated¹¹² or threatens to violate his or her obligations for the award of maintenance amounts that are not yet due.¹¹³ In order to take the postulate of legal clarity into account, it seems sensible to amend section 406 ZPO in the sense of the case law.¹¹⁴ This can ensure that the provision is understandable in itself.

Of course, the legislator does not have to follow the interpretation of the Supreme Court. It is also conceivable that a rewording of the relevant legal provision could result in a different legal situation from the interpretation by the Supreme Court.

¹⁰⁷ OGH 4 Ob 501/93 EvBl 1993/101; OGH 7 Ob 192/12d SZ 2012/144; OGH 2 Ob 103/15h EvBl 2016/140; OGH 1 Ob 93/16g GesRZ 2017/119 (*Kalss*).

¹⁰⁸ *Brenn* in *Höllwerth/Ziehensack*, ZPO (2019) § 406 note 1; *Fucik* in *Fasching/Konecny*, Kommentar III/2³ § 406 ZPO note 2; *Rechberger/Simotta*, Grundriss⁹ note 598.

¹⁰⁹ For the exceptions see *Brenn* in *Höllwerth/Ziehensack*, ZPO § 406 note 4 as well as *Fucik* in *Fasching/Konecny*, Kommentar III/2³ § 406 ZPO note 14 et seqq.

¹¹⁰ *Fucik* in *Fasching/Konecny*, Kommentar III/2³ § 406 ZPO note 1.

¹¹¹ Cf. RIS-Justiz RS0022402.

¹¹² OGH 5 Ob 276/61 EvBl 1961/530; OGH 1 Ob 591/81; OGH 7 Ob 510/82 SZ 55/23.

¹¹³ OGH 10 Ob 58/13x EFSlg 143.982; OGH 2 Ob 32/14s.

¹¹⁴ Cf. *Fasching*, Lehrbuch² note 1064, who criticises the lack of a legal basis for the restriction of (threatened) violations (see now section 101 AußStrG); similarly *Rechberger/Simotta*, Grundriss⁹ note 598.

4. Impairment of the clarity of standards and determinations due to structure, language and references

4.1. Impairment of the clarity of norms and provisions due to the structure of the law

An essential element for the clarity of procedural norms is the structure of the legal sources and their embedding in the existing system. The existing procedural law systems in Austria are basically structured systematically.

The ZPO, for example, is divided into several parts. The first section of the first part of the ZPO contains general provisions – such as norms on the party, (party capacity and) procedural capacity, party majorities and the participation of third parties in the legal dispute, costs of proceedings, provision of security and procedural aid. The second section deals with pleadings in the proceedings (content, formal requirements), service, time limits and hearings, consequences of default and how to fight them, as well as interruption and suspension of the proceedings. The third section regulates the oral proceedings, in particular their publicity, the task and the course of the oral proceedings, the chairing of the hearing and the police. The second part regulates the course of proceedings before the courts of first instance. The first section of the second part concerns the procedure up to the judgement, with provisions on the action, the defence and the hearing of the dispute as well as on the procedure of taking evidence being included here. The second section of the second part concerns judgments and orders. The third part regulates the procedure before the district courts, the fourth part the appellate procedure, whereby first the appeal (first section), the revision (second section) and the recourse (third section), finally the party application to the Constitutional Court (fourth section) and finally the action for annulment and reopening (fifth section) are regulated. The sixth section deals with special types of proceedings such as the European Small Claims Procedure, the Mandate Procedure, the Procedure in Disputes over Bills of Exchange, the Procedure in Disputes arising from the Tenancy Agreement and the Arbitration Procedure.

The AußStrG is divided into several main pieces; the respective main pieces are subdivided into sections. Main piece I concerns the scope of application and the parties (chapter 1), the procedure (chapter 2), the decisions (chapter 3), the appeal (chapter 4), the appeal on a point of law (chapter 5), the application for modification (chapter 6), the reimbursement of costs (chapter 7), the enforcement of decisions (chapter 8) and the party

application to the Constitutional Court (chapter 9). The following main pieces contain special provisions for proceedings in matrimonial, child and adult protection matters, probate proceedings and notarisation. The final main paragraph contains final and transitional provisions.

The ZPO and the AußStrG differ in their structure. Since they are two different proceedings, the different structure does not have a significant impact on legal certainty. The structure of both the ZPO and the AußStrG can basically be described as systematic, even though a different structure – e.g. putting the provisions on the action first in the ZPO – may also seem sensible. The systematic structure ensures that the norms are clear and easy to find. This is partly interrupted by subsequent amendments and additions to the law (see already under point 2.2).

4.2. Impairment of the clarity of norms and determinations by the language used

Some of the procedural norms are still valid in their original version and date back to the 19th century, such as certain norms of the ZPO. For this reason, the language is partly outdated. This applies both to the spelling (e.g. “*Thatsachen*” instead of “*Tatsachen*” in section 172 [2], section 226 [1] and section 266 [1] ZPO or “*Prozeßgericht*” instead of “*Prozessgericht*” in section 64 [1] No. 4, section 68 [1] and [2] and section 227 [1] No. 1 ZPO) and to the phrases (“*behufs*” in section 21 [1], section 38 [1] and section 56 [2] ZPO). Within the framework of the overall reform of the execution law (GREx),¹¹⁵ the spelling of the laws affected by the reform was adapted to the regulations in force today.

¹¹⁵Bundesgesetz, mit dem die Exekutionsordnung, das Einführungsgesetz zur Exekutionsordnung, die Insolvenzordnung, das Allgemeine bürgerliche Gesetzbuch, das Gerichtsgebührengesetz, das Gerichtliche Einbringungsgesetz, das Unternehmensgesetzbuch, das EWIV-Ausführungsgesetz, das Genossenschaftsgesetz, das GmbH-Gesetz, das Aktiengesetz, die Notariatsordnung, das Rechtsanwaltsstarifgesetz, das Eingetragene Partnerschaft-Gesetz, das Urkundenhinterlegungsgesetz, das Rechtspflegergesetz, das Sicherheitspolizeigesetz, das Bundesgesetz, mit dem Verstöße gegen bestimmte einstweilige Verfügungen zum Schutz vor Gewalt und zum Schutz vor Eingriffen in die Privatsphäre zu Verwaltungsübertretungen erklärt werden, das Asylgesetz 2005, das Niederlassungs- und Aufenthaltsgesetz, das Mineralrohstoffgesetz und das Insolvenz-Entgeltsicherungsgesetz geändert werden sowie die Anfechtungsordnung und das Vollzugsgebührengesetz in die Exekutionsordnung übernommen werden (Gesamtreform des Exekutionsrechts – GREx), BGBl I 2021/86; Federal Act amending the Execution Code, the aw concerning the introduction of the the Execution Code, the Insolvency Code, the Civil Code, the Court Fees

However, the obsolete language does not fundamentally affect the clarity of the procedural norms. On the one hand, the provisions are printed in the currently valid spelling in the available editions of the law¹¹⁶, on the other hand, the procedural norms are mainly addressed to lawyers and to persons familiar with the use of laws – such as certified judicial officers or law enforcement officers – so that it can be assumed that they know or can ascertain the meaning of obsolete expressions.¹¹⁷ The court has a special duty to instruct and instruct unrepresented persons so that there is no lack of protection in this respect (cf. section 432 ZPO as well as section 14 AußStrG). This ensures that unrepresented parties can participate in the proceedings in a qualitatively equivalent manner even without legal assistance.

For the same reasons, the use of technical terms is not harmful. Moreover, the use of technical language is unavoidable in legal texts – especially those dealing with a complex matter such as civil procedure.

With regard to the language, it is to be criticised that long sentences consisting of several subordinate clauses are used in some cases (e.g. section 266 [2] ZPO: “*The extent to which such a confession is annulled or impaired in its effectiveness by additions and restrictions attached to it by the party, and what influence a revocation has on the effectiveness of the confession, is to be assessed by the court according to its discretion guided by careful consideration of all circumstances*”). For better comprehensibility, the use of shorter sentences would have made more sense. However, this does not significantly impair clarity.

There is potential for linguistic improvement in many provisions – this applies in particular to the area of the right of appeal of the ZPO (see also under point 4.3)¹¹⁸ and the provisions concerning subject-matter and local jurisdiction.

Act, the Judicial Collection Act, Federal Act on Special Civil Law Provisions for Companies, executive law of EWIV, the Cooperative Law, Law on limited liability companies, the Stock Corporation Act, the Notaries’ Act, the Lawyers’ Fees Act, the Registered Partnership Act, the Document Deposit Act, the Judicial Officer Act, the Security Police Act, the Federal Act declaring violations of certain temporary injunctions to protect against violence and to protect against invasion of privacy as administrative offences, the Asylum Act 2005, the Settlement and Residence Act, the Mineral Resources Act and the Insolvency Remuneration Protection Act will be amended and the rules on contestation and the Enforcement Fees Act will be included in the Execution Rules (Gesamtreform des Exekutionsrechts – GREx), BGBl I 2021/86.

¹¹⁶ Code Civil Procedure 2022/23⁵⁰ (2022); Paragraph – Civil Procedure¹⁶ (2021).

¹¹⁷ On the perpetuation of outdated language by case law, see *Neumayr*, ZZPInt 20 (2015) 73 (99).

¹¹⁸ *Geroldinger*, Der Zugang zum OGH in Zivilsachen, in *G. Kodek*, Zugang zum OGH (2012) 65.

Linguistic frictions also arise from the fact that the legislator is imprecise in the use of terms. Thus, it does not differentiate terminologically between domestic jurisdiction and international jurisdiction, but uses exclusively the term domestic jurisdiction (cf. e.g. sections 27a, 28, 32 [4], sections 42, 43, 76, 104 JN, sections 230, 239 [3], section 260 [3] ZPO, section 14 [2] KSchG¹¹⁹). Since domestic jurisdiction differs from international jurisdiction with regard to its prerequisites and effects and its lack is sanctioned in a different way than the lack of international jurisdiction, a conceptual distinction must also be made between domestic jurisdiction and international jurisdiction.¹²⁰

4.3. Impairment of the clarity of standards and determinations through references

References cannot be avoided in extensive legal texts. This applies in particular to civil procedural law, which consists not only of extensive legal acts (the ZPO has over 600 provisions), but also of several legal sources (see already under point 2). Here, references seem to make sense in order to avoid repetitions or to refer to special norms existing in other laws and their validity.

In certain areas, however, too many references are made. This applies, for example, to the right of appeal under the ZPO. § 508 ZPO, which standardizes the admissibility and prerequisites for an application for modification, contains a total of more than ten references to other relevant standards. The legal situation characterized by the “*jungle of reference chains*”¹²¹ results in a complex and complicated system.¹²² Chains of references of this kind considerably impair the clarity of norms and provisions. This negative effect can only be eliminated by recasting and restructuring.¹²³

¹¹⁹ Bundesgesetz vom 8. März 1979, mit dem Bestimmungen zum Schutz der Verbraucher getroffen werden (Konsumentenschutzgesetz – KSchG), BGBl 1979/140), BGBl 1979/140 i.d.g.F.; Federal Act of 8 March 1979 laying down provisions for the protection of consumers (Consumer Protection Act – KSchG), BGBl 1979/140 as amended.

¹²⁰ Garber in *Fasching/Konecny*, Kommentar I³ (2013) § 42 JN note 2 et seqq.

¹²¹ Danzl, Die Anrufbarkeit des OGH in streitigen Zivilrechtssachen, in *Festschrift Sprung* (2001) 39 (49, 82); see also Neumayr in *Höllwerth/Ziehensack*, ZPO § 502 note 4.

¹²² Neumayr in *Höllwerth/Ziehensack*, ZPO § 502 note 4.

¹²³ Geroldinger in *G. Kodek*, Zugang zum OGH 65.

5. Impairment of the clarity of norms and determinations by international and European civil procedure law

5.1. General

Austria's domestic civil procedure rules are superseded, supplemented or modified by Union legal acts affecting civil procedure law and various bilateral and multilateral state treaties. The clarity of civil procedure law is affected by the numerous bilateral and multilateral conventions as well as the numerous Union legal acts affecting civil procedure law. In concrete individual cases, the question of whether an international or European legal act applies in relation to another state can be difficult to assess. A simplification could be the publication on the website of the Federal Ministry of Justice of the bilateral and multilateral conventions or Union legal acts to be observed in Austria. The status table published on the website of the Hague Conference on Private International Law could serve as a model.¹²⁴ For European legal acts, the publication of this information on a website operated by the European Union – such as the European Justice Portal¹²⁵ – would make sense.

5.2. Impairment of the clarity of norms and determinations due to divergences between European and domestic civil procedural law

There are numerous differences between European civil procedure law and the corresponding standards of Austrian civil procedure law.

These differences can affect legal clarity. For example, the Austrian jurisdiction system differs in structure and rules from the jurisdiction system of European civil procedure law. The different requirements make the (already unclear and confusing)¹²⁶ jurisdiction system of Austrian law even more complex. For example, according to Article 7 No. 2 Brussels Ibis Regulation, according to the case law of the ECJ¹²⁷ both the place of action

¹²⁴ Available at <https://www.hcch.net/> (15.7.2022).

¹²⁵ Available at <https://e-justice.europa.eu/> (15.7.2022); see for example *Garber/Neumayr*, Europäisches Zivilverfahrensrecht (Brüssel I/IIa ua): Materielles Recht, in *Eilmansberger/Herzig*, Jahrbuch Europarecht 2011 (2011) 255 (270); *Garber/Neumayr*, Europäisches Zivilverfahrensrecht (Brüssel I/IIa ua): Materielles Recht, in *Herzig*, Jahrbuch Europarecht 2015, 175 (181).

¹²⁶ Cf. the criticism in *Fasching*, Lehrbuch² note 190; *Schoibl*, Die Entwicklung des österreichischen Zivilverfahrensrechts (1987) 111.

¹²⁷ ECJ 30.11.1976, Rs 21/76, *Bier/Mines de Potasse d'Alsace*, ECLI:EU:C:1976:166; the view is also shared by the literature (see, for example, *Schmaranzer* in *Burgstaller/Neumayr/Geroldinger/Schmaranzer*, Internationales Zivilverfahrensrecht [Loseblattausgabe, 9th

and the place of success give rise to jurisdiction; the comparable provision in Austrian civil procedure law – section 92a JN – is exclusively linked to the place of action.¹²⁸ The extended interpretation of section 92a JN proposed by parts of the doctrine¹²⁹ by analogous application of the case law of the ECJ is methodologically not convincing and was rightly expressly rejected by the Supreme Court¹³⁰. There are further divergences between section 92a JN and Article 7 No. 2 Brussels Ibis Regulation: Section 92a JN only applies to certain offences: Compensation can only be claimed for damage resulting from the killing or injury of one or more persons, from the deprivation of liberty or from damage to a physical object.¹³¹ The scope of application of Article 7 No. 2 Brussels Ibis Regulation, on the other hand, covers all claims arising from tortious acts, including quasi-crimes.¹³² The prerequisite, however, is that the liability for damage is not linked to a contract within the meaning of Article

7 No. 1 Brussels Ibis Regulation.¹³³ The place of jurisdiction for the infliction of damage according to section 92a JN, on the other hand, applies irrespective of whether the claims for damages are based on tort or breach of contract.¹³⁴

In addition to compulsory jurisdictions – in which a deviating agreement on jurisdiction is inadmissible – the Austrian jurisdiction system also knows simple exclusive jurisdictions, in which a deviating agreement on jurisdiction is possible.¹³⁵ The simple exclusive jurisdictions are unknown to the Brussels Ibis Regulation. An agreement on jurisdiction is permissible if divergent conditions exist;¹³⁶ also the formal requirements differ.¹³⁷ An adaptation of Austrian civil procedure law to European civil procedure law

Lfg, 2000] Art 5 EuGVO note 52; *Simotta* in *Fasching/Konecny*, Kommentar V/1² Art 5 EuGVVO note 300 et seq.).

¹²⁸ *Braun* in *Höllwerth/Ziehensack*, ZPO § 92a JN note 6; *Mayr* in *Rechberger/Klicka*, ZPO⁵ § 92a JN note 2.

¹²⁹ *Rechberger/Simotta*, Grundriss⁹ note 306; see also *Simotta* in *Fasching/Konecny*, Kommentar I³ § 92a JN note 9/1.

¹³⁰ OGH 2 Ob 157/04h ecolex 2004, 860 (*Mayr*) = JBl 2005, 260.

¹³¹ *Braun* in *Höllwerth/Ziehensack*, ZPO § 92a JN note 2; *Mayr* in *Rechberger/Klicka*, ZPO⁵ § 92a JN note 1.

¹³² Instead of many *Simotta* in *Fasching/Konecny*, Kommentar V/1² (2008) Art 5 EuGVVO note 269 et seq.

¹³³ *Simotta* in *Fasching/Konecny*, Kommentar V/1² Art 5 EuGVVO note 268.

¹³⁴ *Ballon*, Die Rechtsprechung in Zuständigkeitsfragen, in Festschrift Fasching (1988) 55 (62).

¹³⁵ *Rechberger/Simotta*, Grundriss⁹ note 287.

¹³⁶ On the differences, see *Burgstaller/Neumayr* in *Burgstaller/Neumayr/Geroldinger/Schmaranzer*, Internationales Zivilverfahrensrecht Art 23 EuGVO note 16 and 31.

¹³⁷ See *Burgstaller/Neumayr* in *Burgstaller/Neumayr/Geroldinger/Schmaranzer*, Internationales Zivilverfahrensrecht Art 23 EuGVO note 30 et seq.

is recommended here.¹³⁸ The standardisation of the rules would considerably improve the clarity of the law on jurisdiction.

When adapting Austrian civil procedural law to European civil procedural law, it is important to proceed with caution. The rules in European civil procedure law should not be adopted in their entirety and unchecked for the cases regulated by domestic law. Deviations may arise, for example, in the structuring of the procedures – this concerns in particular the divergences between the European and the Austrian order for payment procedure¹³⁹ – and in the prerequisites of individual legal institutions and remedies – such as the different structuring of reinstatement in the previous state according to §§ 146 et seqq. ZPO and Article 19 Regulation No. 805/2004, Article 20 Regulation No. 1896/2006 and Article 19 Regulation No. 861/2007.¹⁴⁰ It must be considered whether deviations are objectively justified. In any case, an adaptation is not necessary if the national Regulation fits into the existing system. This applies, for example, to the examination of jurisdiction, which is carried out differently in European civil procedure law than in Austrian civil procedure law.¹⁴¹ The examination of jurisdiction under Austrian law essentially corresponds¹⁴² to the examinations of other procedural prerequisites so that an adaptation to the European model would break through the existing system and counteract its structure and clarity.

5.3. Impairment of the clarity of norms and determinations through the use of and deviation from formulations of European civil procedure law

Frictions also arise from the fact that the Austrian legislator partly adopts formulations of European civil procedure law, even if the system provided for in Austria does not correspond to that of European civil procedure law. In

¹³⁸ See also *Maxl*, Produkthaftung, internationales Zivilprozeßrecht und internationales Privatrecht, JBl 1992, 156 (160) for product liability claims against foreign producers.

¹³⁹ See for example the considerations in *Mayr*, Das europäische Mahnverfahren und Österreich, JBl 2008, 503, who makes a careful comparison between the procedures and partly affirms, partly denies the approximation of the Austrian order for payment procedure.

¹⁴⁰ Thus, under Austrian law – in contrast to the rules in European civil procedure law – a lesser degree of negligence does not preclude reinstatement.

¹⁴¹ For the model in the scope of application of the Brussels Ibis Regulation see for example *Schoibl* in *Fasching/Konecny*, Kommentar V/1² Anhang zu Art 25–26 EuGVVO note 1; for the model under domestic law see *Rechberger/Simotta*, Grundriss⁹ note 568 et seqq.

¹⁴² Admittedly, there are differences in detail; see, for example, *Rechberger/Simotta*, Grundriss⁹ note 762 et seqq.

other cases, the Austrian legislator deviates from the wording of the European legislator, even if the same objective is pursued and European civil procedure law in this respect represents a model for domestic regulation.

An example of the first case mentioned is section 584 ZPO. According to this provision, if an action is brought before the state court in a matter that is the subject of an arbitration agreement, the state court shall dismiss the action unless the respondent makes a submission on the merits or makes oral submissions without objecting. A similar provision can be found in Article 26 Brussels Ibis Regulation,¹⁴³ according to which a court does not assume jurisdiction if the defendant enters an appearance to invoke the lack of jurisdiction. Within the scope of application of the Brussels Ibis Regulation, the court in *limine litis* may in principle not examine its jurisdiction of its own motion,¹⁴⁴ but must give the defendant the opportunity to establish international jurisdiction by appearing in the proceedings. In contrast, under domestic law, the court must examine jurisdiction in *limine litis* in contentious civil proceedings and dismiss the action if it lacks jurisdiction. It is questionable whether the admissibility of the ordinary course of law as a prerequisite of the proceedings may be examined *ex officio* in *limine litis* – as was the case before section 584 ZPO came into force – or whether the inadmissibility of the course of law can only be exercised on the basis of a plea by the defendant, which the defendant must raise before entering the plea.¹⁴⁵

An example of the latter case is section 14 (1) last half-sentence KSchG. According to section 14 KSchG, an agreement on the place of jurisdiction between a consumer and an entrepreneur is only permissible to a limited extent; no limitation applies “*to legal disputes that have already arisen.*” This adopts a provision of European civil procedure law. According to Article 19 No. 1 Brussels Ibis Regulation, rules in consumer matters may be derogated from “*if the agreement is made after the dispute has arisen.*” Although Article 19 No. 1 Brussels Ibis Regulation was the model for the Austrian regulation, the wording of the provision deviates from the European regulation for no apparent reason.

¹⁴³ For the provisions that served as a model for section 584 ZPO, see *Hausmaninger* in *Fasching/Konecny*, Kommentar IV/2³ (2016) § 584 ZPO note 1, 12 et seqq. and note 17 et seqq.

¹⁴⁴ For the exceptions see *Schoibl* in *Fasching/Konecny*, Kommentar V/1² Anhang zu Art 25–26 EuGVVO note 1.

¹⁴⁵ For the state of opinion see *Kloiber/Haller* in *Kloiber/Rechberger/Oberhammer/Haller*, Das neue Schiedsrecht: Schiedsrechts-ÄnderungsG 2006 (2006) 22; *Rechberger* in *Liebscher/Oberhammer/Rechberger*, Schiedsverfahrensrecht I (2011) note 6/21; *von Saucken*, Die Reform des österreichischen Schiedsverfahrensrechts auf der Basis des UNCITRAL-Modellgesetzes über die internationale Handelsschiedsgerichtsbarkeit (2004) 99.

5.4. Impairment of the clarity of standards and determinations due to translation errors

Significant adverse effects arise from translation errors of European legal acts into other languages.¹⁴⁶

For example, the German language version of Article 9 Brussels IIter Regulation¹⁴⁷ differs from other language versions. This provision provides for special jurisdiction to modify a judicial decision on contact that has already been issued. If certain conditions are met¹⁴⁸, the courts of the Member State that issued the contact judgment also have jurisdiction to modify or adapt that judgment. The provision has the effect of maintaining the jurisdiction of the courts of the Member State in which the child was habitually resident before the move for a period of three months. As a precondition, the German version stipulates that the “*parent with rights of access*” according to the decision on rights of access must continue to be habitually resident in the Member State of the child’s former habitual residence. If, on the other hand, the person with rights of access is a person other than the remaining parent, such as a grandparent or step-parent, according to part of the doctrine¹⁴⁹ the general jurisdiction pursuant to Article 8 (1) Brussels IIbis Regulation should remain. However, the restriction of the scope of application to the parent with rights of access is based on a translation error. The other language versions do not contain a corresponding restriction, but use the neutral term “*person entitled to contact or visitation*”. For example, the Hungarian version reads “*a láthatási jog jogosultja*”. This corresponds to the wording of the English version (“*holder of access rights*”), the French version (“*titulaire du droit de visite*”), the Italian version (“*titolare del diritto di visita*”), the Dutch version (“*persoon die ingevolge die beslissing het omgangsrecht heeft*”) and

¹⁴⁶ See the numerous examples in *Fucik/Neumayr*, Einander recht verstehen, in *Clavora/Garber*, Sprache und Zivilverfahrensrecht: 3. Österreichische Assistententagung zum Zivil- und Zivilverfahrensrecht der Karl-Franzens-Universität Graz (2013) 15 (27 et seq.); *Fucik/Neumayr*, Einander recht verstehen, RZ 2013, 154 (160 et seq.).

¹⁴⁷ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ 2003 L 338/1.

¹⁴⁸ Cf. for example *Garber* in *Gitschthaler*, Internationales Familienrecht Art 9 Brüssel IIa-VO note 18 et seqq.

¹⁴⁹ *Fleige*, Die Zuständigkeit für Sorgerechtsentscheidungen und die Rückführung von Kindern nach Entführungen nach Europäischem IZVR (2006) 232 et seq.; *Rauscher* in *Rauscher*, Europäisches Zivilprozess- und Kollisionsrecht IV⁴ (2015) Art 9 Brüssel IIa-VO note 10; *Weber* in *Mayr*, Handbuch des europäischen Zivilverfahrensrechts note 4.117.

the Spanish version (“*titular del derecho de visita*”) so that consequently every holder of a right of access, such as a grandparent or step-parent with their own right of access, is covered.¹⁵⁰ This translation error is eliminated in the Brussels IIter Regulation: In contrast to the wording of Article 9 Brussels IIter Regulation, Article 8 Brussels IIter Regulation no longer requires that the parent with rights of access continues to reside habitually in the Member State of the child’s former habitual residence, but that the “*persons entitled to access*” continue to reside there.¹⁵¹ The wording of Article 8 (2) of the Brussels IIter Regulation was adapted accordingly.

However, the Brussels IIter Regulation contains other translation errors.¹⁵² The recognition of jurisdiction after a court has been seised pursuant to Article 10 (1) (b) (ii) Brussels IIter Regulation requires that the parties “*have been informed of their right to contest the jurisdiction of the court seised*”. The German language version is misleading in that it seems to refer to possible legal remedies according to the *lex fori* (“*anfechten*”).¹⁵³ In other language versions, it can be inferred that the court has to instruct that a party can prevent the prorogation by not accepting jurisdiction. For example, the Hungarian language version uses the phrase “*kapjon a joghatósággal szembeni kifogásemelési jogáról*”, the English language version “*right not to accept the jurisdiction*”, the French “*droit de ne pas accepter sa compétence*” and the Italian “*diritto di non accettare la competenza*”.

6. Result

Austrian civil procedure laws generally exhibit a high degree of clarity and definiteness; in individual sub-areas there is a need for improvement with regard to language, systematics and structuring. Particular challenges arise from European civil procedure law. Alignment with the standards of European civil procedure law can lead to a further improvement in clarity and definiteness in sub-areas – for example with regard to the jurisdiction system.

¹⁵⁰ Garber in *Gitschthaler*, Internationales Familienrecht Art 9 Brussels IIa-VO note 27.

¹⁵¹ Garber, Internationale Zuständigkeit für Verfahren betreffend die elterliche Verantwortung, in *Garber/Lugani*, Die Brüssel IIb-Verordnung: Zuständigkeit, Anerkennung und Vollstreckung in Eheachen und Kindschaftssachen einschließlich der internationalen Kindesentführung (2022) note 6/20; *Garber/Lugani*, Zak 2022/11, 204 (205); *Garber/Lugani*, NJW 2022, 2225 (2227).

¹⁵² The German language version published in July 2019 contains numerous spelling errors in upper and lower case.

¹⁵³ Garber in *Garber/Lugani*, Die Brüssel IIb-Verordnung note 6/245; *Garber/Lugani*, Zak 2022/11, 204 (205); *Garber/Lugani*, NJW 2022, 2225 (2227).

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CONSTITUTIONAL ASPECTS OF CLARITY OF LEGAL PROVISIONS

Abstract

One of the types of social language variants is the technical language, the characteristic of which is that it uses a specific vocabulary and conceptual system. Legal language is also a special form of technical language, so it has a specific technical vocabulary. Compared to other professional languages, however, an important difference is that not only lawyers but everyone must understand it. Laws and regulations must be applied and followed by not only the authorities and the courts, but it should be understood by everyone to whom it applies. Therefore, a special requirement for legal regulations is that the content of legal norms be clear, precise and unambiguous. The question of normative clarity is a constitutional expectation, and the Constitutional Court is on guard to ensure it.

The first part of the article shows, through concrete examples and Constitutional Court decisions, which are the most common cases of violation of normative clarity (for example, unclear wording, imprecise framework provisions, overly general wording). In the second part, the author presents the impact of international legal principles on the Hungarian legal language, with particular regard to the adoption of concepts developed by the European Court of Human Rights or the US Supreme Court into the Hungarian legal language (for example: the right to a fair trial, Engel criteria, clear and present danger, chilling effect).

Based on all this, the reader can get a glimpse into the approach of legal language, the dilemmas of codification formulations and the work of the Constitutional Court to ensure clarity of norms.

1. The constitutional conditions for norm clarity

The Constitutional Court has elaborated the concept of clarity of legal provisions (hereinafter: norm clarity) in its early decisions and has confirmed and firmly outlined the content of the concept in a number of decisions.

1.1. The requirement of norm clarity in general

According to the interpretation of the Constitutional Court, legal certainty requires that the legal system as a whole, its sub-areas and individual rules should be clear, unambiguous, predictable in their effects and foreseeable for the addressees of the norm, and that they carry a normative content that is recognisable in the course of the application of the law.¹ Legal certainty creates the possibility for legal entities to effectively adapt their behaviour to the requirements of the law.² The Constitutional Court has recently confirmed these constitutional principles in its Decision 20/2020. (VIII.4.) AB.

The Constitutional Court has also pointed out that a differentiated approach must be adopted when examining the existence or otherwise of legal certainty. In determining whether the manner of regulation and the content of the rules infringe legal certainty, the purpose of the regulation and the addressees must always be taken into account.³ The constitutionality of a rule is measured differently in terms of its clarity and legal certainty if the addressees are expected to have the special expertise necessary for its interpretation, and differently if it affects legal entities in general.⁴

In its decisions, the Constitutional Court has also made it clear that unconstitutionality can be established on the grounds of a breach of the norm clarity if the regulation is uninterpretable for the legislator or allows for different interpretations, and as a result creates an unpredictable and unforeseeable situation for the addressees as regards the effect of the norm, or if the overly general wording of the norm leaves room for subjective, arbitrary application of the law.⁵ Decision 47/2003. (X. 27.) AB pointed out that the Constitutional Court has always attached great importance to the availability of well-established judicial practice to answer the question it is examining, which – when making its decisions – assists the legislator to the extent indispensable for the realisation of legal certainty.⁶

¹ Decision 9/1992. (I. 30.) AB, ABH 1992, pp 65–66; Decision 38/2012. (XI.14.) AB, Reasoning [84]

² Decision 3208/2013. (XI. 18.) AB, Reasoning [58]

³ Decision 125/B/2003. AB, ABH 2005, p 1127, p 1137

⁴ Decision 395/D/2010. AB, ABH 2011, p 2090, p 2096

⁵ E.g. Decision 1160/B/1992. AB, ABH 1993, p 607, p 608; Decision 10/2003. (IV. 3.) AB, ABH 2003, p 130, pp 135–136; Decision 1063/B/1996. AB, ABH 2005, p 722, pp 725–726; Decision 381/B/1998. AB, ABH 2005, p 766, p 769

⁶ ABH 2003, p 525, p 535. Similarly see: Decision 56/2010. (V. 5.) AB, ABH 2010. p 383, p 389

1.2. The requirement of norm clarity with regard to criminal law

In the practice of the Constitutional Court, the requirement of norm clarity arising from Article B (1) of the Fundamental Law is particularly important with regard to criminal law norms, which are inherently restrictive of fundamental rights.

In accordance with the Constitutional Court's practice on the constitutional requirements for the content of criminal law norms, when assessing the constitutionality of a criminal law, it must be examined whether the specific provision of the Criminal Code⁷ is moderate and provides an appropriate response to the phenomenon deemed dangerous or undesirable, i.e. whether it is limited to the narrowest possible scope for achieving the objective in accordance with the requirement governing the restriction of fundamental constitutional rights. According to the requirements deriving from the constitutional guarantees of criminal law, the disposition describing the conduct threatened by a criminal sanction must be definite, delimited and clearly formulated. It is a constitutional requirement that the legislative intention concerning the protected legal subject-matter and the conduct must be clearly expressed. It must contain a clear message as to when an individual commits a criminal offence. At the same time, it should limit the possibility of arbitrary interpretation of the law by law enforcement authorities.⁸

2. The Constitutional Court's practice in relation to the norm clarity

The Constitutional Court's practice on the subject can be examined and assessed from several aspects. Of these approaches, I believe that the following ones present the most illustratively the complex interpretative system of the Court.

2.1. Uninterpretable law

In Decision 1160/B/1992. AB, the Constitutional Court explained that the constitutional requirement for the content of legislation is that

⁷ Act C of 2012 on Criminal Code

⁸ From the practice of the Constitutional Court, see for this: Decision 30/1992. (V. 26.) AB, ABH 1992, p 167, p 176; Decision 12/1999. (V. 21.) AB, ABH 1999, p 106, pp 110–111; Decision 95/2008., (VII. 3.) AB, ABH 2008, p 782, p 786; Decision 4/2013. (II. 21.) AB, Reasoning [59]

“legislation shall appear in a fixed linguistic form. The concepts and expressions of the language are always general. Thus, in a given case, it may always be questionable whether a specific historical fact falls within the scope of the concept contained in the legal norm (...) If the facts of a statute are too detailed, too narrow, too ad hoc, this binds the legislator and prevents the statute from fulfilling its role in regulating life circumstances. If, on the other hand, a statutory provision is too abstract or too general, it may be extended or narrowed by the discretion of the legislator. Such a rule gives opportunity to subjective decisions by the law enforcers, divergent practices by different law enforcement authorities and a lack of legal unity. This undermines legal certainty.”⁹

On the basis of these considerations, the Constitutional Court concluded that

“[i]t is not a breach of legal certainty that the legislator has defined the legal conditions for oral testamentary dispositions in a rather general and not very detailed (casuistic) manner. It is not unconstitutional that the wording of the law does not list in detail all the situations, conditions and illnesses in which an oral testament may be made.”¹⁰

In its Decision 1/1999. (II.24.) AB, the Constitutional Court pointed out that legal certainty may be infringed if the internal inconsistency inherent in the rule cannot be eliminated by the necessary interpretation in the application of the law.¹¹

2.2. The issue of framework disposition

In Decision 1026/B/2000. AB, the Constitutional Court held that the framework codification technique is not unconstitutional in itself or in general. The fact that the content of an element of the conduct punishable under criminal law is determined not by the criminal law itself, but by the laws of another branch of law or by lower-level legislation, does not in itself violate the requirement of the rule of law. In certain cases, framework disposition is an unavoidable solution. It may be a desirable objective, but it should certainly not be a constitutional requirement for all offences that all elements of the criminal disposition in the Special Part are determined by the criminal law itself.¹² However, it follows from legal certainty that the legal

⁹ ABH 1993, p 607, p 608

¹⁰ ABH 1993, p 607, p 608

¹¹ Decision 1/1999. (II. 24.) AB, ABH 1999, p 25, p 46

¹² Decision 31/2015. (XI. 18.) AB, Reasoning [51]

subject-matter of the right protected by the criminal law and the sanctioned conduct must be made clear to the law enforcement authorities in a clear, definite and delimited manner. The rule of law makes it essential for legal certainty that the offence is recognisable to all, and the requirement of clear, comprehensible and interpretable rules is therefore particularly important for criminal law. This follows from the place of criminal law in the legal system. As the Constitutional Court has stated in several decisions:

“Criminal law is the *ultima ratio* in the system of legal liability. It has the social function of being the sanctioning element of the legal system as a whole. The role and function of criminal sanction, of punishment, is to maintain the integrity of legal and moral norms when the sanctions of other branches of law no longer help.”¹³

With regard to framework provisions requiring a specific assessment from the point of view of the interpretation of the content of the norm, the Constitutional Court has stated in principle that the use of the framework codification technique in the case of criminal law, i.e. the fact that the content of an element of the conduct to be punished is not determined by the criminal law itself but by the laws of other branches of law or lower-level legislation, does not “in itself and in general” give rise to a situation contrary to the Fundamental Law.¹⁴

In its practice, the Constitutional Court has therefore placed great emphasis on the requirement of the norm clarity in relation to criminal law. For example:

- in Decision 58/1997. (XI. 5.) AB,¹⁵ the Constitutional Court annulled the statutory

provision on “abuse of the right of association” in Section 212 of the Criminal Code on the ground of conflict with the requirement of legal certainty, or

- in Decision 47/2000. (XII. 14.) AB,¹⁶ the Constitutional Court ruled that the offence of “criminal misuse of performance-improving substances or techniques” in Section 283/B of the Criminal Code was unconstitutional on the grounds of a breach of the stricter requirement of the clarity of criminal law.

¹³ Decision 30/1992. (V. 26.) AB, ABH 1992, p 167, p 176

¹⁴ Decision 31/2015. (XI. 18.) AB, Reasoning [51]

¹⁵ ABH 1997, p 348

¹⁶ ABH 2000, p 377

2.3. Norms defined too broadly

In its Decision 15/2020. (VII.8.) AB, the Constitutional Court pointed out that

“[t]he difficulties arising from the drafting of a norm give rise to a breach of legal certainty and the annulment of the norm becomes inevitable only where the law is inherently uninterpretable, making its application unpredictable and unforeseeable for the addressees of the norm.¹⁷ At the same time, the legal provisions of the Penal Code not only have to be uninterpretable, but also have to be constitutional in that the criminalisation of an ‘act’ under Article XXVIII (4) of the Fundamental Law does not contain undefined legal concepts. An indeterminate disposition is incompatible with the principle of *nullum crimen sine lege*, because in such a case the addressees of the statutory provision cannot decide what conduct they must refrain from or what conduct is punishable by law. The legal enforcer may not impose a penalty for an act which is not covered by any specific provision of the legislature. Any application of criminal law against the defendant which goes beyond the content of the criminal statutory norm is prohibited. Neither the conditions of criminal liability nor the constituent elements of the offences in the special part of the criminal law may be interpreted in an expansive manner against the defendant. A non-factual act cannot be brought within the scope of criminal liability by analogy.”¹⁸

In the legislative process, it is not unknown for words taken from the everyday language. An example is the presence of the word ‘thief’ in the offence of robbery in Section 365 (2)¹⁹ of the current Criminal Code. The term ‘thief’ is already used in the Csemegi Code, as Section 345 of Act V of 1878 defined robbery as follows: “It is considered robbery if the thief apprehended (*tetten kapott tolvaj, Hun*)²⁰ in the act, uses violence or threats to carry out the theft or to keep the stolen goods.” The current Penal Code also uses the term ‘thief’ in the definition of robbery, but no longer refers to ‘the thief *captured* in the act’, but to ‘the thief *caught* in the act’ (*tetten ért tolvaj, Hun*). Well, the term ‘thief’ has retained its place in the Criminal Code for the last 144 years, because it clearly and precisely states that the prerequisite for committing robbery is the act of the thief, i.e. theft.

¹⁷ Decision 3106/2013. (V. 17.) AB, Reasoning [10]

¹⁸ Decision 3106/2013. (V. 17.) AB, Reasoning [42]

¹⁹ (2) Where a thief caught in the act applies force or threat against life or bodily integrity in order to keep the thing, it shall be construed as robbery as well.

²⁰ Act of 1878, Section 354

3. The impacts on legal language

In recent decades, the language of legislation has evolved significantly, partly as a result of changes in the everyday language, partly as a result of changes in society, EU legislation²¹ and international instruments, and these changes have led to the creation of new legal concepts, the disappearance of existing concepts or their survival with modified meanings.

Hungary became a member of the Council of Europe in 1990.²² This historic step had a significant impact on the use of Hungarian legal language. Through the interpretation of the provisions of the European Convention on Human Rights, the new concepts contained in the judgments of the Strasbourg Court²³ became evident in national legislation and in the application of the law. Although the concept of fair trial was already enshrined in the Constitution²⁴, EU accession also has a major impact by imposing a number of legislative obligations on Member States. Initially the obligation to transpose and implement framework directives into national law was significant,²⁵ and now there are tight deadlines for transposing directives.

3.1. Impact of ECtHR decisions on the Hungarian legal language

Obviously without claiming completeness, I would like to illustrate the impact of the judgments and the ‘language’ of the European Court of Human Rights on Hungarian²⁶ legislation through a few examples.

3.1.1. “Fair trial”

When examining the constitutional content of the right to a fair trial, the Constitutional Court already indicated in its Decision 6/1998. (III.11.) AB that it considers as authoritative

“the generally accepted interpretation of the articles of the Covenant and the European Convention on Human Rights containing procedural guarantees which serve as a model for the content and structure of Section 57 of the

²¹ Hungary has been a member of the European Union since 1 May 2004.

²² Hungary became a member of the Council of Europe on 6 November 1990 as the twenty-fourth country to join.

²³ hereinafter: ECtHR

²⁴ See in details: Czine, Ágnes: A tisztességes bírósági eljárás: Audiatur et altera pars. HVG-ORAC, Budapest 2020, pp 156–159

²⁵ See in details: Czine Ágnes – Dr. Szabó Sándor – Dr. Villányi József: Strasbourgi ítéletek a magyar büntető eljárásban. HVG ORAC Lap- és Könyvkiadó, Budapest, 2008.

²⁶ hereinafter: ECtHR

Constitution. Accordingly, ‘a fair trial’ is a quality which can only be judged in the light of the whole of the proceedings and the circumstances of the case. Therefore, despite the absence of certain details, as well as despite compliance with all the detailed rules, the proceedings may be ‘unfair’ or ‘unjust’ or ‘dishonest’.²⁷

This interpretation has subsequently been confirmed on numerous occasions, more than 150 times, both in judgments and orders. Among these the Decision 7/2013. (III.1.) AB deserves mention. This was the first case in which the Constitutional Court compared the content of the provisions of the Constitution and the Fundamental Law that enshrine the right to a fair trial. As a result, the Constitutional Court has concluded that there is no obstacle to the applicability of the arguments and findings contained in its previous decisions, and it considers the previous Constitutional Court practice in relation to the fundamental right to a fair trial, and as part of that practice the interpretation of fair trial originated by the international law, to be authoritative for the future.²⁸

The constitutional content of the right to a fair trial has been enshrined in the Constitutional Court’s practice, in the light of the international meaning of ‘fair trial’, as follows. The guarantees set out in the fair trial requirement include a number of specific conditions of the right to a fair trial which are not absolute in the sense of, for example, the presumption of innocence, but which are nevertheless absolute limits on the discretion of the general rule. There is no necessity for which the fairness of a trial may be limited in a proportionate manner; rather, a system of criteria must be developed within the concept of a fair trial which gives it its content, and only within this framework can the necessity and proportionality of certain limitations be assessed.²⁹

The right to a fair trial is enshrined in Article XXVIII (1) of the Fundamental Law as the primary procedural guarantee of the courts. By interpreting this provision of the Fundamental Law, it is possible to identify the so-called partial rights that fill out the content of the right to a fair trial, of which the Constitutional Court has so far in its practice in particular set out the following:

- the right to a court established by law (the right to a judge established by law, the right to access to a court),
- the right to an independent and impartial tribunal,
- the right to a fair and public hearing (publicity, public announcement of the court’s decision, obligation to state reasons),

²⁷ ABH 1998, p 91, p 95

²⁸ Reasoning [24]

²⁹ Decision 6/1998. (III. 11.) AB, ABH 1998, p 91, p 99

- the requirement of a trial within a reasonable time,
- equality of arms (not de facto laid down in the constitutional provision, but interpreted by the Constitutional Court as part of the fair trial, which also requires equality of arms in the proceedings).

In addition to the right to a fair trial under Article XXVIII (1) of the Fundamental Law, Article XXVIII of the Fundamental Law also mentions other procedural guarantees in court, namely:

- the presumption of innocence [Article XXVIII (2)],
- the right of defence [Article XXVIII (3)],
- the principle of *nullum crimen sine lege, nulla poena sine lege* [Article XXVIII (4)],
- the principle of *ne bis in idem* [Article XXVIII (6)],
- the right to a remedy [Article XXVIII (7)].

The concept of fair trial is also reflected in a number of national rules. An example is the Criminal Code. For example, the criminal offence of illegal manipulation of sports results, as defined in Section 349/A (1) of the Criminal Code, which lays down the “principles of fair play”³⁰. Now, it is up to the legislator to flesh out the essence of the principles of fair play.

Just as a point of interest, the right to a fair trial and the sub-rights that fill out its content are not exactly the same in Hungary and in the United States. To be more precise, the US Constitution³¹ and its amendments³² contain the following fundamental rights with regard to a person subject to criminal proceedings³³:

- Amendment I: freedom of speech and assembly;
- Amendment II: right to keep and bear arms;
- Amendment IV: prohibition of unnecessary search and seizure;
- Amendment V: right to due process (similar as to fair trial), prohibition of double jeopardy, prohibition of self-incrimination and Miranda rights (charging warnings);

³⁰ Section 349/A (1): Any person who enters into an arrangement whereby to influence the outcome of sporting competitions or matches arranged or organized by any sports association so to obtain a pre-determined result in contrast with the rules of the game or against the integrity of sports in general is guilty of a felony punishable by imprisonment not exceeding three years, insofar as the act did not result in another criminal offense.

³¹ Constitution of the United States

³² United States Bill of Rights (1791)

³³ Fantoly Zsanett: Az Amerikai Egyesült Államok alkotmányának büntető eljárásjogi tárgyú kiegészítései, különös tekintettel a terhelhet megillető eljárási garanciákra. Miskolci Jogi Szemle, Year 14, 2019/2. Vol.1., p 247, https://www.mjsz.uni-miskolc.hu/files/6556/26_fantolyzsanett_t%C3%B6rdelt.pdf; Accessed: 5 July 2022

- Amendment VI: the right to an effective defence and to a speedy and public trial;
- Amendment VIII: right to proportionate bail; prohibition of torture and inhuman and degrading punishment.

The right to keep and bear arms is enshrined as a fundamental right in the US Constitution, for a number of historical reasons, but the various mass terrorist attacks have increasingly brought this fundamental right into the public discourse.

3.1.2. “Engel criteria”

The Constitutional Court first referred to the case of *Engel and others v. the Netherlands* in its Decision 8/2004. (III.25.) AB, when examining the scope of the guarantee system deriving from the right to a fair trial.³⁴ It stated that

“although disciplinary proceedings against professional members of the national security service are not based on a criminal charge, the Constitutional Court is of the opinion that the requirements laid down in Section 57 (1) of the Constitution in relation to the decision on the charge must also apply to proceedings the outcome of which may in many respects be to the detriment of the person subject to the proceedings as a result of a criminal conviction. For the person concerned, disciplinary proceedings against a member of the national security services may have consequences comparable to those of a conviction by a criminal court, sometimes even more serious, in terms of the prospects of continuing his or her professional activities and the development of the perception of his or her person by members of the community. Therefore, the Constitutional Court considers that disciplinary proceedings, and in particular disciplinary proceedings against persons in a situation of dependence, must also be subject to the requirements of a fair trial, including the right of defence. Consequently, a member of the national security service must have the right to have access to a lawyer of his choice in disciplinary proceedings against him. In reaching this view, the Constitutional Court also took into account the judgment of the European Court of Human Rights in *Engel* of 8 June 1976.”³⁵

This ECtHR decision was subsequently referred to in 38/2012 (XI.14.) when the ECtHR reviewed its practice in relation to the award of administrative sanctions, including misdemeanour sanctions.³⁶

³⁴ Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72; 23 November 1976

³⁵ ABH 2004, 144, 156.

³⁶ Reasoning [36].

Only afterwards, in Decision 30/2014. (IX. 30.) AB, the Constitutional Court used the term “Engel criteria” in connection with its examination of the same subject matter. It referred to the fact that the ECtHR

“has interpreted the phrase ‘criminal charges’ in Article 6 (1) of the Convention in several decisions. In its judgment in *Engel and Others v Netherlands* [...], it explained that the starting point for assessing the ‘criminal’ nature of an accusation is whether the offence under investigation is a criminal offence under the national law of the State Party concerned. This is not, however, a decisive factor: the nature of the offence is more important, as is the gravity of the penalty imposed (paragraphs 80 to 83, the so-called Engel criteria).”³⁷

This example has been followed by the Constitutional Court in Decision 8/2017. (IV.18.) AB³⁸ and in Decision III/4328/2021, Reasoning.

3.1.3. “Sufficiently close connection in substance and in time”

This term is relatively new in the practice of the Constitutional Court. The related practice of the ECtHR and the specific case introducing the above phrase in it were already referred to by the Court in Decision 8/2017. (IV.18.) AB when examining the constitutional content of the prohibition of double assessment. It referred to the fact that, according to the ECtHR,

“no violation of the Convention may be established where the national law of a Contracting State provides for the possibility of an integrated, parallel and interconnected application of administrative and criminal procedures for the assessment of unlawful acts consisting in the non-payment of taxes, provided that the procedures, and the penalties which may be imposed as a result of those proceedings are foreseeable for the person concerned and there is a close material and temporal link between the different legal consequences, in particular where, in determining the level of the penalty imposed as a result of the criminal proceedings, account has been taken of the administrative penalty previously imposed {See: *A and B v Norway* [GC] (24130/11; 29758/11) 15 November 2016 paragraphs 146, 147, 151–153}.”³⁹

In addition, the term itself was identified by Ildikó Dr Hörcherné Dr Marosi, constitutional judge in her parallel reasoning to the decision.

However, it was in Decision III/4328/2021 AB that referred to the term literally. According to the reasoning

³⁷ Reasoning [31].

³⁸ Reasoning [30].

³⁹ Reasoning [33].

“the ECtHR in *A and B v Norway* not only summarised its previous findings on *ne bis in idem*, but also gave a new direction to the content of the principle of law. It is clear from its interpretation that the *ne bis in idem* principle does not preclude administrative and criminal proceedings – and the application of sanctions in them – from fulfilling their respective functions. The novelty of this interpretation lies in the fact that, when examining whether the *ne bis in idem* principle has been infringed, the two procedures are no longer concerned solely with the conduct committed and the (final) determination of liability – administrative or criminal – but also with their relationship to each other. Thus, the ECtHR has interpreted the principle of law as not being infringed where criminal proceedings and administrative proceedings are complementary and not repetitive. The decision also provides criteria for this: the test of a sufficiently close connection in substance and in time includes the identity of the evidence taken into account in the evidentiary process in the two proceedings, the identity of the assessment of the evidence and the application of the sanctions in relation to each other. The *ne bis in idem* principle also presupposes a temporal link between the two proceedings as a guarantee that the determination of liability will not be unduly delayed (paragraphs 132–134).”⁴⁰

3.2. The impact of US Supreme Court’s decisions on the Hungarian legal language – “Clear and present danger”

It would obviously be the subject of a separate study to discuss how the impact of the decisions of the US Supreme Court⁴¹, which is also the US Constitutional Court, may appear in public discourse, legal jargon and in some decisions of the Hungarian Constitutional Court. Their importance is illustrated by the *Miranda v. Arizona*⁴² case, decided by the US Supreme Court in 1966. The decision is a summation of two rights, the right to remain silent and the right of a detained suspect to defence attorney. The interpretation of the Supreme Court as set out here has subsequently spread virtually throughout the world and these rights are among the guarantees of criminal procedure in criminal procedural codes throughout the world.

The term “clear and present danger” was first used in Decision 30/1992. (V.26.) AB, in which the Constitutional Court examined the constitutionality of the offence of incitement against a community under Section 269 (1) of the former Criminal Code (Act IV of 1978). According to the decision, the

⁴⁰ Reasoning

⁴¹ Supreme Court of the United States

⁴² <https://law.justia.com/cases/arizona/supreme-court/1965/1394-0.html>. Accessed 5 July 2022

sanctioned conduct also entails a threat to individual rights which gives such weight to the public peace as the immediate object that the restriction of freedom of expression can be considered necessary and proportionate. Although the practical result of the consideration is similar, this line of reasoning is not merely about the intensity of the disturbance to public tranquillity which, above a certain level (“clear and present danger”), justifies a restriction of the right to freedom of expression. What is decisive here is what is at risk: incitement jeopardises subjective rights that are also very high on the constitutional value scale.⁴³ This is the finding referred to in Decision 18/2000. (VI.6.) AB⁴⁴ and Decision 18/2004. (V.25.) AB⁴⁵. Most recently, the term appeared in Decision 14/2016. (VII.18.), and the Constitutional Court, indicating its source, stated the following.

“The State, in the context of Article VIII (1) of the Fundamental Law, is primarily under an obligation according to Article I (1) of the Fundamental Law to protect the exerciser of the fundamental right by appropriate means in order to enable him to exercise his right to peaceful assembly. The loss of the peaceful character of the event must be clear and imminent. This test is akin to the US clear and present danger test [Dennis v. U.S., 341 US 494 (1951)], an improved version of which, the lawless imminent action test, takes into account not only the likelihood of a threat of a breach of the peace but also the intention to cause a breach. [Brandenburg v. Ohio, 395 US 444 (1969)]”⁴⁶

In addition, the decision referred back to previous decisions in which the clear and present danger test had already been invoked in the context of the mother right of peaceful assembly, freedom of expression.

3.3. The combined effect of ECtHR and US Supreme Court decisions on the Hungarian legal language – “Chilling effect”

The term was first mentioned in 13/2013 (VI. 17.) AB, but not in the reasoning of the Constitutional Court, only in the petitioner’s presentation. The petitioner argued that the case-law procedure and the system under which the case-law procedure is subject to the supervision of the presidents of the courts can have a “chilling effect” on individual judges and therefore violates their independence under Article 26 (1) of the Fundamental Law. The

⁴³ ABH 1992, p 167, p 179

⁴⁴ ABH 2000, p 117, pp 127–128

⁴⁵ ABH 2004, p 303, p 309

⁴⁶ Reasoning [61]

Constitutional Court did not invoke the term in its substantive assessment of the infringement of the principle of judicial independence under Article 26 (1) of the Fundamental Law.

The first time the term was used in a substantive constitutional review was in Decision 13/2014. (IV. 18.) AB. In examining the constitutional relationship between the right to human dignity and freedom of expression, the Constitutional Court stated that “the protection of human dignity under criminal law, by virtue of the *ultima ratio* nature of criminal law, can only provide protection against the most serious cases where the opinion expressed violates a constitutional right or where there is an imminent risk of a violation of the right. This position is reinforced, on the one hand, by the public authority character of the enforcement of the state’s criminal claim, which is based on legal coercive acts, and, on the other hand, by the retributive and stigmatising nature of the criminal sanction. The deterrent effect of punishment also intimidates and discourages those involved in shaping public opinion, which undermines the development and value of a public life based on democratic and pluralist foundations. Indeed, criminalising and penalising the exercise of freedom of speech and of the press is likely to have a chilling effect, which may force those who wish to exercise this right to self-restraint [see, similarly, the United States Supreme Court in *Lamont v. Postmaster General*, 381 U.S. 301 (1965)]. Therefore, the imposition of *ex post* criminal sanctions on those exercising their freedom of expression in public affairs may be justified in a narrow range of circumstances, where the communication infringes the fundamental rights of others. Since the expression of opinion in public debate enjoys enhanced constitutional protection, criminal action regarding criticism of public figures is possible only within strict limits, distinguishing between value judgments and statements of fact in public communications on public matters.”⁴⁷ In the decision, the Constitutional Court referred to the practice of the US Supreme Court in interpreting the term.

It did not do so, but based its interpretation on the practice of the ECtHR in Decision 3002/2018. (I.10.) AB.

“[I]n its practice, the ECtHR has also pointed out that, in assessing the proportionality of an interference under Article 10 of the ECHR, the nature and gravity of the sanction imposed must also be taken into account {*Ceylan v Turkey* [GC] (23556/94) 8 July 1999, para 37; *Lešník v Slovakia* (35640/97) 11 March 2003, para 63}. In the view of the ECtHR, a measure requiring the withdrawal of an opinion is capable of having a chilling effect. The ECtHR has

⁴⁷ Reasoning [30]

stressed in this connection that, for example, ‘the rectification of a statement of facts ordered by a national court entails in itself’ the application of the protection afforded by Article 10 of the ECHR [Karsai v Hungary (5380/07), 1 December 2009, para. 23].⁴⁸

3.4. Impact of social changes on legal language, creation of new concepts – the creation of the concept of “exceptional public figure”

The term was introduced by the Constitutional Court with reference to changes in social conditions in its Decision 3145/2018. (V.7.) AB as follows.

“The Constitutional Court has already indicated in its early practice that it is essentially the task of the legislative practice to determine which public figures’ exercise of freedom of expression excludes the possibility of finding unlawfulness in the assessment of criminal liability [Decision 36/1994. (VI. 24.) AB, ABH 1994, 219, 231.] The Constitutional Court, in its Decision 57/2001. (XII. 5.) AB, referring to the practice of the ECtHR, distinguished between politicians and persons holding office in the category of ‘persons in public life’ (ABH 2001, p 484, p 493). However, despite the fact that the Constitutional Court already in its early practice referred to the fact that the circle of public figures is broader than the circle of persons exercising public authority and politicians acting in public, no clear criteria have been developed to serve as a basis for determining the quality of public figures. However, the need to clarify this criterion for the application of the law is particularly justified by the fact that, as a result of changed social conditions, in particular the spread of telecommunications, the circle of public figures has widened. As a result of this trend, it is possible for persons who were not previously, by virtue of their status, public figures to become active participants in public debates. These are the so-called exceptional public figures.”⁴⁹

This interpretation was followed by the Constitutional Court in Decision 26/2019. (VII.23.)⁵⁰ AB, Decision 3019/2021. (I.28.) AB⁵¹, Decision 3051/2022. (II.11.)⁵² AB and Decision 3052/2022. (II.11.) AB⁵³.

⁴⁸ Reasoning [53]

⁴⁹ Reasoning [45]

⁵⁰ Reasoning [32]

⁵¹ Reasoning [22]

⁵² Reasoning [42]

⁵³ Reasoning [51]

Summary

According to social (vertical) stratification (lifestyle, occupation, etc.), we can speak of group languages (sociolects). One type of social language is a technical language, which is the result of social stratification. It is the language of the professions, of the sciences, and tends to be unambiguous, although it can also be recognised by its specific vocabulary. Legal jargon is also specialised in comparison with other jargons, such as medical jargon. However, the language of legislation and legal norms is not a specialised language, but has a privileged role, because the “guarantee” requirement for legislation and legal norms is that they should be clear.

Preserving the norm clarity is often not an easy task, since both the common language and the technical language, the language of science, are subject to many influences as society and science change. Therefore, the legislator tries to clarify the content of the law by creating a legislative act⁵⁴ which, for example, requires the draftsman of the law to attach an explanatory memorandum to the draft law⁵⁵. The decree of the Ministry of Justice⁵⁶, which implements the law, contains the main grammatical rules for drafting legislation, which also guide the legislative process.⁵⁷ However, it is up to all of us to take care of our language and to make legislation an art of precise and clear drafting.

Sándor Kányádi writes in his poem to Apáczai that “our only baggage, wandering stick, weapon is our mother tongue”.⁵⁸

⁵⁴ Act CXXX of 2010 on Legislation

⁵⁵ Section 18 (1): The draftsman of the legislation shall attach to the draft legislation an explanatory memorandum, in which he shall describe the social, economic and professional reasons and objectives which make the proposed legislation necessary, the expected effects of the legislation and his position on the publication of the explanatory memorandum.

⁵⁶ Decree 61/2009 (XII. 14.) IRM on Legislative Drafting

⁵⁷ E.g.: According to para 7(4) of Decree 61/2009 (XII.14.) IRM, the conjunctive “illetőleg (Hun)” should not be used in legislation (draft legislation), because it can denote the conjunctive “and” (és, Hun) and “or” (vagy, Hun). Since it is not clear when the word “illetőleg” denotes the conjunctive “and” and “or”, the legislation prohibits the use of these words. According to the above legislation, the conjunctive “illetve (Hun)” should only be used in the draft legislation if no other clear language is available. This word is also ambiguous, “illetve” can express the relative (separating), the related (and) and the partially related (clarifying) relationships. It can be used only in exceptional cases.

⁵⁸ Kányádi Sándor: Apáczai. <https://mek.oszk.hu/02600/02673/html/vers0602.htm>. Accessed 5 July 2022

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NORM CLARITY IN THE LIGHT OF HUNGARIAN CASE LAW

Abstract

A legal rule is necessarily subject to interpretation, since by its nature it is nothing more than a human manifestation prohibiting or prescribing a conduct, to which some meaning or significance must be attributed in order to comply with it.

There is therefore a fundamental interest in ensuring that citizens' compliance with the law is not hindered by the very laws which are intended to define and prescribe such conduct by reason of them being incomprehensible. The requirement of norm clarity arises in this context.

Already, Act XI of 1987 on law-making stipulated that legislation must be drafted using simple and plain language and observing the rules of the Hungarian language.¹ This is, in essence, in line with the requirement of the new legislative law, which entered into force in 2010, stipulating that legislation must have a regulatory content that can be clearly understood by the addressees.² According to the minister's reasoning behind this law "the bill summarises and enshrines in an Act the most basic substantive requirements of legislation: the requirement of unambiguous interpretation, the prohibition of retroactivity and the need to ensure a period of preparation. These requirements, as interpreted by the Constitutional Court, are rules deriving from the Constitution, which may, however, be repeated in terms of content by the act on law-making." It is clear, therefore, that the legislator's intention was to enforce the requirement of norm clarity at several levels of the hierarchy of legal sources when it introduced the requirement of unambiguous interpretation into the act on law-making.

Apparently, Article 28 of the Fundamental Law lays down a rule for the interpretation of the law by the courts, according to which "in the course of the application of law, courts shall interpret the text of laws primarily in

¹ See Section 18(3) of Act XI of 1987 on law-making.

² See Section 2(1) of Act CXXX of 2010 on law-making.

accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for, or for amending, the law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good.” However, consistent case law of the high courts has also derived from this rule the requirement that the legislative objective must be made clear from the laws in a manner that is clear and apprehensible to all.³ It is therefore an expectation that legislation should be comprehensible to the public, but the questions remain as to when this requirement is met, and what criteria are used to determine whether legislation is sufficiently clear and unambiguous.

Recently, the requirement of norm clarity has been frequently addressed in legal literature, and there have also been several attempts to define it.⁴ One concept holds that “the requirement of norm clarity means that the grammatical structure of the law should not be unnecessarily complex, causing intellectual challenge for law-abiding citizens in the application of the law”⁵, while according to another view “laws should be drafted in such a way that the addressee is in no doubt as to the rights and obligations arising from it”.⁶

Lastly, before examining the case law, it is also worth mentioning the definition according to which the most important thing from the point of view of clarity is that the addressees of the rule attribute the same meaning to the legal terms and expressions in all circumstances.⁷

In the domestic legal system, norm clarity is not only a linguistic and drafting requirement for legislation, but also a much more complex

³ See in this context, for example the decision No. Köf.5.036/2020 of the Curia of Hungary, i.e., case-by-case decision No. BH 2021.6.186.

⁴ FICSOR, Krisztina: A normák határozott megfogalmazásának problémája a büntetőjogban – A normavilágosság fogalma az Alkotmánybíróság döntéseiben és a bírói gyakorlatban (The problem of the definite formulation of rules in criminal law – The concept of norm clarity in the decisions of the Constitutional Court and in judicial practice); *Pro Futuro* 2018/3.; pp 37–59.

⁵ See: SZANISZLÓ, Krisztián: Államszervezeti fogalmak útvesztőjében Jogállamiság, népszuverenitás – egy lehetséges értelmezés (In the maze of constitution concepts Rule of law, popular sovereignty – a possible interpretation); in: *Jura*; 2017/2.; p 421.

⁶ See Novák, Barnabás: A terminológiai munkafolyamat a minőségi jogalkotásban – Magyarolasz összehasonlító vizsgálat az alkotmányjogi terminológia területén; doctoral thesis (The terminological workflow in quality legislation – Hungarian-Italian comparative study in the field of constitutional terminology); Pécs; 2018. p 49.

⁷ See: Vinnai, Edina: Nyelvhasználat a jogi eljárásban (The language of legal proceedings); doctoral thesis, Miskolc; 2011.

requirement affecting the application of the laws. In this context, the role of the courts in interpreting the meaning of laws and the obligation to draft court documents and decisions in plain, simple and clear language should be emphasised. This latter requirement is also included in the Magna Carta of Judges and the Vilnius Declaration.⁸

For this reason, the most authentic picture of the domestic application of the requirement of norm clarity can be obtained by taking a very close look at the case law of recent years, after having shed light on the legal background.

The Constitutional Court has dealt with the issue of norm clarity in detail, and as early as 1992 it stated, as a matter of principle that “the clarity, intelligibility and proper interpretation of legislative content is a constitutional requirement for the legislative texts. Legal certainty – which is an important element of the rule of law declared in Article 2(1) of the Constitution – requires that the text of laws must contain a meaningful and clear legislative content that can be recognised in the course of the application of the law.”⁹ Thus, the requirement of norm clarity is inextricably linked to the principles of the rule of law and legal certainty, and can be derived from them in the practice of the Constitutional Court.

If we want to give a really precise definition of the concept, we should approach it from a negative direction, i.e., from the point of view of the requirement of norm clarity.

The Constitutional Court holds that unconstitutionality can be established on the grounds of a violation of norm clarity if the regulation is uninterpretable for the law enforcer or allows for different interpretations, and as a result the effect of the rule creates an unpredictable and unforeseeable situation for the addressees, or if the overly general wording of the rule leaves room for subjective, arbitrary application of the law.¹⁰ This is also reflected in another finding of the Constitutional Court, according to which

“the lack of regulation is incompatible with the requirement of norm clarity derived from the principle of the rule of law [Article B(1)], because the

⁸ See Section 16 of the document adopted by the General Assembly of the Consultative Council of European Judges in Strasbourg on 10–19 November 2010 and point 7 of the document “Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate” adopted by the European Network of Councils for the Judiciary at its General Assembly in Vilnius on 8–10 June 2011.

⁹ See Decision 26/1992 (IV. 30.) AB of the Constitutional Court.

¹⁰ See Decision No. 56/2010 (V. 5.) AB of the Constitutional Court.

regulation is meaningless, uninterpretable, unpredictable and has a meaning that is not foreseeable and identifiable by the addressees.”¹¹

In the same decision, the panel explains that the requirement of norm clarity is an open-ended, general clause formulated at a high level of abstraction, a legal concept requiring interpretation, and as such, it is as much an integral part of our legal system as the detailed, casuistic legislation. The Constitutional Court holds that legislators must issue legislative texts that meet the requirements of the norm clarity.

“The legislator is responsible for regulating the various spheres of life covered by the legislation by means of appropriate provisions. Whether or not the provision confers discretionary or interpretative powers on the law enforcement authorities depends on the nature of the sphere of life, on the one hand, and of the legislation, on the other hand. In some cases, laws contain a closed, exhaustive list, which the law enforcement agencies are not free to extend, while social relations to be regulated may be so diverse and varied that the use of this method of regulation is out of the question. In such cases, the law either defines the persons, objects or services to which a provision applies on the basis of substantive criteria, or includes a non-exhaustive list.”¹²

The Constitutional Court stated that

“in certain cases, it is not the detailed, but the general framework-like regulation that promotes legal certainty. For the sake of clarity and transparency of laws, it is advisable for the legislator to avoid an exhaustive list of situations to which a given provision of the law applies; due to the constant evolution and changes in life circumstances, drawing up an exhaustive list of these situations would be a hopeless undertaking. And if it turned out again and again that the scope of the law had to be extended to situations which the legislator had not initially thought of or could not have thought of, this would, as a result of the necessity of a series of amendments to the law, pose a threat to a component of the rule of law declared in Article 2(1) of the Constitution, namely legal certainty.”¹³

In my view, a good example of this is the Public Procurement Act, which was so complex at times that even public procurement experts had difficulty interpreting certain provisions, and still contained references to provisions

¹¹ See Decision No. 3104/2017 (V. 8.) AB of the Constitutional Court.

¹² See Decision No. 847/B/1996 AB of the Constitutional Court.

¹³ See Decision No. 55/2001 (XI. 29.) AB of the Constitutional Court.

that had since been repealed. In the end, the legislator understood that it was impossible to regulate in detail all the legal situations that were multiplying as a result of the complexity of life. And, also, perhaps the Public Procurement Arbitration Board had not an insignificant role to play in this, as it increasingly emphasised the application of principles as a tool for interpreting legislation that are not sufficiently clear.

An examination of the case law shows that the domestic high courts are also often confronted with the question of norm clarity. Decisions in such cases almost always refer to Article 28 of the Fundamental Law, already mentioned above, which provides guidance on how the courts should interpret the law. It is important to stress, however, that the interpretation of the text of a law in accordance with its purpose should not lead to the adoption of an interpretation that departs from the text of such law.¹⁴ It should also be noted that the principle of norm clarity requires predictability of laws and clarity of the individual legal rules.¹⁵

In another case, the court examined whether the perceived uncertainty about a particular law was caused by the legal framework or whether something else might be behind it. At this, the Curia of Hungary (hereinafter: Curia) came to the conclusion that the rule formulation complied with the requirement of clarity and that, since the application of the law fills the rule with content, the uncertainty is due to the fact that there is no established practice in the application of the specific law. The Curia held in this particular case that the uncertainty in application did not arise from the lack of the norm clarity of the legal rule but from the fact that the circumstances influencing the determination of the amount of compensation for certain claims arise as a technical issue.¹⁶

The Curia has also addressed the question of the clarity of legislation in a uniformity decision, and stated that, as a consequence of this requirement, the content of the law must be clearly and unequivocally determinable.¹⁷

In a case-by-case decision this year, the Curia, interpreting Section 2(1) of Act CXXX of 2010 on law-making, states that the “provision referred

¹⁴ See the precedent-setting decision No. Kfv.38170/2021/6 of the Curia of Hungary in an administrative dispute concerning the landfill tax.

¹⁵ See the precedent-setting decision No. Kfv.38193/2021/6 of the Curia of Hungary in an administrative dispute concerning a land transaction case.

¹⁶ For details, see the precedent-setting decision No. Kfv.37045/2022/17 of the Curia of Hungary concerning the compensation rules applicable in the mining sector.

¹⁷ See the administrative and civil law uniformity decision No. 3/2021 of the Curia of Hungary on determining the court to hear an appeal against an enforcement order, relating to a judgment in an administrative lawsuit, issued by a regional court as a court of first instance.

expresses the principle of norm clarity required as part of the legal certainty considered to be a defining element of the rule of law, and as such, it has been confirmed several times in the clear practice of the Constitutional Court. The Constitutional Court has handed down a number of decisions on clear and apprehensible legislative content that can be understood by all. So, legal certainty requires that the wording of the law must be meaningful and clear, and that it must have a legislative content that is recognisable in the course of the application of the law. Relying on the Constitutional Court's decisions, the Curia states that

“legal certainty requires the state – and primarily the legislator – to ensure that the law as a whole, its subdivisions and individual pieces of legislation are clear and unambiguous. They must be predictable and foreseeable in their operation for the addressees of the legislation. Legal certainty requires not only the clarity of certain rules, but also the predictability of the functioning of certain legal institutions.”

This is why the requirement of clear, apprehensible and properly interpretable legislative content is infringed by a conflict of laws within a local government decree if the contradiction cannot be eliminated by legal interpretation, or if one of the contradictory provisions also conflicts with a higher law.

The requirement of norm clarity is infringed if the provisions of a local government decree are imprecise, contradictory and refer to ineffective legal provisions.¹⁸

As mentioned above, the requirement of norm clarity does not only impose strict requirements on the text of laws, but applies to legislation as a whole. This is in line with the finding of the Curia that the regulation of identical or similar spheres of life cannot be unduly parallel or layered. The horizontal fragmentation of legislation is not permissible either, and the requirement of norm clarity also includes the requirement that the local government decree should not contain technical regulatory defects.¹⁹

The question of norm clarity is very often raised by tax legislation before the courts, including the Curia. The supreme judicial forum has recently ruled as a matter of principle that tax legislation, including local government decrees on local taxes, meets the requirement of norm clarity if it clearly and unambiguously defines the subject, object and rate of the tax. This is

¹⁸ For more details see decision No. Köf.5.036/2022 of the Curia of Hungary.

¹⁹ See in this respect the decision No. BH 2021.11.324, which also establishes the prohibition of duplication of regulation.

therefore a minimum requirement that must be met for all tax legislation.²⁰ In tax legislation, tax liability can only be defined by a clear rule, and it is not possible to expand its content by interpretation or by referring to the draft legislation. Otherwise, in domestic jurisprudence, the requirement of norm clarity must be satisfied by all pieces of legislation and sources of law.²¹ In its administrative ruling in principle No.18/2015, the Curia pointed out that when enforcing the requirement of norm clarity, whether and how the inadequately interpretable legislative content affects the application of the legislative content, and whether it causes legal uncertainty in the interpretation of the law must be taken into account. In another decision concerning the interpretation of the provisions of tax laws, the Curia has emphasised that the clearly taxing content of the laws cannot be extended by means of legal interpretation. There is no legitimate pathway to broaden the meaning of the facts of the case by means of interpretation, even if, taken as a whole, they may constitute a potentially fragmentary or incomplete regulation.²²

The requirement of norm clarity is often combined with the principles of legal certainty and transparency.²³ In the light of the case law, the requirement of norm clarity also implies that, considering the constitutional requirements imposed on legislation, the legislative aim must be made clear in a manner that is clear and apprehensible to all. From this point of view, the question arises as to whose level of literacy should be taken as a starting point when taking a position on whether a particular rule meets these requirements. Is there such a thing as a justice-seeker with an average level of literacy, and is it possible to examine the text of a law from their perspective, even with the help of a forensic linguist? These are questions to which no clear answer can be given today, since some courts and authorities prefer to rely on linguistic experts, while others consider the interpretation of the text of the law to be strictly a matter of law and reserve the privilege of doing so for themselves. The requirement of norm clarity applies not only to the text of laws in the strict sense, but also, for example, to the enacting provisions, since ambiguity in these provisions also creates legal uncertainty. The domestic high courts clearly attach to the

²⁰ See decision No. BH 2019.11.311 of the Curia of Hungary.

²¹ Pursuant to Foundation Chapter Article T(2) of the Fundamental Law, “laws shall be Acts, government decrees, prime ministerial decrees, ministerial decrees, decrees of the Governor of the Hungarian National Bank, decrees of the heads of independent regulatory organs and local government decrees”.

²² See decision No. Kfv.I.35.198/2015/4 of the Curia of Hungary.

²³ See, for example, decision No. BH 2022.5.143, according to which the identification of unmarketable immovable property of high national economic importance and of property of limited marketability in the local government decree on assets must be sufficiently specific in terms of identifiability, within the limits of the powers conferred by the relevant Acts.

violation of the requirement of norm clarity the legal consequence that a law with such a deficiency, i.e. a rule whose content cannot be ascertained, which is contradictory or uninterpretable, cannot form the basis for the decision of a specific dispute.²⁴ The Curia pointed out in connection with the interpretation of a provision of the Act on Duties that the requirement of norm clarity may be violated not by interpretation of the law, but by law-making.²⁵

If only one decision could be singled out from the case law of the Curia in relation to the requirement of norm clarity, it would undoubtedly be the decision No. Kvk.39485/2022/2. In its decision the Curia emphasised that

“an essential component of being a state governed by law is the rule of law, or in other words, the legally binding nature of public power and the requirement of legal certainty. The requirement of legal certainty itself consists of several components, such as the requirement of norm clarity, or access to the texts of laws, the predictability of the law as a whole and of certain rules.”

This is further elaborated on by another decision of the Curia, which is of similar importance, and which considers as a prerequisite for the requirement of norm clarity the irrebuttable presumption that “the legislator intends to achieve a predetermined regulatory objective and is aware of the meaning of the terms it uses. Therefore, the law is drafted with the text that the legislator intended to draft. The necessity of a teleological interpretation, taking into account the legislator’s intent, may arise if more than one interpretation could be derived from the legislative text. In such cases, the legislator turns to the preamble of the law, the explanatory memorandum of the bill, or, exceptionally, to other sources that are available to anyone and from which the legislative aim can be inferred. (E.g., the position of the proposer of a bill in the parliamentary debate.)”²⁶ However, there is also an insurmountable limit to this, which has also been pointed out by the supreme judicial forum. The legislator’s intent, the purpose of drafting the law itself, cannot serve to undermine the content of the legal provisions, which are otherwise grammatically clear and satisfy the requirement of norm clarity.²⁷

The requirement of norm clarity may be contradicted not only by vague wording, but also by inappropriate technical legal solutions such as overly

²⁴ See in this respect decision No. BH 2018.7.214, according to which the uncertainty of the entry into force of the law or the confusion of substantive and procedural rules cannot be attributed to the client.

²⁵ See decision No. AVI 2015.12.103.

²⁶ See decision No. Kfv. IV. 37.639/2021/11 of the Curia of Hungary.

²⁷ See the precedent-setting decision No. Kfv.38170/2021/6 of the Curia of Hungary.

fragmented legislation. If a misleading name occurs in the text of a law, this is also a legislative error in the context of norm clarity.²⁸ An interesting question is what is the point of law to be decided by the courts in the context of the requirement of norm clarity, and whether such a point can be formulated in general terms. In my opinion, yes, and this is also confirmed by a decision of the Curia, which points out that the court in such cases must primarily take a position not on the question of whether or not the law meets the requirement of norm clarity, but on the question of whether the indisputable legislative content is what reasonably acting legal entities—in their interpretation—attribute to it.²⁹ A further interesting correlation can be found if we look at the requirement of norm clarity in terms of the quality of the whole process on which it is based. Increasingly, both before the Curia and the Constitutional Court, the right to a fair trial is being invoked in connection with the violation of norm clarity. If a rule is unclear, it leads to its application being seriously unfair, and it inherently follows from this that the constitutional reasoning that the right to a fair hearing before a public authority or a court, as enshrined in Articles XXIV(1) and XXVIII(1) of the Fundamental Law, is not satisfied in a proceeding implementing such a rule.³⁰

Finally, in the context of standard terms of contract, the Curia pointed out that the requirement of norm clarity cannot be invoked without limitation, and that only if certain conditions are met can a legal rule be found to be defective in this respect. According to the decision in question, “difficulties in interpreting a legal rule only give rise to a breach of legal certainty if the given law is inherently uninterpretable; the fact that a law needs to be

²⁸ In relation to the excessively fragmented regulation, see the precedent-setting decision No. Bhar.495/2021/41 of the Curia of Hungary on the felony of misappropriation, and a good example of the misleading term in the text of a law is the precedent-setting decision No. Pfv.20144/2020/3 of the Curia of Hungary on the use fee (public space use fee), where the supreme judicial forum considered the term ‘public space contract’ in a local government decree to be misleading.

²⁹ See in this regard the precedent-setting decision No. Kfv.35308/2018/12 of the Curia of Hungary concerning the judicial review of administrative decisions.

³⁰ See Article XXIV(1) of the Fundamental Law, which states that “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”, and Article XXVIII(1) of the Fundamental Law, which states that “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.”

interpreted or can be interpreted in various ways does not in itself constitute a breach of the requirement of norm clarity.”³¹

Lastly, also in the context of norm clarity, it is worth mentioning a new development in Hungarian law, namely the type of petition that can be submitted in proceedings before the Constitutional Court, known as *amicus curiae* in the working language of ministries. The essence of this legal instrument is that the creator of the law relevant to the subject matter of the case or the initiator of the Act may inform the Constitutional Court of its position on the case and present its opinion. The creator of the law and the initiator of the Act may also reach a joint opinion by agreement. Thus, *amicus curiae* may even help the Constitutional Court in its work as a means of revealing the legislative intent, although in my view the principle is not compatible with the requirement of norm clarity if the legislative intent behind the enactment of the legislation is not clearly evident from the law itself. Nevertheless, the legal institution has a *raison d'être*, given that *amicus curiae* also plays a role in developing the law, supporting the application of the law and the decision-making mechanism with technical arguments.³²

Summary

In the light of the foregoing, reference to the requirement of norm clarity, in domestic case law, too, is becoming more and more common both in litigation submissions and in final court decisions. Like any legal term, it is constantly evolving, with ever new meanings, typically assigned by decisions of the Constitutional Court and higher courts. Overall, norm clarity, as enshrined in law and enforced by the courts, is a complex requirement which, as we have seen, not only concerns the language of legal rules in the strict sense, but also imposes other requirements, thus greatly assisting people seeking justice in navigating the labyrinths of the law and ultimately contributing to legal certainty and the rule of law.

³¹ See the precedent-setting decision Gfv.30387/2014/1 of the Curia of Hungary on the rebuttal of the legal presumption relating to standard terms of contract, which also contains reference to the decision of the Constitutional Court.

³² See in this context: VÁRADI, Ágnes; MÁZI, András: Az Igazságügyi Minisztérium megnövekedett szerepe az alkotmánybírósági eljárásokban, az *amicus curiae* intézménye (The increased role of the Ministry of Justice in constitutional court proceedings, the institution of *amicus curiae*); in: *Fontes Iuris*: Periodical published by Ministry of Justice; 2015 (3–4); pp. 17–23; ISSN 2416-2159.

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THE LINGUISTIC NORM AND NORM OF LEGAL LANGUAGE

Abstract

The concept of norm is a cross-disciplinary one. The norm can be approached using normative and interpretative paradigms. As regards the linguistic norm, there is a debate about the prescriptive norm, which is important for prescriptive linguistics (language cultivation) and pedagogy, and the socio-cultural norm, which is important for descriptive linguistics. The linguistic norm is shaped by language use (*usus*), language awareness and knowledge-dissemination practices (cultivation), and linguistic prejudices (stereotypes) about language situations, styles, speakers, etc. The linguistic norm also changes historically. There have also been many attempts to define the legal norm. The requirement of clarity in a legal context means that laws must have a regulatory content that is clearly understandable to its addressees.

Introduction: tradition, norm

Norm is a fundamental concept in many disciplines (philosophy, anthropology, ethnography, linguistics, psychology, pedagogy, law, etc.). Norm is closely related to the notion of tradition.¹ The semantic content of the word *tradition* can be grasped with the notions of permanence, prevalence, cultural transmission, and intergenerational connections. It also includes phenomena such as prejudice, value system, practice, inclination, institution, taste, skill, convention, habit, mentality, paradigm, rank, ritual, style, rule, custom, technique, authority, law, and, of course, norm. Understandably, these can all change over time, but they are an integral, static (only slowly changing)

¹ cf. Balázs, Géza 1993. A nyelvi norma és a hagyomány (Linguistic norm and tradition). Magyar Nyelvőr 1993, pp. 413–5., Balázs, Géza 2000. Normatudatok és normaváltozatok (Norm mindsets and norm variations). In: Paraszti múlt és jelen az ezredfordulón. Ed.: Cseri, Miklós–Kósa, László–T. Bereczki, Ibolya. Magyar Néprajzi Társaság és a Szentendrei Szabadtéri Néprajzi Múzeum, Szentendre, 2000. pp. 309–316.

part of the tradition. The ethnographer László Veres² notes in relation to moral norms: “the survival of the elements of traditional community culture was also ensured by objectified norms to which subjects subordinated their behaviour with a binding force.” Tradition and norm play an important role in social behaviour and cooperation. The norm is a set of rules that dictate how to behave in a given situation. The options range from recommended to mandatory, from free choice to prohibitions.

The normative and interpretative paradigms

Starting from Durkheim, until the mid-1960s, sociology and social psychology were dominated by a paradigm that treated norms as objective entities.³ The only choice individuals had was to accept or reject the norms. This is called the normative paradigm. Since the 1960s, with the rise of pragmatics, the so-called interpretative paradigm has come to the fore, in which the emphasis is on the participants’ collective performance of norm-building and norm-interpreting, with special regard to rules. However, this is only a conceptual framework, because, as Csepeli⁴ writes, “in both cases the basic function of social interactions is fulfilled: the orderliness, predictability and protection of social behaviour against disintegrating trends.” This can be seen as a basis from both a cultural linguistic and a legal point of view.

The two types of norm paradigms can be described as follows:

Table: The two paradigms of norm

normative paradigm	interpretative paradigm
norm	rule
static	dynamic
a given framework condition	socially constructed behaviour

The linguistic norm

In the decade following the change of regime in Hungary in 1990, the “norm issue” gained importance in linguistics on several occasions, and even became

² Veres, László 1984. *Erkölcsei normatívák és tevékenységi típusok* (Moral norms and types of activity). Debrecen. *Folklor és etnográfia*, 15.

³ Csepeli, György 1997: *Szociálpszichológia* (Social psychology). Osiris, Budapest pp. 165.

⁴ Csepeli, György 1997: *Szociálpszichológia* (Social psychology). Osiris, Budapest pp. 165.

the target of scientific and science-policy debates. The main points of the “debate on the linguistic norm”: How is the linguistic norm defined? Can a literary norm be defined? How many linguistic norms are there? If it cannot be precisely defined, can a norm be referred to in prescriptive linguistics (language cultivation)?

The questions are legitimate in themselves, but much depends on which of the paradigms we consider.⁵ Indeed, both descriptive and prescriptive linguists used to speak of an “educated”, “sophisticated”, “model” vernacular form, and its written version as a “literary” language, according to a previous, static conception of the norm. This vernacular and literary language was perceived as a “model” or “norm” of communicative unification. This contrasts with the interpretative or sociocultural norm.

Table: The prescriptive and socio-cultural norms

model norm	interpretative, sociocultural norm
prescriptive	ensures the ability to adapt
model	not a model, just an expectation
ideal	not an ideal
delimitable (<i>contiguum</i>)	process (<i>continuum</i>)
fixes	interprets
institutionalised	only regulated at community level

The linguistic norm has been defined by the more modern approach to prescriptive linguistics, formed in the second half of the 20th century, as follows⁶

“The socially valid and accepted rules, guidelines and conventions for the use of written and spoken language are called linguistic norms. This system of language use, which is valid for the whole of society, is shaped by social consensus, by the language of the day. It is not the language habits, the language tastes (examples) of everyone, not even of the majority, but the habits and language use of the linguistically more educated, those who use the most advanced form of the national language, the sophisticated vernacular and the

⁵ For a fuller summary of the issue see Tolcsvai Nagy, Gábor 1998. A nyelvi norma (The linguistic norm). Akadémiai, Budapest. Nyelvtudományi Értekezések, 144., for linguistic standards see Balázs, Géza 2000. Lehetséges nyelvi szabványok (Possible language standards). A-Z, Budapest, 2000.

⁶ Fábán, Pál-Lőrincze, Lajos 1990: Nyelvművelés (Language cultivation). Mai magyar nyelvi gyakorlatok IV. Tankönyvkiadó, Budapest pp. 128–129.

literary language, that have become, in the course of historical development, the example to follow. (...)

The vernacular norm is in fact an abstraction, not living in its ‘pure’ form in perhaps any Hungarian speaker. But for some linguistic forms, linguistic phenomena, there is no unanimous opinion as to their correctness (the norm). For example, our pronunciation norm is still rather uncertain. There are still uncertainties about the norm in our vocabulary and grammar.

Although the norm in principle presupposes a uniform linguistic behaviour, in reality there are different degrees of conformity to the norm. For example, the norm is stricter and tighter in written than in oral expressions...”

After the linguistic debates, the definition of the linguistic norm was modified as follows

“a system of rules, regularities, that allows the creation and understanding of a text, a sentence, in a language, a language variant, or a speech situation. Language does not have a norm in general, nor can only literary language be considered a norm (as, for example, prescriptive linguistics has long proclaimed), but each language variety and even each community of speakers within a language has its own set of norms. The linguistic norm of each language variety is governed by the values of authority and judgment (> linguistic value). (...) The linguistic norm is usually hidden, i.e., most of the language-using contexts and text types of everyday communication do not have a fixed linguistic norm... (...) The linguistic norm in most languages, including Hungarian, is fixed in the literary language in descriptive grammars, dictionaries, spelling guides (> spelling), and other manuals...”⁷

The *Alkalmazott nyelvészeti kisszótár* defines linguistic norm similarly

“A set of linguistic and language use patterns established by communities of speakers and/or communities of practice, which exhibit certain regularities and which serve as a reference point in the linguistic interactions between individuals belonging to a given community and between individuals and the community. The linguistic norm is a dynamic, ever-changing phenomenon, shaped by the living use of language (e.g., the current purpose of communication and identity signalling).”⁸

⁷ Tolcsvai Nagy, Gábor (ed.) 2000: *Nyelvi fogalmak kisszótára* (Glossary of linguistic terms). Korona Kiadó, Budapest, pp. 173.

⁸ Ladányi, Mária–Hrenek, Éva (eds.) 2019: *Alkalmazott nyelvészeti kisszótár* (Handy dictionary on applied linguistics). ELTE Eötvös Kiadó, ELTE BTK, Budapest, pp. 110.

As regards norm-related phenomena that are not always easy to grasp, the *Nyelvművelő kézisztár*⁹ writes as follows under the headword *norm*:

“Even today, we do not have a handbook on pronunciation and intonation norms, we are only familiarising ourselves with the norms governing Hungarian texts (we do not even know how far a multiple compound sentence is normative in a certain type of text, and when it goes outside the norm). Even the largest dictionaries of our national language are only approximately complete and accurate; some parts of our official Spelling Guide are questionable, and there are dubious points in our best grammars, too. (This is necessarily the case in all other languages!) Yet we have no choice but to adapt our speech and writing to them, if our communication situation is such that our fellow speakers and readers can expect us to respect the norms of the national language. It is clear that we cannot consistently speak about a theoretical subject in dialect (for lack of means), nor can we formulate an ethical treatise or a religious sermon in argot or vulgar style.”

The description, of course, exhibits a prescriptivist attitude:

“The unity of our nation is also expressed in the norms of the national language (...). It is the duty of those who have access to both the widest and the deepest linguistic and literary culture to disseminate and cultivate it. By their authority, they also influence these norms...”

Linguistic journals play a major role in the ongoing norm research and norm shaping¹⁰

The *Retorikai lexikon* tried to summarise the lessons and results of the debates with a rhetorical-prescriptivist attitude

⁹ Grétsy, László–Kemény, Gábor (eds.) 2005.: *Nyelvművelő szótár* (Dictionary of language cultivators). (Második, javított és bővített kiadás). Tinta Könyvkiadó, Budapest.

¹⁰ cf. Balázs, Géza 2022. *A Magyar Nyelvőr története (1.) Szarvas Gábor Nyelvőre (1872–1895)* (History of the Hungarian linguistic journal *Magyar Nyelvőr* (1) Gábor Szarvas’ *Magyar Nyelvőr* (1872–1895)). *Magyar Nyelvőr* pp. 12–37. <https://doi.org/10.38143/Nyr.2022.1.12>

Balázs, Géza 2022. *A Magyar Nyelvőr története (2.) Simonyi Zsigmond Nyelvőre (1895–1919)* (History of the Hungarian linguistic journal *Magyar Nyelvőr* (2) Zsigmond Simonyi’s *Magyar Nyelvőr* (1895–1919)). *Magyar Nyelvőr* pp. 227–247. <https://doi.org/10.38143/Nyr.2022.2.227>

Balázs, Géza 2022. *A Magyar Nyelvőr története (3.) Balassa József Nyelvőre* (History of the Hungarian linguistic journal *Magyar Nyelvőr* (3) József Balassa’s *Magyar Nyelvőr*). *Magyar Nyelvőr* 2022. pp. 429–438. DOI: 10.38143/Nyr.2022.3.429

“The word *norm* means expectation, requirement, rule of conduct, moral rule, customary or official standard.¹¹ Norm is a concept of social psychology. Norms are what make social life possible. Norms are always formed unconsciously by members of a group. The norms are established and obeyed by the group members to dissolve the anxiety arising from disorder and normlessness (from lack of standards). Each person is a member of many groups (communities), so they are involved in creating and learning many different norms. Globalisation and travel bring with them both the learning and, in part, the clash of different norms. In the technocultural world and in the global space, new forms of communication, language and behaviour are emerging, which, because of their novelty, have no fixed norms and ethics, and therefore create conflicts. Excessive relativity and variability of norms can lead to insecurity, obstruction, and paralysis (frustration). (...)

A linguistic norm is a set of written and unwritten principles, rules and requirements in a more organised form. It is the linguistic norm that allows a sentence, and ultimately a text, to be constructed and understood. A linguistic norm is always specific to a language, a language variant and a speech situation. The linguistic norm is abstraction. It is necessary to have something to compare it with. Although we talk about a linguistic norm ‘in general’, there are many different norms in everyday language use. The distinction between ideal and usage norms can help us to distinguish between norms. An ideal norm is an imagined or accepted ideal. The Latin word *norm* means: carpenter’s square, rule, pattern. In other words, we compare facts that appear in reality (for example, concrete speech or text) with the norm. It is excessive abstraction to assume a general linguistic norm. The linguistic norm is most commonly used to refer to sophisticated vernacular and literary language (formerly all written texts, now merely the variety of language used by authoritative writers). More recently, the language of the quality press and (in Europe) of the media that embrace public service values can also be seen as a linguistic norm because of its standard, idealistic, exemplary character.¹² Together, these can be called ideal or model norms. In every linguistic situation (speech situation), language variety and community of speakers there are identifiable and describable linguistic rules which form specific local norms. These can be called sub-norms or usage norms.

Grammatical rules are the basis for the rules that define the norm, but they are not sufficient to produce speech that conforms to the norm. In addition to grammatical rules, you also need to know linguistic and social rules and rules of behaviour (or simply: usage rules). These are not called rules in linguistic pragmatics, but rather principles or requirements.

¹¹ Balázs, Géza 2010: Nyelvi norma (Language norm). 856–859. In: Tamás, Adamik (editor-in-chief): Retorikai lexikon (Rhetorical lexicon). Kalligram, Pozsony. pp. 856–859.

¹² cf. Balázs, Géza 2000. Médianorma. A nyilvános megszólalás esztétikája (Media norm. The aesthetics of public speaking.). Magyar Rádió, Budapest.

Both ideal and usage norms are manifestations of a cooperative society, but with different practical purposes and at different levels of functioning, and they are mutually dependent. It is therefore not worthwhile to play them off against each other, as has sometimes been attempted in the last two decades on the basis of what has been called the prescriptive linguistic norm and what has been considered the behavioural descriptive sociolinguistic norm. In the rhetorical approach to the norm, it is primarily the level of publicity that is taken into account, and therefore the rhetorical norm is mostly ideal and prescriptive, although rhetoric has always emphasized the appropriateness to the situation (which is a feature of the norm of use).

In the development of the ideal norm, authority (arguments of authority), also referred to in rhetoric, plays a major role. In other words, the ideal norm is shaped and influenced by authoritative people, communities (groups), institutions (academia, publishing houses, press, media). The norm is shaped by language use (*usus*), language awareness and knowledge-dissemination practices (cultivation), and linguistic prejudices (stereotypes) about language situations, styles, speakers, etc. Taken together, it is clear that the linguistic norm is the result of historical development and is subject to constant change, and therefore may contain uncertainties and fluctuations (especially in frequently and rapidly changing social systems). Broadly speaking, the main trend in the development of the Hungarian language over the past half millennium has been one of convergence, which has been followed by a century, and especially the last quarter of a century, of divergence. In some areas, this means a change of norms, which results in communication and behavioural uncertainties (disturbances, conflicts).

Certain rules of the ideal or model norm are also set out in writing. The linguistic norm of a vernacular or literary language (more recently: linguistic standard) is contained in descriptive grammars, dictionaries, spelling guides, taught in schools (unless otherwise instructed), and used in the press, media, academic and public life. The rules apply mainly to written texts, but there are also recommendations on the norm for public speaking. The 'minimum requirements' for public service radio, which includes rules on speaking, can be considered as such, but all radio and television stations have certain written or unwritten but applied principles on speaking. There are also other strict prescriptive standards, such as diplomatic etiquette, which gives detailed advice on how to speak, or the rules for editing certain press releases (text types) and scientific works.

Rhetoric and linguistics are concerned primarily with the ideal or model norm and with its regulation. Norms of usage or of a narrower scope tend to develop spontaneously and, although they express important situations in life and are appropriate within their scope, they are not usually suitable for all linguistic functions."

The benefits of the norm debate are the inclusion of multiple approaches to norms, the recognition of degrees and uncertainties; but the passion of the debate has in many ways made prescriptive linguists and teachers, and perhaps parents, uncertain. For if there is no privileged norm, no ideal, then in practice no linguistic form can be blamed; in public language use, no linguistic requirement can be set because there is no set of rules to justify it.

Scientific research can be characterised by the conception and study of any type of norm, but for society we cannot ignore the identification, description and even popularisation of the traditional, culture-bearing, ideal or model norm. A disturbed way of life, values or perceived norms leads to the disintegration of social functions, disorganization, and ultimately even the end of democracy.

The norm of legal language and the requirement of norm clarity

Many attempts have been made to define the concept of a legal norm. Perhaps the Austrian-born American jurist Hans Kelsen dealt with this question in the most detail in his seminal work *Pure Theory of Law*. According to the now well-established definition, a legal norm is an elementary unit of law, a legal command, which, as a model, is structurally composed of three parts: the facts, the disposition and the legal consequence.¹³ In this sense, it is not only the legislative act that constitutes a legal norm, but also, Hans Kelsen argued, the decision of a judge or authority as a so-called individual norm addressed exclusively to specific recipients. The requirement of clarity in a legal context means that laws must have a regulatory content that is clearly understandable to its addressees.¹⁴ A fundamental question is, thus, how laws are defined. The answer is found in Article T(2) of the Fundamental Law of Hungary which defines laws as “Acts, government decrees, prime ministerial decrees, ministerial decrees, decrees of the Governor of the Hungarian National Bank, decrees of the heads of independent regulatory organs and local government decrees. The expectation of norm clarity applies to all these pieces of legislation and is not limited to the above-mentioned requirement arising from the law on legislative drafting, since the practice of the Constitutional Court and the Supreme Court has also defined further essential aspects in recent decades. As a starting point, it should be

¹³ See in this context: POKOL, Béla: *Jogi alaptan (Legal Fundamentals)*. Rejtjel Kiadó; Budapest; 2000 and BÍRÓ, György–Lenkovics, Barnabás: *Általános tanok (General Doctrines)*. Novotni Kiadó; Miskolc; 2010.

¹⁴ See in this respect Section 2 (1) of Act CXXX of 2010 on Legislative Drafting.

noted that an essential component of the rule of law is the accountability of public authorities to the laws and the requirement of legal certainty. The latter requirement is also made up of several components. For example, the requirement of the clarity of norm, or access to and comprehensibility of the text of laws, the predictability of the law as a whole and of its individual rules.¹⁵ Another source of the requirement of clarity is Article 28 of the Fundamental Law, according to which

“in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for, or for amending, the law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good.”

The wording does not seem to imply a requirement of clarity, but the consistent practice of the Supreme Court has also derived from this rule the requirement that the legislator’s purpose must be made clear in a way that is comprehensible and interpretable to all.¹⁶ By the way, the definition, which is considered to be an etalon in the domestic legal system, was created by the Constitutional Court, when it stated in 1992 that

“the clear, comprehensible and properly interpretable content of the norm is a constitutional requirement for the normative text. Legal certainty, which is an important element of the rule of law declared in Section 2(1) of the Constitution of Hungary, requires that the text of the legislation must contain a meaningful and clear normative content that can be recognised in the course of the application of the law.”¹⁷

On the basis of all the above, it can be concluded that the violation of the requirement of the clarity of norm may result in non-conformity with the constitution or fundamental law of the piece of legislation. According to the consistent position of the Constitutional Court, unconstitutionality can be established on this ground if the law is uninterpretable for the law

¹⁵ See in detail ad-hoc decision No. Kvk.39485/2022/2 of the Curia, which also summarises the practice of the Constitutional Court.

¹⁶ See in this context, for example, decision No. Köf.5.036/2020 of the Curia, i.e. ad-hoc judicial decision No. BH 2021.6.186.

¹⁷ See Decision No. 26/1992 (30 April) of the Constitutional Court, in which, of course, reference is still made to the former Constitution of Hungary (Act XX of 1949).

enforcer or allows for different interpretations, and as a result the law creates an unpredictable and unforeseeable situation for the addressees, or if the wording of the law is too general, thus allowing for subjective, arbitrary application of the law.¹⁸

Finally, it should be noted that the requirement of clarity is not only violated if the wording of the text of law is difficult or impossible for the addressees to understand, but also if the legal norm suffers from a technical error. A good example of this is the intricate (almost unintelligible) chain of references back and forth within the legislation or outside the norm, or the overly fragmented, unjustifiably layered regulation of the same subject. The normative requirement of the clarity of norm is thus an open-ended general clause, formulated at a high level of abstraction, which has been given substance by judicial practice and which can thus be understood as a complex requirement enforced by the courts, which not only concerns the linguistic formulation of legal norms in the strict sense of the term, but also imposes other requirements, thereby greatly assisting individuals who want to obey the law in navigating the maze of law and ultimately contributing to legal certainty and the rule of law.

A further question is from whose point of view should laws be subjected to a test of clarity of norm. Is there a category of person who is an average literate individual who seeks to obey the law and, if so, what are the criteria for defining such category? Does the requirement of clarity of norm include an expectation that a person (consumer) who is unacquainted with the law but has an average level of education should be able to interpret without particular difficulty the text of the norm to which he must adapt his actions in some area of life? There is no concrete and generally accepted answer to this question in domestic judicial practice, but the European Court of Human Rights has addressed the issue and held that the requirement of clarity of norm is met if the citizen can clearly ascertain the meaning of the norm, at worst with the help of legal advice, and thus is able to judge the consequences of his or her conduct.¹⁹

Therefore, the fact that a citizen does not have the skills or knowledge to understand the text of a norm does not in itself result in a breach of the requirement of the clarity of norm, as no one is excluded from seeking

¹⁸ See Decision No. 56/2010 (5 May) of the Constitutional Court.

¹⁹ See in this connection paragraph 42 of the judgment of the ECtHR of 25 November 1996 in *Wingrove v. the United Kingdom*, where the Court states: “The Court recognises that the offence of blasphemy cannot by its very nature lend itself to precise legal definition. National authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence.”

legal advice. Because of the complexity of real-life circumstances, the legislator cannot always use “plain language”, and such an expectation is not necessarily justified, since, as the Constitutional Court also points out, a legislative text that is too general may become incomprehensible and open the door to arbitrary application of the law. Therefore, it is a well-established technical solution in law that any gaps in a specific law are filled by principles, which also fulfil the requirement of clarity, while at the same time providing a framework for the interpretation of the law as a whole. Regardless of this, the legislator is of course expected to tailor the text of specific laws as much as possible to law-abiding citizens with an average level of knowledge, i.e., to make the wording only as complex as is strictly necessary with regard to the subject matter of the law. The balance is therefore very delicate, and it is not easy for forensic linguists who, in the context of specific legal disputes, whether on judicial assignment or at private request, sometimes have to take a position on the question of how comprehensible a specific legal text could be to a person of average literacy, or what meaning such a person could attribute to the text. It can still be said that courts typically treat the interpretation of legal texts (e.g., tax laws) as a legal question which they alone have the power to decide, and thus motions for the appointment of a forensic linguist for this purpose are usually rejected. In civil cases, the role of forensic linguists is limited to the interpretation of legal declarations, although here too there is a reluctance on the part of the courts, and it is more the practice of certain authorities (e.g., Hungarian Intellectual Property Office) to take the forensic linguist’s opinion into account when making decisions.

Under the current Civil Code of Hungary, in the event of a dispute, the declaration must be interpreted in the manner in which the addressee must have understood it, having regard to the presumed intention of the declarant and the circumstances of the case, according to the “generally accepted meaning of the words”. This latter phrase creates a justification for the forensic linguist’s expert opinion, as specialised expertise may be required to answer the question of the meaning of a given phrase from the perspective of the average literate consumer. This is why, according to the lawyer author of this study, there is no justification at all for the courts’ dismissive attitude towards linguistic experts, since in other cases they rely on expert opinions even when the subject of the dispute is not a technical issue but a question of law to be decided.

In a broader sense, contracts and unilateral legal declarations (e.g., last wills) are also legal norms, which are subject to the requirement of norm clarity, except that in their case vague wording does not result in a violation

of fundamental law, but leads to the fact that the given contract or declaration will be partially or wholly incapable of producing the desired legal effect. The meaning that the person making the declaration may have attributed to the expressions in the document may therefore be decisive. The identification of the generally accepted meaning of words can be considered as a specialised issue requiring expertise, which may justify the use of a forensic linguist, since according to consistent judicial practice, the *ex-post* statement of the party concerned, obviously driven by his own interests, is not the relevant one in the context of a legal declaration. It is of course up to the court to draw the legal conclusions, even if a forensic linguist is involved.

Overall, the role of forensic linguists in civil and administrative (e.g., tax) cases is still limited, and they are rarely relied upon by the courts in matters concerning the wording of laws or legal declarations (contracts).²⁰ At the same time, it is clear that the real-life situations to be regulated are becoming increasingly complex, so the legal norms are often incomprehensible even to those with an above-average level of education. Consequently, some kind of linguistic control would be necessary, and this could be achieved by giving forensic linguists a greater role, at least in the codification process in order to promote the requirement of norm clarity.

Practical areas of norm clarity

The areas of legal and linguistic clarity are, in particular, the clarity of legislation, the clarity of legal and informative texts (contracts, wills, instructions for use) and the clarity of judicial decisions. This is a common task for the linguist, the lawyer and, if there is a dispute, the forensic linguist, as Balázs Arató (2020) reports in detail.

There are many examples of good practice.

2000. The Hungarian Language Strategy Research Group is set up, one of the aims of which is a programme to simplify legal texts.

2002–2010. Lectures on communication in plain language at the Faculty of Law and Political Sciences of the University of Pécs.

2006. The Office of Hungarian Language Services is set up to organise specific training courses on legal language.

2006–2016. Lectures and training on official and legal language at the Hungarian Academy of Judicial Training

²⁰ See details on this: Balázs Arató: Quo vadis, igazságügyi nyelvészet? (Quo vadis, forensic linguistics?) in: Magyar Jogi Nyelv 2020/2.; pp. 8–15

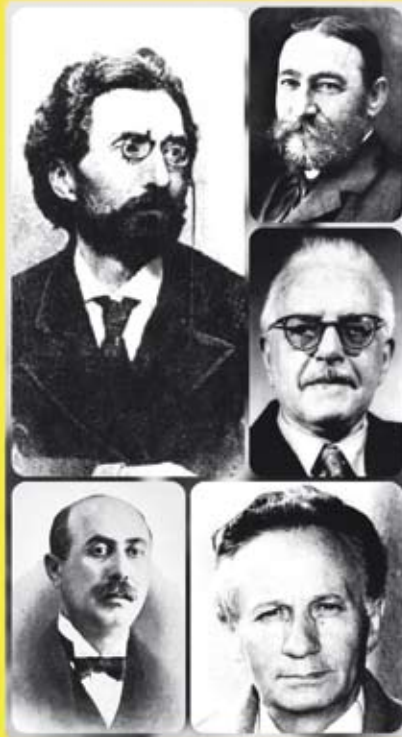
2013. A multiannual programme for the simplification of the language of laws launched by the Ministry of Public Administration and Justice, with recommendations and language training from the Office of Hungarian Language Services.
2013. On 17 January 2013, the President of the Curia established a jurisprudence analysis group to examine the subject of Decision Drafting under Act CLXI of 2011 on the Organisation and Administration of Courts. The summary opinion of the analysis group has been made public.²¹
2020. Lectures on rhetoric in the courtroom at Budapest-Capital Regional Court (and other regional courts across Hungary).
2022. In a dispute over the use of names, Szeged Regional Court ruled on two conflicting opinions of linguistic experts (including a forensic linguist). The judgment was also published as a document in *Magyar Nyelvőr*, see: Szeged Regional Court, 2022).

²¹ https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemenypdf

Balázs Géza's book entitled *The Boisterous History of Magyar
Nyelvőr (1872–2022)* has been published.

BALÁZS GÉZA

A MAGYAR NYELVŐR
viharos története



1872–2022