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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.