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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.

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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]

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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 Code[7] 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.

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[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 1978, 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 legislation[21] 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 Court[23] became evident in national legislation and in the application of the law. Although the concept of fair trial was already enshrined in the Constitution[24], 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 Hungarian[26] 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 Constitution[31] and its amendments[32] contain the following fundamental rights with regard to a person subject to criminal proceedings[33]:

- 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 terheltet 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.) AB[38] 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 Court[41], 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.) AB[44] and Decision 18/2004. (V.25.) AB[45]. 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.) AB[51], Decision 3051/2022. (II.11.)[52] AB and Decision 3052/2022. (II.11.) AB[53].

[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 act[54] which, for example, requires the draftsman of the law to attach an explanatory memorandum to the draft law[55]. The decree of the Ministry of Justice[56], 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 61/2099 (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