

Certainty and Uncertainty in Criminal Law and the ‘Clarity of Norms’ Doctrine

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Abstract. The principle of legality includes numerous requirements which guarantee that criminal law and its application meet the demands of the rule of law and legal certainty. One of these requirements is maximum certainty according to which the rules of criminal law must be defined in a clear and precise way in order to make criminal law understandable and predictable for citizens. In the practice of the Hungarian Constitutional Court this requirement is called the ‘clarity of norms’ doctrine. However, the theoretical content of this doctrine is obscure and is also ambiguous in the practice of the Constitutional Court. It is also a problematic phenomenon in the Hungarian judicial practice that the principle of maximum certainty is treated as a mere linguistic issue. Judges try to solve criminal cases in which criminal laws are uncertain by searching for the meaning of words in dictionaries and do not tend to take into consideration moral or justificatory reasons behind the relevant criminal law. The Author throws light on the above mentioned problematic elements in the Hungarian legal practice and makes efforts to suggest a theoretical solution for these problems.

Keywords: principle of legality, legal certainty, clarity of norms in criminal law

1. INTRODUCTION

In April 2017, two men participated in a demonstration against the Hungarian government and its newly adopted law. During the demonstration, one of these two men attempted to throw some water-based paint on the wall of the residency of the president of Hungary as an expression of their opinion that they disagree with the decision of the president who signed a statute after the Parliament adopted it. One of them was successful in throwing some yellow water-based paint on the wall and caused minimal damage. The two men were arrested by the police and then convicted by the court¹ according to the following section of the Hungarian Criminal Code:

Public Nuisance 339. § (1) Any person who displays an apparently anti-social and violent conduct which is able to incite indignation or alarm in other people is guilty of a misdemeanor punishable imprisonment for up to two years, if such act does not result in a criminal act of greater gravity.

According to the judge, who decided the case, the behaviour of the protesters could be qualified as apparently anti-social, violent and was able to incite indignation. After the decision was made, it was found out that the judge, who actually convicted the two men, defended his PhD dissertation in 2010. One of the main theoretical issues addressed by the judge’s dissertation was whether the conduct declared by the above mentioned section in the criminal code (*public nuisance*) could be legitimately criminalized by the state in its criminal code. So the theoretical question that he wanted to answer was whether this offence can be a legitimate part of the criminal code of a constitutional democracy where the rule of law is one of the most respected value in the legal system.

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¹ See the decision of Central District Court of Buda 10. B. I.650/2017/3.

The conclusion of the dissertation is that the offence of public nuisance is unconstitutional. The author argues for the claim that declaring this behaviour as a criminal offence in the criminal code violates the rule of law because the concepts it includes especially ‘apparently anti-social’, are too vague and uncertain. Thus, it depends on the judges’ discretionary power whether the offender will be convicted or acquitted and therefore the offence of public nuisance violates the principle of legal certainty – it does not have a place in the legal system of a constitutional democracy.²

The final conclusion of the dissertation is that it is an obligation of judges to suspend the trial in public nuisance cases and they have to appeal to the Constitutional Court asking it to annul the particular statute on the basis of its being unconstitutional.

This criminal offence is one of the most controversial criminal offences in the Criminal Code of Hungary despite public nuisance been part of the criminal law since 1955 in Hungary and a consistent judicial practice had been established³ concerning the question of what kind of behaviours can be categorized as public nuisance. Going deeper into in the analysis and interpretation of this criminal offence leads to the realization that behind the ‘consistent’ judicial practice there is a great debate over the clear content of the concepts included in the statute. One of the most controversial and debated concepts in the statute is ‘apparently anti-social.’ In order to decide that a conduct is anti-social, moreover, apparently anti-social, the judge needs to make inquiries in moral issues that are absolutely beyond the text of the statute.

However, it is not the aim of this paper to provide an interpretation of the content of public nuisance. Rather, the previously mentioned case is interesting because it reveals that it is still a debated and serious issue in modern legal systems of how it is possible to make law and judicial decisions clear and understandable for citizens.

In the next sections of this article the issue of legal certainty in criminal law and in the practice of the Hungarian Constitutional Court (HCC) will be discussed. The HCC is authorized to annul statutes that do not meet the requirements of the so-called ‘clarity of norms’ doctrine. The purpose of this paper is to make clear the content of this requirement and give an alternative and distinct explanation of certainty in criminal law to the conception which dominates the Hungarian jurisprudence and judicial practice of interpreting criminal statutes.

Numerous Hungarian criminal law textbooks contain the set of canons of interpretation that can be used by judges to reveal the meaning of and dissolve ambiguities and vagueness in the text of criminal statutes. The interpretative strategies of these textbooks, on the one hand, can be categorized by answering the question of what kind of argumentative methods they use to reveal the meaning of criminal statutes. In accordance with this classification of interpretative methods, distinctions can be made between linguistic or textual (grammatical), logical, historical and systematic interpretation. The function of linguistic interpretation is to unfold the semantic content of legal concepts included in criminal statutes.⁴ When legal argumentation is based on logical interpretation, the interpreter focuses on the rules of

² Hornyák (2010) 158–70.

³ Bócz (2017) 5.

⁴ In the Hungarian legal literature and judicial practice this interpretative method is usually called ‘grammatical’ interpretation. However, I prefer using the phrase of ‘linguistic’ or ‘textual’ interpretation because this method is not only about revealing the grammatical structure of words and sentences, but its aim is to find the ‘true meaning’ of them. In short, it is a semantical analysis of legal sentences and concepts. Blutman (2007) 4.

formal logic. The fundamental source of historical interpretation is the intention and purposes of the legislator behind criminal rules. By applying systematic interpretation, judges can come to conclusions concerning the meaning of criminal rules by finding the given criminal rule's place in the context of the legal system as a whole.⁵

Taking into consideration the possible results of interpretation, extensive, restrictive and declarative interpretations can be differentiated. These canons of interpretation reflect the tension between the plain or literal meaning of criminal norms' text and the legislative purpose behind them.⁶ The interpretation of a statute is extensive if the criminal norm is applied to cases which cannot be subsumed under the plain meaning or semantic content of the norm. Restrictive interpretation refers to the argumentative strategy of narrowing 'the set of cases that the statute would have ruled if the judge had interpreted it literally.'⁷ The result of declarative interpretation is a judicial decision that does not go beyond the 'true meaning', or the semantic content of the criminal norm's text.⁸

Beyond the canons of interpretation mentioned above, the teleological interpretation is also an often discussed interpretative strategy among legal scholars. When a judicial decision is based on reasons stemming from teleological interpretation of the statute, it means that the judge takes into consideration the relevant justificatory purpose or moral principle behind the statute.⁹ Although, it is an important prescription in the Fundamental Law of Hungary that legal rules must be interpreted in accordance with their purposes and with the Fundamental Law,¹⁰ it is still a debated issue in legal theory and in theories of adjudication that in what kind of cases it is allowed for judges to go beyond the literal meaning of statutes in their reasoning and how they can justify decisions that are in contradiction with the plain meaning of the legal rule. The Author believes that it is a common feature of adjudication that different canons of interpretation can result in and can lead to different legal conclusions in the same case. Furthermore, the application of certain canons of interpretation is determined by important constitutional principles e.g., separation of powers, the rule of law, the principle of democracy, it will always be a 'hot issue' in the theoretical discourse as to which one of them can be the right basis of judicial decisions and why.

However, this analysis focuses on the theoretical problems raised by the Hungarian legal practice and its theoretical implications go beyond a mere illustration of the Hungarian problems.

The problems that appear in the Hungarian judicial practice can be placed into a broader set of problems which characterizes the nature of legal decision-making and legal interpretation in Central and Eastern Europe. Empirical examinations of judicial decisions in Central and Eastern Europe demonstrated the fact that, even if the circumstances changed in the last few years,¹¹ judges tend to follow a formalist method of decision-making and interpretation of rules when they decide cases.

The most important feature of this kind of interpretative method is that judges mostly strive for searching for the plain meaning of rules without resorting to the relevant

⁵ Belovics (2017) 122–23.

⁶ Canale and Tuzet (2018) 67.

⁷ Canale and Tuzet (2018) 68.

⁸ Nagy (2014) 122. and Gál (2010) 67.

⁹ Nagy (2014) 109.

¹⁰ The Fundamental Law of Hungary, Article 28.

¹¹ Bencze et al. (2015).

justificatory reasons of statutes that they have to apply. Interpretation of rules is rather a matter of linguistic analysis and they rule out moral reasons or purposes behind the rules from the justification of their decisions.¹² This kind of judicial strategy of interpreting rules can be discerned especially in criminal law. The reason for this is that the theoretical conception of criminal law is dominated by the perception that criminal law is the set of legal rules that enables the state to confine citizens' freedom of action with the most powerful coercive means. For this reason it is essential to build principles of the rule of law in criminal law that guarantee the safety of citizens from the state e.g., maximum certainty and textual, linguistic interpretation of rules. It is in the aim of this essay to demonstrate that the methods of judicial interpretation which determines the application of criminal law in Hungary (and in Central and Eastern Europe) is misleading and sometimes can result in irrational or unjust decisions. It will be suggested that that judges need to face uncertainty of criminal law by accepting a strategy of reasoning that is more open to the moral basis of criminal law and the justificatory reasons or the *ratio legis* behind criminal rules, without ignoring the principles of legality.

2. THE PRINCIPLES OF THE RULE OF LAW CONCERNING CRIMINAL LAW IN MODERN LEGAL SYSTEMS

The demand of clarity in criminal law is inevitable because criminal rules, as any other kind of legal rules, are necessary to govern human conducts in a predictable manner and are needed for legal decision-makers to solve legal problems in a coherent and consistent way.

In modern constitutional democracies, criminal law must be based on a system of rules that are able to guide citizens' conducts effectively and principles guaranteeing that authorities creating and applying criminal laws will respect human rights and autonomy of the members of the political community. Montesquieu states in *The Spirit of Laws* that 'Political liberty consists in security; or at least, in the opinion that we enjoy security. This security is never more dangerously attacked than in public or private accusations. It is therefore on the goodness of criminal laws that the liberty of the subject principally depends.'¹³

The paper will make an outline of the most important principles of the rule of law that must guide legislation and the interpretation of criminal laws, leaning on the analysis established by Andrew Ashworth. Light will then be shone on some differences that exist in the system of principles in the Hungarian criminal law.

According to Ashworth, a contrast between two principles dominates the debates over the proper justificatory or moral basis of criminal law. There are principles the function of which is to impose restraint on authorities creating and applying criminal law. Principles of restraint demand that legislators and courts must respect the limits of their power when adopting and interpreting criminal laws. These principles embrace the principle of non-retroactivity, the principle of maximum certainty and the principle of strict-construction.¹⁴

According to the non-retroactivity principle, courts must apply criminal laws that were in effect at the time when the offence was committed. Citizens must be convicted under

¹² Bencze et al. (2010) 87.

¹³ Montesquieu (1776) 269.

¹⁴ Horder (2016) 66.

laws that previously declared a conduct as a criminal offence and thus conviction by courts can only be legitimate if the conduct can be brought under a previously adopted law. This principle aims at respecting citizens' ability and right to plan their life and conducts according to law, to expect and foresee what the law requires from them.¹⁵

One of the most important requirements of the rule of law in modern states is that the state must establish a system of law in which the members of the political community are able to understand from the text (the wording) of the statute of what kind of behaviour is required by the law. This is the demand of legal certainty or maximum certainty which requires that criminal laws must be clearly and precisely defined.¹⁶ According to the report adopted by the Venice Commission in 2011 'legal certainty requires that legal rules are clear and precise and aim at ensuring that situations and legal relationships remain foreseeable.'¹⁷

The principle of strict construction establishes the requirement for courts that if any doubt arises concerning the meaning of a criminal statute it must be resolved in the favour of the defendant.¹⁸

These principles especially maximum certainty and non-retroactivity principle, aim at protecting respecting individuals of the community as rational and autonomous persons who are able to plan their life by complying with the rules of law and the demand of avoiding the possibility of arbitrary decisions of political authorities.¹⁹ In sum, principles of restraint establish a picture of criminal law where human rights of citizens are fully respected by building up a strict, clear and precise system of criminal rules which enables citizens to predict and foresee what conducts are required and forbidden by criminal statutes.

In contrast to principles of restraint, the authoritarian principle reflects a more flexible conception of criminal law in which it is allowed for courts to bring within the scope of existing criminal offences conducts that are worthy of criminalization, however they cannot be subsumed under the meaning of any of the previously declared offences.²⁰ If adjudication is guided by this principle judges have discretionary power which is, of course, not unconstrained, to decide if a wrongdoing, not covered explicitly by the meaning of any existing offences, can be reasonably criminalized by constructing a new offence or extending the scope of a previously existing offence. This principle is antithetic to the principle of maximum certainty and emphasizes that judges should take into account the permanently changing world in which new forms of criminal conducts always emerge. The essence of the authoritarian principle is the thin ice principle – citizens who know that their behaviour is on the borderline of illegality must expect that they can be convicted for committing a crime.²¹

¹⁵ Horder (2016) 82–83.

¹⁶ Horder (2016) 85.

¹⁷ Report on the Rule of Law. (2011) Adopted by the Venice Commission at its 86th plenary session. Venice, 25–26 March 11.

¹⁸ Horder (2016) 87.

¹⁹ Horder (2016) 86–87.

²⁰ Horder (2016) 89.

²¹ Horder (2016) 89. As Horder cites Lord Morris's 'definition' of the thin ice principle: 'those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he will fall in.'

Hungarian criminal law is built upon similar principles of the rule-of law; however, it differs in some ways from the Anglo-Saxon conception of criminal law. The principles of legality can be expressed by the principle of *nullum crimen sine lege* which can be divided into four ‘sub-principles.’ The principles of non-retroactivity and maximum certainty are essential elements of Hungarian criminal law as well and two more important principles: the requirement of written criminal laws and the prohibition of resorting to analogy by judges.²²

In Hungary, the conditions of criminal liability and legal punishments can only be determined in previously adopted written statutes. It is not allowed for judges to create or change these factors of criminal offences in practice. In this context, legal certainty means that citizens are only able to learn what is forbidden and allowed by law if their rights and obligations are declared in precisely formed statutes.

In principle, as a fourth requirement of legality, it is not allowed for judges to extend the scope of existing criminal offences to new circumstances by interpretation. This is the prohibition of analogy. Judges are bound by the precise meaning of criminal norms’ text. This also entails that judges should apply the textual interpretation of criminal statutes, they should reveal the semantic content of the concepts included in rules, and they are not allowed to rely on other kinds of interpretative method, for example on the teleological interpretation the point of which is that the clear content of statutes should be explored by revealing and interpreting the justificatory principles, moral values and aims behind the statutes. In criminal cases it is forbidden for judges to resort to moral values, because moral values are highly disputed among the members of the political community and make criminal adjudication unpredictable.²³

Thus, the authoritarian principle is not accepted in the Hungarian criminal jurisprudence. However, the authoritarian principle reflects the problems that can occur in every-day judicial decision-making – it can often happen that the wording of the statute does not provide a certain answer for the case. In such cases, judges have to engage in moral reasoning which includes the relevant moral values and arguments that lurk behind the applicable criminal norm. However, in the Hungarian judicial practice, it is a detectable attitude of judges that they do not tend to face the moral dilemmas that are generated by the facts of a certain case. The main reason for this is that legal certainty, the protection of individual freedom and the separation of powers do not allow judges to create new offences or extend the scope of offences arbitrarily. The justification of the decisions is established mostly by searching for the plain meaning of words in dictionaries or by looking for the ordinary meaning by a linguistic and grammatical analysis, which can be a wrong strategy of interpreting criminal norms in certain cases.²⁴

²² Nagy (1995) 257–70.

²³ It must be emphasized that the principle of retroactivity, the prohibition of applying non-written rules and resorting to analogy in criminal law pertain only to cases when they would be used to the detriment of the defendant. Applying a criminal norm retroactively or using analogy in a given case does not necessarily violate human rights if they are applied in favour of the defendant. It also must be made clear that Article 28 of the Fundamental Law of Hungary prescribes for judges to interpret the wording of legal rules in light of their justificatory purposes and in accordance with the Fundamental Law of Hungary. However, judges are not allowed to base their decision on moral and political values if the result of the decision would be holding someone guilty for an act which does not constitute a criminal offence under Hungarian or EU or international law. (Article XXVIII. section 4 of the Fundamental Law)

²⁴ However, there is an exception of this principle – the extension of criminal offences can be realized only in the favour of the defendant. Nagy (1995) 261–66.

In Montesquieu's interpretation the liberty of individuals depends on the goodness of criminal statutes. To summarize the implications of the above mentioned principles, the goodness of criminal laws lies in

a) their ability to guide citizens' conducts effectively, determines precisely what is required and what is forbidden and enables them to understand and follow the rules without doubts concerning their meaning;

b) respecting the human rights of citizens – respecting the ability of individuals of being rational and autonomous human beings who have freedom of action and freedom of deciding what kind of values they accept and pursue as guiding principles of good life. In constitutional democracies, political authorities creating and interpreting criminal rules respect the limits of their power and human rights are the most important constraints on the criminal power of the state.

2. THE PRINCIPLE OF MAXIMUM CERTAINTY IN THE PRACTICE OF THE HUNGARIAN CONSTITUTIONAL COURT

After a brief illustration of the principles of legality in the Anglo-Saxon and the Hungarian jurisprudence, it is time to focus on the question of how these principles are interpreted in the judgments of the Hungarian Constitutional Court. These requirements of legality are represented by the 'clarity of norms' doctrine in the practice of the HCC which annuls statutes that do not meet the requirements set forth by the doctrine. The HCC is authorized to annul vague, uncertain and ambiguous statutes stating that they are in contradiction with the Fundamental Law of Hungary.

The most important theoretical issue here is that how the principle of maximum certainty and the principle concerning the judicial interpretation of criminal norms can be realized in practice. How can be clearness and certainty theoretically grasped? Taking into consideration that the language of law always carries uncertainty and indeterminacy to some degree, some theoretical questions cry out for clear answers. What does it mean that a norm is clear? Is it possible to draw a sharp line between uncertain but still constitutional norms and unconstitutional norms because of being unclear? What are the criteria according to which it is possible to determine whether a criminal statute is unconstitutional because of being vague? What is the role of judicial interpretation of rules in this context? Judicial interpretations of criminal norms are inevitable in almost every case so to what extent are judges authorized to make the statutes' content 'clear'?

2.1. The addressees of criminal norms

The principle of maximum certainty (clarity of norms) expects criminal norms to be clear and understandable means the question that should be answered is 'Who are the addressees of criminal norms?'²⁵ Who are the persons who should understand criminal norms properly? Regarding to this question, certainty or clarity of criminal norms can be interpreted in two dimensions depending on the addressees of norms.

One of the most important group of persons to whom criminal norms are addressed are the citizens. If 'clearness' or 'certainty' are to mean from the perspective of the citizen, it is necessary to analyze the special features and circumstances of citizens who have to obey criminal norms.

²⁵ Gellér (2012) 65–94.

Judges represent the other type of addressees because they are the ones who decide cases according to criminal norms. Judges make clear the content of criminal norms and concepts through interpretation. The crucial issue here is that criminal rules must be drafted in a way which enables judges to unfold a reasonable interpretation of the norm and to avoid the making of arbitrary decisions.

2.2. How is ‘clarity’ defined in the Hungarian Constitutional Court’s decisions?

The Hungarian Constitutional Court (HCC) approaches the concept of clarity rather in a negative way – it defines what kind of drafting of the norm can be considered as unclear. The first ‘version’ of an unclear criminal norm, in the HCC’s interpretation, is when the scope of it is too broad, that is, the norm is drafted in an extremely abstract, general way. In judicial practice the result of such formulation of a rule can be arbitrary judicial interpretation as it gives opportunity for judges to decide cases in light of their subjective considerations, creates incoherent and unstable judicial practice where contradictory interpretations can be given to the same rule.²⁶

The second type of unclear norms, which is mentioned in some decisions of the HCC, can be when the scope of the norm is too narrow, the norm is extremely exhaustive, specifies every possible occurrence of the particular conduct. The problem which can be entailed by such drafting of norms is that it unduly constrains judges in deciding cases. A criminal norm with too narrow scope has the potential to ‘force’ judges to acquit offenders who actually should be convicted if the justificatory principles behind the norm is taken into consideration. However, the conduct at issue is not literally included in the text of the norm. It can occur that the offender committed a wrongful act for which, taking into consideration all circumstances of the case and the purpose and justifying principles of criminal law in general, the offender should be convicted, however, the wording of the relevant section of the criminal code does not include literally that certain kind of conduct. Since the extension of the scope of criminal norms is not allowed for judges by interpretation as in such cases they would have no any option except for acquitting the offender.²⁷

In some cases, the HCC dismisses claims criticizing the criminal norm for being too abstract and hence unconstitutional on the ground that the criminal law and statutes should be formulated in a flexible, abstract and general way. The HCC often asserts in its reasoning that there are offences that can be committed in uncountable ways. If, in such cases, the legislator defined the offence in an exhaustive and detailed way, if it made efforts to build in the definition all possible ways in which the offence could be committed, this legislative strategy in itself would infringe the rule of law exactly because of the previously mentioned problem – judges would not have the possibility to convict offenders whose conduct are in contradiction with criminal law and its purposes but their conduct is not involved explicitly in the text of the criminal statute.²⁸ In cases where it is not possible to enumerate all probable ways of perpetration of a certain offence, judges should be authorized to have discretionary power to decide what kind of conducts should fall into the category included in

²⁶ See e.g. the following decisions of the Hungarian Constitutional Court: 38/2012. (XI. 14.) HCC; 31/2015. (XI. 18.) HCC; 4/2013. (II. 21.) HCC; 18/2000. (VI. 6.) HCC; 3284/2017. (XI. 14.) HCC.

²⁷ However, it is hard to find a decision of the HCC in which the Court annulled a statute because of being vague in this sense.

²⁸ See the following decision of the Constitutional Court: 673/B/2004 HCC.

the criminal rule. In these cases judges have the right to illuminate the clear content of abstract and general concepts of criminal norms by interpretation. Thus, the meaning of such norms can be understood by following the judicial practice.²⁹

In other cases, the Court annuls the statute by stating that it is too vague or abstract and provides judges with extremely broad discretionary power – therefore the application of the norm can be discriminatory.³⁰

The problem that appears in the HCC's practice is that it is not possible to find a coherent theoretical basis of the Court's distinction between the above mentioned situations. On what theoretical grounds it is possible to distinguish between cases when criminal norms should meet the requirement of flexibility and adaptability (therefore judges can be authorized to make criminal norms' content clear by interpretation) and cases when criminal norms must be precisely and clearly drafted (where judges must apply the norm's explicit semantic content and it is not allowed for them to be creative in interpretation). In brief, it is difficult to find a coherent theoretical conception of certainty in the HCC's practice.

2.3. Emphasizing the judge's point of view

It seems that regarding to the 'clarity of norms' doctrine in the HCC's practice, in most of the cases that the Court sets aside from the citizens' point of view and when it analyzes the clearness or vagueness of a norm it takes the judges' perspective as a background of its reasoning.³¹ It can be argued for the claim as well that the judges' point of view is more fundamental when clarity of the requirements of certainty is needed.

Why should the judges' perspective be taken as the starting point when trying to understand the theoretical basis of the clarity of norms doctrine? First, judges are entitled to determine in their final decision the correct legal meaning of a certain statute. Citizens must comply with the content of the final judicial decision even if they accept a different interpretation of the statute.

It is impossible to determine objective criteria of 'clarity' of norms according to which the legislator would be able to draft or enact statutes that are understandable for every

²⁹ The Court based its decision 673/B/2004. HCC on the same reasons, when it stated that the section in the Criminal Code called 'failure to comply with the reporting obligation related to money laundering' was not unconstitutional. The HCC's opinion was similar on the constitutionality of section called 'insult of subordinate' in its decision 769/B/2006. In these cases the court stands for the claim that the offences – the constitutionality of which was disputed by the applicants – can be committed in numerous ways which cannot be enumerated in the definition of the crimes. The legislator did not infringe the Constitution and the rule of law when it defined these conducts by using abstract and general concepts leaving a relatively wide scope of discretion for judges to decide whether the facts of the disputed case could be subsumed under the rule or not.

³⁰ In its decision 38/2012. (XI. 14.) HCC the HCC annulled a statute which criminalized the conduct of 'living in public places.' The Hungarian Government adopted a law in 2012 which contains the offence of infringing the rules of residing on public premises for habitation, that is, the Government criminalized homelessness in itself. From the reasoning of the decision of the HCC it comes to light that almost all of the concepts that are included in the statute are vague and hard to interpret: the norm does not make it possible to decide clearly what kind of behaviour can be considered as illegal, or when it is possible for the judge to decide that circumstances of an excuse or a justification exist in the concrete case. According to the opinion of the Court, the text of the norm is so vague and ambiguous that it is not possible to establish its clear content by judicial interpretation.

³¹ See the decision of the Constitutional Court 3258/2015. (XII. 22.) HCC.

single member of the society. In legal theory one criterion is mentioned that a rule is clear and unambiguous if ordinary persons with common intelligence are able to understand it.³² However, the members of the society have not the same intelligence and wisdom to understand the texts of criminal norms and most of the offenders, before they commit a crime, do not tend to read any of the offences included in criminal codes. Moreover, it can occur that even persons with high intelligence are not able to interpret and understand legal statutes or see through criminal law's doctrinal and conceptual system in a proper way.³³ Most of the citizens are not willing to read and interpret legal statutes and when they are involved in a criminal procedure, the most important question in which they are interested in is the one how the judge will decide their case. Regarding to this question, they rather count on the opinions and advices of professional agents like lawyers.

Maybe it would be possible to reduce the interpretative difficulties of unclear laws and judicial decisions by using more simple sentences and concepts, for example, ordinary words in legal statutes. However even if it is possible, in the linguistic sense, to establish a more simple system of communicating legal statements, the problem of uncertainty cannot be eliminated totally because of the nature of language. Herbert Hart's arguments can be mentioned here.

In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. [...] At this point, the authoritative general language in which a rule is expressed may guide only in an uncertain way much as an authoritative example does.³⁴

The other reason behind uncertainty in law is the argumentative character of law. Legal propositions are normative statements so every single legal statement and interpretation can be challenged and disputed. Since jurisprudence does not share the features of natural sciences, it cannot be said that in every single case law provides one right answer.

³² Gellér (2012) 80.

³³ An interesting reasoning that was provided by the offender can be found in one of the decisions of the Curia (the Supreme Court of Hungary). The offenders were charged with committing the offence of vandalism of historic monuments or protected cultural goods (Hungarian Criminal Code, s.357). The offenders were owners of a castle which fell under the category of 'protected cultural good.' According to the facts of the case, the offenders did not comply with the administrative laws that prescribed the obligation for the owners of cultural goods to maintain and reserve the castle in its original status. They had not implemented any maintaining or reserving work on the castle, so it suffered damages. One of the offenders, a law student at the time of the trial, argued that they did not commit a crime. In accordance to their textbook, they interpreted the wording of the statute as it only could be committed by intentional and active conduct. The scope of the meaning of vandalism, according to them and the criminal law textbook, cannot cover conducts that are qualified as omissions. Their conduct was an omission of their obligations declared in administrative laws, in the result of which they must be acquitted by the judge and should be fined according to administrative prescriptions. The Curia, however, convicted them, and based its decision mostly on doctrinal and conceptual arguments which are part of the system of criminal law as a whole. Doctrinal arguments hardly can be predicted and understood by even a person with high intelligence who spends some time to read and interpret legal rules. This does not entail that the court made a right decision in this case. (Decision of the Curia Bfv.II.13/2009/5.) See the dissenting opinion of Pokol Béla in the decision of the Constitutional Court 3077/2012. (VII. 26.) HCC.

³⁴ Hart (1994) 127.

It can occur that the same legal statute can be given different but equally reasonable interpretations. Moreover, it can happen as well that the interpretation of a statute that is given by the citizen differs from the correct legal meaning. Thus, 'interpretation is probably unavoidable and will certainly form part of the judicial function in criminal law. The choices which courts make when interpreting statutes are political choices, in the sense that they have implications for individual citizens and the community and in the sense that judges are effectively making law when they determine the interpretation.'³⁵ Therefore the essential theoretical question is how the problem of certainty is treated in judicial practice.

3. CERTAINTY IN JUDICIAL PRACTICE

Certainty in judicial practice is treated as a linguistic problem, in the result of which the textual interpretation of criminal norms dominates judicial reasoning. In the reasoning of their decisions judges often prefer dictionaries, referring to ordinary and plain meaning of the concepts included in criminal statutes. It seems, that in criminal cases judges tend to refuse to apply interpretative methods like teleological interpretation which aims to make clear legal rules' meaning by finding and understanding the justificatory reasons and purposes behind them.³⁶ Criminal courts often spend time mainly with analyzing the semantic content of the concepts included in criminal statutes. The justification for this strategy in judicial reasoning is the above mentioned principles of legality and these can only be realized by searching for the plain meaning of concepts in criminal norms.

In Hungarian legal theory, László Blutman represents the view that judicial reasoning should be based on textual interpretation of statutes. According to him, law and legal practice is not only the business of lawyers, judges and prosecutors. Law provides authoritative reasons for action, that is, it is an obligation for citizens to act according to the prescriptions of law. This is the reason why it is essential for it to be understandable for the members of the community. Professor Blutman stands for the claim that, notwithstanding, textual interpretation is not an ideal method of justifying legal decisions, judges must base their legal conclusions on ordinary or literal meaning of words. This requirement is rooted in the principle of the separation of powers, the principle of legal certainty and the demand of establishing a coherent and consistent judicial practice. Textual interpretation provides a relatively objective ground for justifying and making legal decisions understandable, because judges must interpret the wording of statutes in a way as ordinary citizens with common sense would understand it. Applying textual interpretation can contribute to a coherent and consistent and more predictable judicial practice, while it reduces judicial discretion to a minimal level because it excludes the possibility of balancing moral and other non-legal arguments from judicial reasoning. So, it contributes to the realization of legal certainty and the separation of powers.³⁷

However, certainty in law in judicial reasoning and decision-making cannot be only a matter of linguistic theory or a matter of searching for the plain or ordinary meaning of words. In the next sections of this paper, the problems of textual interpretation will be highlight by describing the reasoning of some judicial decisions. It will be argued that whether law is certain or uncertain is not a mere linguistic question. The Author agrees with

³⁵ Ashworth (1991) 446.

³⁶ Bencze (2011) 169–71.

³⁷ Blutman (2010) 99–101.

the often cited Dworkinian thesis that ‘legal practice, unlike many other social phenomena, is argumentative. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions.’³⁸

In legal practice, it is a familiar phenomenon, as well that lawyers often disagree in the question of what law requires or permits. However, this disagreement does not reflect different opinions only about the meaning of words. Arguing about the ordinary meaning of statutes does not enable lawyers to dissolve disagreements in legal questions completely. Disagreement among lawyers about the right legal answers is more complex than debating over the literal or ordinary meaning of concepts. Dworkin states that when judges (or lawyers in general) disagree about the right legal answer in the same case, it reflects a theoretical disagreement about the issue of the relevant sources of law. When two judges disagree in the right legal answer for a certain problem, it is often the case that both of them have different theories or conceptions about the right sources or grounds of law. They have different theories about the issue what law is and what it should be.³⁹

In most of the cases, linguistic arguments provide little help for finding the correct legal answer. It can often happen that revealing the plain meaning of the wording of a statute is troublesome. This happened in the graffiti-case where both the judge and the prosecutor resorted to linguistic arguments and came forward with a distinct interpretation of the statute’s plain meaning. This case is a good example for illuminating how linguistic arguments and using dictionaries can be misleading in establishing the correct legal decision.⁴⁰ ‘[T]he dictionary is best suited to demonstrating the range of possible meanings of a word, rather than indicating a “correct” meaning in a given context.’⁴¹ It can also

³⁸ Dworkin (1986) 5.

³⁹ Dworkin (1986) 3–6.

⁴⁰ An interesting example of this kind of judicial reasoning is when the arguments were based solely on the analysis of the semantic content of legal definitions in the statute. The prosecutor and the judge as well resorted to a linguistic analysis by using dictionaries, explicating the words’ ordinary and literal meaning and they had come to different conclusions. According to the prosecutor the offender was guilty in committing the offence of vandalism by means of placement of graffiti. The question was whether this offence can be committed by placing a lettering (a word) on a sheet with the intention of expressing the offender’s opinion during a demonstration. In accordance with the judge’s opinion, this behaviour cannot be qualified as vandalism because this concrete perpetration does not fall under the ordinary and literal meaning of graffiti as graffiti, according to its ordinary and literal meaning, only can be placed on walls. The prosecutor referred to the section in the Criminal Code which defines the concept of graffiti in the following way: [...] ‘graffiti’ means surface coating containing images or lettering applied with spray paint, marker pens or any other manner on property that is not required for the proper use of the property.’ The prosecutor concluded that the semantic content of this section can be determined evidently. Since it includes the word property, and contains no reference to wall, it entails that graffiti can be placed on every kinds of property, not only on walls. In consequence, the offender, who placed a lettering on a sheet of private ownership with a spray paint, committed the crime of vandalism by means of placement of graffiti. Neither the judge’s, nor the prosecutor’s reasoning included arguments concerning the right to free speech which is obviously a relevant extra-textual principle to take into consideration in this case. See the decision EBD 2016. B.5.

⁴¹ Ashworth (1991) 428.

happen that the literal or ordinary meaning of the text is clear even for the citizen, however, the decision which is based on the meaning of the text of the statute, would be unjust or irrational. These examples from judicial practice can convince that legal certainty and determinacy is not only a matter of linguistic considerations about the meaning of statutes. Revealing the linguistic content of criminal norms is important but it only scratches the surface of legal problems. ‘Interpretation should not, however, be presented solely as a dictionary matter: it should be recognized as involving the attribution of meaning to words in their statutory context and in the context of relevant legal doctrine.’⁴²

It seems, it is inevitable in criminal cases as well that judges must build ‘extra-textual’ arguments in their reasoning, of course, not without restraint. The sources of these extra-textual’ arguments must originate not in judges’ intuitions and feelings,⁴³ rather in the justificatory principles behind criminal norms i.e., the purpose of rule, the relevant legal doctrines, fundamental principles of criminal law in general and in the basic constitutional principles and human rights of the citizens. These values reflect the political morality of a community.

Certainty and clarity are the requirements that judges should make their choices of interpretation explicit in every single decision and they should recognize that it is a part of adjudication to consider and to weigh constitutional principles and values of criminal law, not only the semantic content of words in the statutes.

This demand is represented by the principle of explanatory clarity.⁴⁴ The requirement of explanatory clarity embodies the demand that it is important in every justification of decisions to reveal or to explore for the defendant clearly that their point of view about the meaning of the statute was taken into consideration by the judge as well. However, it is the obligation of the judge to convince the defendant of why their interpretation of the norm cannot be accepted as a basis for the correct legal solution of the case. Judges must throw light on all of the choices which they made and function as building blocks of their final decision. Certainty can be achieved by making every step of their reasoning explicit so that the defendant can follow the arguments on which the decision was based. ‘[Criminal law] must be capable of being explained by judges to laypersons [...] so that they can grasp its application to the facts.’⁴⁵ A very good illustration of a judicial decision which meets the demands of explanatory clarity is made by the Debrecen Regional Court of Appeal. In its reasoning the court aimed at illuminating every important choice on which it established

⁴² Ashworth (1991) 446.

⁴³ Nor can be a correct solution for the problems generated by uncertainty of law that the judge resorts to reasons originated in public morality. András Jakab, in one of his essays, argues for the claim that judges must follow the opinion of the society in moral issues. In order to recognize public morality, the judge only needs to read newspapers and have conversations with ordinary people. Jakab (2010) 87. This is obviously a wrong way of deciding cases in general, not only in criminal cases. Public morality cannot be the basis of judicial decisions. On the one hand, it is controversial what is meant by public morality and even if it was clear, public morality is a changing phenomenon. In constitutional democracies the judges’ duty is to apply law to the cases at hand. If it was their obligation to follow the opinion of the society it would not be necessary to establish a legal system and legal institutions to apply legal statutes. A narrower concept of morality is needed when we refer to moral dilemmas that are raised by uncertainty in law.

⁴⁴ This concept is borrowed from Jeremy Horder. Horder (2002) 236.

⁴⁵ Horder (2002) 236.

its decision.⁴⁶ The justification of the decision in this case demonstrates how legal certainty can and should function in law. Moreover, the reasoning in this decision can serve as a starting point when trying to demystify the requirement of the clarity of norms doctrine.

The clarity of norms doctrine establishes the demand that the legislator must enact legal norms with a clear and precise text in order to prevent judges from making arbitrary decisions or providing inadequate interpretations. How can the HCC decide whether this demand is fulfilled by a criminal statute? In one of its decisions, the HCC comes forward with a theoretically more grounded reasoning. The Court declared a statute unconstitutional which criminalized the conduct of disobedience to the measure of a public officer. The Court's opinion was reported by Miklós Lévy.⁴⁷ In the reasoning of the decision he emphasized, that as the problem evolving around the question of the unconstitutionality of a legal rule for being unclear, it is important to take into consideration the justificatory reasons behind the rule and the values that are protected by it. After such a justificatory purpose is revealed behind the norm, the Court has the possibility to decide whether the legislator drafted its text in an extremely broad manner compared to the purpose and values protected by the statute. In this concrete issue, the HCC determined the purpose and values behind the rule. In general, it was the value of protecting public safety and public order; in particular, the public interest in the execution of public measures safely and constantly without being obstructed. Taking into consideration these values, the Court decided that, compared to the purposes and values behind the statute, the concept of disobedience is too vague and abstract which gives judges wide discretionary power, in the result of which they will have the opportunity to convict persons whose conduct can be qualified as disobedience. However, it does not intend to obstruct or interfere the officer's measure. Regarding to this offence, the Court called on the Parliament to enact a statute with a more sophisticated and precise language to prevent judges from making arbitrary and irrational decisions.⁴⁸

4. A POSSIBLE THEORETICAL BACKGROUND FOR DECIDING PROBLEMS GENERATED BY UNCERTAINTY IN CRIMINAL LAW

What kind of theoretical basis can be suggested for approaching the problem of certainty? A possible answer can be a conception of the nature of criminal law.

⁴⁶ Decision of the Debrecen Court of Appeal Pf.I.20.574/2011/5. The question, which had to be solved by the court in a civil trial was that whether the offender, after being acquitted by the criminal court, is entitled to compensation for being placed in a psychiatric institution. The defendant of the preceding criminal trial had given an interpretation of the relevant section in the Code of Criminal Proceedings. He applied textual interpretation and based his arguments on the plain meaning of the statute. The court agreed that the textual interpretation of the statute given by the defendant was correct, however, the plain meaning of the text could not be the basis of the right legal decision. The court decided that the offender had no right for compensation and it justified its decision by explicating step by step how it had come to its conclusion. The court took into consideration the interpretation given by the offender, it explored why this interpretation had been rejected and why it was necessary for the court to resort to extra-textual reasons, namely the aims and justificatory principles behind the relevant section of the statute. Moreover, the court had provided with a detailed explanation about how judicial interpretation of statutes function and explicated the relevant interpretative canons that could provide arguments for justifying judicial decisions.

⁴⁷ Decision of the Hungarian Constitutional Court 31/2015. (XI. 18.) HCC.

⁴⁸ Decision of the Hungarian Constitutional Court 31/2015. (XI. 18.) HCC.

R. A. Duff illuminates a theoretical distinction between two conceptions of criminal law. Both of them embrace values that have implications on the question of how the problem of certainty in criminal law should be approached.

Briefly, the positivistic conception accepts the following views on the function and nature of criminal law. At first, criminal law provides with content-independent reasons for actions for citizens. In most of the cases, rules of criminal law are formed as prohibitions to which citizens must obey without taking into consideration the content of its prescriptions. This means that citizens must obey criminal law and refrain from crime only because the law requires it and criminal rules do not presuppose and do not need the substantive agreement of citizens. In consequence, criminal norms must be articulated in a clear, certain and precise way so that citizens will be able to understand what the law requires from them.

In the positivistic conception of criminal law, the question of why certain conducts are wrong cannot be raised. In legal reasoning it is not accepted to argue about the values that are protected by criminal offences, it is not allowed to interpret criminal statutes in the light of their justifying background reasons and principles.⁴⁹ Of course, the fundamental reason for thinking about criminal law and adjudication in this way is legal positivism's commitment to the sources thesis and the service conception of law – the essence of which is that the validity of law should not depend on its moral value.⁵⁰

In the positivist theory of criminal law, legal certainty and clearness of rules are extremely important values, where the legislator is given a huge role in making criminal law determinant and understandable for citizens by enacting statutes in a precise and clear form. No doubt, the positivistic conception fits very well to the Hungarian perception about the theoretical basis of criminal law.

The other conception could be called the 'Dworkinian theory of criminal law.' However, there is a view that Ronald Dworkin supported a rather positivistic theory of criminal law.⁵¹ The Author would agree with the statement that the following considerations on criminal law's character could be the reflections of some elements in Dworkin's theory of law, which represents a clear anti-positivist thinking about law in general.

The 'Dworkinian theory'⁵² assumes that in every political community there are wrong conducts in which the wrongfulness is independent from being prohibited by criminal law. In the Anglo-Saxon criminal law these offences are called *mala in se*⁵³ – conducts that are wrong in themselves or wrong by nature e.g., murder, rape, theft etc., in contrast with *mala prohibita* offences the wrongfulness of which is based on the mere fact that law prohibits them e.g., driving offences. The essence of *mala in se* offences is that they violate the fundamental moral and political principles of a political community.⁵⁴ Without analyzing the theoretical explanation of distinguishing these two kinds of offences in English criminal law, for these purposes here, outlining the rationale behind *mala in se* offences is enough to show that the 'Dworkinian theory' can be an adequate theory for criminal law in general.

⁴⁹ Duff (2002) 51–53.

⁵⁰ Horder (2002) 222. and Raz (1979) 47.

⁵¹ Horder (2002) 222.

⁵² The implications of Dworkin's theory on criminal law theory needs a much more detailed analysis, however the author will make attempts to explicate it in another essay.

⁵³ In this paper I will not examine in details the distinction between the so called *mala in se* and *mala prohibita* offences. However, analyzing the nature of these conducts in English criminal law has a long tradition which does not have its roots in the Hungarian system of criminal law and jurisprudence.

⁵⁴ Duff (2002) 53.

In accordance with this theory, criminal law addresses citizens in terms of the values which justify the content of criminal law as a whole. This conception of criminal law builds its considerations on the picture of a democratic political community in which the common life of the citizens is based on shared moral and political values determining the main principles of relationships between the citizens and between the state and citizens. Principles which delineate the criminal law's content e.g., what kind of conducts can be legitimately criminalized and why, what is the theoretical basis of criminal liability etc., constitute a huge part in the system of these moral and political values.

In this view, the reason for obedience to criminal law is not the mere fact that some conducts are prohibited by the law. It must always be an issue why certain conducts are wrong and declared as criminal offences in the criminal code: that is what the legislator must clarify when drafting and enacting criminal statutes. How is this possible? Duff suggests that it can be realized by using thick concepts by the legislator when it drafts a criminal statute. The legislator should enact statutes in terms of substantive and specific ethical values or rather the legal versions of them. These concepts can be easily recognized as wrongs by the citizens because they reflect the fundamental substantive values of their community.⁵⁵ The application of these concepts, by the citizens and judges, 'depends on a grasp of the substantive values they embody'.⁵⁶ According to the 'Dworkinian theory', criminal law should use a shared normative language through which it communicates the fundamental values of the political community.

At the end of this paper, it becomes clear that this article has argued for a more flexible criminal law and a more flexible judicial reasoning in criminal cases. It is far from the purpose to eliminate the requirement of clarity and the demands of maximum certainty from criminal law. Rather a different conception of clarity and certainty has been suggested which could be realized by mainly judges. Legal certainty is one of the most important principles of criminal law. However, it seems that in judicial practice this principle is conceived of as it justifies textual interpretation (even if revealing the ordinary meaning results in an irrational or unjust decision).⁵⁷ Legal certainty is a more complex set of requirements than analyzing and determining the semantic content of rules – it is not just a matter of linguistic theory. Criminal law reflects very important moral and political values and principles should appear in judicial reasoning as arguments justifying the correct legal decision in cases when criminal rules are uncertain.

5. CONCLUSIONS

Despite the fact that the section of public nuisance is articulated in an extremely abstract and general way in the criminal code, its constitutionality should not be questioned. The Author's opinion is that many conducts can fall under the scope of this section evidently. There are conducts of public nuisance the wrongfulness of which are self-evident

⁵⁵ Duff (2002) 56–61.

⁵⁶ Duff (2002) 61.

⁵⁷ E.g., the description of the prosecutors' reasoning in the following article: Deák (2014). In one of the decisions of the Szeged Regional Court of Appeal (Bf.III.429/2013/5.) the Court resorted to the teleological interpretation of the relevant section of the criminal code, it based its decision on the purpose and values protected by the rule. The prosecutor supported textual interpretation – by referring to the principle of legal certainty – and he insisted on the plain meaning of the text even if the decision inferred from the semantic content would have been irrational and unjust.

and the members of the community have the right to be protected from them. It is, of course, not an easy task to decide whether the offenders must be convicted. However, analyzing the linguistic content of the section will not provide with any help.

According to the presented point of view, the case mentioned at the beginning of the paper, is not a public nuisance offence. However, it should be compared to another decision which, in contrast to the court's standpoint, is evidently a case of public nuisance.

In the following case, the Court decided that the offender's conduct could be qualified as violation of the freedom of conscience and religion⁵⁸ (Criminal Code, section 215). In the description of the facts, it turned out that numerous persons participated in a procession, a religious marching in the street. While the offender was approaching them by car, he became outraged because of the road had been blocked by the religious ceremony and he could not continue his way. He started cursing the people around him loudly, tried to drive through the crowd and finally he got out of the car and threatened the persons next to him with an air rifle shouting that he would kill them if they did not get out of his way.

According to section 215 in the Criminal Code of Hungary, any person, who a) restricts another person in his freedom of conscience by applying violence or duress, b) prohibits another person from freely exercising his religion by applying violence or duress, is guilty of a felony punishable imprisonment for up to three years.

The Author does not agree with the judicial decision which convicted the defendant for committing the violation of the freedom of conscience and religion. If only the semantic content of the rule is analysed, this case could be easily qualified as violation of freedom of conscience and religion. It is true that the people participated in the procession were not able to continue the ceremony in peaceful circumstances. However, this decision would be wrong. Going beyond the text and revealing the values that this criminal norm protects, it becomes clear that this norm protects freedom of religion and conscience and the right to practice religion without interruption. It becomes obvious that any offender should have exactly the intention to force or threat someone because of their religious beliefs and restricting or preventing them from exercising their religion. Only in that case can the offender be convicted under this section. Since the offender's behaviour was not intended to restrict or prevent the victims from exercising their religion – he just expressed his anger because he could not continue his way, This case represents a 'simple' public nuisance offence as the offender had 'only disturbed' the victims in participating in the ceremony.

However, the case mentioned at the beginning of this paper, is not public nuisance, or at least, the issue cannot be decided in a simple way. Here again, a more complex examination of the relevant values are (or should have been) of a great help for the judge. At first glance, the defendants' conduct could be qualified as public nuisance – throwing paints on the residence of the president of Hungary surrounded by a crowd in itself can be anti-social and can incite indignation. However, the special circumstances of the case i.e., the intention of the defendants did not involve causing a great damage and their conduct was an expression of their opinion against the government's actions during a legally organized demonstration should have urged the judge to make a complex analysis on the freedom of speech, its content and limits. However, the reasoning of the judge did not contain any arguments concerning these constitutional values and the values protected by the offence of public nuisance.⁵⁹

⁵⁸ Judicial Decision Nr. EBH 1999. 2. Bencze (2011) 97–98.

⁵⁹ Bócz (2017) 6. See the decision of the Central District Court of Buda 10.B.I.650/2017/3.

This paper aimed to throw light on the problematic elements in the requirement of certainty in criminal law. This demand is often analyzed by the Constitutional Court of Hungary which is authorized to annul statutes that do not meet the requirement of the clarity of norms doctrine. As far as can be seen, the HCC rarely annuls statutes for being unclear. In most of the cases, it argues that criminal norms should be articulated in a flexible and abstract manner then criminal law must be capable of adjusting to the constantly changing world and new cases as well. In general, the HCC accepts the view that clarity depends on judicial interpretation. When a criminal statute includes abstract and general concepts, judges are entitled to elucidate their legal content by interpretation. Notwithstanding, it seems that in judicial practice judges do not tend to face the moral dilemmas that are raised by the cases where legal uncertainty appears concerning the applicable rule. The requirement established by the HCC (making criminal laws' content clear by judicial interpretation) only can be realized in judicial practice if a 'Dworkinian' conception of criminal law is supported. If it is accepted that criminal law is part of a system which is based on moral and political principles of a constitutional democracy. This conception expects judges to engage in a more flexible and open reasoning in criminal cases and not to be afraid of resorting to values and principles behind the rules. These considerations are not the expressions of breaking with legal certainty but rather they are providing another, more complex conception of it. However, it is hard to imagine that judicial reasoning will adopt this conception of criminal law within a short time.

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